DISTRICT OF COLUMBIA LEGAL ETHICS: A SUMMARY OF THE LAW OF LAWYERING IN THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA LEGAL ETHICS

TABLE OF CONTENTS

INTRODUCTION

0.1:100 Sources of Law and Guidance

- 0.1:101 Professional Codes
- 0.1:103 Background of the DC Rules of Professional Conduct
  - Introductory Sections of the Rules of Professional Conduct
- 0.1:104 Unusual Aspects of the DC Ethics Rules
  - Major Differences Between the DC Rules and the Model Rules
  - DC Rules Differentially Affecting Government Lawyers

0.2:200 Forms of Lawyer Regulation in DC

- 0.2:210 Judicial Regulation
- 0.2:220 Bar Organizations
- 0.2:230 Disciplinary Agency
- 0.2:240 Disciplinary Process
- 0.2:245 Mandatory Disbarment Upon Conviction of a Crime Involving Moral Turpitude
- 0.2:280 Ethics Rules Applied in Federal Courts in DC

0.4:400 Abbreviations, References and Terminology

- 1.0:100 "Belief" or "believe"
- 1.0:120 "Consults" or "consultation"
- 1.0:130 "Firm" or "law firm"
- 1.0:140 "Fraud" or "fraudulent"
- 1.0:160 "Knowingly," "known," or "knows"
- 1.0:200 "Reasonable" or "reasonably"
- 1.0:210 "Reasonable belief" or "Reasonably believes"
- 1.0:220 "Reasonably should know"
- 1.0:230 "Screened"
- 1.0.240 "Substantial"
- 1.0:250 "Tribunal"
- 1.0:260 "Writing" or "written"

I. CLIENT-LAWYER RELATIONSHIP

1.1 RULE 1.1 COMPETENCE

1.1:100 Comparative Analysis of DC Rule

1.1:101 Model Rule Comparison

1.1:102 Model Code Comparison

1.1:200 Disciplinary Standard of Competence

1.1:210 Relationship of Rule 1.1(a) and 1.1(b): Ability vs. Performance

1.1:220 Instances of Incompetence

1.1:300 Malpractice Liability

1.1:310 Relevance of Ethics Codes in Malpractice Actions

1.1:320 Duty to Client

1.1:330 Standard of Care

1.1:335 Requirement of Expert Testimony

1.1:340 Causation and Damages

1.1:350 Waiver of Prospective Liability

1.1:360 Settlement of Client's Malpractice Claim

1.1:370 Defenses to Malpractice Claim

1.1:380 Liability to Client for Breach of Contract, Breach of Fiduciary Duty, and Other Liabilities

Breach of Contract

Breach of Fiduciary Duty

Other Causes of Action

1.1:390 Liability When Non-Lawyer Would Be Liable

1.1:400 Liability to Certain Non-Clients

1.1:410 Duty of Care to Certain Non-Clients

1.1:420 Reliance on Lawyer's Opinion

1.1:430 Assisting Unlawful Conduct

1.1:440 Knowledge of Client's Breach of a Fiduciary Duty

1.1:450 Failing to Prevent Death or Bodily Injury

1.1:460 Wrongful Use of Civil Proceedings; Abuse of Process; False Arrest

1.1:470 Assisting Client to Break a Contract

1.1:500 Defenses and Exceptions to Liability

1.1:510 Advocate's Defamation Privilege
1.1:600 Vicarious Liability
1.2 RULE 1.2 SCOPE OF REPRESENTATION
1.2:100 Comparative Analysis of DC Rule
1.2:101 Model Rule Comparison
1.2:102 Model Code Comparison
1.2:200 Creating the Client-Lawyer Relationship
1.2:210 Formation of Client-Lawyer Relationship
1.2:220 Lawyer's Duties to Prospective Client
1.2:230 When Representation Must Be Declined
1.2:240 Client-Lawyer Agreements
1.2:250 Lawyer's Duties to Client in General
1.2:260 Client's Duties to Lawyer
1.2:270 Termination of Lawyer's Authority
Termination by the Client
Withdrawal by the Lawyer
1.2:300 Authority to Make Decisions or Act for Client
1.2:310 Allocating Authority to Decide Between Client and Lawyer
1.2:320 Authority Reserved to Client
1.2:330 Authority Reserved to Lawyer
1.2:340 Lawyer's Authority to Act for Client
1.2:350 Lawyer's Knowledge Attributed to Client
1.2:360 Lawyer's Act or Advice as Mitigating or Avoiding Client Responsibility
1.2:370 Appearance Before a Tribunal
1.2:380 Authority of Government Lawyer
1.2:400 Lawyer's Moral Autonomy
1.2:500 Limiting the Scope of Representation
1.2:510 Waiver of Client or Lawyer Duties (Limited Representation)
1.2:600 Prohibited Counseling and Assistance
1.2:610 Counseling Illegal or Fraudulent Conduct
1.2:620 Assisting Illegal Conduct or Fraud by Client

1.2:630 Counseling About Indeterminate or Uncertain Law
1.2:700 Warning Client of Limitations on Representation
1.2:800 Identifying to Whom a Lawyer Owes Duties
1.2:810 Prospective Clients
1.2:820 Persons Paying for Representation of Another
1.2:830 Representing an Entity
1.2:840 Representing a Fiduciary
1.2:850 Class Action Clients
1.3 RULE 1.3 DILIGENCE
1.3:100 Comparative Analysis of DC Rule
1.3:101 Model Rule Comparison
1.3:102 Model Code Comparison
1.3:200 Diligence and "Zeal"
1996 Amendments
1.3:210 Prejudicing a Client
1.3:300 Promptness
1.4 RULE 1.4 COMMUNICATION
1.4:100 Comparative Analysis of DC Rule
1.4:101 Model Rule Comparison
1.4:102 Model Code Comparison
1.4:200 Duty to Communicate with Client
1.4:300 Duty to Consult with Client
1.4:400 Duty to Inform the Client of Settlement Offers
1.5 RULE 1.5 FEES
1.5:100 Comparative Analysis of DC Rule
1.5:101 Model Rule Comparison
1.5:102 Model Code Comparison
1.5:200 A Lawyer's Claim to Compensation
1.5:210 Client-Lawyer Fee Agreements
1.5:220 A Lawyer's Fee in Absence of Agreement
1.5:230 Fees on Termination
1.5:240 Fee Collection Procedures

1.5:250 Fee Arbitration
1.5:260 Forfeiture of Lawyer's Compensation
1.5:270 Remedies and Burden of Persuasion in Fee Disputes
1.5:300 Attorney-Fee Awards (Fee Shifting)
1.5:310 Paying for Litigation: The American Rule
1.5:320 Common-Law Fee Shifting
Bad Faith or Oppressive Litigation
Wrongful Involvement in Litigation
Common Fund or Common Benefit
Disobedience of a Court Order
Valid Contractual Provision
1.5:330 Statutory Fee Shifting
Civil Rights Proceedings
Real Property and Housing-Related Proceedings
Citizens' Suits and Enforcement of Environmental Regulations
Eminent Domain
Banking and Other Financial Transactions
Proceedings on Bond or Undertaking
Attachment and Garnishment
Custody Proceedings
Family Division Proceedings
Consumer Protection Proceedings
Employment/Labor-Related Proceedings
Anti-Fraud and Whistleblower Protection
Franchise Distributorship-Related Proceedings
Insurance-Related Proceedings
Elections, Initiatives, Referenda and Political Process
Freedom of Information Act Proceedings
Proceedings for Injury to Trade
Proceedings Regarding Corporations, Cooperatives, Partnerships and Associations
1.5:340 Financing Litigation

1.5:400 Reasonableness of a Fee Agreement
1.5:410 Excessive Fees
1.5:420 "Retainer Fees:" Advance Payment, Engagement Fee, or Lump-Sum Fee
1.5:430 Nonrefundable Fees
1.5:500 Communication Regarding Fees
1.5:600 Contingent Fees
1.5:610 Special Requirements Concerning Contingent Fees
1.5:700 Unlawful Fees
1.5:710 Contingent Fees in Criminal Cases
1.5:720 Contingent Fees in Domestic Relations Matters
1.5:730 Other Illegal Fees in DC
1.5:800 Fee Splitting (Referral Fees)
1.6 RULE 1.6 CONFIDENTIALITY OF INFORMATION
1.6:100 Comparative Analysis of DC Rule
1.6:101 Model Rule Comparison
1.6:102 Model Code Comparison
1.6:200 Professional Duty of Confidentiality
1.6:210 Definition of Protected Information
1.6:220 Lawyer's Duty to Safeguard Confidential Client Information
1.6:230 Lawyer Self-Dealing in Confidential Information
1.6:240 Use or Disclosure of Confidential Information of Co-Clients
1.6:250 Information Imparted in Lawyer Counseling Programs
1.6:260 Information Learned Prior to Becoming a Lawyer
1.6:300 Exceptions to Duty of Confidentiality--In General
1.6:310 Disclosure to Advance Client Interests or with Client Consent
1.6:320 Disclosure When Required by Law or Court Order
Disclosure When Required by Court Order
1.6:330 Disclosure in Lawyer's Self-Defense
1.6:340 Disclosure in Fee Dispute
1.6:350 Disclosure to Prevent a Crime
1.6:360 Disclosure to Prevent Death or Serious Bodily Injury

1.6:370 Disclosure to Prevent Financial Loss
1.6:380 Physical Evidence of Client Crime
1.6:390 Confidentiality and Conflict of Interest
1.6:395 Relationship with Other Rules
1.6:400 Attorney-Client Privilege
1.6:410 Privileged Communications
1.6:420 Privileged Persons
1.6:430 Communications "Made in Confidence"
1.6:440 Communications from Lawyer to Client
1.6:450 Client Identity, Whereabouts, and Fee Arrangements
1.6:460 Legal Assistance as Object of Communication
1.6:470 Privilege for Organizational Clients
1.6:475 Privilege for Governmental Clients
1.6:480 Privilege of Co-Clients
1.6:490 Common-Interest Arrangements
1.6:495 Duration of Attorney-Client Privilege
1.6:500 Waiver of Attorney-Client Privilege
1.6:510 Waiver by Agreement, Disclaimer, or Failure to Object
1.6:520 Waiver by Subsequent Disclosure
1.6:530 Waiver by Putting Assistance or Communication in Issue
1.6:600 Exceptions to Attorney-Client Privilege
1.6:610 Exception for Disputes Concerning Decedent's Disposition of Property
1.6:620 Exception for Client Crime or Fraud
1.6:630 Exception for Lawyer Self-Protection
1.6:640 Exception for Fiduciary-Lawyer Communications
1.6:650 Exception for Organizational Fiduciaries
1.6:660 Invoking the Privilege and Its Exceptions
1.6:700 Lawyer Work-Product Immunity
1.6:710 Work-Product Immunity
1.6:720 Ordinary Work-Product
1.6:730 Opinion Work-Product

1.6:740 Invoking Work-Product Immunity and Its Exceptions
1.6:750 Waiver of Work-Product Immunity by Voluntary Acts
1.6:760 Waiver of Work-Product Immunity by Use in Litigation
1.6:770 Exception for Crime or Fraud
1.7 RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE
1.7:100 Comparative Analysis of DC Rule
1.7:101 Model Rule Comparison
1.7:102 Model Code Comparison
1.7:200 Conflicts of Interest in General
1.7:210 Basic Prohibition of Conflict of Interest
1.7:220 Material Adverse Effect on Representation
1.7:230 Perspective for Determining Conflict of Interest
1.7:240 Client Consent to a Conflict of Interest; Non-Consentable Conflicts
1.7:250 Imputation of Conflict of Interest to Affiliated Lawyers
1.7:260 Sanctions and Remedies for Conflicts of Interest
1.7:270 Positional Conflicts
1.7:280 Relationship to Other Rules
1.7:290 Identity of Client for Conflicts Purposes
1.7:300 Conflict of Interest Among Current Clients (Concurrent Conflicts)
1.7:310 Representing Parties with Conflicting Interests in Civil Litigation
1.7:320 Conflicts of Interest in Criminal Litigation
1.7:330 Multiple Representation in Non-Litigated Matters
1.7:340 Conflicts of Interest in Representing Organizations
1.7:400 Conflict of Interest Between Current Client and Third-Party Payor
1.7:410 Insured-Insurer Conflicts
1.7:420 Lawyer with Fiduciary Obligations to Third Person
1.7:500 Conflict of Interest Between Current Client and Lawyer's Interest
1.8 RULE 1.8 CONFLICT OF INTEREST: SPECIFIC RULES
1.8:100 Comparative Analysis of DC Rule
1.8:101 Model Rule Comparison
1.8:102 Model Code Comparison

1.8:200 Lawyer's Personal Interest Affecting Relationship
1.8:210 Sexual Relations with Clients
1.8:220 Business Transactions with Clients
1.8:300 Lawyer's Use of Client Information
1.8:400 Client Gifts to Lawyer
1.8:500 Literary or Media Rights Relating to Representation
1.8:600 Financing Litigation
1.8:610 Litigation Expenses
1.8:620 Living and Medical Expenses
1.8:700 Payment of Lawyer's Fee by Third Person
1.8:710 Compensation and Direction by Third Person
1.8:720 Insured-Insurer Conflicts
1.8:730 Lawyer with Fiduciary Obligation to Third Persons
1.8:800 Aggregate Settlements
1.8:900 Agreements Involving Lawyer's Malpractice Liability
1.8:910 Prospective Limitation of Malpractice Liability
1.8:920 Settlement of Legal Malpractice Claim
1.8:1000 Opposing a Lawyer Relative
1.8:1100 Lawyer's Proprietary Interest in Subject Matter of Representation
1.8:1110 Acquiring an Interest in Subject Matter of Representation
1.8:1120 Contingent Fees
1.8:1130 Lawyer Liens
1.8:1140 Retention of Files to Collect Fees
1.9 RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT
1.9:100 Comparative Analysis of DC Rule
1.9:101 Model Rule Comparison
1.9:102 Model Code Comparison
1.9:200 Representation Adverse to Interest of Former Client--In General
Whether Client is Current or Former Client; Hot Potato Question
1.9:210 "Substantial Relationship" Test
1.9:220 Material Adversity of Interest
1.9:230 Relevance of "Appearance of Impropriety" Standard

1.9:300 Client of Lawyer's Former Firm

1.9:310 Removing Imputed Conflict of Migratory Lawyer

1.9:320 Former Government Lawyer or Officer

1.9:400 Use or Disclosure of Former Client's Confidences

1.10 RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

1.10:100 Comparative Analysis of DC Rule

1.10:101 Model Rule Comparison

1.10:102 Model Code Comparison

1.10.103 Definition of "Firm"

1.10:200 Imputed Disqualification Among Current Affiliated Lawyers

1.10:300 Removing Imputation by Screening

1.10:400 Disqualification of Firm After Disqualified Lawyer Departs

1.10:500 Client Consent

1.11 RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE OR OTHER EMPLOYMENT

1.11:100 Comparative Analysis of DC Rule

1.11:101 Model Rule Comparison

1.11:102 Model Code Comparison

1.11:103 Definition of "Matter"

1.11:200 Representation of Another Client by Former Government Lawyer

1.11:210 No Imputation to Firm if Former Government Lawyer Is Screened

1.11:300 Use of Confidential Government Information

1.11:310 Definition of "Confidential Government Information"

1.11:400 Government Lawyer Participation in Matters Related to Prior Representation

1.11:500 Government Lawyer Negotiating for Private Employment

1.11:600 Federal Conflict of Interest Statutes and Regulations

The Statutory Post-Employment Restrictions

General Exceptions to the Statutory Post-Employment Prohibitions

The Clinton Pledge

The Statutory Restrictions on Conflicts of Interest During Government Service

Interpretive Authority

Penalties and Other Remedies

SpecialGovernmentEmployees

1.11:610 Restrictions Arising from Former Government Service: Permanent Prohibition with Respect to Particular Matters Participated in Personally and Substantially (18 U.S.C. § 207(a)(1))

Comparison to Rule 1.11

Particular Matter Involving a Specific Party or Parties

PersonalandSubstantialParticipation

1.11:620 Restrictions Arising from Former Government Service: Two-Year Prohibition with Respect to Particular Matters Under Official Responsibility (18 USC § 207(a)(2))

1.11:630 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Senior Personnel (18 USC § 207(c))

1.11:640 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Very Senior Personnel (18 USC § 207(d))

1.11:650 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to the Legislative Branch (18 USC § 207(e))

1.11:660 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Representation of Foreign Governments and Political Parties (18 USC § 207(f))

1.11:670 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Trade or Treaty Negotiations (18 USC § 207(b))

1.11:680 Prohibition with Respect to Payment for Representational Services Before the Government (18 USC § 203).

Lawyers Entering a Law Firm from Government

SpecialGovernmentEmployees Simultaneously Employed in a Law Firm

1.11:690 Prohibition on Representation of Others Before the Government (18 USC § 205)

1.11:695 Prohibition with Respect to Acts Affecting a Personal Financial Interest (18 USC § 208)

Particular matter

Personal and Substantial Participation
Financial Interest
Waivers and Exemptions
Additional Regulatory Restrictions
Applicability to Law Firm Recruitment
Applicability to Spouses Where One Is in Government and the Other Is a Lawyer in the Private Sector
1.11:699 Prohibition with Respect to Non-Governmental Compensation for Governmental Services (18 USC § 209)
Payments to Persons Entering Government Service
1.11:700 DC Conflict of Interest Statutes and Regulations
1.11:710 Federal Statutes Also Applicable to DC Government Employees
1.11:720 DC Statutes and Regulations
Chapter 6
Chapter 11
1.12 RULE 1.12 THIRD-PARTY NEUTRALS
1.12:100 Comparative Analysis of DC Rule
1.12:101 Model Rule Comparison
1.12:102 Model Code Comparison
1.12:200 Former Judge or Arbitrator Representing Client in Same Matter
1.12:300 Negotiating for Future Employment
1.12:400 Screening to Prevent Imputed Disqualification
1.12:500 Partisan Arbitrators Selected by Parties to Dispute
1.13 RULE 1.13 ORGANIZATION AS CLIENT
1.13:100 Comparative Analysis of DC Rule
1.13:101 Model Rule Comparison
1.13:102 Model Code Comparison
1.13:200 Entity as Client
1.13:210 Lawyer with Fiduciary Obligation to Third Person
1.13:220 Lawyer Serving as Officer or Director of an Organization
1.13:230 Diverse Kinds of Entities as Organizations
1.13:300 Preventing Injury to an Entity Client
1.13:310 Resignation Versus Disclosure Outside the Organization

1.13:400 Fairness to Non-Client Constituents Within an Entity Client
1.13:500 Joint Representation of Entity and Individual Constituents
1.13:510 Corporate Counsel's Role in Shareholder Derivative Actions
1.13:520 Representing Client with Fiduciary Duties
1.13:530 Representing Government Client
1.14 RULE 1.14 CLIENT WITH DIMINISHED CAPACITY
1.14:100 Comparative Analysis of DC Rule
1.14:101 Model Rule Comparison
1.14:102 Model Code Comparison
1.14:200 Problems in Representing a Partially or Severely Disabled Client
1.14:300 Maintaining Client-Lawyer Relationship with Disabled Client
1.14:400 Appointment of Guardian or Other Protective Action
1.15 RULE 1.15 SAFEKEEPING PROPERTY
1.15:100 Comparative Analysis of DC Rule
1.15:101 Model Rule Comparison
1.15:102 Model Code Comparison
1.15:110 DC IOLTA Plan
1.15:120 DC Client Security Fund
1.15:200 Safeguarding and Safekeeping Property
Maintenance of Records and Rendering Accounts
Prompt Placement in Safekeeping
1.15:210 Status of Fee Advances
1.15:220 Surrendering Possession of Property
1.15:230 Documents Relating to Representation
1.15:300 Holding Money as a Fiduciary for the Benefit of Clients or Third Parties
Misappropriation
Commingling
1.15:400 Dispute Over Lawyer's Entitlement to Funds Held in Trust
1.16 RULE 1.16 DECLINING OR TERMINATING REPRESENTATION
1.16:100 Comparative Analysis of DC Rule
1.16:101 Model Rule Comparison
1.16:102 Model Code Comparison

1.16:200 Mandatory Withdrawal
1.16:210 Discharge by Client
1.16:220 Incapacity of Lawyer
1.16:230 Withdrawal to Avoid Unlawful Conduct
1.16:300 Permissive Withdrawal
1.16:310 Withdrawal to Undertake Adverse Representation
1.16:320 Circumstances Justifying Discretionary Withdrawal
1.16:400 Order by Tribunal to Continue Representation
1.16:500 Mitigating Harm to Client Upon Withdrawal
1.16:600 Fees on Termination
1.16:610 Termination of Lawyer's Authority
1.17 RULE 1.17 SALE OF LAW PRACTICE
1.17:100 Comparative Analysis of DC Rule
1.17:101 Model Rule Comparison
1.17:102 Model Code Comparison
1.17:200 Traditional Rule Against the Sale of a Law Practice
1.17:300 Problems in Sale of Practice
1.18 RULE 1.18 DUTIES TO PROSPECTIVE CLIENT
1.18:100 Comparative Analysis of DC Rule
1.18:101 Model Rule Comparison
1.18:102 Model Code Comparison
1.18:200 Definition of "Prospective Client"
1.18:300 Confidentiality of Communications with a Prospective Client
1.18:400 Conflicts of Interest Arising Out Of Communications with a Prospective Client
1.19 RULE 1.19 TRUST ACCOUNT OVERDRAFT NOTIFICATION
1.19:100 Analysis of DC Rule
1.19:101 Model Rule Comparison
1.19:102 Model Code Comparison
1.19:200 Disciplinary Enforcement of Rule 1.19
II. COUNSELOR
2.1 RULE 2.1 ADVISOR

2.1:100 Comparative Analysis of DC Rule
2.1:101 Model Rule Comparison
2.1:102 Model Code Comparison
2:1:200 Exercise of Independent Judgment
2:1:300 Non-Legal Factors in Giving Advice
2.2 RULE 2.2 INTERMEDIARY
2.2:100 Comparative Analysis of DC Rule
2.2:101 Model Rule Comparison
2.2:102 Model Code Comparison
2.2:200 Relationship of Intermediation to Joint Representation
2.2:300 Preconditions to Becoming an Intermediary
2.2:400 Communication During Intermediation
2.2:500 Consequences of a Failed Intermediation
2.3 RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS
2.3:100 Comparative Analysis of DC Rule
2.3:101 Model Rule Comparison
2.3:102 Model Code Comparison
2.3:200 Undertaking an Evaluation for a Client
2.3:300 Duty to Third Persons Who Rely on Lawyer's Opinion
2.3:400 Confidentiality of an Evaluation
2.4 RULE 2.4 LAWYER SERVING AS THIRD PARTY NEUTRAL
2.4:100 Comparative Analysis of DC Rule
2.4:101 Model Rule Comparison
2.4:102 Model Code Comparison
2.4:200 Definition of "Third Party Neutral"
2.4:300 Duty to Inform Parties of Nature of Lawyer's Role
III. ADVOCATE
3.1 RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS
3.1:100 Comparative Analysis of DC Rule
3.1:101 Model Rule Comparison
3.1:102 Model Code Comparison
3.1:200 Non-Meritorious Assertions in Litigation

3.1:300 Judicial Sanctions for Abusive Litigation Practice
Appeals Rule 38
Civil Rule 11
Civil Rule 37
3.1:400 Civil Liability for Abusive Litigation Practice
3.1:500 Complying with Law and Tribunal Rulings
3.2 RULE 3.2 EXPEDITING LITIGATION
3.2:100 Comparative Analysis of DC Rule
3.2:101 Model Rule Comparison
3.2:102 Model Code Comparison
3.2:200 Dilatory Tactics
3.2:300 Judicial Sanctions for Dilatory Tactics
3.3 RULE 3.3 CANDOR TOWARD THE TRIBUNAL
3.3:100 Comparative Analysis of DC Rule
3.3:101 Model Rule Comparison
3.3:102 Model Code Comparison
3.3:200 False Statements to a Tribunal
3.3:300 Disclosure to Avoid Assisting Client Crime or Fraud
3.3:310 Prohibition on Counseling or Assisting Fraud on a Tribunal
3.3:400 Disclosing Adverse Legal Authority
3.3:500 Offering False Evidence
3.3:510 False Evidence in Civil Proceedings
3.3:520 False Evidence in Criminal Proceedings
3.3:530 Offering a Witness an Improper Inducement
3.3:540 Interviewing and Preparing Witnesses
3.3:600 Remedial Measures Necessary to Correct False Evidence
3.3:610 Duty to Reveal Fraud to the Tribunal
3.3:700 Discretion to Withhold Evidence Believed to Be False
3.3:800 Duty of Disclosure in Ex Parte Proceedings
3.4 RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL
3.4:100 Comparative Analysis of DC Rule
3.4:101 Model Rule Comparison

3.4:102 Model Code Comparison
3.4:103 Overview
3.4:200 Unlawful Destruction and Concealment of Evidence
3.4:210 Physical Evidence of Client Crime
3.4:300 Falsifying Evidence
3.4:310 Prohibited Inducements
3.4:400 Knowing Disobedience to Rules of Tribunal
3.4:500 Fairness in Pretrial Practice
3.4:600 Improper Trial Tactics
3.4:700 Advising Witness Not to Speak to Opposing Parties
3.4:800 Standards of Civility
3.5 RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL
3.5:100 Comparative Analysis of DC Rule
3.5:101 Model Rule Comparison
3.5:102 Model Code Comparison
3.5:200 Improperly Influencing a Judge, Juror, or Other Court Official
3.5:210 Improperly Influencing a Judge
3.5:220 Improperly Influencing a Juror
3.5:300 Improper Ex Parte Communication
3.5:400 Intentional Disruption of a Tribunal
3.6 RULE 3.6 TRIAL PUBLICITY
3.6:100 Comparative Analysis of DC Rule
3.6:101 Model Rule Comparison
3.6:102 Model Code Comparison
3.6:200 Improper Extrajudicial Statements
3.6:300 Permissible Statements
3.6:400 Responding to Adverse Publicity
3.7 RULE 3.7 LAWYER AS WITNESS
3.7:100 Comparative Analysis of DC Rule
3.7:101 Model Rule Comparison
3.7:102 Model Code Comparison
3.7:200 Prohibition of Advocate as Witness

3.7:300 An Affiliated Lawyer as Advocate (Imputed Disqualification)
3.8 RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR
3.8:100 Comparative Analysis of DC Rule
3.8:101 Model Rule Comparison
3.8:102 Model Code Comparison
3.8:200 The Decision to Charge
3.8:300 Efforts to Assure Accused's Right to Counsel
3.8:400 Seeking Waivers of Rights from Unrepresented Defendants
3.8:500 Disclosing Evidence Favorable to the Accused
3.8:600 Monitoring Extrajudicial Statements by Law Enforcement Officials
3.8:700 Issuing a Subpoena to a Lawyer
3.8:800 Making Extrajudicial Statements
3.8:900 Peremptory Strikes of Jurors
3.9 RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS
3.9:100 Comparative Analysis of DC Rule
3.9:101 Model Rule Comparison
3.9:102 Model Code Comparison
3.9:200 Duties of Advocate in Nonadjudicative Proceedings
IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS
4.1 RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS
4.1:100 Comparative Analysis of DC Rule
4.1:101 Model Rule Comparison
4.1:102 Model Code Comparison
4.1:200 Truthfulness in Out-of-Court Statements
4.1:300 Disclosures to Avoid Assisting Client Fraud
4.2 RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
4.2:100 Comparative Analysis of DC Rule
4.2:101 Model Rule Comparison
4.2:102 Model Code Comparison
4.2:200 Communication with a Represented Person
4.2:210 "Represented Person" (Contact with an Agent or Employee of a Represented Entity)

4.2:220 Communications "Authorized by Law" — Law Enforcement Activities

The Department of Justice and Rule 4.2

4.2:230 Communications "Authorized by Law" — Other

4.2:240 Communication with a Represented Government Agency or Officer

4.2:250 Communication with a Confidential Agent of Non-Client

4.3 RULE 4.3 DEALING WITH UNREPRESENTED PERSON

4.3:100 Comparative Analysis of DC Rule

4.3:101 Model Rule Comparison

4.3:102 Model Code Comparison

4.3:200 Dealing with Unrepresented Person

4.4 RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

4.4:100 Comparative Analysis of DC Rule

4.4:101 Model Rule Comparison

4.4:102 Model Code Comparison

4.4:200 Disregard of Rights or Interests of Third Persons

4.4:210 Cross-Examining a Truthful Witness; Fostering Falsity

4.4:220 Threatening Prosecution

V. LAW FIRMS AND ASSOCIATIONS

5.1 RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

5.1:100 Comparative Analysis of DC Rule

5.1:101 Model Rule Comparison

5.1:102 Model Code Comparison

5.1:200 Duty of Partners to Monitor Compliance with Professional Rules

5.1:300 Monitoring Duty of Supervising Lawyer

5.1:400 Failing to Rectify the Misconduct of a Subordinate Lawyer

5.1:500 Vicarious Liability of Partners

5.2 RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

5.2:100 Comparative Analysis of DC Rule

5.2:101 Model Rule Comparison

5.2:102 Model Code Comparison

5.2:200 Independent Responsibility of a Subordinate Lawyer

5.2:300 Reliance on a Supervisor's Resolution of Arguable Ethical Issues

5.3 RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

5.3:100 Comparative Analysis of DC Rule

5.3:101 Model Rule Comparison

5.3:102 Model Code Comparison

5.3:200 Duty to Establish Safeguards

5.3:300 Duty to Control Nonlawyer Assistants

5.3:400 Responsibility for Misconduct of Nonlawyer Assistants

5.4 RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER [RESTRICTIONS ON FORM OF PRACTICE]

5.4:100 Comparative Analysis of DC Rule

5.4:101 Model Rule Comparison

5.4:102 Model Code Comparison

5.4:200 Sharing Fees with a Nonlawyer

5.4:300 Forming a Partnership with Nonlawyers

5.4:400 Third Party Interference with a Lawyer's Professional Judgment

5.4:500 Nonlawyer Ownership in or Control of Profit-Making Legal Service Organizations

5.4:510 Group Legal Services

5.4:520 Nonprofit Organizations Delivering Legal Services

5.5 RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

5.5:100 Comparative Analysis of DC Rule

5.5:101 Model Rule Comparison

5.5:102 Model Code Comparison

5.5:200 The Prohibition on Unauthorized Practice

5.5:210 The Limited Role of Rule 5.5

5.5:211 The Provisions of DC App. Rule 49

5.5:212 The Scope of the Prohibition on Unauthorized Practice

5.5:213 Sanctions for Engaging in Unauthorized Practice

5.5:214 Unauthorized Practice by Lawyers

5.5:300 Admission and Residency Requirements for Out-of-State Lawyers

5.5:310 Pro Hac Vice Admission
5.5:320 Special Legal Consultants (Foreign Lawyers)
5.5:400 Performing Legal Services in Another Jurisdiction
5.5:500 Assisting in the Unauthorized Practice of Law
5.6 RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE
5.6:100 Comparative Analysis of DC Rule
5.6:101 Model Rule Comparison
5.6:102 Model Code Comparison
5.6:200 Restrictions on Lawyers Leaving a Firm
5.6:300 Settlements Restricting a Lawyer's Future Practice
5.7 RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES
5.7:100 Comparative Analysis of DC Rule
5.7:101 Model Rule Comparison
5.7:102 Model Code Comparison
5.7:200 Applicability of Ethics Rules to Ancillary Business Activities
VI. PUBLIC SERVICE
6.1 RULE 6.1 PRO BONO PUBLIC SERVICE
6.1:100 Comparative Analysis of DC Rule
6.1:101 Model Rule Comparison
6.1:102 Model Code Comparison
6.1:200 Lawyer's Moral Obligation to Engage in Public Interest Legal Service
6.2 RULE 6.2 ACCEPTING APPOINTMENTS
6.2:100 Comparative Analysis of DC Rule
6.2:101 Model Rule Comparison
6.2:102 Model Code Comparison
6.2:200 Duty to Accept Court Appointments Except for Good Cause
6.3 RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION
6.3:100 Comparative Analysis of DC Rule
6.3:101 Model Rule Comparison
6.3:102 Model Code Comparison
6.3:200 Conflicts of Interest of Lawyers Participating in a Legal Services Organization

6.4 RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

6.4:100 Comparative Analysis of DC Rule

6.4:101 Model Rule Comparison

6.4:102 Model Code Comparison

6.4:200 Conflicts of Interest of Lawyers Participating in Law Reform Organizations

6.5 RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

6.5:100 Comparative Analysis of DC Rule

6.5:101 Model Rule Comparison

6.5:102 Model Code Comparison

6.5:200 Scope of Rule

6.5:300 Special Conflict of Interest Rule

VII. INFORMATION ABOUT LEGAL SERVICES

7.1 RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

7.1:100 Comparative Analysis of DC Rule

7.1:101 Model Rule Comparison

7.1:102 Model Code Comparison

7.1:200 Lawyer Advertising--In General

7.1:210 Prior Law and the Commercial Speech Doctrine

7.1:220 False and Misleading Communications

7.1:230 Creating Unjustified Expectations

7.1:240 Comparison with Other Lawyers

7.2 RULE 7.2 ADVERTISING

7.2:100 Comparative Analysis of DC Rule

7.2:101 Model Rule Comparison

7.2:102 Model Code Comparison

7.2:200 Permissible Forms of Lawyer Advertising

7.2:300 Retaining Copy of Advertising Material

7.2:400 Paying to Have Services Recommended

7.2:500 Identification of a Responsible Lawyer

7.3 RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENT
7.3:100 Comparative Analysis of DC Rule
7.3:101 Model Rule Comparison
7.3:102 Model Code Comparison
7.3:200 Prohibition of For-Profit In-Person Solicitation
7.3:210 Solicitation by Non-Profit Public Interest Organization
7.3:220 Solicitation of Firm Clients by a Departing Lawyer
7.3:300 Regulation of Written and Recorded Solicitation
7.3:400 Disclaimers for Written and Recorded Solicitation
7.3:500 Solicitation by Prepaid and Group Legal Services Plans
7.4 RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION
7.4:100 Comparative Analysis of DC Rule
7.4:101 Model Rule Comparison
7.4:102 Model Code Comparison
7.4:200 Regulation of Claims of Certification and Specialization
7.5 RULE 7.5 FIRM NAMES AND LETTERHEADS
7.5:100 Comparative Analysis of DC Rule
7.5:101 Model Rule Comparison
7.5:102 Model Code Comparison
7.5:200 Firm Names and Trade Names
7.5:300 Law Firms with Offices in More Than One Jurisdiction
7.5:400 Use of the Name of a Public Official
7.5:500 Misleading Designation as Partnership, etc.
7.6 RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES
7.6:100 Comparative Analysis of DC Rule
7.6:101 Model Rule Comparison
VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION
8.1 RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS
8.1:100 Comparative Analysis of DC Rule
8.1:101 Model Rule Comparison
8.1:102 Model Code Comparison

8.1:200 Bar Admission
8.1:210 Bar Admission Agency
8.1:220 Bar Admission Requirements
Admission by Examination
Admission Without Examination
8.1:230 Admission on Motion
8.1:240 Admission Pro Hac Vice
8.1:300 False Statements of Material Fact in Connection with Admission or Discipline
8.1:400 Duty to Volunteer Information to Correct a Misapprehension
8.1:410 Protecting Client Confidential Information
8.1:500 Duty to Respond to Admission and Disciplinary Authorities
8.1:600 Application of Rule 8.1 to Reinstatement Proceedings
8.2 RULE 8.2 JUDICIAL AND LEGAL OFFICIALS
8.2:100 Comparative Analysis of DC Rule
8.2:101 Model Rule Comparison
8.2:102 Model Code Comparison
8.2:200 False Statements About Judges or Other Legal Officials
8.2:300 Lawyer Candidates for Judicial Office
8.3 RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT
8.3:100 Comparative Analysis of DC Rule
8.3:101 Model Rule Comparison
8.3:102 Model Code Comparison
8.3:200 Mandatory Duty to Report Serious Misconduct
8.3:300 Reporting the Serious Misconduct of a Judge
8.3:400 Exception Protecting Confidential Information
8.4 RULE 8.4 MISCONDUCT
8.4:100 Comparative Analysis of DC Rule
8.4:101 Model Rule Comparison
8.4:102 Model Code Comparison
8.4:200 Violation of a Rule of Professional Conduct
8.4:300 Commission of a Crime

8.4:400 Dishonesty, Fraud, Deceit and Misrepresentation

8.4:500 Conduct Prejudicial to the Administration of Justice

8.4:600 Implying Ability to Influence Public Officials

8.4:700 Assisting Judge or Official in Violation of Duty

8.4:800 Discrimination in the Practice of Law

8.4:900 Threatening Prosecution

8.5 RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

8.5:100 Comparative Analysis of DC Rule

8.5:101 Model Rule Comparison

8.5:102 Model Code Comparison

8.5:200 Disciplinary Authority

There appear to be no pertinent DC court decisions or ethics opinions relating to this aspect of DC Rule 8.5.

8.5:300 Choice of Law

9.1 RULE 9.1 DISCRIMINATION IN EMPLOYMENT

INTRODUCTION

0.1:100 Sources of Law and Guidance

0.1:101 Professional Codes

The ethical code governing members of the DC Bar consists of the District of Columbia Rules of Professional Conduct, adopted by the DC Court of Appeals effective January 1, 1991 and revised by the Court effective February 1, 2007. The DC Rules, though based on the Model Rules, were the product of an extensive process of study described in 0.1:103 below, which resulted in a number of variances from the Model Rules: these are explained under the caption Model Rule Comparison in the discussion of each pertinent Rule, below.

Prior to adoption of the DC Rules, the applicable ethical code was the District of Columbia Code of Professional Responsibility, which had been adopted by the Court in 1972 (the year in which disciplinary authority over lawyers practicing in the District of Columbia was officially transferred to the Court from the United States District Court for the District of Columbia). As initially adopted, the DC Code was almost identical to the Model Code, though it contained a few variances that had been approved by a vote of the membership of the DC Bar. On several subsequent occasions the Court adopted further changes in the DC Code, generally at the instance of the DC Bar. Where relevant, these variances of the DC Code from the Model Code are identified under the caption Model Code Comparison in the discussion of each pertinent Rule, below.

0.1:103 Background of the DC Rules of Professional Conduct

The Model Code of Professional Responsibility was adopted in the District of Columbia in slightly modified form; after adoption it was further modified on several occasions. It was therefore to be expected that after the ABA House of Delegates adopted the Model Rules in place of the Model Code, in August 1983, the DC Court of Appeals, rather than automatically adopt the Model Rules, approved the appointment by the DC Bar of a committee to study and make recommendations about them for the Court's consideration. The process of study, recommendation exposure for comment and adoption took almost seven years in all.

The District of Columbia Bar Model Rules of Professional Conduct Committee, chaired by Robert E. Jordan, III, Esq. (herein referred to as the "Jordan Committee"), was promptly appointed, and after two years of study, submitted its report to the Bar Board of Governors in September 1985. The Committee's report was published for comment and was intensively reviewed by the Board of Governors, in a series of meetings from September 1985 through June 1986. In November 1986, the Board of Governors filed with the Court of Appeals a petition seeking adoption of a modified set of Rules of Professional Conduct largely reflecting the Jordan Committee's recommendations but with some changes made by the Board of Governors. The recommendations submitted to the Court are contained in a volume titled "Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar," which shows in legislative format, and explains, the changes from the Model Rules proposed by the Jordan Committee and the modifications made by the Board of Governors.

The Bar's original petition was followed by three supplemental petitions, in March 1987 (proposing amendments to Rules 1.6 and 1.10), September 1987 (relating to Rule 5.4) and June 1988 (relating to Rules 1.7 and 1.6). The Bar's proposals were then published again for comment, at the Court's instance, in October 1988.

Meanwhile, the Board of Governors had also appointed a special committee called the Special Committee on Government Lawyers and the Model Rules of Professional Conduct, chaired by Joe Sims, Esq. (the "Sims Committee"). The Sims Committee's report, suggesting changes relating to government lawyers in certain rules, was submitted to the Board of Governors in December 1988 and was promptly forwarded by the Board to the Court.

After extended consideration of the DC Bar's proposal and the numerous comments elicited by publication of the proposals, the Court of Appeals adopted a final version on March 1, 1990, to be effective January 1, 1991. The Rules then adopted were published in a special February/March Supplement of the Bar's official newspaper, *Bar Report*, in a legislative format showing changes that the Court had made in the version that had been published for comment.

A number of changes have been made in the DC Rules since their adoption by the Court in 1990. A new Rule 1.17, on trust accounts, was adopted in June 1992 [and is discussed together with Rule 1.15 at 1.15:300, below]. Amendments to Rules 1.10 and 1.11 to allow law firms to lend lawyers to certain governmental agencies were adopted in November 1991 and further amended in 1995: these are discussed in 1.10:100 below.

In late 1991 the Bar Board of Governors appointed a Rules of Professional Conduct Review Committee, chaired by F. Whitten Peters, Esq. (the "Peters Committee"), to review the Rules that had become effective at the beginning of that year. The Peters Committee filed a report with proposed amendments in December 1993, which was forwarded to the Court of Appeals by the Board of Governors without significant change. After lengthy consideration, the Court of Appeals on October 15, 1996 adopted almost all of the proposals of the Peters Committee, to be effective November 1, 1996.

A standing committee of the DC Bar titled Rules of Professional Conduct Review Committee (for convenience, referred to hereafter as the Rules Review Committee) completed a thorough review of the DC Rules in June 2005, when it issued a report making a number of recommendations for changes in those Rules. The Committee had followed closely the deliberations of the ABA's Commission on the Evaluation of the Rules of Professional Conduct (commonly known as the "ABA Ethics 2000 Commission"), and considered for possible adoption in the DC Rules the changes to the Model Rules resulting in 2001 and 2002 from that Commission's recommendations, as well as the changes resulting in 2003 from the recommendations of the ABA's Corporate Task Force, and suggestions from the DC Bar's Legal Ethics Committee. The committee's report and recommendations were submitted to the DC Court of Appeals, which on August 1, 2006 issued an order approving the changes to the DC Rules recommended by the committee, to be effective as of February 1, 2007. The changes thus made to the DC Rules, together with the related changes in the Model Rules, are described in the "Model Rule Comparison" sections of the treatment of the individual rules, below.

Introductory Sections of the Rules of Professional Conduct

The DC Rules, like the Model Rules, have three introductory sections, designated "Preface" (in the case of the Model Rules, "Preamble"), "Scope," and "Terminology," respectively.

The DC Rules "Preface" sets out the history of the Rules' consideration and adoption. The Model Rules, on the other hand, begin with a "Preamble," subtitled "A Lawyer's Responsibilities," comprising twelve numbered paragraphs. The Jordan Committee characterized the Preamble as an "apparent attempt to provide a brief overview of the lawyer's responsibilities and the role of the lawyer in society." The Committee rejected inclusion of this Preamble in the DC Rules, saying it included a significant amount of substantive comment on the responsibilities of lawyers that the Committee viewed as more appropriately placed within the appropriate Rule or Comment "in order to avoid

confusion." The Committee also expressed concern that the Preamble might be relied upon in interpreting the Rules thus entrapping a lawyer who would reasonably seek guidance to the interpretation of a rule only in the Comments accompanying that rule. The Committee moved some of the Model Rules Preamble material to Comments but also deleted much because it was already adequately covered in Comments. The Jordan Committee termed the remainder of the Model Rules Preamble "commentary on the role of self-regulation in the profession" which was "inappropriate to a Code being promulgated by the Court."

As to the Scope section, the Jordan Committee worked from the Model Rules Scope section, but made considerable changes, retaining only four of the Model Rules' nine numbered paragraphs, and modifying all but one of those. The Jordan Committee proposed changes in paragraph [1] of the Scope section to clarify its view that "the comments are inseparable from the Rules, and vice-versa," so that although they do not add obligations to the Rules, they also provide *authoritative* guidance about the scope of obligation imposed by the Rules, and should be given *significant weight* in interpreting the Rules. In accordance with the Jordan Committee's recommendations, paragraphs [2] and [5] of the Model Rules' Scope, referring respectively to the larger legal context shaping the lawyer's role and the disciplinary process, were retained, but paragraphs [3], [4], [6], [7] and [8] were omitted. Paragraph [4], describing the special responsibilities and authority of government lawyers, was deleted as a partial and incomplete reference to a subject that was to be addressed by the Sims Committee. The other deleted paragraphs were viewed as needlessly and ineffectually seeking to "prescribe the effects of the Rules in decisions by courts outside the disciplinary process." The Court of Appeals did not wholly agree with the Jordan Committee, however, for it inserted a paragraph [4] that addresses fairly broadly the relationship of the Rules to civil liability and other non-disciplinary matters. Paragraph [4] is referred to in the **Finkelstein** case, discussed under 7.1:220, below) Paragraph [9] of the Model Rules Scope section, describing the role of the Comments to the Rules, was retained (as what is now paragraph [6] of the DC Scope section), in somewhat modified form.

The Peters Committee proposed, and the Court of Appeals in October 1996 approved, two significant changes in the Scope section. First, paragraph [4] was amended to eliminate the proposition (also found in paragraph [6] in the Model Rules Scope) that violation of a Rule does not necessarily give rise to a cause of action or create a presumption that a legal duty has been violated; and to substitute the proposition that

> Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer's duty to others.

Second, a new paragraph [5] was added, to provide a rule of construction for circumstances where more than one rule might be applicable, one general and the other

particular. The core proposition of this paragraph is that in such circumstances the general rule "does not supplant, amend, enlarge, or extend the specific rule."

The Terminology section of the DC Rules is addressed in 0.4:400 below.

0.1:104 Unusual Aspects of the DC Ethics Rules

The end product of the process leading to adoption of the DC Rules of Professional Conduct, discussed in 0.1:103 above, is a set of ethics rules that vary in a large number of respects from the Model Rules. (Part of the reason for the variances also is that the Model Rules have been amended numerous times since their adoption in 1983, and not all of those amendments have been reflected in the DC Rules.) Most of the differences are matters of language rather than substance, but there are quite a few variances in substance as well. Each of these is discussed in the "Model Rules Comparison" portion of the treatment of each rule below, but the more important of the points of substantive difference are listed here. As a result of both the recommendations of the Sims Committee and the fact that the Jordan Committee had itself given particular attention to possible differences in the application of the ethics rules to lawyers in government and in private practice (and had had a special subcommittee for this purpose), a number of the differences relate to lawyers in government. The major differences between the DC Rules and the Model Rules, other than those concerning government lawyers, are listed immediately below; then the differences that concern government lawyers are listed separately below.

<u>Major Differences Between the DC Rules and the Model Rules</u>

- DC Rule 1.3, on diligence, is considerably more elaborate than the Model Rule, requiring not only the Model Rule's diligence and promptness but also zeal, and prohibiting a lawyer from prejudicing or damaging a client in the course of the professional relationship. [See 1.3:101.]

- DC Rule 1.5, on fees, unlike the Model Rule, *requires* that fee agreements be in writing in certain circumstances and does not flatly prohibit contingent fees in domestic relations cases. [See 1.5:101.]

- DC Rule 1.6, on confidentiality of information, varies considerably from the Model Rule, using the defined terms "confidence" and "secret" rather than "information relating to representation of a client" to describe the information a lawyer must protect; spelling out the fact that a lawyer may be obliged to protect confidential information acquired before becoming a lawyer; and providing for confidentiality in lawyer counseling programs. DC Rule 1.6 also includes a prohibition on a lawyer's *using* a client's information that is protected from *disclosure* to the disadvantage of that client or for the advantage of the lawyer or a third person; this prohibition is found in a separate provision of the Model Rules, Rule 1.8(b). [See 1.6:101.]

- DC Rule 1.7, on conflicts of interest, is very different in structure from the Model Rule — among other things, spelling out a category of conflict that is not consentable and allowing an attorney to become adverse to an existing client without consent where representation of another client unforeseeably leads to such adverseness and the lawyer's effectiveness on behalf of both clients is not impaired.

However, the two versions of the Rule are probably not very different in application. Although the structure of the Model Rule was considerably modified (and improved) in 2002 as a result of the recommendations of the Ethics 2000 Commission, the DC Bar's Rules Review Committee did not think the DC Rule required any such restructuring. [See 1.7:101.]

- DC Rule 1.8, on prohibited transactions, differs from the Model Rule in allowing a lawyer more latitude in providing financial assistance to a client, in more tightly prohibiting agreements limiting a lawyer's malpractice liability, and in strictly limiting a lawyer's right to retain client files in order to collect a fee. Unlike the Model Rule, the DC Rule does not contain a specific prohibition on a lawyer's having sexual relations with a client (added to the Model Rule in 2002), but it does have two Comments addressing the possible conflict implications of such a relationship. [See 1.8:101.]

- DC Rule 1.10, on imputed disqualification, exempts from imputation a lawyer whose disqualification results from involvement in a matter before becoming a lawyer. And it has a special provision allowing firms to lend their lawyers to certain government agencies. Neither of these provisions has a parallel in the Model Rule. [See 1.10:101.]

- DC Rule 1.11, on successive government and private employment, differs substantially from the Model Rule. It disqualifies former government lawyers from taking employment not only in the *same* matter as they participated in while in government but also in a *substantially related* matter. It prescribes a significantly different procedure for avoiding imputation. Unlike the Model Rule, moreover, it contains no provision for waiver by the government agency of an individual lawyer's disqualification. It also lacks three provisions found in the Model Rule: one addressing "confidential government information" (MR 1.11(c); another providing for disqualification of government lawyers on the basis of representations undertaken before entering government service (MR 1.11(d)(2)(i)); and one prohibiting negotiating for private employment in a matter in which the lawyer is involved in a governmental capacity (MR 1.11(d)(2)(ii)). Finally, DC Rule 1.11, unlike the Model Rule, applies to former judges and their law clerks, whereas these are covered in the Model Rules by Rule 1.12. The DC Rules Review Committee recommended that the provisions dealing with former judges and their clerks be moved to DC Rule 1.12, but this was the one recommendation by the Committee that was not adopted by the Court of Appeals. [See 1.11:101.]

- DC Rule 1.12, applying to former third party neutrals some of restrictions parallel to those imposed by DC Rule 1.11 on former government lawyers, differs from its Model Rule counterpart mainly in its limited scope, since Model Rule 1.12 applies to judges as well as third-party neutrals. As noted in the preceding paragraph, the DC Rules Review Committee's recommendation that Rules 1.11 and 1.12 be revised to conform to the corresponding Model Rules in this respect was rejected by the Court of Appeals, though it did accept the Committee's

proposed broadening of the latter to include other third party neutrals well as arbitrators. [See 1.12:101.]

- DC Rule 1.13, on organizational clients, differs from the Model Rule in omitting, provisions in the latter, adopted in 2003, that provide for a Lawyer's "reporting out" on corporate misconduct (i.e., disclosing such misconduct outside the corporation, under paragraph (c)); exempting from such disclosures information learned by the lawyer in the course of an internal investigation of the client (paragraph (d)); and providing that a lawyer who believes he or she has been discharged by reason of his internal reports on misconduct may do what is necessary to see that the organization's highest authority is so informed (paragraph (e)). [See 1.13:101.]

- DC Rule 1.15, on safekeeping property, differs from the Model Rule in making specific provision for Interest on Lawyers Trust Accounts (IOLTA). The DC Rule is also supplemented by a separate rule on trust accounts, originally designated as Rule 1.17, but redesignated as Rule 1.19 in 2006, when a new Rule 1.17 on Sale of a Law Practice was added to the DC Rules. [See 1.15:101.]

- DC Rule 1.19 (originally designated 1.17, as state above), titled Trust Account Overdraft Notification, requires that trust funds in a lawyer's possession be deposited in accounts as to which the financial institution holding the account agrees to notify Bar Counsel in the event of an overdraft on the account. It has no parallel in the Model Rules. [See 1.19:100.]

- DC Rule 3.3 allows a lawyer to put on the stand, without examination, a criminal defendant who insists on offering false testimony; the Model Rule prohibits a lawyer in all circumstances from offering testimony known to be false. The Model Rule requires the lawyer to reveal false evidence even if Rule 1.6 would otherwise prohibit the revelation; the DC Rule does not similarly trump Rule 1.6. [See 3.3:101.]

- The principal substantive difference between DC Rule 3.4 and the corresponding Model Rule is in its paragraph (g), which was added on the recommendation of the DC Rules Review Committee in 2006. That paragraph, which has no counterpart in Model Rule 3.4, prohibits a lawyer from peremptorily striking a juror on grounds of race, religion, national or ethnic background, or sex. A similar provision had previously been in paragraph (h) of DC Rule 3.8, regarding special responsibilities of a prosecutor; the Rules Review Committee recommended moving it to Rule 3.4 in order to extend it to other lawyers as well as prosecutors. There is no corresponding provision in either MR 3.4 or MR 3.8. There are also some minor differences in paragraph (a) of the two versions of Rule 3.4. [Se 3.4:101.]

- DC Rule 3.6, on trial publicity, is limited to "a case being tried before a judge or jury," and so does not restrict comments made before commencement of a

trial, while the Model Rule is not similarly limited as to the time at which it may apply. The DC Rule also applies only to lawyers involved in trying a case, whereas the Model Rule extends to lawyers investigating as well as those litigating, and to lawyers associated with them in a firm or government agency. The DC Rule also sets a higher standard of risk of material prejudice to a proceeding -- a "serious and imminent threat" rather than a "substantial likelihood" as in the Model Rule. [See 3.6:101.]

- DC Rule 3.8, on special responsibilities of prosecutors, differs from the Model Rule in a number of significant ways: it includes several provisions that have no counterpart in the corresponding Model Rule, and it lacks several provisions that are in the Model Rule. The most significant provisions of the DC Rule that have no parallel in the Model Rule paragraph (a) of the DC Rule, prohibiting a prosecutor from improperly favoring or invidiously discriminating in deciding whether investigate or prosecute; and paragraph (d), which says that a prosecutor may not intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense. On the other hand, there are four significant provisions of the Model Rule for which there is no counterpart in the DC Rule. One of those provisions calls for a prosecutor to make reasonable efforts to ensure that the accused has had a reasonable opportunity to obtain counsel (paragraph (b) of the Model Rule); another prohibits a prosecutor from seeking to obtain from an unrepresented person a waiver of pretrial rights (paragraph (c); the third limits the issuance of subpoenas to lawyers in grand jury or other criminal proceedings (paragraph (e)); and the fourth is a requirement that prosecutors exercise reasonable care to prevent persons assisting or associated with the prosecutor from making extrajudicial statements that would violate Rule 3.6 (paragraph (f)). [See 3.8:101.]

- DC Rule 4.2, on communications with represented parties, allows significantly greater latitude than the Model Rule for communications with employees of an organizational party. It also has a provision (paragraph (d)) stating that the Rule does not prohibit a lawyer communicating with governmental officials who have the authority to redress the client's grievances -- a subject dealt with somewhat differently in Comment [5] to the Model Rule. The potentially most significant difference, however, is that in the DC Rule but not the Model Rule, the phrase " a lawyer shall not communicate" is followed by the "or cause another to communicate." [See 4.2:101.]

- DC Rule 4.4, on respect for rights of third persons, differs somewhat from its Model Rule counterpart in its guidance as to the responsibility of a lawyer who receives documents that have been inadvertently sent by an opposing party or lawyer. [See 4.4:101.]

- DC Rule 5.4, on professional independence, allows lawyers, under strictly defined conditions, to have nonlawyer partners — something that neither the Model Rule nor. until very recently, the rules of any other jurisdiction permitted.

The ABA's Commission on Multidisciplinary Practice recommended the adoption of changes to Rule 5.4 that would have provided substantially greater latitude for lawyers to practice in partnerships with members of other professions, but although those recommendations have been implemented by a few jurisdictions, they were rejected by the ABA House of Delegates, and the DC Court of Appeals similarly rejected the parallel recommendations of a DC Bar committee that had been charged with consideration of the recommendations of the ABA Committee. [See 5.4:101.]

- DC Rule 7.1, on communications about a lawyer's services, covers, in a substantially less elaborate and restrictive way, the subjects covered by four Model Rules: Rule 7.1, on the general standard of truthfulness; Rule 7.2 on advertising; Rule 7.3 on direct contact; and Rule 7.4 on communication of fields of practice. [See 7.1:101.]

- The DC Rules have no counterpart to MR 8.2, regarding judges and legal officials.

- DC Rule 8.4 preserves a prohibition from the Model Code that was not carried forward in the Model Rules: namely, the prohibition against seeking or threatening criminal or disciplinary charges solely to obtain advantage in a civil matter. [See 8.4:101.]

- DC Rule 9.1, prohibiting discrimination in employment, has no counterpart in the Model Rules.

DC Rules Differentially Affecting Government Lawyers

- DC Rule 1.2, on scope of representation, has a paragraph (d) that addresses the allocation of decision-making authority between a government lawyer and a governmental client, and recognizes that the lawyer's authority over decisions concerning the representation may be expanded by statute or regulation beyond the limits stated in paragraphs (a) and (c). This provision has no Model Rule counterpart. [See 1.2:101.]

- In DC Rule 1.6, on confidentiality of information, what are now paragraphs (e)(2)(B) and (k), together with Comments [37]-[40] thereto, address some of the special circumstances presented by attorney-client relationships within the government. They have no Model Rule counterpart.

- DC Rule 1.11, on successive government and private employment, is, like its Model Rule counterpart, entirely concerned with government lawyers, or former ones. There are a number of differences between the two versions of the Rule, as described above, under the caption Major Differences Between the DC Rules and the Model Rules.

- DC Rule 3.7, on lawyer as witness, includes language in paragraph (b) that excepts government lawyers from the prohibition of that paragraph. No such exception is provided in the Model Rule [See 3.7:101].

- DC Rule 3.8, on special responsibilities of prosecutors, is, as noted above, significantly different from the Model Rule.

0.2:200 Forms of Lawyer Regulation in DC

The several forms of lawyer regulation in the District of Columbia are generally comparable to those in many states. The most pervasive form is judicial regulation in rules promulgated by the District of Columbia Court of Appeals. These rules establish a mandatory DC Bar and an overall disciplinary system authorizing sanctions against lawyers for unethical conduct in violation of professional standards promulgated by the Court. Other forms of lawyer regulation include the DC courts' power to punish lawyers for contempt, Congressional legislation mandating disbarment for certain types of criminal conduct, and regulation through civil tort claims for malpractice based on alleged violations of competence standards established by DC courts in the exercise of their common law authority.

0.2:210 Judicial Regulation

Unlike individual states with sovereign power, the District of Columbia is a federal enclave provided for in Article I of the U.S. Constitution and controlled in large part by the United States Congress. Article I gives the Congress "exclusive Legislation in all Cases whatsoever" over the seat of government. Congress has invoked its Article I powers in legislation creating a limited home-rule DC government with legislative and executive branches. **District of Columbia Self Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973)**. Cognate legislation provides for the local DC courts, both Article I courts: the Superior Court at the trial court level and the District of Columbia Court of Appeals at the appellate level. It further provides that all judges of the local courts are appointed by the President, subject to Senate confirmation for 15-year terms, **District of Columbia Court Reform and Criminal Procedure Act of 1970, DC Code §§ 11-101 et seq. (1995)**. The Court of Appeals is empowered by the statute (1) to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar," and (2) to "censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct or conduct prejudicial to the administration of justice." **DC Code §§ 11-2501-02 (1995).**

The Court of Appeals has relied on these statutory provisions as well as its "inherent powers" in promulgating "Rules Governing The District of Columbia Bar" (Court of Appeals Rules I-XV), which include in Rules X and XI, respectively, "Rules of Professional Conduct" and provisions on "Disciplinary Proceedings" conducted under the aegis of the Court-created Board on Professional Responsibility. *See* **In re Wade, 526 A.2d 936, 938 (DC 1987), cert. denied, 484 U.S. 1010 (1988)**. The US District Court for the District of Columbia, a federal court comparable to other US district courts throughout the country, has no jurisdiction to review orders of the Court of Appeals relating to admission, discipline and disbarment of members of the DC Bar. Such orders can be reviewed only in the US Supreme Court by writ of certiorari to the DC Court of Appeals, although lower federal courts do have jurisdiction over claims challenging on federal grounds the validity of a Court of Appeals general admission

rule. *See* **District of Columbia Court of Appeals v. Feldman, 460 US 462, 482-88 (1983)**.

In some states the highest state court has relied on the state's constitution, the separation of powers doctrine, the court's "inherent powers" or some combination thereof in ruling that the state's highest court has *exclusive* jurisdiction over the regulation of lawyers practicing law in state courts, thereby prohibiting by constitutional doctrine any regulation of lawyers by the state's legislative or executive branches. None of the DC courts has asserted such a broad concept of exclusive jurisdiction, and from the beginning of the federal government, Congress has exercised legislative authority to regulate the practice of law in federal tribunals. **Judiciary Act of 1789**, now **28 USC § 1654**; *cf*. **In re Kerr, 424 A.2d 94, 98-99 (DC 1980)** (rejecting a contention that the statute requiring disbarment of a lawyer convicted of an offense involving moral turpitude, **DC Code § 11-2503(a)**, unconstitutionally infringed on the authority of the Court over attorney discretion).

0.2:220 Bar Organizations

In its "Rules Governing the District of Columbia Bar," the Court of Appeals created a mandatory bar organization in which membership is required of "all persons admitted to practice law in the District of Columbia." Rule I includes a list of multiple purposes of the Bar, all "to the end that the public responsibility of the legal profession may be more effectively discharged." Rule VII provides a referendum procedure whereby active members of the Bar, by a majority of the votes cast, may determine "any question of Bar policy," which thereafter "shall control the action of the Bar, the Board of Governors, the officers and committees." Rule X provides that "the standards governing the practice of law" shall be those prescribed in Appendix A, which are entitled "District of Columbia Rules of Professional Conduct" and are patterned after the ABA's Model Rules. Rule XI establishes a comprehensive disciplinary system, described in 0.2:230 and 0.2:240 below. Rule XII authorizes the Board of Governors of the Bar to use mandatory dues to create a "Clients' Security Trust Fund" administered by five trustees appointed by the court. This fund is used in "reimbursing . . . losses caused by dishonest conduct of members of the District of Columbia Bar, acting either as attorneys or as fiduciaries except to the extent they are bonded." [See 1.15:120, below.]

Appendix B to the Rules Governing the District of Columbia Bar makes provision for Interest on Lawyers Trust Accounts (known by the acronym IOLTA). Every lawyer save those who have opted out by submitting an appropriate "notice of declination" to the Court of Appeals clerk is required to deposit "client funds which are nominal in amount or expected to be held for a short period of time" in an interest-bearing account at a depository institution and "to remit interest or dividends . . . to the District of Columbia Bar Foundation," which in turn disburses the funds to "legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance." [See 1.15:110, below.]

Although the Court of Appeals Rules establish a mandatory bar and a comprehensive disciplinary system, Rule XI expressly recognizes that voluntary bar associations may discipline their members. Thus, Rule XI, § 1(b) provides that "nothing in this rule shall . . . prohibit a voluntary bar association from censuring, suspending or expelling its members." However, there appear to be no published reports of any independent disciplinary action by voluntary bar associations in DC, although there are a number of such organizations.

0.2:230 Disciplinary Agency

The DC disciplinary agency is the Board on Professional Responsibility, which is an arm of the Court of Appeals created by Rule XI of the Rules Governing the District of Columbia Bar. The Board consists of seven members of the bar appointed by the court "from a list submitted by the [Bar's] Board of Governors" plus two non-lawyers appointed by the court. The powers and duties of the Board are analogous to those of an administrative agency with authority to perform judicial-type functions as well as prosecutorial duties and limited legislative-type functions. Thus, the Board is empowered to "investigate any alleged ground for discipline or alleged incapacity of any [DC] attorney" and to "appoint Bar Counsel . . . and such Assistant Bar Counsel and staff as may be required to perform the [investigative/prosecutorial] duties and functions of that office." Rule XI, § 4. The Board is also authorized to appoint hearing committees (each composed of two lawyers and one non-lawyer) to "conduct evidentiary hearings on [Bar Counsel's] formal charges of misconduct". *Id.* The Board is empowered "to review the findings and recommendations of hearing committees" on the basis of the record in a hearing committee's evidentiary hearing and to submit to the Court of Appeals the Board's "own findings and recommendations." *Id.* The Board also has authority to issue a "reprimand" as a sanction for an attorney's misconduct, subject only to appellate review by the Court. *Id.* Any more serious sanction may be imposed only by the Court itself, either on a recommendation of the Board or at its own initiative. The Board is also empowered to adopt rules, procedures and policies not inconsistent with Rule XI or other rules of the Court; and it has adopted rules governing its procedures (herein "Board Rules").

Although Bar Counsel is appointed by the Board and serves "at the pleasure" of the Board, Rule XI empowers Bar Counsel to exercise significant independent authority. For example, in disciplinary cases on appeal before the Court of Appeals, Bar Counsel has authority to "argue for a disposition other than that contained in the report . . . of the Board." Rule XI, § 6.

0.2:240 Disciplinary Process

The disciplinary process in the District of Columbia comprises up to seven distinct stages. The *first* stage consists of Bar Counsel's preliminary screening of complaints against members of the bar to determine whether or not a particular complaint should be "docketed." Disgruntled clients are the source of most of the complaints, but Bar Counsel has authority to initiate an investigation based on allegations from any source, including newspaper reports. Board Rule 2.1. Any complaint submitted to Bar Counsel must be reduced to writing and must include a brief statement of the alleged underlying facts. Board Rule 2.2. The complaint need not be sworn to, and Bar Counsel is authorized to assist a complainant in reducing the complaint to writing. *Id.*

Bar Counsel may decline to docket a complaint if a preliminary screening shows that the complaint on its face is unfounded, or that the alleged facts do not amount to misconduct warranting discipline, or that the alleged misconduct is not within the jurisdiction of the Court. Board Rule 2.3. If Bar Counsel makes a negative decision on docketing, Bar Counsel is required to notify the complainant (if any) of the reasons therefor, but Bar Counsel's negative decision is not subject to further review. Board Rule 2.4. If a lawyer's client in a criminal case is the source of a complaint, Bar Counsel is required to conduct a "preliminary inquiry" and to "docket the matter" if such inquiry "indicates a reasonable basis for opening an investigation." Board Rule 5.1.

If Bar Counsel makes an affirmative decision on docketing, this triggers the *second* stage of the disciplinary process, consisting of a formal investigation of the alleged charges. Complainants must be promptly informed of the docketing decision. Board Rule 2.4. Bar Counsel is then required to notify the accused lawyer in writing of the formal investigation and to provide to the lawyer a copy of the written complaint (or other documents forming the basis for the investigation) together with a request for a written response from the lawyer. Board Rule 2.7.

During an investigation and also after a petition (if any) is filed, the accused lawyer "shall have access to all [pertinent] material in the files of Bar Counsel" other than "privileged" or "work product" material. Board Rule 3.1. With certain limitations, Rule XI, § 18 also authorizes both Bar Counsel and the lawyer under investigation to "compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and documents," but Board Rule 3.2 requires an accused lawyer to show a "compelling need" for such a subpoena addressed to a "non-party."

The *third* stage of the disciplinary process involves Bar Counsel's proposed disposition of a docketed complaint upon completion of the formal investigation. With the prior approval of a member of one of the hearing committees who is designated the Contact Member, Bar Counsel "may dismiss the complaint, informally admonish the attorney, or institute formal charges" before a Hearing Committee. Rule XI, § 8. In addition, Bar Counsel may enter into a "diversion agreement" with the accused lawyer. *Id.* Although the diversion program may be offered "in Bar Counsel's sole discretion," it is "subject

to review by a member of the Board," who may disapprove it. *Id.* No standard of review is specified.

If Bar Counsel and the Contact Member disagree as to the appropriate disposition of a complaint, the matter is submitted to the chair of a hearing committee (other than the committee of the Contact Member), whose decision is final. Board Rules 2.12 and 2.13. The accused lawyer has no right to participate directly in the decision-making process or to appeal from a Contact Member's decision approving Bar Counsel's proposed disposition of a complaint. Neither a Contact Member nor any reviewing chair of a hearing committee can participate in any subsequent formal disciplinary proceeding arising out of Bar Counsel's proposed disposition of a complaint that either of them has reviewed.

The *fourth* stage of the disciplinary process consists of a formal evidentiary proceeding before a hearing committee framed by the allegations in a "petition" filed by Bar Counsel and the allegations in the accused lawyer's answer. A disciplinary proceeding moves to this stage whenever an investigation is *not* terminated by a mutually acceptable disposition requiring no evidentiary hearing. Board Rules 7.1-7.21. In a proceeding before a hearing committee, Bar Counsel has the "burden of proving violations of disciplinary rules by clear and convincing evidence." Board Rule 11.4. After hearing all pertinent evidence relating to such allegations, the Hearing Committee submits to the Board a written report containing the Committee's findings and recommendation, together with the complete evidentiary record and any briefs of the parties. Rule XI, § 9; Board Rule 12.1.

The *fifth* stage of the disciplinary process is a proceeding before the Board. If either Bar Counsel or the accused lawyer files a notice of "exceptions" to the Hearing Committee's report, the matter is scheduled for the submission of briefs to and oral argument before the Board. Board Rules 13.2 and 13.3. If no such notice of exceptions is filed, the Board is required to decide the matter on the record made before the Hearing Committee. Board Rule 13.4. In either instance, the Board may dismiss Bar Counsel's petition, remand the matter to the Hearing Committee for further proceedings, adopt (with or without modification) the findings and recommendation in the Committee's report, direct Bar Counsel to issue an informal admonition, issue the Board's own sanction consisting of a "reprimand" of the accused lawyer, or submit to the Court of Appeals the Board's report with findings and recommendations for the Court's disposition of the matter. Rule XI, § 9.

If the Board decides to dismiss the petition, to remand the case to the Hearing Committee, or to order Bar Counsel to issue an informal admonition, the Board is not required to submit a written report to the Court of Appeals. *Id.* Any other proposed disposition by the Board must be submitted to the Court in a written report containing the Board's Findings and Recommendation, together with the entire record. *Id.*

The *sixth* stage of the disciplinary process consists of proceedings before the Court of Appeals, which may be triggered by the Court acting *sua sponte* or by the filing of

"exceptions" to the Board's report either by Bar Counsel or by the respondent lawyer. Rule XI, § 9(e)-(g).

Bar Counsel is entitled to appear as a party in all proceedings before the Court. Rule XI, § 9(h). If Bar Counsel disagrees with the findings or recommendation of the Board, the position of the Board may be presented to the Court by the Board's Executive Attorney or other counsel, and the Court has discretion to "appoint an attorney to present the views of a minority of the Board." *Id.* Upon completion of the appellate hearings, "the Court shall enter an appropriate order." Rule XI, § 9(g). The Court is bound to accept the findings of fact made by the Board if they are supported by substantial evidence of record, and it is directed to adopt the Board's recommended disposition "unless to do so would foster a tendency toward inconsistent dispositions of comparable conduct or would otherwise be unwarranted." *Id.* The Court's final order in a disciplinary case is subject to further review only by the US Supreme Court on a writ of certiorari.

A possible *seventh* stage of the disciplinary process is a reinstatement proceeding, which may occur in cases wherein a disbarment order has been in effect for five years or more (since a disbarred lawyer may apply for reinstatement no earlier than five years after the effective date of disbarment, Rule XI, § 16(a)) or in cases in which a lawyer is suspended for less than five years by an order of the Court requiring proof of rehabilitation prior to reinstatement. Reinstatement proceedings follow much the same course as regular disciplinary proceedings, except that the lawyer seeking reinstatement is the moving party and is required to establish by clear and convincing evidence that he or she has the "moral qualifications, competency and learning in law required for readmission, and that the resumption of the practice of law . . . will not be detrimental to the integrity and standing of the bar, or to the administration of justice, or subversive to the public interest." Rule XI, § 16(d).

0.2:245 Mandatory Disbarment Upon Conviction of a Crime Involving Moral Turpitude

Federal legislation enacted in 1970 provides mandatory disbarment as the sanction for a member of the DC Bar who is convicted of a crime involving "moral turpitude." In the language of the statute, "the name of the member of the bar so convicted shall be struck from the roll of the members of the bar and [such person] . . . shall thereafter cease to be a member." **DC Code § 11-2503(a) (1995)**. This statutorily imposed sanction has been troublesome with respect to both the definition of "moral turpitude" and the duration of disbarment necessary to satisfy the statutory mandate that the convicted lawyer "shall thereafter cease to be a member."

In **In re Colson, 412 A.2d 1160 (DC 1979) (en banc)** the Court of Appeals held that the statute requires a two-step procedure: first to determine whether a *per se* rule applies on the ground that the criminal offense, on the face of its essential elements, inherently involves moral turpitude, and second (assuming a negative determination in the first step) to determine whether the crime involved moral turpitude on the particular facts underlying the conviction. The Court in **Colson** ruled that in the case of a crime that the Court had determined to involve moral turpitude *per se*, no hearing in the disciplinary proceeding would be required or even permitted, whereas in the case of conviction of a crime *not* involving moral turpitude *per se*, there must be an evidentiary hearing in the disciplinary proceeding to determine whether the convicted attorney's crime involved moral turpitude on the particular facts. *Id.* at 1164-65. The **Colson** court also defined "moral turpitude" as "an act of baseness, vileness or depravity . . . contrary to the accepted and customary rule of right and duty between man and man." *Id.* at 1168. The definition could be satisfied whether the crime is classified as a felony or misdemeanor.

In another precedent-setting decision, the Court of Appeals held that all crimes requiring proof of an "intent to defraud" are *per se* crimes of moral turpitude, automatically requiring disbarment without any inquiry into the particular facts of the crime. **In re Willcher, 447 A.2d 1198, 1200 (DC 1982)**. In still another landmark early decision, the Court interpreted the statutory word "thereafter" to mean "forever," which caused the phrase "shall thereafter cease to be a member" to require permanent disbarment for the lifetime of any attorney convicted of a crime involving moral turpitude. **In re Kerr, 424 A.2d 94, 97-98 (DC 1980)**.

Recently, the Court of Appeals re-examined its prior statutory interpretations in **Colson**, **Willcher** and **Kerr**, and partially reaffirmed and partially overruled them. In **In re McBride, 602 A.2d 626 (DC 1992) (en banc)**, the Court reaffirmed the main holdings of **Colson**, *i.e.*, the general definition of moral turpitude, the two-step procedure for determining whether a crime involves moral turpitude, and the rule that once the court itself has determined that the elements of a particular crime involve moral turpitude *per se*, such determination thereafter shall be applicable to all future cases involving a conviction for the same crime. 602 A.2d at 634-35. The Court also partially reaffirmed

its holding in **Willcher** to the extent that it interpreted the statute as mandating automatic disbarment for conviction of a *felony* involving an "intent to defraud." 602 A.2d at 634. But **McBride** partially overruled **Willcher** with respect to *misdemeanor* convictions, holding instead that a lawyer convicted of any misdemeanor (including a misdemeanor one of whose elements is an intent to defraud) is entitled to a hearing on whether the attorney's crime, on its particular facts, involved moral turpitude. 602 A.2d at 635. The Court, most significantly, overruled in its entirety the prior statutory interpretation in **Kerr** that disbarment upon conviction of a crime involving moral turpitude is forever. Instead the Court ruled that a lawyer disbarred under the "crime involving moral turpitude" statute is eligible, like any other disbarred lawyer, to file a petition for reinstatement after five years of disbarment and have it acted upon. 602 A.2d at 640-41.

In still another recent decision, a three-judge panel of the Court of Appeals, while recognizing **McBride's** elimination of mandatory lifetime disbarment under the statute, ruled that the Court in that case did not eliminate the gravity of the crime for which a lawyer was disbarred as a factor in deciding later whether an application for reinstatement after five years of disbarment should be granted or denied. **In re Borders, 665 A.2d 1381 (DC 1995)** (lawyer previously disbarred for federal convictions of conspiracy, obstruction of justice, and unlawful intent to commit bribery). The Court agreed with the Board on Professional Responsibility's interpretation of **McBride** as holding that the gravity of the lawyer's misconduct may require a closer examination of other factors pertinent to an application for reinstatement. 665 A.2d at 1382. The Court decided, however, that it would "expressly leave open [the question] . . . whether [in a particular case] the gravity of the original crime(s) may trump every other consideration bearing on reinstatement," as was suggested in the opinion of one member of the Board. *Id.* In addition, the Court disagreed with Bar Counsel's position that a lawyer disbarred for conviction of a crime involving moral turpitude can never be reinstated unless the lawyer is willing to testify under oath about all underlying details of the prior crime. Instead, the Court ruled that the lawyer's particular post-crime conduct in the **Borders** case ("to stonewall the post-crime investigation" relating to alleged bribery of a federal judge) was a relevant adverse factor with respect to the disbarred lawyer's "steps taken to remedy past wrongs" and was also an adverse factor concerning "his present character," and that his petition for reinstatement should consequently be denied. *Id.* at 1385.

In **In re Spiridon, 755 A2d 463 (DC 2000)**, the court addressed the question whether a misdemeanor conviction for theft of $18, which had been determined to constitute a crime reflecting adversely on the respondent's "honesty, trustworthiness, or fitness as a lawyer in other respects," so as to fall under Rule 8.4(b), also involved moral turpitude, so as to require disbarment. Following **McBride**, the court held that even though a felony conviction for theft would entail moral turpitude *per se*, and the elements of the misdemeanor offense were identical to those of the felony, yet a hearing was required to determine whether the particular circumstances supported a finding of oral turpitude. Such a hearing had here been held; the Board on Professional Responsibility had

concluded, on the basis of mitigating facts, that moral turpitude was not involved; and the court sustained that determination.

The DC Court of Appeals has held that conspiring to engage in a monetary transaction in property believed to be derived from illegal drug trafficking was a crime involving moral turpitude, **In re Lee, 755 A.2d 1034 (DC 2000)**, as were involvement in a fraudulent investment scheme, **In re Mason, 736 A.2d 1019 (DC 1999)**, and attempted bribery involving intentional dishonesty for personal gain, **In re Tucker, 766 A.2d 510 (DC 2000)**.

In **In re Corrizzi, 803 A.2d 438 (DC 2002)**, the respondent was found to have committed a number of ethical delicts, of which the most serious involved counseling two clients, in separate cases, to commit perjury on their depositions. These two offenses, which themselves violated several different Rules, including DC Rule 3.4(b) as well as 3.3(a)(2), 8.4(c) and 1.3(b)(2), were held sufficient to warrant disbarment. The Court cited several precious decisions holding that "perjury and perjury-related offenses involve moral turpitude per se and therefore convictions of such crimes mandate disbarment under DC Code § 11-2503(a)(2001)." *Id.* at 442. It also cited **In re Gormley, 793 A.2d 469 (DC 2002)(per curiam)** for the proposition that a lawyer need not actually be convicted of a crime of moral turpitude in order to be disbarred on the basis of the underlying conduct.

Other decisions involving the issue of moral turpitude are discussed under 8.4:300, below.

0.2:280 Ethics Rules Applied in Federal Courts in DC

Both the US Court of Appeals for the DC Circuit and the US District Court for the District of Columbia have adopted, as the ethics rules applicable to lawyers in those courts, the Rules of Professional Conduct adopted by the DC Court of Appeals, as amended from time to time. Circuit Rules of Disciplinary Enforcement, Rule IB; District Court Rule 706(a).

0.4:400 Abbreviations, References and Terminology

The District of Columbia Rules of Professional Conduct and the District of Columbia Code of Professional Responsibility are sometimes referred to in this narrative as the "DC Rules" and the "DC Code," respectively.

There are occasional references to the "Jordan Committee," the "Sims Committee," the "Peters Committee," and the "Schaller Committee": all of them committees of the DC Bar commonly and conveniently referred to by the names of their chairmen. The first three of the Committees, as explained in 0.1:103 above, issued reports that shaped the DC Rules in their present form: the Jordan Committee having made the recommendations that largely accounted for the form of the DC Rules as originally adopted; the Sims Committee having contributed certain modified provisions relating specifically to government lawyers; and the Peters Committee having recommended a number of modifications that were put into effect as of November 1, 1996.

The Schaller Committee was the source of recommended changes to DC Court of Appeals Rule 49, which governs the unauthorized practice of law in the District of Columbia. Its recommendations, which were adopted by the Court and became effective on February 1, 1998, are discussed under 5.5:210, below.

The DC Bar's Rules of Professional Conduct Review Committee, whose recommendations resulted in the numerous changes in the District of Columbia Rules of Professional Conduct effective February 1, 2007, as explained under 01.1:103 above, will be referred to for brevity as the DC Rules Review Committee.

Many of the changes made in the DC Rules as a result of the recommendations of the DC Rules Review Committee reflected changes that the ABA had made in the Model Rules in 2002 and 2003 as a result of recommendations made by the ABA's Commission on the Evaluation of the Rules of Professional Conduct, which was generally known as the ABA Ethics 2000 Commission, and will be so referred to herein.

1.0 Rule 1.0 Terminology

1.0:100 "Belief" or "believe"

The DC Rules define these terms identically to the Model Rules.

1.0:110 "Confirmed in writing"

The DC Rules have no corresponding defined term.

1.0:120 "Consults" or "consultation"

The DC Rules define these terms identically to the Model Rules.

1.0:130 "Firm" or "law firm"

The DC Rules define these terms identically to the Model Rules.

1.0:140 "Fraud" or "fraudulent"

The DC Rules define this term identically to the Model Rules.

1.0:150 "Informed consent"

This term and a definition identical to that in the model Rules were added to the DC Rules on the recommendation of the Rules Review Committee.

1.0:160 "Knowingly," "known," or "knows"

The DC Rules define these terms identically to the Model Rules.

1.0:170 "Law clerk"

The DC Rules omit this definition.

1.0:180 "Matter"

The defined term "matter," which does not appear in the Terminology section of the Model Rules (although a somewhat similar definition appears in MR 1.11(d)(1)) was added to the DC Rules effective November 1, 1996, as a result of a recommendation of the Peters Committee. At the same time this defined term was added to the Terminology, related changes were made in two of the provisions of Rule 1.7 and three comments to that Rule, which turn on the term "matter." [See 1.7:101 below, where the reasons for these amendments are explained.] In addition, paragraph (d) of DC Rule 1.11, from which this defined term was largely taken, was amended so as no longer to

define “matter” but simply to use the defined term — but to limit it as used in that particular rule to a “matter” involving a specific party or parties. [See 1.11:101, below]

1.0:190 “Partner”

This term and a definition identical to that in the model Rules were added to the DC Rules on the recommendation of the Rules Review Committee.

1.0:200 “Reasonable” or “reasonably”

The DC Rules define these terms identically to the Model Rules.

1.0:210 “Reasonable belief” or “Reasonably believes”

The DC Rules omit this definition.

1.0:220 “Reasonably should know”

The DC Rules define these terms identically to the Model Rules.

1.0:230 “Screened”

This term and a definition identical to that in the Model Rules were added to the DC Rules on the recommendation of the Rules Review Committee.

1.0.240 “Substantial”

The DC Rules define this term identically to the Model Rules.

1.0:250 “Tribunal”

The DC Rules’ definition of this term was altered at the recommendation of the Rules Review Committee to conform to the Model Rules.

1.0:260 “Writing” or “written”

These terms and a definition identical to that in the Model Rules were added to the DC Rules on the recommendation of the Rules Review Committee.

I. CLIENT-LAWYER RELATIONSHIP

1.1 Rule 1.1 Competence

1.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary:

1.1:101 Model Rule Comparison

D.C. Rule 1.1(a) is identical to the entire MR 1.1. DC Rule 1.1(b) adds a requirement that the lawyer serve the client with skill and care commensurate with that generally afforded by other lawyers in similar matters. Rule 1.1(b) was added, according to the Jordan Committee, to give lawyers a "meaningful standard" by which to measure their "ability" — that is the Committee's word, though "performance" would seem the apter term — against the requirements of Rule 1.1(a). The Jordan Committee had originally proposed that Rule 1.1(b) begin with the phrase "at a minimum." The Board of Governors elected to delete this language, however, because "it was inconsistent with the concept of a single applicable standard."

The Comments to DC Rule 1.1 add several sentences that are not contained in the Model Rule. Comment [1] to the Model Rule states that expertise in a particular field of law may be required in some circumstances. Comment [1] to the DC Rule adds the example that expertise in a particular field of law may be required when a client has been led by the lawyer reasonably to expect such expertise. Comment [5] to the Model Rule sets forth standards for competent handling of a case. The DC Comment [5] adds the requirement that a lawyer give continuing attention to the needs of the representation of a client to ensure that such needs are not neglected. Finally, Comment [6] to the Model Rule was amended as recommended by the Ethics 2000 Commission to add that a lawyer should "keep abreast of changes in the law and its practice." This phrase was also added to the DC Rule's Comment [6] pursuant to the Rules Review Committee's recommendation, along with the phrase "and comply with all continuing legal education requirements to which the lawyer is subject."

1.1:102 Model Code Comparison

The counterpart to Rule 1.1 in the Model Code was DR 6-101(A)(1)-(3), which prohibited a lawyer from handling a matter the lawyer was not competent to handle, required preparation adequate in the circumstances, and prohibited neglect of a matter. Rule 1.1 is much more specific than DR 6-101 about what constitutes competent representation, especially as to areas of specialty practice. DR 6-101(A)(3)'s specific prohibition of neglect of a matter is absent from Rule 1.1, which instead affirmatively requires that the representation of the client be competent; "competent representation" includes qualities — thoroughness and preparation as well as legal knowledge and skill — that are inconsistent with neglect. Neglect is mentioned in Comment [5] to DC Rule 1.1, which says that "competent handling of a particular matter" requires "continuing attention to the needs of the representation to assure that there is no neglect of such needs." Neglect is addressed more directly in Rule 1.3 and Comment [7] to the DC Rule. See 1.3:300, below.

1.1:200 Disciplinary Standard of Competence

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary: ABABNA § 31:201, ALI-LGL § 16, Wolfram § 5.1

1.1:210 Relationship of Rule 1.1(a) and 1.1(b): Ability vs. Performance

Although the Jordan Committee proposed that Rule 1.1(b) be added in order to provide a standard for measuring compliance with Rule 1.1(a), and the Board of Governors endorsed this concept, Bar Counsel, in the tradition of prosecutors' proliferating counts of a charge, has sometimes charged lawyers with violating both subparts of Rule 1.1, often for the same conduct. Perhaps in reaction, in order to differentiate Bar Counsel's charges, the Board on Professional Responsibility has sometimes read Rule 1.1(a) as dealing with a lawyer's competence in the sense of ability and Rule 1.1(b) as dealing with a lawyer's performance.

In re Lewis, 689 A.2d 561 (DC 1997), concerned an experienced criminal defense lawyer accused of neglect in a particular case and charged with violating both subparts of Rule 1.1. The Board ruled that the lawyer did not violate Rule 1.1(a) because "there [was] no evidence that lack of competence [*i.e.*, ability] was at issue" but did violate Rule 1.1(b) because the lawyer's lapses were not commensurate with the skill and care afforded to clients by other lawyers in similar matters. The Board thought Rule 1.1(b) "better tailored [than Rule 1.1(a)] to address the situation in which a lawyer capable to handle a representation walks away from it for reasons unrelated to his competence in that area of practice." *Id*. at 564. The case was not contested in the Court of Appeals, which merely appended the Board's opinion to a one-paragraph per curiam order affirming it. See also these Board decisions not contested in the Court of Appeals: **In re Lyles, 680 A.2d 408 (DC 1996)** (lawyer professing to be a bankruptcy specialist violated Rule 1.1(b) when she failed to follow fundamental pleading and filing requirements of the Bankruptcy Code; violation of Rule 1.1(a) not charged); **In re Sumner, 665 A.2d 986 (DC 1995)** (both subparts of Rule 1.1 violated by lawyer who had no experience in criminal appeals and bungled attempted criminal appeal).

However, in a contemporaneous case similar to **Lewis**, the Board reversed a hearing committee's decision that had relied on the distinction between ability and performance in finding that a lawyer (again an experienced criminal defense lawyer who had neglected clients' interests) had violated Rule 1.1(b) but not Rule 1.1(a). **In re Drew, 693 A.2d 1127 (DC 1997) (per curiam)**. In reversing as to Rule 1.1(a), the Board noted that Rule 1.1(a) says "that a lawyer shall *provide* competent representation to a client" and added: "That he may have the requisite skill and knowledge . . . and yet deliberately refuse to provide competent representation cannot . . . allow him to escape his obligation under Rule 1.1(a)." *Id*. at 1132 (emphasis in original).

The Board then quoted from DC Rule 1.1, Comment [5], as supporting its conclusion. *Id*. The **Drew** case was contested in the Court of Appeals. The court stated, not very helpfully, that it "agree[d] with the Board that violations of Rule 1.1(a) were established by clear and convincing evidence." *Id*. at 1127.

Whether the ability/performance distinction between Rule 1.1(a) and Rule 1.1(b) will survive the Court of Appeals' cryptic approval of the Board's rejection of the distinction on the facts of **Drew** cannot be known. Although the distinction draws some support from the Jordan Committee's unfortunate use of "ability" instead of "performance" in explaining the purpose of Rule 1.1(b) — paragraph (b), added by the Committee, "provides lawyers with a meaningful standard by which to measure their ability" — it is indefensible textually. Rule 1.1(a) requires a lawyer to provide "competent representation," not merely to be capable of providing competent representation, and says that "competent representation" includes, in addition to legal knowledge and skill, "thoroughness and preparation reasonably necessary for the representation."

In **In re Outlaw, 917 A.2d 684 (DC 2007)**, the respondent lawyer had negligently allowed the statute of limitations on the client's tort claim to run before initiating meaningful negotiations with the defendant's insurer, and had thereby violated DC Rules 1.1(a) and (b) and 1.3(a). The respondent had also failed to advise her client of her professional lapses, and thus violated Rule 1.4(a). In the latter connection, the respondent was also found to have deliberately avoided disclosing to the client the true posture of the case, and so to have violated Rule 8.4(c) as well.

In **In re Evans, 902 A.2d 56 (DC 2006)**, a disciplinary proceeding in which the respondent's principal ethical transgression was a conflict of interest in violation of DC Rule 1.7(b)(4) by reason of the lawyer's representing a client in a matter that involved a business in which he had a personal financial interest [discussed under 7.1:210, below], this conflict was found to have led to violations of DC Rule 1.1(a) and (b) as well as Rule 8.4(d) [discussed under 8.4:500, below]. The respondent owned a title company, and also engaged in a law practice that included probate and real estate matters. His title company was contacted to close a real estate loan, but when it appeared that the property to be encumbered was not owned by the borrower but instead belonged to the unprobated estate of the borrower's deceased mother-in-law, the respondent undertook to represent the borrower in initiating a probate proceeding to secure the borrower's title to the property. He undertook this engagement without advising the borrower of his conflict of interest or getting her informed consent to his proceeding with the engagement despite the conflict of interest, and this was the basis of the violation of Rule 1.7(b)(4). He then proceeded to commit a number of errors and omissions in the course of his representation of the borrower, presumably as a result of his conflicting interests, that were found to have violated both paragraphs of Rule 1.1. To prove a failure to provide competent representation, under paragraph (a) of Rule 1.1, prior case law had established that Bar Counsel must show not only that the lawyer failed to apply his or her skill and knowledge, but that this failure constituted a serious deficiency in

the representation, and here the respondent was found to have had four such failures in his representation of the borrower. These lapses were then held, along with one additional lapse, to have also manifested a failure to "serve a client with the skill and care commensurate with that generally afforded to clients by other lawyers in similar matters," in violation of paragraph (b) of the Rule.

Another overlap is between Rule 1.1 and Rule 1.3. The same conduct or pattern of conduct has been found to violate one or both subparts of Rule 1.1 and one or more of the subparts of Rule 1.3. See **Drew**; **Lewis**; **Lyles**; **Sumner**; **In re Green, 689 A.2d 560 (DC 1997)**; **In re Roxborough, 679 A.2d 950 (DC 1996) (per curiam)**; **In re Peartree, 672 A.2d 574 (DC 1996)**; **In re Ryan, 670 A.2d 375 (1966)**.

1.1:220 Instances of Incompetence

In addition to the cases discussed in 1.1:210, a few other disciplinary cases involving competence have reached the Court of Appeals. In **In re Chisholm, 679 A.2d 495 (DC 1996)**, there was no charge of a violation of Rule 1.1, but the Board on Professional Responsibility based its leniency in the sanction it imposed in part on the ground that lawyer's misconduct was "largely the product of accepting a case outside his area of expertise." Opting instead for the more severe sanction requested by Bar Counsel, the court said that "the record does not bear out the notion that this [lack of expertise] was the cause of [the lawyer's] misconduct," where the record "demonstrated persistent and intentional dishonesty" on the lawyer's part. "There is no rational nexus between repeated acts of dishonesty and an attorney's lack of specialized expertise." *Id*. at 504. In **In re Ryan, 670 A.2d 375 (1996)**, the misconduct charged to a lawyer extended over the period of both the Model Code and the Model Rules. She was found to have violated both Rule 1.1 and DR 6-101(A)(3) by neglecting the interests of undocumented alien clients seeking work permits.

In **In** re **Ford, 79 A.2d 1232 (DC 2002)**, the Court upheld, against a challenge by Bar Counsel, dismissal of a Hearing Committee finding that respondent had failed in his duty of competent representation under Rule 1.1(a) and (b) by reason of errors in a probate petition. The Court did not, unfortunately, spell out the exact nature of the errors involved, but simply noted that its decisions imposing discipline for incompetent representation "have required proof of deficiency more serious than that demonstrated here." It cited, as cases involving disciplinable incompetence, **In** re **Shorter, 707 A.2d 1305, 1306 (DC 1998)**; **In re Bland, 714 A.2d 787 (DC 1998) (per curiam)**; and **In re Sumner, 665 A.2d 986, 989 (DC 1995) (per curiam).**

In cases arising solely under the Model Code, the Court has sustained findings of violations of DR 6-101(A)(3) (neglect) where the lawyer did not comply with discovery deadlines and did not keep his client informed, and of DR 6-101(A)(2) (inadequate preparation), where the same lawyer let the time for filing a petition for certiorari pass without filing a petition. **In re Spaulding, 635 A.2d 343 (DC 1993)**. In **In re Willis, 505 A.2d 50 (DC 1985)**, the lawyer had filed pleadings that were "sloppy, incoherent, incomplete and misleading on their face . . . [and] prepared . . . without any meaningful investigation," *id*. at 50 (citation omitted), and thus violated DR 6-101(A)(2). The disciplined lawyer in **In re Stow, 633 A.2d 782, 783-84 (DC 1993) (per curiam)**, maintained haphazard and disorganized files and thus violated DR 6-101(A)(3). In **In re Alexander, 513 A.2d 781, 789-90 (DC 1986) (per curiam)**, a lawyer violated DR 6-101(A)(2) and (3) because he prepared for a case inadequately and made legally deficient arguments. In **In re Mance, 869 A.2d 339 (DC 2005)**, the Court upheld a finding that the respondent had violated Rules 1.1(a) and (b), as well as Rules 1.3 (a) and (b), by filing an untimely appeal from his client's criminal conviction of multiple offenses and failing to seek available relief for that lapse, and in addition failing to get the client's sentence reduced on the available ground that some of the offenses of which he was convicted merged. Similarly, in **In re Outlaw, 917 A.2D 784 (DC 2007)**, the

Court upheld the Board's determination that the respondent's error in miscalculating the applicable statute of limitations her client's tort case, and her neglect of the case that allowed the limitation period to expire before initiating meaningful negotiations with the defendant's insurance carrier constituted failure to provide competent representation and to serve the client with skill and care, in violation of DC Rules 1.1(a) and (b), as well as failure to provide zealous and diligent representation in violation of Rule 1.3(a), despite the fact that the error in recording the applicable limitations period had been made by an employee who was under the respondent's supervision and not the respondent herself.

In **In re Nwadike, 905 A.2d 221 (DC 2006)**, the Court approved a determination that the respondent had failed to represent her client with skill and care in violation of Rule 1.1(b) by failing to file, in a medical malpractice action, a timely and complete statement pursuant to Civil Rule 26(b)(4), listing potential experts to be called at trial and summarizing their expected testimony; but also approved the Board's recommendation that in the circumstances the appropriate disciplinary sanction therefor be an informal admonition, the least severe available sanction.

In **In re Cater, 887 A.2d 1 (DC 2005)**, there were four consolidated proceedings against the same lawyer, in one of which the respondent was charged with violating DC Rules 5.3(b) and 1.1(b) by failing to act competently and failing adequately to supervise a nonlawyer assistant, in connection with a former secretary's embezzlement of $47,000 from the estates of two incapacitated adults for whom the respondent had been court-appointed guardian and conservator. (In the three other proceedings, the respondent had been charged with violating DC Rules 8.1(b) and 8.4(d) by reason of her repeated failures to respond to inquiries from Bar Counsel; these are more fully discussed under 8.1:500, below.) With respect to the Rule 5.3(b) proceeding, the evidence showed that over a nine-month period, the respondent's secretary had forged the respondent's signature on thirty-four checks totaling $42,000 from the account of one of the clients, and two checks totaling a little over $5,000 from the other client's account -- facts that the respondent did not discover until she examined the accounts a year after he secretary had disappeared without notice. The respondent had delegated to the secretary entire responsibility for handling the two accounts, and had done nothing to check or supervise her handling of them. The Hearing Committee had concluded that the respondent had not violated these two rules because she had offered an explanation that the Committee found persuasive, and a divided Board had concurred, albeit with four members dissenting. The Court, however, agreed with the minority on the Board, and quoted the commentary in the Annotated Model Rules of Professional Conduct to the following effect:

> Courts view holding money in trust for clients as a nondelegable fiduciary responsibility that is not excused by ignorance, inattention, incompetence or dishonesty. Although lawyers may employ nonlawyers to assist in fulfilling this fiduciary duty, lawyers must provide adequate training and supervision to

ensure that ethical and legal obligations to account for clients' monies are being met.

Id. at 13. Having concluded that the respondent had violated Rule 5.3(b), the court stated that it followed *a fortiori* that she had also failed to provide competent representation and thereby violated Rule 1.1(a), since the same evidence supported both charges.

See also **In re Devaney, 870 A.2d 53 (DC 2005)**, where, as more fully discussed under 1.8:400, below, a lawyer's violation of DC Rule 1.8(b)'s prohibition on a lawyer's preparing an instrument giving the lawyer or a member of his family a substantial gift from a client was held also to have violated Rule 1.1(a)'s requirement of competent representation.

The only relevant opinion of the Legal Ethics Committee under Rule 1.1 is **DC Ethics Opinion 256 (1995)**, stating that the inadvertent disclosure of confidential information to opposing counsel does not by itself constitute a violation of the rule. The Committee said that inadvertent disclosure would violate Rule 1.1 only if the lawyer failed to review the documents to be turned over to opposing counsel with the thoroughness, preparation, skill or care required by the rule.

Several ethics opinions addressed incompetence under the DC Code. **DC Ethics Opinion 28 (1977)** stated that a second lawyer cannot provide competent representation to a client (though he may consult with and advise the client) in a matter in which the client already has a lawyer unless the first lawyer knows of and consents to the dual representation or withdraws from the case. **DC Ethics Opinion 116 (1982)** said that a lawyer does not have to seek out a client for whom he previously drafted a will to advise the client that subsequent changes in the law make a change in the will desirable unless there is continuing representation. **DC Ethics Opinion 118 (1982)** held that when a lawyer is employed by a union as a staff lawyer and provides legal services to both the union and its individual members, the lawyer cannot strike or participate in a work slowdown except in what the Legal Ethics Committee apparently considered the unlikely event that participation in the strike or slowdown "in no way interferes with the timely and competent performance of the [lawyer's] work." **DC Ethics Opinion 139 (1984)** addressed the issue of the duty a lawyer owes to a client who has minimal contact with the lawyer and expresses minimal interest in her own affairs. The lawyer in question represented a woman in a criminal case. The client was convicted and the lawyer filed an appeal. Rather than order a transcript, the trial judge ordered the lawyer to prepare a stipulation of facts to submit to the appellate court. The stipulation was not prepared because the client skipped bail and became a fugitive. Throughout the following year, the client had minimal contact with the lawyer, missed appointments, spent some time in jail, and remained on fugitive status. It was clear, however, that the client wanted the lawyer to proceed with the appeal. The Legal Ethics Committee opined that, because the lawyer did not need the client's participation in the appeal, the

lawyer should continue to represent the client in the way he thought appropriate and should renew his efforts to contact her. Lastly, **DC Ethics Opinion 170 (1986)** cautioned against pre-paid legal services plans that afford to members unlimited monthly telephone access to legal advice within the scope of the plan. The Committee observed that, while not inherently unethical, telephonic advice of this kind, if handled in an "off-the cuff" rapid assembly-line fashion, can result in incompetent representation.

1.1:300 Malpractice Liability

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary: ABABNA § 301:1, ALI-LGL § 49-54, Wolfram § 5.6

1.1:310 Relevance of Ethics Codes in Malpractice Actions

Scope Comment [6] of the Model Rules states: "Violation of a [disciplinary rule] should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [The Rules] are not designed to be a basis for civil liability." The Preamble and Preliminary Statement to the DC Code contained similar language, stating that the disciplinary rules do not "undertake [to] define standards for civil liability of lawyers for professional conduct." The Jordan Committee, however, recommended the deletion from the DC Rules of language referring to the relationship between ethics rules and civil liability. The Committee thought that any attempt to "prescribe the effect of the [ethics rules] in decisions by courts outside the disciplinary process seem[ed] unwarranted." The Committee recommended deleting Scope Comment [6] of the Model Rules and instead leaving it up to the courts to define, on a "case-by-case" basis, the relationship between the ethics rules and the judicial process. The Court of Appeals, however, retained, in a new Scope Comment [4], the first sentence of Comment [6], together with a general discussion of the possible relevance of violations of the rules to civil liability. The Peters Committee recommended deletion of this language. In keeping with the spirit of the Jordan Committee's recommendation — allowing malpractice law to develop independently of ethics rules — the Peters Committee recommended that the Scope section simply state that the disciplinary rules are not "intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer's duty to others." The Court of Appeals agreed this time, and the Peters Committee wording was incorporated into Scope Comment [4] of the DC Rules, effective November 1, 1996. To date (as of March 1998), there is no case law under the DC Rules interpreting Scope Comment [4].

In **Waldman v. Levine, 544 A.2d 683 (DC 1988)**, the Court held that, while the disciplinary rules do not define civil liability, they are relevant evidence of the standard of care to which a lawyer is held. Accordingly, the Court in Waldman affirmed the trial judge's decision to allow an expert witness to use the DC Code as a guide to the relevant standard of care in a malpractice action. The Court cited cases involving expert use of traffic and safety manuals in negligence actions as support for the proposition that a malpractice expert should be treated the same as other experts using codes of conduct in negligence cases. See *id*. at 691. See also **Smith v. Haden, 872 F. Supp. 1040, 1045 n.2 (DDC 1994), aff'd, 69 F.3d 606 (DC 1995)** (citing **Waldman** for the proposition that the DC Code is relevant to establishing the standard of care governing a lawyer's conduct); **Williams v. Mordkofsky, 901 F.2d 158, 163 (DC Cir. 1990)** ("While the Model Code does not provide for a direct private malpractice action, violations of the Code certainly constitute evidence in an action at common law"). The

Peters Committee, making specific reference to the **Mordkofsky** case, stated that decisions holding that the disciplinary rules are relevant evidence in malpractice cases were consistent with the original Scope Comment [4].

See 1.1:380 below, for discussion of cases holding that, in contrast with the duty-of-care malpractice cases, violation of a disciplinary rule defining a fiduciary duty is conclusive of a lawyer's breach of his common-law fiduciary obligations.

1.1:320 Duty to Client

A lawyer owes a duty to his client ˜"to employ a reasonable degree of care and skill in the performance of his duties.'" **Cohen v. Surrey, Karasik & Morse, 427 F. Supp. 363, 373 (DDC 1977)** (quoting **Savings Bank v. Ward, 100 U.S. 195, 198 (1880)**). A lawyer does not breach her duty merely because she makes an error in professional judgment. *Id*. In **Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 383 (DDC 1985), aff'd, 809 F.2d 930 (DC Cir. 1987)**, the court held that a lawyer did not breach his "professional duty by failing to introduce specific items of evidence at trial" because such trial decisions were in the lawyer's discretion. This discretion exists even when the lawyer disregards the client=s advice in the heat of a trial or rejects a client's suggested trial tactic. *Id*. (citing **Frank v. Bloom, 634 F.2d 1245, 1256-57 (10th Cir. 1980)**). Failure to follow a client's explicit instructions regarding a non-discretionary issue is, on the other hand, a breach of duty and constitutes negligence. See **Waldman v. Levine, 544 A.2d 683, 692 n.7 (DC 1988)** (stating that a lawyer breaches his duty when he fails to ask for a continuance of a trial despite being explicitly asked to do so by his client).

A lawyer who is retained after the client has terminated another lawyer's services has no duty to lessen the adverse effect of the terminated lawyer's negligence. See **Waldman, 544 A.2d at 693**. **Waldman** involved a woman who died after giving birth. The woman's mother, Essie Swann, retained Waldman, a lawyer, to file a medical malpractice action. Waldman failed to retain an expert witness, failed to ask for a continuance of the trial despite the client's explicit instructions to do so, and forced the client to acquiesce in a settlement for a nominal sum. Swann fired Waldman and hired Levine to set aside the settlement and reinstate the action. Waldman, at Levine's suggestion, signed a praecipe withdrawing his appearance as counsel and sent it to Levine. Levine never filed the praecipe, however, and never entered an appearance as Swann's lawyer. Accordingly, Swann's case remained dismissed. Swann sued Waldman for malpractice. Waldman filed a third party complaint against Levine for contribution, alleging that Levine's actions prevented Waldman from setting aside the dismissal and reducing the injury to Swann. The Court held that the third-party action against Levine could not stand. Levine had made a professional judgment not to take Swann's case, and his failure to enter an appearance did not cause or exacerbate Swann's injuries. See *id*. As a result, the court held that "[w]here there is a choice to be made, successor counsel has no duty to the client to take action which would lessen the damages resulting from predecessor counsel's negligence, and is not liable to predecessor counsel for contribution." *Id*.

A lawyer's duty is limited by the scope of the representation the lawyer has undertaken. See **Smith v. Haden, 872 F. Supp. 1040 (DDC 1994), aff'd, 69 F.3d 606 (DC Cir. 1995)**. **Haden** was a malpractice suit against a lawyer for failing to file a civil action on behalf of her client before the statute of limitations ran. The court found that the lawyer was retained to file not a civil action but a claim with the Alaska Victim's Compensation Board, which she did file; the lawyer therefore had no duty to pursue the

civil action. See *id*. at 1054. Generally, the establishment of a lawyer-client relationship is a necessary predicate for stating a claim for malpractice. See **Chase v. Gilbert, 499 A.2d 1203, 1211 (DC 1985)**; **Williams v. Callaghan, 938 F. Supp. 46, 50 (DDC 1996)**. For exceptions to this rule, see 1.1:410, below. For a discussion of fiduciary duties, see 1.1:380, below.

1.1:330 Standard of Care

The standard of care in malpractice actions is "'that degree of reasonable care and skill expected of lawyers acting under similar circumstances.'" **O'Neil v. Bergan, 452 A.2d 337, 341 (DC 1982)** (citing **Morrison v. MacNamara, 407 A.2d 555, 561 (DC 1979)**). What constitutes reasonable care may "vary depending upon circumstances." **Smith v. Public Defender Serv., 686 A.2d 210, 213 (DC 1996)**. As a threshold matter, a lawyer must have "not only the formal legal training reflected by membership in the bar, but also enough additional knowledge, as well as experience," to satisfy the required degree of care. **Battle v. Thornton, 646 A.2d 315, 322 (DC 1994)**. The Court in **Battle** observed that the required experience and knowledge may include satisfaction of certain requirements of DC Rule 1.1. See *id*. at 322-23. For example, a lawyer may need additional formal legal training to act with reasonable care on a particular matter. See *id*.

A criminal defendant who has been unsuccessful in seeking to set aside a conviction on the ground of ineffective assistance of counsel is not barred from bringing a malpractice action against his defense lawyer. See **Smith, 686 A.2d at 212**; **Brown v. Jonz, 572 A.2d 455, 457 n.7 (DC 1990)**. Although the Court of Appeals is somewhat ambiguous in its reasoning, it has firmly established that the standard for ineffective assistance of counsel as a ground for setting aside a conviction differs from the standard for malpractice. See **Smith, 686 A.2d at 212**; **Brown, 572 A.2d at 457 n.7**. The District of Columbia differs from some other jurisdictions, which have held that a denial of an ineffective assistance claim bars a malpractice action. See **Smith, 686 A.2d at 212** (citing cases).

1.1:335 Requirement of Expert Testimony

Expert testimony is required to establish the applicable standard of care in a legal malpractice action unless the lawyer's lack of care is so obvious that "the trier of fact can find negligence as a matter of common knowledge." **O'Neil v. Bergan, 452 A.2d 337, 341 (DC 1982)**. Obvious negligence requiring no expert testimony includes allowing a statute of limitations to run, see *id*. at 342, permitting the entry of default against a client, see *id*., and failing to include a residuary clause in a will, see **Hamilton v. Needham, 519 A.2d 172, 175 (DC 1986)**. Matters requiring expert testimony, on the other hand, include trial strategy decisions made by the lawyer, see **Williams v. Callaghan, 938 F. Supp. 46, 50 (DDC 1996)**; procedural strategy decisions made by the lawyer, see **Liu v. Allen, 894 A.2d 453, 460-61 (DC 2006);** the extent of pre-trial preparation, see **Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 382-83 (DDC 1985), aff'd, 809 F.2d 930 (DC Cir. 1987)**; the filing of evidence after a court-imposed deadline, see **Mavity v. Frass, 456 F. Supp.2d 29, 34 (DDC 2006);** and the adequacy of a lawyer's investigation of corporate misconduct, see **O'Neil, 452 A.2d at 342**. Failure to produce expert testimony when it is required can result in a directed verdict for the opposing party. See *id*.

An expert witness does not have to be a specialist in the area of law he is testifying about. A general practitioner with knowledge and legal expertise can be qualified as an expert. For example, in **Battle v. Thornton, 646 A.2d 315, 323 (DC 1994)**, the court permitted a general practitioner with substantial expertise in criminal law to testify as an expert in a Medicaid fraud case despite the fact that the witness had no experience in the Medicaid fraud area. The Court observed that any "weakness attributable to [the expert's] lack of experience with Medicaid fraud was a matter for cross-examination at trial, affecting the weight to be accorded his testimony." *Id*. at 324.

The expert testimony requirement generally applies whether the trier of fact is a judge or a jury. See **O'Neill, 452 A.2d at 342 n.5**. Some decisions, however, suggest an exception for bench trials. In **Greenberg v. Sher, 567 A.2d 882, 884 (DC 1989)**, a trial judge conducting a bench trial excluded expert testimony on the issue of whether a lawyer's recommendation of settlement to a client fell below the standard of due care, holding that the expert testimony was unnecessary in view of the judge's own experience in personal injury litigation. The Court of Appeals ruled that in the circumstances of the case the trial judge did not abuse her discretion in excluding the testimony. On the other hand, a judge trying the facts may sometimes allowably hear an expert that a jury would not be allowed to hear. **Smith v. Haden, 872 F. Supp. 1040 (DDC 1994), aff'd, 69 F.3d 606 (DC Cir. 1995)**, was a malpractice suit against a lawyer for failing to file a civil action on behalf of her client before the statute of limitations ran. An expert testified for plaintiff in a bench trial on the probability and value of a settlement had the action not been time-barred. The defendant argued that the expert's testimony was too speculative and confusing. The court held that, while expert testimony on settlement value might be too speculative and confusing for a jury, it was admissible and might be helpful in a bench trial. See *id*. at 1047.

1.1:340 Causation and Damages

"Proximate cause exists when there is a 'substantial and direct causal link' between the attorney's breach and the injury sustained by the client." **Dalo v. Kivitz, 596 A.2d 35, 42 (DC 1991)** (citation omitted). In order to show that a lawyer's malpractice was the cause of her injury, a plaintiff must prove that she would have prevailed in the underlying case but for her lawyer's malpractice. See **Williams v. Patterson, 681 A.2d 1147 (DC 1996)**. **Patterson** was a malpractice case against a lawyer who failed to file a personal injury claim within the limitations period. The plaintiff was injured in an automobile accident. She retained Williams, a lawyer, to file a civil action on her behalf. After Williams had let the limitations period expire, the would-be personal injury plaintiff sued him. The court held that in order for the plaintiff to recover for malpractice she had to prove, by expert testimony, that her injuries were either exacerbated by or originated in the automobile accident. See *id*. at 1150. In **Williams v. Callaghan, 938 F. Supp. 46, 51 (DDC 1996)**, the court stated that a plaintiff in a malpractice action must show that "the result of his criminal trial would have been different had his attorney not committed the alleged misconduct." Williams was a criminal defendant who was found guilty at trial. He sued his trial lawyer for malpractice, alleging that the lawyer was negligent in rejecting Williams' suggestions for cross-examining and interviewing witnesses. The Court held that Williams failed to demonstrate that the result of his trial would have been different had the lawyer acted on his suggestions.

Although a malpractice plaintiff has to demonstrate that his lawyer's negligence prevented him from being awarded a money judgment, he probably does not have to prove in the first instance that the judgment was collectible. In **Smith v. Haden, 872 F. Supp. 1040, 1054 (DDC 1994), aff'd, 69 F.3d 606 (DC Cir. 1995)**, the United States District Court, noting that there was no District of Columbia law on the issue, held that collectibility of a judgment is not an element of plaintiff's malpractice claim. Instead, noncollectibility is an affirmative defense that defendant must plead and sustain. No other District of Columbia court appears to have addressed this issue.

An act of another that intervenes between the lawyer's negligence and the client's injury does not necessarily break the chain of causation. See **Dalo, 596 A.2d at 42**. A lawyer may be liable to a client for malpractice even though an intervening act was a more immediate cause of the plaintiff's injury than the lawyer's misconduct if the lawyer could have "anticipated and protected against" the intervening act. *Id*. (citation omitted). In **Waldman v. Levine, 544 A.2d 683, 693-94 (DC 1988)** (1.1:320 above), the court held that a successor lawyer's failure to file an appearance for a client is not an intervening event that breaks the chain of causation and relieves the predecessor lawyer of liability for malpractice.

Punitive damages are awarded in a malpractice action only if the defendant's actions are wilful, fraudulent, wanton, reckless, oppressive, or inspired by ill will or evil motive. See **Dalo, 596 A.2d at 40**. In other words, lawyers are treated like all other defendants

with respect to claims for punitive damages. The DC Court of Appeals has observed that "actions do not become more egregious simply because of the professional obligations of the person committing them." **Boynton v. Lopez, 473 A.2d 375, 378 n.1 (DC 1984)**. In **Boynton**, the Court overturned as unjustified a jury's award of punitive damages to a plaintiff who sued his lawyer for misrepresenting the terms of a settlement offer. *Id*. at 377-78. In **Dalo**, the court affirmed a trial judge's decision not to award punitive damages to a malpractice plaintiff whose lawyer entered into an unethical business arrangement with him, improperly filed a lawsuit against him, and caused his assets to be frozen. See **Dalo, 596 A.2d at 40**. In **Hendry v. Pelland, 73 F.3d 397, 400 (DC Cir. 1996)**, the court upheld a trial judge's refusal to award punitive damages to a plaintiff who complained that his lawyer was not "well-advised" in the law and failed to advise the client properly regarding settlement. An award of punitive damages was permitted, however, when a lawyer, acting as an escrow agent for one potential purchaser of a house, used that purchaser's deposit to enable a different purchaser to buy the house. See **Wagman v. Lee, 457 A.2d 401, 405 (DC 1983)**.

Breezevale Limited v. Dickinson, 759 A.2d 627 (DC 2000), affirmed on rehearing en banc, 783 A.2d 573 (DC 2000), which is discussed more fully in connection with defenses to malpractice claims [under 1.1:370, below], also addressed both causation and damages.

1.1:350 Waiver of Prospective Liability [see 1.8:910]

See 1.8:910, below, for a discussion of this topic.

1.1:360 Settlement of Client's Malpractice Claim [see 1.8:920]

See 1.8:920, below, for a discussion of this topic.

1.1:370 Defenses to Malpractice Claim

The District of Columbia has a three-year statute of limitations on legal malpractice claims, see DC Code § 12-301, and the "discovery rule" (modified, as explained below, as the "continuous representation rule") is used to determine when a cause of action accrues. See **Knight v. Furlow, 553 A.2d 1232, 1234 (DC 1989)**. Under the discovery rule, a cause of action in malpractice accrues when a "plaintiff has knowledge of (or by the exercise of reasonable diligence should have knowledge of) (1) the existence of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing." *Id*. (citing **Bussineau v. President & Dirs. of Georgetown College, 518 A.2d 423, 425 (DC 1986)**).

In **R.D.H. Communications Ltd. v. Winston, 700 A.2d 766 (DC 1997)**, the Court adopted the "continuous representation rule," as an exception to the discovery rule for determining when a cause of action for a malpractice accrues. Under that exception, "when the injury to the client may have occurred during the period the attorney was retained, the malpractice cause of action does not accrue until the attorney's representation concerning the particular matter in issue is terminated." *Id*. at 768 (quoting **Weisberg v. Williams, Connolly & Califano, 390 A.2d 992, 995 (DC 1978)**). The court described the "purpose and parameters" of the rule as follows: "The rule's primary purpose is to avoid placing the client in the untenable position of suing his attorney while the latter continue to represent him. For that reason, the rule is limited to situations in which the attorney who allegedly was responsible for the malpractice continues to represent the client in that case." *Id*. (quoting **Williams v. Mordkofsky, 901 F.2d 158, 163 (DC Cir. 1990)**).

Determining when a plaintiff had or should have had knowledge of a lawyer's malpractice entails a factual analysis of the conduct and the representations of the lawyer and the reasonableness of the client's reliance thereon. See **Diamond v. Davis, 680 A.2d 364, 372 (DC 1996) (per curiam)**. In some situations, a layperson simply may not be aware that a lawyer committed malpractice until the malpractice is affirmatively brought to the layperson's attention. See **Williams v. Mordkofsky, 901 F.2d 158, 162 (DC Cir. 1990)**. In **Duggan v. Keto, 554 A.2d 1126, 1144 (DC 1989)**, for example, the Court held that the earliest time a beneficiary could have known about a lawyer's malpractice in drafting a will was when the testator died and the will was presented for probate.

Even if a plaintiff believes that a lawyer has been providing deficient representation, the statute of limitations does not begin to run until the plaintiff has suffered an actual injury. "Typically, . . . a potential – not actual – injury has occurred when a client claims that an attorney has mishandled a lawsuit still in progress by failing to take appropriate discovery, or by making some other error that, however egregious, does not conclude the lawsuit." **Wagner v. Sellinger, 847 A.2d 1151, 1156 (DC 2004)**. "That is to say, until the lawsuit is resolved (either by verdict or ruling in court or by settlement), the injury remains uncertain or inchoate. It follows that the statute of

limitations has not yet begun to run." *Id.* (internal citation omitted). However, "[p]artial resolution of lawsuit, such as by way of partial summary judgment," may also give rise to actual injury. **See Havens v. Patton Boggs LLP, No. 05-01454, 2006 WL 1773473 (DDC June 26, 2006)**, *aff'd*, **2007 WL 1549030 (DC Cir. 2007).**

In **Mordkofsky**, however, the Court ruled that a malpractice claim was time-barred because of the time that had passed since the plaintiff-client should have known that his lawyer's wrongdoing possibly constituted malpractice. On his lawyer's advice, the client-plaintiff made inconsistent statements in separate applications to an administrative agency. The inconsistency was questioned by the administrative law judge hearing one of the applications, who scheduled a second hearing to determine whether the client "'misrepresented or lacked candor' in [his] failure to report the conflicting statements." **Mordkofsky, 901 F.2d at 161**. The Court said that the client should have known that the lawyer's advice constituted possible malpractice at this point, which was beyond the period of limitations. See *id.* at 162. The client waited until after the application was denied and administrative appeals from that denial were taken and denied. In the circumstances, the Court held, that was too late. *Id*. And if it does take adverse action by a tribunal to create a cause of action in malpractice, resolution of an appeal of that action is not necessary to state a claim in malpractice. See **Knight, 553 A.2d at 1235**. **Knight** involved a will that had been invalidated by a trial court because of the drafting lawyer's malpractice. While the trial court's decision was pending on appeal, a malpractice action was filed against Furlow, the lawyer who drafted the will. Furlow claimed that the malpractice action was not ripe because the appeal had not been decided, and thus no injury had occurred. The Court held that not all of a plaintiff's damages have to occur before a malpractice action can be brought. The legal fees and costs incurred by the plaintiff in defending the invalidated will in the trial court "constitute legally cognizable damages for purposes of stating a claim for . . . malpractice." *Id*. at 1235.

The discovery rule's reasonable diligence standard applies to cases involving fraud or fraudulent concealment. See **Diamond, 680 A.2d at 381**. To avoid dismissal of his action as time-barred, the plaintiff there urged adoption of a rule that, in a case in which fraud and fraudulent concealment are alleged, the cause of action accrues only when the plaintiff has actual knowledge of the fraud. The Court ruled against him and applied the discovery rule as it is commonly applied in all other matters, holding that the cause of action accrued when a reasonable person would have been put on inquiry to investigate with reasonable diligence whether fraud was being committed.

Under DC law, the statute of limitations applicable to a legal malpractice action is tolled during an individual's incarceration. **DC Code § 12-302(a)(3)**; **Proctor v. Morrissey, 979 F. Supp. 29, 32 (DDC 1997)**.

Breezevale Limited v. Dickinson, 759 A.2d 627 (DC 2000), affirmed on rehearing en banc, 783 A.2d 573 (DC 2000) held that fraudulent conduct by a client relating to litigation conducted on its behalf by counsel is not necessarily a bar to a malpractice

claim by the client against that counsel; nor does it necessarily constitute contributory negligence barring such a claim. There, the law firm Gibson, Dunn & Crutcher, LLP ("GDC") had represented Breezevale in pursuing claims against Firestone arising from three business transactions involving foreign countries. During pretrial discovery, a Breezevale witness confided to a GDC lawyer on the eve of her deposition that she planned to testify that she had forged certain documents relating to one of the three transactions in issue. Without notifying the client, a GDC partner allowed the deposition to commence and later refused Breezevale's demand that the deposition be suspended before the deposition had disclosed the fraud. Firestone's lawyers then prepared a motion to dismiss all Breezevale's claims with prejudice, and Breezevale, following GDC's advice, settled its multimillion dollar claims for a nominal sum. Breezevale then sued GDC for malpractice; the jury, after a "trial within the trial," in which it heard experts from both sides as to the applicable professional standards, found that despite Breezevale's fraud its suit against Firestone, had it been handled properly by GDC, would have resulted in a recovery of $3,430,000, and awarded Breezevale a verdict in that amount. The trial court then entered judgment n.o.v. in GDC's favor, finding that there was no evidence to support the jury's conclusion that GDC's malpractice proximately caused Breezevale's loss of all but a minimal portion of its potential recovery from Firestone; that the forgery by Breezevale had proximately caused the loss and constitutional contributory negligence on Breezevale's part; and that there was no evidence to support the jury's findings on damages. The trial court then granted GDC $5,356,633 in damages on its counterclaim for "bad faith litigation." The Court of Appeals reversed as to each of these grounds. As to the matter of *proximate cause*, the nub of the Court's holding was that the jury's verdict, recognizing the fraud yet finding that Breezevale would have prevailed at trial nonetheless, undercut the trial court's holding that the fraud would have destroyed Breezevale's case against Firestone. 759 A.2d at 633-34. As to *contributory negligence*, the Court held that the key issue was whether, if GDC had exercised due care, the fraud would have substantially affected Breezevale's chances of ultimately prevailing at trial, and the jury had found that it would not; thus, the fraud did not amount to contributory negligence. *Id*. at 634-35. As to proof of damages, the Court declared that

> Under District law, which governed the malpractice suit, "a plaintiff is not required to prove the amount of his damages precisely; however, the fact of damage and a reasonable estimate must be established." (Quoting **Bedell v. Inner Housing, Inc., 506 A.2d 202, 205 (DC 1980)**.

Id. at 635.

The Court granted GDC's petition for rehearing en banc to consider the contention that "a client who engages in wrongdoing in connection with any aspect of litigation thereby as a matter of law forfeits all rights of recovery against the attorney." 783 A.2d at 574. Rejecting this proposition, the Court held that "Matters must be judged in relative context and with an eye to other available measures of compensation and sanction." *Id*.

In **Breezevale Limited v. Dickinson, 879 A.2d 957 (DC 2005)**, the case returned to the court of appeals after the trial court ruled on remand that Breezeville had litigated its malpractice claim against GDC in bad faith and, as sanctions, dismissed the claim, awarded GDC attorneys' fees, and awarded GDC $1 million in punitive damages. The Court upheld the trial court's conclusion that Breezeville had litigated its malpractice claim in bad faith by focusing on the forgery issue and forcing GDC to refute its false claims of innocence. The Court also agreed that dismissal was an appropriate sanction for "conduct utterly inconsistent with the orderly administration of justice." *Id.* at 968 (internal quotation omitted). It further agreed that Breezeville's bad faith tainted the entire litigation and thus it was not necessary to limit the award of attorneys' fees to the portions of the suit litigated in bad faith. Finally, the Court stated that the trial court had authority to impose punitive damages as a sanction for Breezeville's bad faith litigation, but it vacated the award because the other sanctions imposed by the trial court "bore 'punitive' elements" and to impose an additional $1 million in damages "lack[s] the reasonableness and proportionality required of punitive damages awards." *Id.* at 970 (internal citation omitted).

Two other defenses to malpractice mentioned in DC case law are noncollectibility of a judgment and failure of a client to notice a flaw in a will before executing it. In **Smith v. Haden, 872 F. Supp. 1040, 1054 (DDC 1994), aff'd 69 F.3d 606 (DC Cir. 1995)**, the court held that noncollectibility of a judgment is "an affirmative defense that must be pleaded and proved by the defendant." [See 1.1:370, above, for a discussion of the **Haden** holding.]

In **Hamilton v. Needham, 519 A.2d 172 (DC 1986)**, the court held that the testator's failure to notice an omission in a will before executing it is not a viable defense to a malpractice action for a lawyer's failure to include a residuary clause in the will. The court observed that, while a person is ordinarily bound by what he signs, a client "'has the right to rely upon his attorney and is not forced, as he would be in an adversary position, to weigh the effect of every word in fine print of the modern deed forms.'" *Id.* at 175 (citation omitted).

1.1:380 Liability to Client for Breach of Contract, Breach of Fiduciary Duty, and Other Liabilities

Breach of Contract

Although contract and tort actions may arise from the same factual setting, "they exist separate and distinct from one another." See **Boynton v. Lopez, 473 A.2d 375, 377 (DC 1984)**. Thus, both a fraud claim and a breach of contract claim may be made in the same action. See *id*. A client may bring a breach of contract action against her lawyer on the basis of the lawyer's "implied agreement to deal in good faith and to perform with reasonable skill." **O'Neil v. Bergan, 452 A.2d 337, 342 (DC 1982)**. The "reasonable skill" implied in a contract action is the same "reasonable skill" a lawyer must display to avoid malpractice liability. See *id*. at 343. The plaintiff must present in a contract action, as she would in a malpractice case, expert testimony defining "reasonable skill." See *id*.

An express contract between a lawyer and her client is subject to general principles of contract law but will be scrutinized closely if the contract is beneficial to the lawyer and executed after the establishment of the attorney-client relationship. See **Haynes v. Kuder, 591 A.2d 1286, 1291 (DC 1991)**; **Chase v. Gilbert, 499 A.2d 1203, 1208-09 (DC 1985)**. All agreements "between an attorney and a client for services are governed by the standard of good faith and reasonableness." **Haynes, 591 A.2d at 1291**.

A lawyer is entitled to recover the value of her services in quantum meruit if she relied on a "promise implied by law to pay for beneficial services rendered and knowingly accepted." **Chase, 499 A.2d at 1207**. In other words, if the lawyer rendered services to a client with the reasonable expectation of being compensated for those services, and the client, by implication, asked for those services and accepted the benefit of them, the lawyer may be entitled to payment. See *id*. The issue of whether a lawyer who has been discharged can recover in quantum meruit for the reasonable value of her services based on an express fee agreement has not been decided by the DC courts. See *id*. at 1209.

Breach of Fiduciary Duty

All that is required to establish a fiduciary relationship between a lawyer and her client is a manifestation by the parties, either "explicitly or by their conduct," of their intent to create an attorney-client relationship. See **In re Ryan, 670 A.2d 375, 379 (DC 1996)**. Where a corporation or other entity is involved, the lawyer owes a fiduciary duty only to the entity that he represents, not to "individual shareholders, officers, or directors." See **Egan v. McNamara, 467 A.2d 733, 738 (DC 1983)**. Once a lawyer-client relationship is established, the lawyer's fiduciary duty extends beyond the principal matter for which he was retained. See **Avianca, Inc. v. Corriea, 705 F. Supp. 666, 680 (DDC 1989), aff'd without opinion sub nom. Avianca, Inc. v. Harrison, 70 F.3d 637 (DC Cir. 1995)**. **Avianca** involved a lawyer who had a lawyer-client relationship with

Avianca, a major Colombian airline. The lawyer, acting on behalf of his own corporation, purchased an aircraft for the purpose of leasing it to a wholly owned subsidiary of Avianca. The lawyer failed to disclose his financial interest in the transaction to the subsidiary or Avianca. He argued that he did not breach a fiduciary duty to Avianca because Avianca had not retained him with respect to the lease transaction. The court rejected this argument, stating that the lawyer had a continuing fiduciary obligation to Avianca that did not dissipate simply because he was not specifically or expressly retained with respect to one transaction. See *id*. "The fiduciary duties owed plaintiffs by Corriea extended to all matters in which he was involved, not simply the ones for which he received legal fees." *Id*.

In **First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan, 17 F. Supp.2d 10 (DDC 1998)**, the Court observed that lawyers owe their clients fiduciary duties both of loyalty and of care. *Id.* at *53. Asserted in that case was a breach of the duty of loyalty, *id.* as to which the Court observed that state of mind is immaterial to the question whether there is a breach, though "[i]t can play a role in determining the appropriate remedy." *Id.* at *54. The Court also stated that "The inquiry is whether the lawyer put himself or herself in a position by which he or she could not give full loyalty to which the client is entitled." *Id.* And, comparing the standards governing disciplinary rules and common law fiduciary duties, the Court observed that "[b]oth sets of standards recognize that a lawyer has a duty to avoid conflicts of interest, to exercise independent judgment on behalf of a client, and to fully disclose conflicts of interest to affected clients, but the terminology for enunciating these standards varies." *Id.* at *57.

Loyalty to the client is an essential element of fiduciary duty. In **Hendry v. Pelland, 73 F.3d 397 (DC Cir. 1996)**, the court observed that "a basic fiduciary obligation of an attorney is the duty of 'undivided loyalty,' which is breached when an attorney represents clients with conflicting interests." *Id*. at 401. See also **Griva v. Davison, 637 A.2d 830, 847 (DC 1994)** (stating that a lawyer who represents clients with competing interests breaches his fiduciary duty); **Dalo v. Kivitz, 596 A.2d 35, 37 (DC 1991)** (1.1:340 above) (stating that the trial court was "indisputably correct" in ruling that a lawyer breached his fiduciary duty by failing to advise his client about the potential conflicts of interest that can exist when the lawyer and client enter into a joint business venture).

Though regarded as only evidence of the standard of case to which a lawyer is held in the ordinary malpractice action, based on negligence, disciplinary rules can define a lawyer's fiduciary duties. In **Griva**, the Court of Appeals, after quoting Scope Comment [4] as it read before the 1996 amendment (1.1:310 above), said that "[d]espite these cautious statements . . ., case law confirms that a violation of the . . . [former Code] or of the Rules of Professional Conduct can constitute a breach of the attorney's common law fiduciary duty to the client." **637 A.2d at 846-47**. The "case law" that the court quoted was **Avianca, 705 F. Supp. at 679**. In that case, acting without guidance from the DC Court of Appeals, which alone could speak authoritatively to the point, the United States District Court said that the then effective disciplinary rules of the Model

Code, "while not strictly providing a basis for a civil action, nonetheless may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the DRs is conclusive evidence of a breach of the attorney's common law fiduciary obligations." *Id*. That holding had been anticipated by another district court judge in **Financial General Bankshares, Inc. v. Metzger, 523 F. Supp. 744, 762 (DDC 1981), vacated on jurisdictional grounds, 680 F.2d 768 (DC Cir. 1982)**. And later a third district judge said that, "if the plaintiff has alleged facts indicating a possible violation of one of the Disciplinary Rules, then the plaintiff has stated a claim for breach of fiduciary duty." **Resolution Trust Corp. v. Gardner, 788 F. Supp. 26, 30, partial sum. judgment granted, 798 F. Supp. 790 (DDC 1992)**. The United States Court of Appeals, in vacating the district court decision in **Metzger** for jurisdictional reasons, was critical of the district court's resolving "novel and difficult issues of local law." **Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 769 (DC Cir. 1983)**. More recently, in reliance on the intervening DC Court of Appeals decision in **Griva**, the United States Court of Appeals has ruled that evidence that a lawyer defendant violated one of the rules of the former Code "was sufficient to support [plaintiffs'] claim that he violated his common law fiduciary duty." **Hendry, 73 F.3d at 401**. In each of these cases the disciplinary rules at issue were those dealing with conflicting loyalties.

The Peters Committee thought that Scope Comment [4] as it read before the 1996 amendment was "somewhat inconsistent with the holding in **Avianca"** and "[a]ccordingly" the committee proposed "deleting that portion of Comment [4] which discusses the common law of lawyer liability and the relationship of that law to these Rules." Thus, the topic sentence of Scope Comment [4] as proposed by the committee and approved by the Court of Appeals reads:

> [4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer's duty to others.

Clients who seek compensatory damages against their lawyers for breach of fiduciary duty "must prove injury and proximate causation." See **Hendry, 73 F.3d at 401**. If a client seeks disgorgement of legal fees paid, however, the client need prove only that the lawyer breached his fiduciary duty, not that the breach caused injury. See *id*. In reaching this conclusion, the court in **Hendry** observed that, unlike compensatory damage claims, which focus on the harm the client has suffered, the claim for disgorgement of legal fees focuses on the "decreased value of the representation itself." See *id*. at 402. Thus, "[b]ecause a breach of the duty of loyalty diminishes the value of the attorney's representation as a matter of law, some degree of forfeiture is . . . appropriate without further proof of injury." Id. The court addressed the disgorgement of fees issue only in connection with disloyalty as a breach of fiduciary duty. No court appears to have considered whether the holding should be extended to claims involving

other means of breach. In **Gardner**, the court held that there can be a breach of fiduciary duty when a lawyer collects an excessive fee. **Gardner, 788 F. Supp. at 30**. There, the client plaintiffs argued that the defendant lawyer accepted payments from them but failed to render the requisite legal services. The court observed that accepting payments from a client when no benefit, or little benefit, is received by the client in return amounts to receiving an excessive fee. See *id*.

In **Herbin v. Hoeffel, 806 A.2d 186 (DC 2002)**, the Court addressed a claim resting on allegations that a lawyer in the DC Defender Service had sent to Virginia Law enforcement officials a confidential pre-sentence report from a criminal case in which the plaintiff had been involved, enabling the officials to serve a search warrant on the plaintiff which resulted in "physical pain and suffering and emotional damage." Considering only the claim on its face, in the context of an appeal from a dismissal for failure to state a claim on which relief could be granted, the Court held that the allegations stated a claim for breach of fiduciary duty by the defendant lawyer in disclosing client "secrets" (as defined in Rule 1.6), and that such a disclosure would be sufficiently serious to constitute "extreme and outrageous conduct," and thus to support a damage claim for infliction of emotional distress.

Other Causes of Action

DC courts have also entertained actions against lawyers for the tort of fraud, see **Boynton, 473 A.2d 375**, and the tort of intentional infliction of emotional distress, see **Williams v. Callaghan, 938 F. Supp. 46, 51 (DDC 1996)**. These cases were decided under standard DC tort law with no special consideration for lawyer involvement.

1.1:390 Liability When Non-Lawyer Would Be Liable

There appear to be no pertinent DC court decisions on this subject.

1.1:400 Liability to Certain Non-Clients

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary: ABABNA § 71:1101, ALI-LGL § 51, Wolfram § 5.6

Monick v. Melnicoff, 144 A.2d 381 (DC 1958), addressed "the question of an attorney's personal liability to pay the cost of a stenographic transcript ordered during the course of a proceeding in which the attorney appears on behalf of his client." *Id*. at 382. The Court acknowledged authority for the proposition that "'an attorney's negotiations for work to be done in a law suit is the act [sic] of an agent for a known principal and for the expense of that service the agent does not become personally responsible.'" *Id*. at 383 (citation omitted). However, the Court opted for a different, "and perhaps minority" rule: "[W]hen an attorney orders printing or reporting, although known to be acting as an attorney, he becomes liable unless he makes it expressly known that he is ordering such work as agent for his client." *Id*. The Court stated, "If an attorney ordering a transcript or brief does not intend to bind himself personally, he may avoid responsibility by making his position clear." *Id*.

In **McNeill v. Appel, 197 A.2d 152 (DC 1964)**, a handwriting expert sued a lawyer for the amount of his fee after he had testified for the lawyer's client in a probate hearing. The trial court entered judgment for the expert, and the lawyer appealed, contending that the evidence had been insufficient to support a finding against him. *Id*. at 153. The Court observed that "to avoid liability an agent must disclose both his agency and the identity of his principal. . . . Disclosure of the agency after execution of the contract will not relieve the agent of liability." *Id*. (citations omitted). The Court then held, "A careful review of the record discloses ample evidence to support the trial [court's decision] holding appellant personally liable." Id.

1.1:410 Duty of Care to Certain Non-Clients

Despite the general rule that "'the obligation of the attorney is to his client, and not to a third party,'" **Needham v. Hamilton, 459 A.2d 1060, 1061 (DC 1983)** (quoting **National Savings Bank v. Ward, 100 U.S. 195, 200 (1880)**), a lawyer's duty to exercise reasonable care extends to non-clients who are the "direct and intended" beneficiaries of the lawyer's services. *Id*. at 1062. See also **Quetel Corp. v. Columbia Communications Int'l, Inc., 787 F. Supp. 1, 4 (DDC 1992)** ("[A] third party may bring a legal malpractice claim if he or she is a direct and intended beneficiary of the transaction at issue.") (citing **Needham**). Thus, the intended beneficiary of a will has standing to bring a malpractice action against the lawyer retained to draft the will. **Needham, 459 A.2d at 1061**. See also **Duggan v. Keto, 554 A.2d 1126, 1143 n. 21 (DC 1989)** (legatees of an estate had standing to sue for malpractice, notwithstanding a lack of privity between them and the lawyers who drafted the will) (citing **Needham**). In **Teasdale v. Allen, 520 A.2d 295 (DC 1987)**, the court held that plaintiffs claiming to be intended beneficiaries of a will have standing to sue the drafting lawyer for malpractice regardless of whether the "intended beneficiaries could be discerned from

the four corners of the will itself." *Id*. at 296. Outside the context of wills also, courts have found that direct and intended beneficiaries of legal services enjoy standing to sue for malpractice. In **Williams v. Mordkofsky, 901 F.2d 158 (DC Cir 1990)**, the owner of two corporations brought malpractice claims against the lawyer retained to represent one of the companies. Although the claims related to the corporation that was not the defendant's client, the court refused to grant summary judgment for the lawyer because it believed the parties may have intended that the injured company be a direct beneficiary of the lawyer's representation of the other company. *Id*. at 163-64.

The beneficiaries of an estate do not enjoy standing to bring a malpractice action against the lawyer for the estate's personal representative. **Hopkins v. Akins, 637 A.2d 424, 428 (DC 1993)**. In **Hopkins**, a widower brought a malpractice claim against the lawyer for the personal representative of the deceased wife's estate. The widower argued that the lawyer had owed the beneficiaries of the estate a duty to take reasonable steps to prevent the decedent's son from diverting estate assets. In rejecting that argument, the court quoted approvingly from a treatise on legal malpractice: "'In the absence of an express undertaking, fraud or malice, the attorney for a personal representative owes no duty to and cannot be liable for negligence to heirs, legatees, [or] creditors of the estate.'" *Id*. (quoting **Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice** § 26.10 at 618 (3d ed. 1989)). According to the court, "[t]he principal reason for this rule is 'the potentially adversarial relationship [that exists] between an executor's interest in administering the estate and the interests of the beneficiaries of the estate.'" *Id*. (quoting **Rutkoski v. Hollis, 600 N.E.2d 1284, 1289 (Ill. App. Ct 1992)**). The Court stated further, "It would be very dangerous to conclude that the attorney, through performance of his service to the administrator . . ., subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney." *Id*. (quoting **Goldberg v. Frye, 266 Cal. Rptr. 483, 490 (Cal. Ct. App. 1990)**).

Far from being the intended beneficiaries of a lawyer's legal services, opposing counsel and adverse parties hold interests directly adverse to the lawyer's client. Consequently, neither opposing counsel nor an adverse party enjoys standing to sue a lawyer for malpractice. **Conservative Club of Washington v. Finkelstein, 738 F. Supp. 6, 9-11 (DDC 1990)**. See also **Morowitz v. Marvel, 423 A.2d 196, 199 (DC 1980)** ("Each jurisdiction which has concluded, as we do, that a negligence action will not lie by a former defendant against adverse counsel, has done so primarily for the reason that there is an absence of privity of contract between counsel and an opposing party and for public policy reasons."). According to the court in **Conservative Club**, "To adopt a rule of law that would expose an attorney to the prospect of negligence claims by parties whose interests are adverse to those of his client would result in the demise of our adversarial system of justice." **738 F. Supp. at 10**.

In **Brady v. Graham, 611 A.2d 534 (DC 1992)**, the appellee Graham had originally filed a complaint against her lawyer for failing to account for and tender rental payments that the lawyer had received from Graham's tenant. Graham subsequently amended her complaint to include another lawyer, Brady. According to Graham, her

lawyer had endorsed the money orders in question to Brady, who had then deposited the money in his client's trust account. Graham also alleged that Brady "had failed to provide an accounting of these funds as requested." *Id*. at 534-35. In upholding judgment against Brady, the Court observed that, "[a]s a general matter, an attorney who possesses the funds even of one of [sic] who is not a client in the traditional sense has duties as a fiduciary to safeguard those funds." *Id*. at 536. A lawyer may be liable where he breaches a promise to protect a third party's lien on his client's settlement proceeds. **Travelers Ins. Co. v. Haden, 418 A.2d 1078, 1084 (DC 1980)**. In **Travelers**, a workmen's compensation carrier sought to hold the lawyer of an injured worker liable for the alleged breach of an oral agreement to protect the carrier's lien on the worker's settlement proceeds. The court acknowledged that "an attorney may be liable for failure to protect a lien imposed on his client's settlement proceeds, where he expressly agrees with the client and the creditor to do so," *id*., but denied the carrier's claim against the lawyer because it did not find the evidence sufficient to establish an express agreement. *Id*. at 1085.

In **Heffelfinger v. Gibson, 290 A.2d 390 (DC 1972)**, a lawyer signed an assignment agreement with his client and the physician who had treated the client's injuries. The assignment provided that the lawyer would withhold the amount of the physician's bill from any settlement or damages that the client might obtain in the case against the motorist who had caused the injuries. The lawyer later turned the case over to another lawyer but remained in contact with both the former client and the new counsel regarding the case. The client ultimately received a cash settlement; however, the physician received none of the money. In holding the first lawyer liable for his failure to protect the doctor's fee, the Court observed, "For [the lawyer] to have avoided liability under this agreement would, in our view, have required a novation, *i.e.*, an acceptance by the doctor of an assumption by [the new lawyer] of [the first lawyer's] existing obligation." *Id*. at 393 (footnote omitted).

In **Richter v. Analex Corp., 940 F. Supp. 353 (DDC 1996)**, the issue was whether a company, Analex, could assert the malpractice claims of its predecessor company, Xanalex, against the lawyer who had counseled Xanalex. Analex argued that it had acquired the malpractice claim, along with Xanalex's liabilities . . . and all of Xanalex's assets, and that "as successor and assignee it can assert Xanalex's claim against [the lawyer]." *Id*. at 356. Although the parties agreed "that no court has yet decided whether a legal malpractice claim is assignable under District of Columbia law and that other states are split on the issue," *id*. at 357, the court concluded that "in circumstances such as these, public policy does not prohibit the assignment of a legal malpractice claim and District of Columbia law does not prevent it." Id. at 358.

1.1:420 Reliance on Lawyer's Opinion [see also 2.3:300]

In **Security National Bank v. Lish, 311 A.2d 833 (DC 1973)**, a bank sued a lawyer for losses on a loan that the bank had made to the lawyer's client. The client had borrowed money from the bank using certain real property as collateral. The lawyer believed that his client was in a position to execute a valid second trust instrument to secure the loan. He conveyed this belief to the bank. Because the bank had a history of positive dealings with the lawyer, it relied on his opinion and loaned $25,000 to the client without performing a title search on the property. When the client defaulted on the loan, the bank learned of a previously-existing second trust on the property that was superior to the bank's interest. The default cost the bank $7,500. It wrote off $1,500 and sued the lawyer for the remaining $6,000, claiming that the lawyer had breached a duty to provide reliable information to the bank. The trial court granted the lawyer's motion for summary judgment, based upon "the undisputed facts that plaintiff did not employ defendant to search the title, and that a lawyer-client relationship did not exist between [the bank] and the defendant.'" *Id*. at 834 (quoting the trial court). In reversing the trial court's dismissal, the Court of Appeals stated, "One engaged in supplying information has a duty to exercise reasonable care. Generally, this duty does not extend beyond one's employer. . . . However, there is a recognized exception to this general rule. Where information is supplied directly to a third party (or indirectly for the benefit of a specific third party), then the same duty of reasonable care exists, notwithstanding a lack of privity." *Id*. at 834-35 (citation omitted). The court concluded that a lawyer must be held to the same standard of care, even when his inaccurate representations (however innocently made) are conveyed to a non-client." *Id*. at 835.

1.1:430 Assisting Unlawful Conduct [see also 1.2:600-1.2:630]

In **Hopkins v. Akins, 637 A.2d 424** (see 1.1:410, above), where the personal representative of an estate had misappropriated estate funds, the Court refused to find the representative's lawyer liable to the beneficiaries for failing to take steps to prevent the misappropriation. *Id*. at 428. However, the Court opined that, "where the attorney is alleged to be an accomplice in the wrongdoing, a different case is presented; '[i]ntentional wrongs . . . can give rise to liability.'" *Id*. at 430 (quoting **Mallen & Smith**, supra, § 26.10 at 618).

In **Faison v. Nationwide Mortgage Corp., 839 F.2d 680 (DC Cir. 1988)**, the plaintiffs claimed they had lost their home as a result of a fraudulent loan scheme. The plaintiffs named as defendants the bank that had made the loan, the person who had purchased the plaintiffs' promissory note from the bank, and the lawyer who had conducted the loan settlement for the bank. The plaintiffs alleged that the lawyer had participated in the fraudulent scheme by willfully withholding relevant information, offering misleading information, and negligently performing his responsibilities at the loan settlement. *Id*. at 683. At trial, the jury awarded the plaintiffs $12,000 (which included punitive damages) against the lawyer on a fraud claim and $3,000 against him on a negligence claim. *Id*. at 684. On appeal, the lawyer did not challenge the $3,000 negligence award but claimed that the fraud award should be reversed because of erroneously admitted evidence and improper jury instructions. *Id*. at 685. The court found no error in either the evidentiary rulings or the jury instructions. It thus affirmed the jury's findings of liability as well as the punitive damage awards. *Id*. at 692.

1.1:440 Knowledge of Client's Breach of a Fiduciary Duty [see also 1.13:520]

In **Hopkins, 637 A.2d 424** (see 1.1:410, 420, above), the plaintiff claimed that the lawyer for the personal representative of the estate had breached the duty he owed to the beneficiaries to take reasonable steps to prevent the decedent's son from diverting estate assets. The plaintiff argued that "while the privity requirement may be soundly applied to the customary situation where the personal representative (aided by counsel) referees, as it were, between the interests of competing claimants to the estate, . . . it should not serve to insulate attorneys . . . from the consequences of negligently allowing the personal representative to divert estate property to his own use. . . . When the client is mulcting the estate, . . . the attorney's ethical duties may . . . [include] the obligation to rectify the illegal or fraudulent conduct or withdraw from the representation, . . . and so she is properly answerable to injured beneficiaries for negligence." *Id*. at 429-30 (citation omitted). The court rejected this argument, stating, "Absent a claim of intentional wrong by the attorney, the distinction [plaintiff] posits between the fiduciary-client who merely mismanages the estate and one who deliberately betrays his trust affords no basis for making the attorney liable to beneficiaries." *Id*. at 430.

1.1:450 Failing to Prevent Death or Bodily Injury

There appear to be no pertinent DC court decisions on this subject.

1.1:460 Wrongful Use of Civil Proceedings; Abuse of Process; False Arrest

A plaintiff must prove four things in order to prevail in a claim of malicious prosecution: "(1) the underlying suit terminated in plaintiff's favor; (2) malice on the part of defendant; (3) lack of probable cause for the underlying suit; and (4) special injury [incurred] by plaintiff as the result of the original action." **Morowitz, 423 A.2d at 198** [see 1.1:410, above]. See **Ammerman v. Newmann, 384 A.2d 637 (DC 1978) (per curiam)** (dismissing a doctor's malicious prosecution claim against the lawyers whose client had sued the doctor for malpractice, on the ground that the doctor had failed to allege sufficient facts to satisfy the elements of probable cause, malice, and special injury). See also **Dalo v. Kivitz, 596 A.2d 35, 39 (DC 1991)** (holding that the plaintiff would not be entitled to damages from his former lawyers under a malicious prosecution theory, because the lawyers had lacked malice and had possessed probable cause to file their lawsuit in a dispute with their former client over a real estate transaction).

To succeed in a claim of abuse of process, a plaintiff must prove that "'the process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do.'" **Morowitz v. Marvel, 423 A.2d at 198** (quoting **Jacobson v. Thrifty Paper Boxes, Inc., 230 A.2d 710, 711 (DC 1967)**).

In **Morowitz**, several doctors brought a small claims suit against a patient for unpaid medical bills. A lawyer hired by the patient filed a counterclaim (later withdrawn) against the doctors, alleging medical malpractice and professional negligence. After the patient won a default judgment on the doctor's claim in the small claims court, the doctors sued the lawyer for malicious prosecution and abuse of process. *Id*. at 197. On the claim of malicious prosecution, the Court stated, "The injuries [the doctors] complain of are those which 'might normally be incident to the service of process on anyone involved in a legal suit.' . . . Such injury is not actionable in a malicious prosecution claim." *Id*. at 198 (citation omitted). With regard to the abuse of process claim, the Court observed, "The critical concern . . . is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly or legally obtainable. . . . In the instant case, [the lawyer] merely filed a counterclaim and subsequently withdrew it. Without more, [the doctors'] proffer that [the lawyer] filed the counterclaim with the ulterior motive of coercing settlement, is deficient." *Id*. The Court thus concluded that "the trial court did not commit error in dismissing the [doctors'] complaint." *Id*. at 197.

In **Epps v. Vogel, 454 A.2d 320 (DC 1982)**, several doctors sued the lawyer who had represented a group of patients in a medical malpractice action against the doctors. In their complaint, the doctors included claims for malicious prosecution and abuse of process. The trial court dismissed the complaint because it "lacked two necessary elements of claims for malicious prosecution and abuse of process, respectively:

specific allegations of special injury, and contentions that the underlying suit (filed by [the lawyer]) had been used to accomplish an end not regularly or legally obtainable." *Id*. at 322. Though holding that the doctors should have been given an opportunity to amend their complaint, the Court of Appeals agreed with the trial court's decision that the doctors' original complaint did not state a valid claim for malicious prosecution: "The only injury explicitly specified, loss of income, is not an injury that is not usually a consequence of a malpractice suit." *Id*. at 324. The court also observed that the complaint failed to state a claim for abuse of process: "There is no indication [in the complaint] that [the lawyer] sought to accomplish some result 'not contemplated in the regular prosecution of the charge.'" *Id*. (quoting **Morowitz, 423 A.2d at 198**).

The statute of limitations for a malicious prosecution action runs not from the date on which the underlying, allegedly malicious suit was filed, but rather from the date when that suit was terminated in favor of the defendant in that action. **Shulman v. Miskell, 626 F.2d 173, 175 (DC Cir. 1980)** (facts similar to **Epps**).

To prevail on a claim of false arrest, a plaintiff must demonstrate that the defendant acted without probable cause to effectuate the plaintiff's arrest. **Welch v. District of Columbia, 578 A.2d 175, 176 (DC 1990)**. The only DC cases that address a lawyer's liability for false arrest involve actions against a prosecuting lawyer acting in his or her official capacity.

It is the accepted rule in the District of Columbia that a prosecuting lawyer is protected by the doctrine of quasi-judicial immunity if the conduct in question was performed within the scope of his or her official duties. **Cooper v. O'Connor, 99 F.2d 135 (DC Cir 1938)** (finding assistant United States attorney immune from civil suit for damages caused by acts done by him in the discharge of his official duty). This rule extends to claims of false arrest. See **Fletcher v. McMahon, 121 F.2d 729 (DC Cir. 1941)** (dismissing action for false arrest and false imprisonment against assistant United States attorney who prepared and filed for an allegedly illegal arrest warrant when acts were taken in the discharge of his official duties).

In **Lang v. Wood, 92 F.2d 211 (DC Cir. 1937)**, the DC Circuit held that the immunity doctrine is not vitiated by the lawyer's wrongful or malicious motive in arresting or imprisoning the plaintiff. The plaintiff in **Lang** brought a damages action against the Attorney General of the United States alleging that he, along with members of the United States Parole Board, had illegally imprisoned plaintiff by denying him his parole without the benefit of a hearing. Finding the subject matter to be committed by law to the Attorney General, the court dismissed the suit. The court held that a prosecutor who acts within the scope of his or her duties is immune from suit and cannot be exposed to a civil damages action for false imprisonment even though his or her decision could be described as arbitrary, capricious and malicious.

1.1:470 Assisting Client to Break a Contract

When a lawyer counsels his or her client to behave in a certain way with respect to a contract to which his client is a party, or performs some act with respect to the client's contract, third parties may seek to hold the lawyer liable for tortious interference with the contract. To recover on a claim of tortious interference with contractual relations, a plaintiff would have to prove "(1) the existence of a contract, (2) defendant's knowledge of a contract, (3) defendant's intentional procurement of its breach, and (4) damages resulting from the breach." **Cooke v. Griffiths-Garcia Corporation, 612 A.2d 1251 (DC 1992)** (citing **Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284, 288 (DC 1977)**).

In **Cooke**, the only reported DC case to address a claim against a lawyer for assisting a client to break a contract, the plaintiff signed a contract to buy a piece of real property from two of the defendants, Mr. and Mrs. Semper. One month later, Mr. Semper met another individual, a representative of Griffiths-Garcia Corporation, who was interested in the same real property. Semper informed the Griffiths-Garcia representative that the plaintiff had contracted to buy the property. However, a few days later, Semper's lawyer, Leibowitz, sent a copy of plaintiff's contract to the Griffiths-Garcia representative and, at Semper's request, informed the representative that the contract had been terminated as a result of the plaintiff's failure to satisfy a refinancing contingency. Griffiths-Garcia then made an offer on the property and the sellers accepted. Subsequently, the plaintiff, claiming Leibowitz falsified documents in an effort to terminate plaintiff's contract, brought an action against Leibowitz and Griffiths-Garcia for tortious interference with contract. The Court, in deciding other elements of the plaintiff's case, noted in a footnote that it had affirmed summary judgment in favor of Leibowitz. **Cooke, 612 A.2d at 1254, n.5**. Although the court did not discuss the legal basis for the summary judgment, the case suggests one way in which a lawyer can become embroiled in a lawsuit for assisting a client to break a contract.

1.1:500 Defenses and Exceptions to Liability

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary: ABABNA § 301:1001, ALI-LGL § 54, Wolfram § 5.6

1.1:510 Advocate's Defamation Privilege

A lawyer "'is protected by an absolute privilege to publish false and defamatory matter of another' during the course of or preliminary to a judicial proceeding, provided the statements bear some relation to the proceeding." **Arneja v. Gildar, 541 A.2d 621, 623 (DC 1988)** (quoting **Mohler v. Houston, 356 A.2d 646, 647 (DC 1976) (per curiam)**). This privilege also encompasses quasi-judicial proceedings conducted by administrative bodies. **Mazanderan v. McGranery, 490 A.2d 180, 181 (DC 1984)** (holding that the defamation privilege covered a letter to the Public Vehicles Division complaining about a taxi driver, where the letter had led to a hearing by the Hacker's License Appeal Board).

In **Arneja**, one lawyer alleged that another lawyer had made slanderous comments to him in the presence of both lawyers' clients. The alleged incident occurred in a hearing room at the Rental Accommodations Office while the parties and their lawyers awaited the imminent arrival of the hearing examiner to adjudicate the dispute. **541 A.2d at 622**. The court concluded that the comments in question fell within a lawyer's privilege to make defamatory statements in the judicial context. *Id*. at 623. **Conservative Club of Washington v. Finkelstein, 738 F. Supp. 6 (DDC 1990)** (see 1.1:410, above), addressed the question whether a lawyer would be privileged against claims alleging that slanderous statements were made "prior to any litigation actually being filed." *Id*. at 13. In that case, the plaintiff had sought to sell part of its building. The potential buyer had asked the abutting landowners to join in a resubdivision application. The lawyer for those landowners then told the potential buyer "that there was a problem with the title to the subject property and that unless his clients received $100,000 a law suit could be instituted which would tie up the property for 2-3 years." *Id*. at 9. The plaintiff later brought a quiet title and slander of title action against the abutting landowners. In the resulting settlement agreement, the abutting landowners agreed to execute a resubdivision application in exchange for $40,000. The plaintiff then sued the abutting landowners' lawyer for the $40,000 settlement payment, claiming that the lawyer's assertion of problems with the property's title had constituted slander of title. *Id*. at 9, 13. The Court disagreed with the plaintiff's contention that application of "the privilege would be inappropriate because there was no pending litigation at the time of the statements and no proceedings had commenced." *Id*. at 13. The Court quoted approvingly from the Restatement: "As to communications preliminary to a proposed judicial proceeding," the lawyer's privilege to make defamatory statements "applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration." *Id*. at 13-14 (quoting **Restatement**

(Second) of Torts § 586 cmt. e (1977)). In refusing to hold the lawyer liable for his statement regarding title, the court observed, "Here, the statements were made in contemplation of litigation to the very individuals who would have an interest in the outcome of such litigation." *Id*. at 14.

1.1:600 Vicarious Liability [see 5.1:500]

- Primary DC References: DC Rule 1.1
- Background References: ABA Model Rule 1.1, Other Jurisdictions
- Commentary: ALI-LGL § 58, Wolfram § 9.2

In **SEC v. National Student Marketing Corp., 457 F. Supp. 682 (DDC 1978)**, the Securities and Exchange Commission sought injunctive sanctions against numerous defendants, claiming that the defendants had, in consummating a merger, violated the anti-fraud provisions of the federal securities laws. *Id*. at 686. The court found that two of the defendants, each lawyers in the same firm, had aided and abetted the violations. The SEC had also named the lawyers' firm as a defendant. According to the court, the SEC did not articulate "a distinct theory upon which [the law firm] may be held to have violated the securities laws. Instead, it simply charge[d] the firm 'with responsibility for all of [the two lawyers'] activities,' . . . without citation to any statutory provisions . . . or common law principles, such as respondeat superior, upon which such vicarious liability could be founded." *Id*. at 701 n.42 (citations omitted). The court stated that "[d]espite this failing, the Court need not address the significant and difficult questions concerning [the law firm's] responsibility for the actions of [the lawyers] . . . since [the law firm] has not challenged the SEC on this issue. To the contrary, the firm has fully associated itself with the conduct of both of its partners and apparently concedes its responsibility for their conduct." *Id*. (citations omitted).

1.2 Rule 1.2 Scope of Representation

1.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.2
- Background References: ABA Model Rule 1.2, Other Jurisdictions
- Commentary:

1.2:101 Model Rule Comparison

Except for the insertion of a new paragraph (d) and consequent relettering of two other paragraphs, DC Rule 1.2 was, prior to 2002, identical to Model Rule 1.2. Paragraph (d) of the DC Rule is a provision, not in the Model Rules, recognizing that a government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). This additional paragraph was a recommendation of the Sims Committee [see 0.1:103, above]. As a result of the inclusion of paragraph (d), paragraphs (d) and (e) of the Model Rule became paragraphs (e) and (f) of the DC Rule. The Ethics 2000 Commission recommended and the ABA adopted a number of changes both to the Model Rule and, particularly, to its Comments, but the DC Rules Review Committee recommended, and the Court of Appeals adopted, just two of the ABA's changes to the Rule and one of its changes to the Comments. In paragraph (a) of the DC Rule, a new second sentence was added, making clear that a lawyer can take actions for the client that are impliedly authorized to carry out a representation, and in paragraph (c), "gives informed consent" replaced "consents after consultation." Comment [7] to the DC Rules was changed in exactly the same fashion as the corresponding Comment to the Model Rule (now renumbered as Comment [10]). In addition, a new final sentence was added to Comment [4] of the DC Rule, referring to Rule 1.5(b) and the desirability of explaining in writing any limits on the objectives or scope of the lawyer's services. (The report of the Rules Review Committee does not explain the reason for the latter change.)

It should be noted that DC Rule 3.3 contains, in subparagraph (a)(2), a provision identical in substance to DC Rule 1.2(e): see 3.3:101, below.

1.2:102 Model Code Comparison

Paragraph (a) of the Rule has no direct counterpart in the Model Code. It reflects, however, the themes of two Ethical Considerations and a related Disciplinary Rule of the Code. EC 7-7 provided: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of the client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client." EC 7-7 included examples of decisions that rest with the client: "[I]t is for the client to decide whether he will accept a settlement offer," and in criminal cases, "it is for the client to decide what plea should be entered and whether an

appeal should be taken." Providing greater detail regarding client consultation than does paragraph (a) of Rule 1.2, EC 7-8 stated: "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." Paragraph (b) of the Rule has no counterpart in the Model Code.

Paragraph (c) has several Model Code antecedents. DR 7-101(B)(1) provided that "a lawyer may . . . where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." DR 7-101(B)(2) permitted a lawyer to "refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." EC 7-8 also addressed a lawyer's possible desire to place limits on the relationship: "In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." And EC 7-9 asserted that, "when an action in the best interest of his client seems to him unjust, [the lawyer] may ask his client for permission to forego [sic] such action."

Paragraph (d) of the DC Rule had no direct counterpart in the Model Code. However, EC 7-11 recognized that "[t]he responsibilities of a lawyer may vary according to . . . the obligation of a public officer . . . ." Examples included "service as a public prosecutor or other government lawyer."

Paragraph (e) reflects a variety of Model Code provisions, most directly DR 7-102(A)(7), which provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106(A) directed a lawyer not to "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal . . . but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 added that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

Paragraph (f) of DC Rule 1.2 provides a more flexible approach than DR 2-110(C)(1)(c), which provided that a lawyer may withdraw from representation if a client "insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) also provided that "a lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

1.2:200 Creating the Client-Lawyer Relationship

- Primary DC References: DC Rule 1.2
- Background References: ABA Model Rule 1.2, Other Jurisdictions
- Commentary: ABABNA § 31:101, ALI-LGL §§ 14, 18, Wolfram § 9.2

1.2:210 Formation of Client-Lawyer Relationship

"The existence of an attorney-client relationship is an issue to be resolved by the trier of fact and is predicated on the circumstances of each case." **In re Lieber, 442 A.2d 153, 156 (DC 1982)**. Lieber had placed his name on a roster of volunteer lawyers willing to provide legal assistance to eligible inmates in pro se civil actions. He was subsequently assigned to represent an inmate but failed to enter an appearance after receiving notice from the court as well as phone calls from the inmate. As a defense to charged ethical violations arising out of his failure to appear in the case, Lieber claimed that he had never established an attorney-client relationship with the inmate. He stated, among other things, that he never accepted a fee and did not give legal advice to the inmate. The Court rejected Lieber's defense, observing that "[i]t is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship." *Id.* Furthermore, the Court stated that a relationship can be formed even when the lawyer does not take any substantive action or gave any legal advice. *Id.* Also important in determining the existence of a relationship is the client's perception of the lawyer as his counsel. *See id.* On the facts of the case, particularly the fact that Lieber voluntarily placed his name on the roster, the Court concluded that an attorney-client relationship had been formed. *Id.*

The risk of a lawyer's inadvertently establishing a lawyer-client relationship by providing advice through a "chat room" or "listserv" on the internet is discussed in **DC Ethics Opinion 310 (2002)** (more fully discussed under 7.1:200, below). It is also treated in **DC Ethics Opinion 319 (2003)** (more fully discussed under 1.8:220 below), which addressed the ethical propriety of a lawyer's purchasing a legal claim from a non-lawyer. That **Opinion** pointed out the risk that a non-lawyer in such circumstances might reasonably believe that the lawyer's statements about the value of the claims were made with an expectation that the non-lawyer might rely on them, thus establishing a lawyer-client relationship. The **Opinion** cited in this connection **Nelson v. Nationwide Mortgage Corporation, 659 F. Supp. 611, 617-18 (D.D.C. 1987)**, holding that a borrower who had executed loan and mortgage documents in reliance on statements made by the lender's lawyer at the loan closing could sue the lawyer for malpractice by demonstrating that her "reliance was both reasonable and foreseeable." *Id*. at 618.

In **In re Russell, 424 A.2d 1087 (DC 1980)**, the Court upheld a determination by the Board on Professional Responsibility that a lawyer-client relationship was formed when the lawyer agreed to help a co-worker recover damages for an injury the co-worker had suffered. The fact that there was no written agreement did not alter the finding that the

relationship had been established, where the lawyer had repeatedly represented that "negotiations were on-going," *id.* at 1087, and had obtained a "nuisance value" settlement offer. *Id.* at 1088.

In contrast, the court in **Farmer v. Mount Vernon Realty, Inc., 720 F. Supp. 223 (DDC 1989), aff'd sub nom. Fox v. Begg, Inc., 983 F.2d 298 (DC Cir 1993)**, held that, on the facts in the case, a single conversation with a lawyer did not establish an attorney-client relationship. The plaintiff alleged that she met once at the defendant law firm with an unidentified lawyer who she claimed told her that he would represent her. There was no written record, however, of any arrangement. Moreover, the plaintiff never contacted the firm again and the firm never called her. The court explained that, under these circumstances, the single conversation, which did not result in any further arrangements, was only a preliminary step to the establishment of an attorney-client relationship. See *id.*

When a lawyer represents an entity, he generally does not establish a lawyer-client relationship with individual employees or members of that entity. [See also 1.13:400, below.] Therefore, "[i]t is well established, as a matter of law, that an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance." **Gwin v. National Marine Eng'rs Beneficial Ass'n, 966 F. Supp. 4 (DDC 1997)**. Because a lawyer representing a union "has an obligation to act for the benefit of all members," he has a duty to act in the majority's interest even if it clashes with the interest of an individual member. See *id.* at 8.

DC Ethics Opinion 337 (2007) (discussed more fully under 1.9:200, below), held that a lawyer who serves as an expert witness for a party typically would not have an attorney-client relationship with the party. The Opinion emphasized that the law firm hiring the expert should take steps to avoid any misunderstanding on the part of the client about whether the client and the expert have an attorney-client relationship.

1.2:220 Lawyer's Duties to Prospective Client

When a person approaches a lawyer with the intention of retaining him, but a lawyer-client relationship is not, in fact, established, the would-be client nonetheless "has a right to expect that a lawyer whom he sought to employ will protect confidences and secrets imparted." **Derrickson v. Derrickson, 541 A.2d 149, 153-54 (DC 1988)**. This obligation previously was reflected in EC 4-1, which stated that a lawyer must preserve the confidences and secrets of one who has sought to employ him. Neither DC Rule 1.2 nor DC Rule 1.6 (confidentiality of client information) nor any of the comments thereto deals in terms with the prospective client. DC Rule 1.10(a) as amended following a recommendation of the Peters Committee necessarily implies an obligation to preserve confidences and secrets of a prospective client by providing that a disqualification resulting from an interview with a prospective client is personal to the lawyer who receives the confidences or secrets and is not imputed to that lawyer's firm. (See new Comments [7]-[9] to DC Rule 1.10; discussion in 1.10:101, below.)

1.2:230 When Representation Must Be Declined [see 1.16:200-230]

The Court of Appeals observed, in **Battle v. Thornton, 646 A.2d 315 (DC 1994)**, that a lawyer may need to decline representation when he believes that he is not qualified to handle a particular case. Because the District of Columbia does not license lawyers in "specialties," the court rejected the malpractice plaintiff's claim that no lawyer can properly undertake a Medicaid fraud case "unless he or she qualifies as a Medicaid fraud specialist in some formally discernible or recognized sense." *Id.* at 323. Drawing support from DC Rule 1.1 (Competence), however, the court observed that a lawyer should conduct an ad hoc self-evaluation of individual qualifications before taking a case in an area outside that lawyer's usual practice. See *id.* at 322-23.

The most common reason why a representation must be declined is a conflict of interest, with either a current or a former client, and that subject is discussed in connection with Rules 1.7 and 1.9, below.

1.2:240 Client-Lawyer Agreements

DC Ethics Opinion 116 (1982) noted the importance of written retainer agreements to avoid ambiguities regarding the scope of a lawyer's responsibilities. Citing a number of previous opinions, **Opinion 116** explained: "As we have stressed in a variety of contexts, the surest way to avoid ambiguity over what a lawyer has undertaken to do for a client is to execute a written retainer agreement." One of the opinions cited there was **DC Ethics Opinion 103 (1981)**, which set forth the broad proposition that "retainer agreements are highly desirable." Responding to an inquiry specifically addressed to form retainers, the Opinion noted, however, that form agreements may not adequately account for all of the terms of representation. The Opinion proposed three factors to be considered in judging whether a form agreement is appropriate: (1) the complexity of the matter, (2) whether the fee arrangement is straightforward or intricate, and (3) the client's level of education, sophistication and experience in dealing with lawyers. The form retainer addressed in the Opinion raised issues of scope of authority, including the authority to make decisions regarding the litigation. In particular, the Opinion concluded that the following statement in the retainer agreement improperly gave the impression that the client yielded all control over the litigation to the law firm: "If the matter is litigated, the firm is authorized to file such legal pleadings as their judgment dictates is required or appropriate." Though acknowledging that technical decisions concerning litigation that do not affect the merits of the client's case must be left to a lawyer's discretion, the Opinion, relying in part on DR 7-101(A) and EC 7-7, concluded that, as an example, a lawyer cannot file pleadings that drop a particular claim or defense without first consulting the client.

1.2:250 Lawyer's Duties to Client in General

DC Ethics Opinion 252 (1994) observed that Rule 1.2 requires a lawyer acting as a guardian ad litem for a child to consult with the child client before bringing a tort action on behalf of the child. The Opinion acknowledged that consultation might not be possible if the client were too young but referred to the mandate of DC Rule 1.4 (communication) to maintain a normal lawyer-client relationship as far as reasonably possible with a child client.

DC Ethics Opinion 85 (1980) stated that a lawyer was not bound under DR 2-110(C)(1)(d) to continue representation of his client when the client made the representation "unreasonably difficult." Thus, although a lawyer must abide by the reasonable objectives of the client, the lawyer may withdraw from the employment when he is left without authorization or instructions from the client. In other words, when the client does not make the objectives of the representation clear, the lawyer is not duty-bound to continue. In the circumstances addressed in the Opinion, the lawyer was asked by his client to draft documents to rescind a settlement offer. Despite repeated assurances that she would sign and return the documents, the client failed to do so. The Opinion concluded that the lawyer could withdraw in those circumstances, cautioning, however, that a lawyer must take great care to avoid disruption and prejudice to the rights of the client. Following similar logic, **DC Ethics Opinion 108 (1981)** concluded that a lawyer had no obligation under DR 6-101(A)(3) and DR 7-101(A)(1) to file an action on behalf of a client who had disappeared shortly after the two first met and executed a retainer agreement. The lawyer discharged his duty to the client by making diligent efforts to contact and locate the client in accordance with DR 2-110(A)(2).

On the other hand, **DC Ethics Opinion 139 (1984)** taught that, under DR 6-101(A)(3), DR 7-101(A)(1) and DR 2-110(C)(1)(d), "[w]ithdrawal from employment is not justified where a fugitive client's presence is not necessary to proceed with an appeal and the client believes the attorney still represents her." The Opinion distinguished **DC Ethics Opinions 85 (1980**) and **108 (1981)** on the ground that in those cases additional client contacts were required for the matter to proceed. In **Opinion 139**, although the client's absence made effective representation more difficult, it did not preclude the lawyer from proceeding, particularly because he was authorized to do so by the client.

Typically, a lawyer who drafts a will for a client is not obligated to inform the client of subsequent changes in the law. **DC Ethics Opinion 116 (1982)**, however, concluded that when a client "entrusts" his estate planning on a continuing basis to the lawyer, DR 6-101(A)(3) and DR 7-101(A)(1) counsel that the lawyer should inform his client of relevant statutory changes. To avoid ambiguities regarding the scope of the lawyer's responsibilities, the Opinion suggested that the lawyer execute a written retainer agreement.

A lawyer's emotional difficulties do not excuse his or her obligation to abide by the ethical rules. Emotional problems, such as chronic depression, can, however, serve to

mitigate a sanction when a lawyer has engaged in professional misconduct. *See* **In re Peek, 565 A.2d 627, 631 (DC 1989)**; **In re Dory, 528 A.2d 1247 (DC 1987)**. Nonetheless, the lawyer must make a showing that the emotional problems did, in fact, play a role in the ethical violations. "With respect to diagnosable, chronic depression we conclude as a general rule . . . that unless a causal nexus can be shown between the depression and the misconduct, the depression can be used neither in mitigation . . . nor for enhancement." **Peek, 565 A.2d at 633**.

A lawyer "undertakes the full burdens of the legal relationship no matter how informal or how unremunerative that relationship may be." **In re Washington, 489 A.2d 452, 456 (DC 1985)**. Thus, a lawyer was obligated, pursuant to DR 6-101(A)(3) and DR 7-101(A)(2) and (3), to represent "relatives, friends, and business associates" in the same manner as he or she would represent a formal, paying client. In other words, the DC Rules do not and cannot "create two tiers of ethical obligations, one for attorneys acting formally and for gain, and another for those who act for other reasons." *Id*.

1.2:260 Client's Duties to Lawyer

A primary duty of a client is to compensate the lawyer for his or her services. A lawyer's obligations to the client, however, typically are independent of the client's duties. Thus, in **In re Ryan, 670 A.2d 375, 379-80 (DC 1996)**, the court held that "any supposed failure of a client to fulfill a retainer agreement is no defense to a disciplinary charge against an attorney." *Id.* This result is consistent with the fact that a lawyer's ethical duties arise out of the establishment of a fiduciary relationship with the client and not a contractual one. See *id.*

1.2:270 Termination of Lawyer's Authority

Termination by the Client

DC Ethics Opinion 103 (1981) (discussed more fully under 1.2:240, above) observed that a lawyer should make clear to the client that the client has the authority to discharge the lawyer (for any reason or no reason). This is particularly so when the retainer agreement specifies circumstances in which the lawyer may terminate the employment. A one-sided provision that details only the grounds for termination by the lawyer "creates an impression that the client has entered into a relationship that from his point of view is irrevocable."

Withdrawal by the Lawyer

Esteves v. Esteves, 680 A.2d 398 (DC 1996), demonstrates that termination of the relationship may be necessary when "'there has been a *complete breakdown* in the attorney-client relationship.'" *Id.* at 403 (quoting **Atlantic Petroleum Corp. v. Jackson Oil Co., 572 A.2d 469, 473 (DC 1990)**). When there has been such a breakdown in the course of litigation, the lawyer may not terminate the relationship without leave of court. Withdrawal can be denied if the court finds that it would "unduly delay trial of the case, be unduly prejudicial to any party, or otherwise not be in the interests of justice." *Id.* at 404. Furthermore, the judge should ensure that the record contains sufficient evidence "'to reveal the type of total breakdown in the attorney-client relationship that would justify, in effect, dismissal of plaintiff's lawsuit.'" *Id.* (quoting **Atlantic Petroleum, 572 A.2d at 472**). The Court in **Esteves** approved the withdrawal of Ms. Esteves' counsel on the day of trial on two grounds. First, counsel's withdrawal did not severely prejudice Ms. Esteves because her case was not dismissed. Second, despite the fact that the motion was granted on the first day of trial, Ms. Esteves' consent to the withdrawal on the basis of "irreconcilable differences" indicated that she had had adequate notice to obtain other counsel. See *id.* at 404-05.

In **Atlantic Petroleum**, the trial court granted plaintiff counsel's motion to withdraw on the day of trial and then dismissed the case the following day for failure to prosecute because the plaintiff was not prepared to proceed with new counsel. The Court of Appeals reversed the trial court's order because the record did not show the sort of "total breakdown" required to permit termination of the relationship, particularly on the day of trial. **572 A.2d at 474-75**. In light of the fact that plaintiff's president and trial counsel had encountered similar problems in the past that had been worked out, the court held that the present uncooperativeness, including the president's failure to return phone calls and his late arrival to meetings, did not rise to a level that supported termination of the relationship. *Id.* at 474. Moreover, the very fact that the client's case had to be dismissed for unreadiness to proceed with new counsel indicated that allowing the original counsel to withdraw was improvident. *Id.*

1.2:300 Authority to Make Decisions or Act for Client

- Primary DC References: DC Rule 1.2(a)
- Background References: ABA Model Rule 1.2(a), Other Jurisdictions
- Commentary: ABABNA § 31:303, ALI-LGL §§ 21-23, Wolfram §§ 4.4, 4.6

1.2:310 Allocating Authority to Decide Between Client and Lawyer

Blumenthal v. Drudge, 186 FRD 236 (DDC 1999) dealt with discovery disputes in a case in which, as the Court observed,

> [o]nce discovery began, the parties and their lawyers quickly devolved to the kind of conduct that rightly gives the legal profession a bad name. The papers filed by lawyers on both sides, and the correspondence and deposition excerpts that accompany them, are replete with examples of rudeness, childish bickering, name-calling, personal attacks, petty arguments and allegations of stonewalling and badgering of witnesses. There is such mistrust and suspicion that counsel refuse even to talk to each other on the telephone to attempt to resolve discovery disputes.

Id. at 239. The Court cited DC Rule 1.2 in reminding counsel that

> [t]hey – and not their clients – have a professional obligation to control the means and methods used to achieve the goals of this litigation and that they must act as professionals even if that requires them to tell their clients that certain tactics are beyond the pale.

Id. The Court went on to say that

> Lawyers are not to reflect in their conduct, attitude or demeanor their clients' ill feelings toward other parties and may not "even if called upon by a client to do so, engage in offensive conduct directed towards other participants in the legal process," or "bring the profession into disrepute by . . . making ad hominem attacks. . . ."

Id. at 239-40 [quoting the DC Bar's civility standards (see 3.4:103, below), and citing as well the American Bar Association's Guidelines for Litigation Conduct].
Typically, a lawyer has "broad latitude" in making decisions regarding the direction of litigation. See **Hilton Hotels Corp. v. Banov, 899 F.2d 40, 45 (DC Cir 1990)** (citing EC 2-26 and MR 1.2(a)). Nevertheless, there are certain issues over which the client retains ultimate decisionmaking authority. Where the dividing line lies, however, is the subject of some debate. Courts recognize the difficulty of determining who has authority to decide matters. One DC judge has observed that this is "a subject area in

which neither academics nor practitioners always agree," and "[d]etermining what does and does not fall within the purview of an attorney's inherent authority to make tactical decisions can be extremely difficult." **In re Stanton, 532 A.2d 95, 101 (DC 1987) (Mack, J., concurring)**. See also **ABA/BNA Lawyer's Manual on Professional Conduct § 31:301 (1989)**.

In **United States v. Ortiz, 82 F.3d 1066, 1070 (DC Cir 1996)**, the DC Circuit held that "a criminal defendant has a fundamental constitutional right to testify that is personal to the defendant and cannot be waived by counsel or the court." Citing, among other authorities, MR 1.2(a), the court concluded that "[a]lthough the decision to testify involves a strategic choice, the choice remains the defendant's and not his attorney's." *Id*. See also **Boyd v. United States, 586 A.2d 670, 674 (DC 1991)**.

The DC Circuit, in **United States v. Morrison, 98 F.3d 619 (DC Cir 1996), cert. denied, 117 S. Ct. 1279 (1997)**, articulated the distinction between certain decisions over which authority is allocated to the lawyer and those as to which authority is allocated to the client. Relying in part on MR 1.2(a), the court stated: "The decision whether to object to a particular item of evidence is not among those in regard to which the client's input is considered essential, as are the decisions whether to plead guilty, whether to testify, and whether to take an appeal." *Id*. at 626 n.8.

1.2:320 Authority Reserved to Client

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, below] was a violation of Rule 1.2.(a)'s requirement that a lawyer abide by the client's decision whether to accept a settlement. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients.

DC Ethics Opinion 289 (1999)[discussed more fully under 5.4:400, below], addressing various issues potentially presented by a non-profit organization's program of "cause" litigation involving the representation of third persons, concluded, *inter alia*, that although Rule 1.2(c) allows a lawyer and client to agree to limit the objectives of a representation, an advance agreement by the client not to accept a settlement offer that was conditioned on keeping the fact and/or the terms of the settlement confidential, or one conditioned on waiver of the right to pursue court-awarded fees, would violate Rule 1.2(a), for "a client's right to accept or reject a settlement is absolute."

DC Ethics Opinion 103 (1981) [discussed more fully under 1.2:240, above] addressed the importance of advising a client that ultimate authority rests with the client. Although a client may delegate broad authority to the lawyer, the lawyer should, at the formation of the relationship, explain that the client retains ultimate decisionmaking authority until he or she delegates that authority to the lawyer.

DC Ethics Opinion 21 (1976) instructed that a lawyer may not dismiss a case without the client's consent even though the client has failed to pay the costs, as agreed, for the appearance of critical witnesses. If the client failed or refused to provide the money to bring the witnesses to court and the lawyer knew that he could not prevail without those witnesses, he might seek leave to withdraw from the employment in accordance with DR 2-110(C)(1)(d) and (f).

1.2:330 Authority Reserved to Lawyer [see 1.2:300, 1.2:320]

1.2:340 Lawyer's Authority to Act for Client

"Ordinarily, the acts and omissions of counsel are imputed to the client even though detrimental to the client's cause. This rule is necessary for the orderly conduct of litigation." **Railway Express Agency, Inc. v. Hill, 250 A.2d 923, 926 (DC 1969)**. Courts recognize an exception to this rule, however, when "the conduct of counsel is outrageously in violation of either his express instructions or his implicit duty to devote reasonable efforts in representing his client." *Id*. For example, a lawyer's total disregard for his client's case typically will not be imputed to the client. See *id.* Nevertheless, to seek relief from the effects of a lawyer's lack of diligence, such as a dismissal for failure to prosecute, the client must show that he himself was not negligent. See *id.* In **Railway Express**, the court found that the client had shown a "remarkable indifference" to his case, having not contacted his lawyer for 20 months regarding the status of his case. *Id.* As a result, the court dismissed the case, reversing the lower court's reinstatement of the plaintiff's action. See *id.* at 927.

In **Makins v. District of Columbia, 861 A.2d 590 (DC 2004)(en banc)**, the DC Court of Appeals answered a question about District of Columbia law regarding the authority of a lawyer to agree to a settlement that will be binding on the lawyer's client that had been certified to the Court by the District of Columbia Circuit. Specifically, the question was whether a client is bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on specific terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf, and the attorney leads the opposing party to believe that the client has agreed to those terms. A divided panel of the Court had answered the certified question in the negative, in **Makins v. District of Columbia, 838 A.2d 300 (DC 2002)**, but the Court granted a motion for reconsideration en banc which resulted in the same conclusion, but on somewhat different reasoning from that of the panel decision. Specifically, after a thorough canvass of DC decisional authority and the **Restatement of Agency,** the en banc Court held that the client's actions in sending her attorney to a court-ordered settlement conference and permitting the attorney to negotiate on her behalf were insufficient to confer apparent authority to settle the matter, and that the attorney's conduct and representation of his authority to settle were not dispositive as to whether the attorney had apparent authority, since apparent authority depends on representations made, explicitly or implicitly, by the client, not those made by the client's attorney.

In **Van Kuhn v. United States, 900 A.2d 691 (DC 2006)**, an appellant challenged his conviction of armed robbery, claiming ineffective assistance of counsel on the ground that his lawyer, after consulting with him about the argument to be made, chose, over his objection, to argue a theory of defense different from the one that the appellant had adopted in his testimony. The Court held that although DC Rule 1.2(a) requires a lawyer to abide by the client's decision as to a plea to be entered, whether to waive a jury, whether the client will testify, and and the objectives of a representation, it is the lawyer's responsibility to decide how the objectives are to be achieved. **900 A.2d at 700.** Thus, "the lawyer has -- and must have -- full authority to manage the conduct of

the trial" (quoting **Taylor v. Illinois, 484 U.S. 400, 418 (1988))**, and so, after appropriate consultation, "strategic and tactical decisions are the exclusive province of the defence sounsel" (quoting **Jones v. Barnes, 463 U.S. 400, 753 (1983)).**

1.2:350 Lawyer's Knowledge Attributed to Client

Conduct by a lawyer that would normally warrant dismissal of a case as a sanction should not automatically be attributed to the client. In **Shea v. Donohoe Construction Co., 795 F.2d 1071 (DC Cir 1986)**, the court "advise[d] strongly that district courts themselves directly notify the client when attorney misconduct has occurred to a degree that the court is contemplating dismissal if a recurrence occurs." *Id.* at 1078 (emphasis omitted). The court explained that only after such notification should a court attribute knowledge of the misconduct to the client, stating that if "after this notification the attorney persists in the errant conduct, then the client shares in the responsibility for that conduct." *Id.* The court limited this notice procedure, however, to cases where dismissal is intended for punitive or deterrent purposes. See *id.* The court thus left open the possibility that dismissal may be warranted without notice to the client when the lawyer's misconduct causes actual prejudice to the other party or the judicial system. See *id.* at 1074-77. When prejudice is so severe as to warrant dismissal, the court observed that "it has generally been considered irrelevant whether the delay is the fault of the counsel or his client." *Id.* at 1074. In either case, the court cautioned that a trial court should consider measures less drastic than dismissal when possible. See *id.* at 1076.

Despite acknowledging the notice procedure suggested by **Shea**, the court in **Tucker v. District of Columbia, 115 F.R.D. 493, 496 (DDC 1987)**, granted defendant's motion to dismiss without prior warning to the plaintiff client. Under the circumstances, the court believed that its decision to dismiss was guided by **Link v. Wabash R.R., 370 U.S. 626 (1962)**, which held that a judge has inherent authority to dismiss a case for the plaintiff's failure to prosecute. Essentially rejecting the concerns of the court of appeals in **Shea** that dismissal without prior notice to the client "imposes an unjust penalty on the client," the district court in **Tucker** justified its dismissal order by stating: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." **Tucker, 115 F.R.D. at 496**. Moreover, the court, drawing support from **Link**, asserted that "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.* (quoting **Link, 370 U.S. at 633-34**). The Court's conclusions appear to contradict **Shea'**s express admonition that "[w]hen the client's only fault is his poor choice of counsel, dismissal of the action has been deemed a disproportionate sanction." **Shea, 795 F.2d at 1077**.

Following **Shea**, the Court in **Berry v. District of Columbia, 833 F.2d 1031, 1037 (DC Cir 1987)**, reversed the district court's order dismissing certain claims on the grounds that plaintiff's attorney had failed to file a pretrial brief by the court-imposed deadline, had failed to attend a status conference and had failed to file a pleading specifically requested by the court. Because the misconduct had not severely prejudiced the opposing party, had not placed an intolerable burden on the judicial system and had not been approved in any way by the client, the Court stated that it "was incumbent upon the District Court to consider measures less drastic than dismissal." *Id.*

1.2:360 Lawyer's Act or Advice as Mitigating or Avoiding Client Responsibility

Reliance by a client on the advice of his lawyer often can be used as a defense to avoid responsibility, or at least to mitigate the sanction, for particular client conduct. For example, because Rule 10b-5 of the Securities Exchange Act, Section 17(a)(1) of the Securities Act and Section 206(1) of the Investment Advisers Act require for liability thereunder that a person act with "intent" to defraud, evidence that a person relied in good faith on his lawyer's advice under these statutes can relieve him of liability. *See* **SEC v. Steadman, 967 F.2d 636, 642 (DC Cir 1992)**. The court in **Steadman** concluded that a person cannot "reasonably be said to have demonstrated an intent to defraud or a reckless disregard of [his] legal obligations" when he relies upon advice that the conduct in question is legal. *Id.*

Even though reliance on advice of counsel does not absolve a client from liability, it may help to mitigate the sanction for misconduct. In **WEBR, Inc. v. FCC, 420 F.2d 158 (DC Cir 1969)**, the Court affirmed the FCC Review Board's conclusion that good faith reliance on the advice of counsel, while not relieving the client of responsibility for a violation of FCC application procedures, was sufficient to avoid disqualification for character reasons.

It is important, however, that a client's reliance on his lawyer's advice be reasonable and in "good faith." **Safir v. Klutznick, 526 F. Supp. 921 (DDC 1981), vacated sub nom. Safir v. Dole, 718 F.2d 475 (DC Cir 1983)**, demonstrated this requirement. In an effort to mitigate subsidy recoveries sought by the government under section 810 of the Merchant Marine Act of 1936, the defendant, AGAFBO, argued that it relied upon counsel's advice that it could "lower its prices to a predatory level." See *id.* at 934. The Court nonetheless rejected the defense on the ground that if such advice was actually given, it was unreasonable and not in good faith. See *id.* Specifically, the court stated that, "any ordinary businessman, not to mention 'astute' AGAFBO shipping executives, should have known that AGAFBO's concerted effort to restrain U.S. flag competition was illegal." *Id.* Reliance on counsel's advice may thus be unreasonable because of the substance of the advice; it may also be unreasonable because of who gave the advice. Thus, in **WHW Enterprises, Inc. v. FCC, 753 F.2d 1132 (DC Cir 1985)**, the Court held that the president of a company could not use reliance on counsel as a mitigating factor where the advice relied on was given to him by a lawyer who was himself an officer and director of the company, an interested party in the matter. See *id.* at 1142. Had the court accepted the president's defense under those circumstances, the result would be "that where the president of a company acts pursuant to the improper advice of another officer of the company, the company and both officers are absolved of any blame for wrongdoing." *Id.*

It goes without saying that a client cannot rely on the advice of counsel to avoid or mitigate responsibility when his conduct is beyond the scope of his lawyer's advice. Thus, in an action to recover certain legal costs resulting from his lawyer's negligent

advice, a client could not recover costs stemming from an NLRB complaint that alleged violations about which the lawyer had not given advice. See **M & S Bldg. Supplies, Inc. v. Keiler, 738 F.2d 467, 473 (DC Cir 1984)**.

1.2:370 Appearance Before a Tribunal

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.2:380 Authority of Government Lawyer

Paragraph (d) of DC Rule 1.2, which has no counterpart in MR 1.2, recognizes that a government lawyer's authority and control over decisions concerning the representation may, by dint of statute or regulation, be broader than contemplated by paragraphs (a) and (c).

1.2:400 Lawyer's Moral Autonomy

- Primary DC References: DC Rule 1.2(b)
- Background References: ABA Model Rule 1.2(b), Other Jurisdictions
- Commentary: Wolfram § 10.4

DC Ethics Opinion 231 (1992) held that "the Rules were not generally intended to reach the actions of a lawyer as a legislator," particularly in view of DC Rule 1.2(b), which provides that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social, or moral views or activities." As a result, the Opinion concluded that no provision of the DC Rules would require client consent or preclude a lawyer who is a City Council member from voting on legislation that could affect the future business of the member's law firm.

1.2:500 Limiting the Scope of Representation

- Primary DC References: DC Rule 1.2(c)
- Background References: ABA Model Rule 1.2(c), Other Jurisdictions
- Commentary: ABABNA § 31:306, ALI-LGL § 20, Wolfram § 5.6.7

DC Ethics Opinion 330 (2005) examined the practice of "unbundling" legal services. As explained in the Opinion, "'Unbundling' refers to the separation of the tasks full service lawyers typically conduct into their discrete components, only some of which the client contracts with the lawyer to provide." For example, the client may want a lawyer to draft a complaint or a brief for the client to file *pro se*, or draft a contract reflecting terms the client negotiated. The Opinion concluded that unbundling was no different from an agreement to provide limited representation pursuant to Rule 1.2(c), and thus that unbundling was permissible as long as the lawyer clearly explained the scope of the representation and the limited scope did not prevent the lawyer from providing competent service.

The Opinion also discussed several issues that may arise in the context of unbundled service arrangements. The Opinion stated that a lawyer has a duty to alert the client to any legal problems the lawyer discovers during the representation, even if the problems fall outside the scope of the representation. The Opinion also concluded that opposing counsel should treat *pro se* litigants as unrepresented, rather than as "represented" for purposes of Rule 4.2, even if the opposing counsel knows that the *pro se* litigation is receiving help from a lawyer. Finally, the Opinion concluded that noting in the DC Rules precluded lawyers from "ghostwriting" documents – that is, nothing required lawyers who assist *pro se* litigants in preparing court papers to disclose their involvement.

DC Ethics Opinion 289 (1999) [discussed more fully under 5.4:400, below], addressing various issues potentially presented by a non-profit organization's program of "cause" litigation involving the representation of third persons, concluded, *inter alia*, that although Rule 1.2(c) allows a lawyer and client to agree to limit the objectives of a representation, an advance agreement by the client not to accept a settlement offer that was conditioned on keeping the fact and/or the terms of the settlement confidential, or one conditioned on waiver of the right to pursue court-awarded fees, would violate Rule 1.2(a), for "a client's right to accept or reject a settlement is absolute."

DC Ethics Opinion 248 (1994) responded to an inquiry as to whether a lawyer may jointly represent two clients, both of whom had applied for, but not received, a particular job and who both believed that the hiring decision was based on prohibited discriminatory practices. The Opinion concluded, in part, that the lawyer and clients could limit the objective of the representation, under DC Rule 1.2(c), to establishing the liability of the employer. Nonetheless, the Legal Ethics Committee expressed concern about "whether that would often be feasible."

DC Ethics Opinion 21 (1976) stated that DR 5-103(B) did not obligate a lawyer to advance the costs of litigation if he had not assumed a contractual obligation with the client to do so. Furthermore, a lawyer can condition his representation on the client's commitment to pay the costs of litigation. Such a provision in a retainer agreement is, in essence, a limit on the means of representation, as expressed in Comment [4] to DC Rule 1.2. Although paragraph (c) of the DC Rule provides that a lawyer may limit the "objectives" of representation, Comment [4] states that the terms upon which representation is undertaken may exclude *means*, as well as objectives.

1.2:510 Waiver of Client or Lawyer Duties (Limited Representation)

DC Ethics Opinion 143 (1984) held that, under DR 5-105 and DR 7-101, a lawyer could represent jointly a couple seeking divorce so long as three requirements were met. First, the representation must be limited in scope. On the facts stated in the Opinion, representation was sought solely for the purpose of implementing the couple's preexisting agreement to dissolve their marriage and on the terms of the dissolution. Second, there cannot be any existing conflict between the two clients as to the objective of the representation. Third, the clients must give their uncoerced consent after full disclosure of the limitations inherent in joint representation. The Opinion drew support from **DC Ethics Opinion 49 (1978)**, which permitted joint representation of two corporations for the purpose of drafting an agreement whose general terms had been orally accepted. Turning from **Opinion 49** to **DC Ethics Opinion 54 (1978)**, **Opinion 143** recognized that joint representation may be more troublesome in a litigation context because the client seeks an advocate, not simply an "adviser, negotiator or scrivener." Nonetheless, **Opinion 54** had concluded that joint representation, though not preferred, was not ethically prohibited. The basis for this conclusion was that "clients may limit the objectives of representation and that, once so-limited, a lawyer must limit his own zealous representation to those objectives."

The issue of joint representation in divorce cases was revisited under the DC Rules in **DC Ethics Opinion 243 (1993)**. There, the inquirer intended to "play an active role in helping the parties reach a detailed divorce agreement," as well as proposing solutions from the perspective of mediator. Although **DC Ethics Opinion 143** had permitted joint representation of the spouses in a divorce case, **Opinion 243** distinguished it on the basis that the representation proposed there was much more limited. Moreover, the Legal Ethics Committee found that the result in **Opinion 143** was the exception rather than the rule, stating that "the Opinion certainly suggests that joint representation in divorce cases is usually impermissible." Despite finding the proposed representation impermissible under the reasoning of **Opinion 143**, the Committee considered whether representation under a broader range of circumstances was permissible under the DC Rules. The Opinion concluded that the proposed representation was not permitted under the DC Rules, stating, in part, that "[w]hatever discretion Rule 1.2 gives clients to define the objectives of representation, it does not include the discretion to retain a

lawyer under circumstances likely to cause the lawyer to act in ways (or to be perceived to act in ways) detrimental to the client-lawyer relationship."

1.2:600 Prohibited Counseling and Assistance

- Primary DC References: DC Rule 1.2(e)
- Background References: ABA Model Rule 1.2(d), Other Jurisdictions
- Commentary: ABABNA § 31:307, ALI-LGL § 105, Wolfram § 13.3

1.2:610 Counseling Illegal or Fraudulent Conduct

DC Ethics Opinion 219 (1991) expressly affirmed that DC Rule 1.2(e) obligates a lawyer to withdraw from representation upon a client's failure to rectify fraudulent conduct if the fraud is ongoing and the representation would therefore involve assistance in the fraud by the lawyer. See *id.* at n.3. A lawyer does not have a duty to withdraw, however, if she does not actually know of the client's fraudulent conduct. Thus, the court, in **In re Hopkins, 687 A.2d 938 (DC 1996)**, upheld a determination by the Board on Professional Responsibility that a lawyer did not have a duty (under DR 2-110(B)(2), the predecessor of Rule 1.16(a)(1)), to withdraw from representation when she "suspected that her client might engage in wrongdoing, she feared it, she tried to persuade him to allow her to set up safeguards, but she did not know with the certainty of Austern [referring to **In re Austern, 524 A.2d 680 (DC 1987)**, discussed under 1.2:620, below] that her client was engaged in fraud." **687 A.2d at 940** (emphasis omitted). Despite suspecting that her client was stealing from the estate for which he was personal representative, it was not "obvious" to her that continued employment would violate the Disciplinary Rules. The court concluded, however, that "we expect that the opinion . . . in this case will cause attorneys to take greater care to separate themselves from 'renegade' clients." *Id.* at 942.

1.2:620 Assisting Illegal Conduct or Fraud by Client

DC Ethics Opinion 242 (1993) affirmed in passing that, under DC Rule 1.2(e), a lawyer may not "assist" a client in proposed conduct that the lawyer knows is criminal or fraudulent. Therefore, a lawyer cannot allow a client access to documents in his custody that are not the property of the client if he knows that the client intends to use the documents for a criminal or fraudulent purpose.

A lawyer violated ethical obligations when he assisted his client in concealing information about the client's funds in response to discovery requests in a divorce suit. In **In re Sandground, 542 A.2d 1242 (DC 1988)**, the lawyer participated in secret transfers of the client's funds and responded misleadingly to interrogatories. The court concluded, in part, that the lawyer's conduct was a violation of DR 7-102(A)(7). *Id.* at 1244-45.

In **In re Austern, 524 A.2d 680 (DC 1987)**, the DC Court of Appeals addressed a lawyer's duty when his client requests that he participate in conduct that is illegal or fraudulent. In that case, the client-seller offered to place $10,000 in an escrow account to induce the purchasers to go to settlement. As co-escrow agent, the client-seller's lawyer accepted a check for deposit into the account from the client, who informed the lawyer that the check was "worthless." Nonetheless, the lawyer deposited the check and did not inform the other co-escrow agent that it was not backed by funds in a bank. By the time one of the purchasers made a claim against the account, the funds had been placed in the account. Despite the fact that no purchaser was harmed, the lawyer was publicly censured for assisting the client in fraudulently inducing settlement. Resting its conclusion on DR 7-102(A)(7) and Model Rule 1.2 (though the Rules were not yet in effect in the District), the court held that, "the attorney is under an affirmative duty to withdraw from representation." *Id.* at 682-83. (Thus, a lawyer has similar ethical obligations whether the lawyer is placed in a position where he is asked to counsel illegal conduct, see 1.2:610 above, or one where he is asked to assist in that conduct.)

1.2:630 Counseling About Indeterminate or Uncertain Law

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.2:700 Warning Client of Limitations on Representation

- Primary DC References: DC Rule 1.2(f)
- Background References: ABA Model Rule 1.2(e), Other Jurisdictions
- Commentary: ABABNA § 31:307, ALI-LGL § 105

There appear to be no pertinenct DC court decisions or ethics opinions on this subject

1.2:800 Identifying to Whom a Lawyer Owes Duties

- Primary DC References: DC Rule 1.2
- Background References: ABA Model Rule 1.2(e), Other Jurisdictions
- Commentary: ABABNA § 31:101, ALI-LGL § 105

1.2:810 Prospective Clients [see 1.2:220]

1.2:820 Persons Paying for Representation of Another [see 1.7:400]

1.2:830 Representing an Entity [see 1.13:200]

1.2:840 Representing a Fiduciary [see 1.1:410, 1.1:440, and 1.13:520]

1.2:850 Class Action Clients

Case law addressing class actions typically discusses the obligations of the "class representative." This person or entity is certified by the court to represent the interests of the absent class members. As an agent of the class representative, the representative's lawyer undertakes to discharge the duties of the representative. Primarily, the representative's duty is to "ensure that the absent members' interests are adequately protected." **National Ass'n of Reg'l Med. Programs, Inc. v. Mathews, 551 F.2d 340, 346 (DC Cir 1976)**. It is thus important for a class representative's lawyer to litigate a case not just for the benefit of the representative but in pursuit of the class members' common goals. The most basic obligation of the representative and its lawyer is to provide individual notice to the absentee class members. See **Walsh v. Ford Motor Co., 807 F.2d 1000, 1008 (DC Cir 1986)**. In **Walsh**, the court held that Congress did not eliminate the duty to notify individual class members in suits brought under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. See *id.* at 1011. In reaching this conclusion, the court observed that Congress did expressly limit the notice obligations of the class representative in suits arising under the Deepwater Port Act of 1974. See *id.*

1.3 Rule 1.3 Diligence

1.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.3
- Background References: ABA Model Rule 1.3, Other Jurisdictions
- Commentary:

1.3:101 Model Rule Comparison

Model Rule 1.3 consists of a single sentence, "A lawyer shall act with reasonable diligence and promptness in representing a client," and its descriptive title consists of the single word "DILIGENCE." DC Rule 1.3 adds "AND ZEAL" to the descriptive title, and otherwise expands upon the two concepts. Paragraph (c) of the DC Rule is identical to the Model Rule without its reference to "diligence."

Paragraph (a) retains the language of Model Code Canon 7 that encourages lawyers to represent clients "zealously within the bounds of the law," but changes Canon 7's aspirational "should" to "shall," and adds diligence as an additional requirement along with zeal.

Paragraph (b) of the DC Rule provides that a lawyer shall not intentionally (1) fail to seek the client's lawful objectives "through reasonably available means permitted by law and the disciplinary rules," or (2) "prejudice or damage a client during the course of the professional relationship." The second of these continues the prohibition of DR 7-101(A)(3), which was dropped from the Model Rules.

The Comments to the DC Rule are more numerous and extensive than the Comments to the Model Rule. The Model Rule's Comments appear as Comments [1], [7], and [8] to the DC Rule. The Jordan Committee also relied extensively on the Ethical Considerations under Canon 7 when crafting the Comments for Rule 1.3. Comments [2], [3], [4], [5], and [6] restate EC's 7-1, 7-2, 7-3, 7-9, and 7-10 respectively.

On the recommendation of the Peters Committee, the Court of Appeals approved an additional Comment [9] to Rule 1.3, effective November 1, 1996. The Comment states that Rule 1.3 is "not meant to govern conflicts of interest, which are governed by Rules 1.7, 1.8 and 1.9." The new Comment reflects a belief that general ethical principles such as Rule 1.3 should not govern conduct also covered by specific, detailed rules. [See also 1996 Amendments, under 1.3:200, below.]

The ABA Ethics 2000 Commission recommended no changes to Model Rule 1.3, and the ABA made none, though there were some small changes to several of the Comments to the Model Rule, and addition of a new Comment [5], recognizing the importance of advance planning by sole practitioners to ensure that their clients are not adversely affected by a sudden loss of legal representation due to the lawyer's death. A new Comment [5], differently phrased but to similar effect, was added to the DC Rule.

1.3:102 Model Code Comparison

Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law." DC Rule 1.3(a) makes that responsibility mandatory by changing "should" to "shall." Subparagraph (b)(1) is taken from DR 7-101(A)(1), and subparagraph (b)(2) from DR 7-101(A)(3). Paragraph (c) is based on DR 6-101(A)(3), which required that a lawyer not "neglect a legal matter entrusted to him."

1.3:200 Diligence and "Zeal"

- Primary DC References: DC Rule 1.3(a) & (b)
- Background References: ABA Model Rule 1.3, Other Jurisdictions
- Commentary: ABABNA § 31:901, ALI-LGL § 16, Wolfram § 10.3

DC Rule 1.3(a) states that a lawyer "shall represent a client zealously and diligently within the bounds of the law." Rule 1.3(b) then states that a lawyer *shall not* intentionally (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules or (2) prejudice or damage a client during the course of the professional relationship. According to Comment [1], Rule 1.3 requires the lawyer to pursue a matter on a client's behalf despite "opposition, obstruction, or personal inconvenience to the lawyer." Comment [2] states that the lawyer's duty to be diligent and zealous derives from his or her "membership in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits." The scope of the duty, however, is not boundless. Comment [5] permits a lawyer to ask the client to forgo action that the lawyer believes to be unjust and to inform the client of the limitations on the lawyer's conduct when the client expects assistance not in accord with the professional rules of conduct. The Comment also states that the lawyer's duty to his or her client is subject to the duty of candor before a tribunal under Rule 3.3 and the duty to expedite litigation under Rule 3.2.

In **In re Hunter, 734 A.2d 654 (DC 1999)**, the Court approved the imposition of reciprocal discipline upon a lawyer who had been suspended by the US District Court for ethical violations arising out of her representation of a criminal defendant in a case in which an officer with whom the lawyer was romantically involved had participated in the arrest of a co-defendant and was to be a government witness at trial. The District Court had found the lawyer's conduct violative of, *inter alia*, Rules 1.3(a), 1.4(b), 1.7(b)(4), 8.4(a) and 8.4(d).

In **In re Bernstein, 707 A.2d 371 (DC 1998)**, a lawyer was found to have violated Rule 1.3(a) as well as Rules 1.3(c) and 1.4(a) when, having settled his client's claims arising out of an automobile accident with the defendant's liability insurance carrier, he delayed for three years pursuing a claim for medical expenses from the clients' own insurer, failed timely to respond to an offer of the full coverage from that insurer, and failed timely to tell his clients about either the belated suit against the second insurer or the offer it had made.

In **In re Mance, 869 A.2d 339 (DC 2005)**, the Court upheld a finding that the respondent had violated Rules 1.3(a) and (b), as well as Rules 1.1(a) and (b), by filing an untimely appeal from his client's criminal conviction of multiple offenses and failing to seek available relief for that lapse, and in addition failing to get the client's sentence reduced on the available ground that some of the offenses of which he was convicted merged. With respect to the finding that the neglect met the "hallmark" under Rule

1.3(b) of being intentional, the Court approved the Board's recognition that the Rule does not require proof of intent "in the usual sense of the word;" rather, "[n]eglect ripens into an intentional violation when the lawyer is aware of his neglect of the client matter" (quoting **In re Lewis, 689 A.2d 561, 564 (DC 1997)**. Similarly, in **In re Outlaw, 917 A.2d 684 (DC 2007)**, the Court upheld the Board's determination that the respondent's error in miscalculating the applicable statute of limitations in her client's tort case, and her neglect of the case that allowed the limitation period to expire before initiating meaningful negotiations with the defendant's insurance carrier constituted failure to provide zealous and diligent representation in violation of Rule 1.3(a) as well failure to provide competent representation and to serve the client with skill and care, in violation of DC Rules 1.1(a) and (b), despite the fact that the error in recording the applicable limitations period had been made by an employee who was under the respondent's supervision and not by the respondent herself.

Numerous opinions of the DC Bar Ethics Committee discuss a lawyer's duty to represent a client diligently and zealously. **DC Ethics Opinion 256 (1995)** concluded that a lawyer who receives documents containing confidences or secrets inadvertently sent by other counsel and reads them in good faith, not knowing that their disclosure was inadvertent, may retain and use the documents. The Opinion said, among other things, that to require a lawyer to protect the confidentiality of such materials, as suggested by **ABA Formal Opinion 92-368 (1992)**, would place too much of a burden on a lawyer's obligation under Rule 1.3 to represent his client zealously and diligently. **DC Ethics Opinion 252 (1994)** relied on Rule 1.3, *inter alia*, in concluding that a lawyer who has been appointed guardian ad litem for a child in abuse and neglect proceedings also has a duty to advise the child, or those responsible for the child's care, about potential tort claims and to preserve those claims if necessary. **DC Ethics Opinion 246 (1994)** held that Rule 1.3 may preclude a lawyer from reporting under Rule 8.3(a) the misconduct of a client's former lawyer if the disclosure would prejudice the client.

The duty to represent a client zealously and diligently may apply even if the client maintains only minimal contact with the lawyer and exhibits minimal interest in the matter that is the subject of the representation. Thus, **DC Ethics Opinion 139 (1984)** concerned a lawyer who represented a client in a criminal matter. After the client was convicted, she became a fugitive and only occasionally phoned her lawyer. The Opinion determined that DR 7-101(A) required the lawyer to proceed with the client's appeal.

There is no duty under Rule 1.3, however, if the lawyer-client relationship has been abandoned by the client or has been terminated. Thus, **DC Ethics Opinion 116 (1982)** stated that a lawyer who had previously drafted a will for a client has no duty to seek out and inform that former client of a change in the law that occurred after the representation clearly had concluded. And **DC Ethics Opinion 108 (1981)** determined that a lawyer no longer has a duty to represent a client zealously and diligently in a possible lawsuit when, after an initial consultation, the client moves from the area

without informing the lawyer, leaves no forwarding address, and otherwise abandons her legal claim.

1996 Amendments

Before the adoption of the amendments proposed by the Peters Committee, effective November 1, 1996, Rule 1.3 had been held to preclude a lawyer from continuing to represent two clients with conflicting interests in a matter when the conflict undermined the lawyer's ability to be a zealous and diligent advocate for both, even if the clients consented to the joint representation. Thus, **DC Ethics Opinion 248 (1994)** addressed whether a lawyer could simultaneously represent two clients in an employment discrimination case where the interests of the clients could potentially conflict. The Opinion stated that even if Rule 1.7 did not bar the representation because both clients had consented, Rule 1.3 still might preclude the representation. With respect to those clients whose interests conflict, the lawyer will have to determine whether his or her "obligations to them will limit his [or her] ability to represent each of them zealously and diligently." This Opinion rested in part on Comment [15] to DC Rule 1.7 (interpreting paragraph (c)(2) of that Rule, as it then stood), which stated in effect that even if Rule 1.7 was satisfied by client consent, the lawyer still had obligations under Rules 1.3, 1.4 and 1.6 that might bar a particular representation. That Comment was, however, omitted in the 1996 amendments proposed by the Peters Committee, along

with Rule 1.7(c)(2), and a new Comment [9] to Rule 1.3 was adopted, which states that Rule 1.3 is a rule of general applicability and is not meant to restrict any specific rule, and, in particular, the rule is not meant to govern conflicts of interest, which are governed by Rules 1.7, 1.8 and 1.9. See also **DC Ethics Opinion 253 (1994)** (to the same effect as **Opinion 248**); **DC Ethics Opinion 210 (1990)** (same); **DC Ethics Opinion 163 (1986)** (same).

1.3:210 Prejudicing a Client

As has been noted, DC Rule 1.3(b)(2), preserves the prohibition against prejudicing or damaging a client in the course of a professional relationship that was found in DR 7-101()A)(3) of the Model Code, but that was dropped in the Model Rules.

Its predecessor Code provision had been interpreted as preventing a lawyer from engaging ign activities related to the lawyer's law practice when those activities could adversely affect a client's interests. **DC Ethics Opinion 5 (1975)** advised that a lawyer could violate DR 7-101(A)(3), Rule 1.3(b)(2)'s predecessor provision, by publishing an article in a legal journal that reflected unfavorably on his client's case. **DC Ethics Opinion 204 (1989)** concluded that DR 7-101(A)(3) barred a law firm from submitting comments on its own behalf to an administrative agency in a rulemaking proceeding that could adversely affect clients with applications pending before the agency, although it did not prevent a firm from making comments that would not affect pending client applications. **DC Ethics Opinion 231 (1992)** held, however, that Rule 1.3 does not prevent a lawyer who also is a DC Council member from voting on legislation that could adversely affect some of the clients represented by the lawyer-member's firm.

DC Ethics Opinion 326 (2004) held that recommending competent counsel to an unrepresented person who approaches the lawyer seeking representation in a matter that is or would be adverse to a party with whom the lawyer has an on-going lawyer-client relationship does not constitute prejudice to a client within the meaning of Rule 1.3.

In **In re Corrizzi, 803 A.2d 438 (DC 2002)**, the respondent was found to have committed a number of ethical delicts, of which the most serious involved counseling two clients, in separate cases, to commit perjury on their depositions. These two offenses, which themselves violated several different Rules, including DC Rule 1.3(b)(2) as well as Rules 3.3(a)(2), 3.4(b) and 8.4(c), were held sufficient to warrant disbarment. The Court explained that in this case the lawyer's suborning the clients' perjury had damaged them because it had "virtually destroyed their prospects for recovery in their personal injury claims and it exposed them to criminal prosecution for perjury." *Id.* at 440.

1.3:300 Promptness

- Primary DC References: DC Rule 1.3(c)
- Background References: ABA Model Rule 1.3, Other Jurisdictions
- Commentary: ABABNA § 31:401, ALI-LGL § 16; Wolfram § 10.3

DC Rule 1.3(c) states that "a lawyer shall act with reasonable promptness in representing a client." Comment [7] explains that "perhaps no professional shortcoming is more widely resented by clients than procrastination." Paragraph (c) in part reflects the fact that a client's interests often can be adversely affected by the passage of time or a change of conditions. The provision additionally reflects that "unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness" even when the client's interests are not affected in substance. Comment [7].

A violation of Rule 1.3 commonly occurs when a lawyer has failed to meet a filing deadline, failed to keep in contact with a client, or otherwise failed to handle a client's affairs in a prompt and efficient manner. In **In re Lyles, 680 A.2d 408 (DC 1996)**, the Court of Appeals imposed a six-month suspension on a bankruptcy lawyer whose violations primarily consisted of her failure to file satisfactory bankruptcy plans on behalf of her clients, to correct promptly certain deficiencies in those plans, to remain in contact with her clients, and to take any timely action to prevent the foreclosure of her clients' homes. The court observed that the harm caused by a lawyer's procrastination in a bankruptcy proceeding is "particularly acute." In **In re Chisholm, 679 A.2d 495 (DC 1996)**, the court approved a six-month suspension and restitution of fee as a condition of reinstatement as penalty for a failure, over a period of more than six years, to pursue an appeal from a deportation order, in violation of, *inter alia*, Rules 1.3(a), 1.3(b)(1) and 1.3(b)(2). In **In re Ryan, 670 A.2d 375 (DC 1996)**, an immigration lawyer violated Rule 1.3 by missing numerous filing deadlines, failing to file an appeal of her client's deportation order, and going on maternity leave without notifying her clients. Similarly, in **In re Robertson, 612 A.2d 1236 (DC 1992)**, the Court found a violation of Rule 1.3 where a tax lawyer negligently failed to file a client's tax returns on time. See also **In re Bernstein** [discussed under 1.3:200, above].

In **In re Shelnutt, 719 A.2d 96 (DC 1998)**, the respondent was found to have violated Rule 1.3(c) when, by reason of respondent's neglect, his client spent extra time in jail awaiting release on bail. Rejecting respondent's argument that because a warrant for the client's arrest was then outstanding, the client had not been harmed, the Court asserted that "Professional disciplinary violations arise from malfeasance, not the actual harm imposed upon a client," and quoted **In re Banks, 461 A.2d 1038, 1061 (DC 1983)** as asserting that "prejudice to a client is not an element of a charge of neglect, although . . . [it] may be relevant on the issue of sanctions."

1.4 Rule 1.4 Communication

1.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.4
- Background References: ABA Model Rule 1.4, Other Jurisdictions
- Commentary:

1.4:101 Model Rule Comparison

DC Rule 1.4(a) and (b) are identical to Model Rule 1.4(a) and (b). Paragraph (c) of the DC Rule, which has no counterpart in the black letter Model Rules, sets out a requirement that a lawyer who receives an offer of settlement in a civil case or a proffered plea bargain in a criminal case must communicate it promptly to the client. Comment [1] to the Model Rule says a lawyer *should* promptly communicate such an offer, unless prior discussions with the client have made it clear that the offer is unacceptable, but the DC Rule changes the precatory *should* to a mandatory *must*, in terms eliminates the exception resting on prior discussions with the client, and puts the provision into the black letter text (while amending Comment [1] correspondingly). The addition of paragraph (c) to the DC Rule resulted from a proposal of the DC Bar's Legal Ethics Committee to amend DR 7-104(A)(1) (the predecessor of Rule 4.2) to include such a requirement — a proposal that was superseded by the development of the Model Rules. The Ethics Committee's proposal reflected advice of the Office of Bar Counsel that there was a recurring problem of lawyers apparently failing to communicate such offers to clients. The Jordan Committee chose to make this change in Rule 1.4 rather than Rule 4.2.

The ABA Ethics 2000 Commission recommended and the ABA adopted a number of changes to Model Rule 1.4, identifying with greater specificity the various elements of the lawyer's duty to keep the client reasonably informed about the status of a matter, and consolidating all discussions of the duty to communicate in that Rule. A number of changes were also made in the Comments to the Model Rule, significantly expanding the discussion regarding communications with the client and providing examples and suggesting "best practices." The DC Rules Review Committee considered the ABA's changes, but preferred to stick with the DC Rule as it stood, noting in particular that "the obligation to communicate settlement offers to the client is sufficiently important that it should be retained in the text of Rule 1.4(c) rather than be included as a comment."

1.4:102 Model Code Comparison

Rule 1.4 had no direct counterpart in the Model Code, although DR 6-101(A)(3) provided that a lawyer must not "neglect a legal matter entrusted to him," and DR 9-102(B)(1) [DR 9-103(B)(1) in the DC Code] required that a lawyer promptly notify a client of receipt of funds and other properties. In addition, EC 7-7 stated that it was for the client to decide whether to accept a settlement offer or waive an affirmative defense; EC 7-8 said a lawyer should "exert his best efforts" to insure that the client's decisions were fully informed; and EC 9-2 stated that "a lawyer should fully and promptly inform his client of material developments."

1.4:200 Duty to Communicate with Client

- Primary DC References: DC Rule 1.4
- Background References: ABA Model Rule 1.4, Other Jurisdictions
- Commentary: ABABNA § 31:501, ALI-LGL § 20, Wolfram §§ 4.5,, 4.6

In **United States v. Morrison, 98 F.3d 619 (DC Cir 1996)**, the court observed that a lawyer need not "as a general matter, inform the client of every incidental tactical decision he or she will implement at trial," citing MR 1.4, Comment [2]. The context was a claim of ineffective assistance of counsel, turning on counsel's having allowed the government to introduce in evidence a tape recording made by an informer in a conversation with the defendant, which was susceptible to both an inculpatory and an exculpatory interpretation.

In disciplinary cases, a violation of Rule 1.4 appears invariably to be found in conjunction with violations of other rules as well — typically one or more of Rules 1.1 (competence), 1.2 (scope of representation), and 1.3 (diligence), and sometimes others. Thus, in **In re Roxborough, 675 A.2d 950 (DC 1996)**, the court approved an increase in the severity of a 30-day suspension by the additional imposition of a requirement of a showing of fitness before reinstatement, in a case in which the Board on Professional Responsibility had found violations of Rules 1.3(c) (failure to act with reasonable promptness), 5.1(b) (failure to supervise associate) and 1.1 (failure to provide competent representation), as well as Rule 1.4(a). The Court adopted the Board's characterization of the case as involving "a total disregard of the interests of a client, a failure to provide even the most minimal representation and to take the most basic steps to protect the client, an extreme case of what the hearing committee rather charitably concluded was 'neglect and inattention' rather than intentional failure to seek the lawful objectives of the client." *Id.* at 952. See also **In re Bernstein, 707 A.2d 371 (DC 1988)** [discussed under 1.3:200, above].

In **In re Outlaw, 917 A.2d 684 (DC 2007)**, the respondent had been found to have violated DC Rules 1.1(a) and (b) and 1.3(a) by negligently allowing the statute of limitations on the client's tort claim to expire before initiating meaningful negotiations with the defendant's insurer [as explained more fully under 1.1:220 and 1.3:200, above], and in addition was found to have violated DC Rule 1.4(a) by failing to advise her client in a timely fashion of her mistake and Rule 1.4(b) by failing to explain the matter to the extent necessary for the client to make an informed decision about the representation. Because the respondent was found to have deliberately avoided disclosing to the client the true posture of the case, her misconduct was held to have violated DC Rule 8.4(c) as well.

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, below] was a violation of Rule 1.4.(a)'s requirement that a lawyer keep the client reasonably informed about the status of a matter. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under

which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients. A point the Court made about the Rule 1.4(a) violations was that under that Rule "lawyers not only must respond to client inquiries but also must initiate contact to provide information when needed." *Id.*. at 915.

In **In re Ryan, 670 A.2d 375 (DC 1996)**, the court approved the imposition of a four-month suspension with a requirement of proof of fitness before reinstatement, and payment of restitution to certain clients, for a pattern of neglect of immigration clients involving violations of eight different provisions of the Code and of the Rules, including a failure to keep a client informed of a matter in violation of Rule 1.4(a).

In **In re Sumner, 665 A.2d 986 (DC 1995)**, the court approved the imposition of a thirty-day suspension on a lawyer who had violated several of the rules, including Rule 1.4(a), by failing to keep his client reasonably informed of how he could be reached or to inform the client that court deadlines had been set that the lawyer would not meet.

DC Ethics Opinion 327 (2005) [which is discussed more fully under 1.7:330, below] addressed a joint representation in which the law firm's retainer agreement expressly provided that any information disclosed in connection with the representation "may be shared" with the other clients in the same matter. The Opinion held that the law firm had an affirmative obligation under Rule 1.4 to disclose any information bearing on the representation that might affect the interests of the non-disclosing clients once it learned the information, even if the law firm knew that the disclosing client did not wish to reveal the information to the other clients.

DC Ethics Opinion 296 (2000) [which is discussed more fully under 1.7:330, below] pointed out that in a joint representation a lawyer owes each client obligations both to preserve client confidences under Rule 1.6 and to keep the client informed, under Rule 1.4; and that if one client reports a confidence that may not be shared with the other client, but whose disclosure to that client is required under Rule 1.4, the lawyer has a conflict that requires withdrawal from the representation of both clients. In the particular circumstances there addressed, a law firm jointly represented an employer and its alien employee in seeking a visa for the employee, without any advance understanding as to whether client confidences with respect to the representation would be shared, and the problem arose because the employee disclosed to the law firm that she had fabricated the credentials on which the visa had been based.

DC Ethics Opinion 282 (1998) [which is more fully discussed under 1.6:320, below] held that a lawyer who proposes to engage a social worker to provide services in connection with a representation must inform the client that the social worker may be obligated by statute to report suspected child abuse or neglect, and must leave to the client the decision whether to engage the social worker.

DC Ethics Opinion 273 (1997) addresses a number of ethical issues relating to movement of lawyers between firms, which are the subject of frequent inquiries to the Bar's ethics counsel. One such issue concerns communications with clients by a lawyer leaving a firm. The **Opinion** holds that Rule 1.4, imposing an obligation on a lawyer to keep a client informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in most circumstances will require the lawyer to communicate the prospective change of affiliation to the client, and to do so sufficiently in advance of the departure to give the client adequate opportunity to consider by whom it wants to be represented. The **Opinion** goes on to say that the lawyer's communication should state the fact and the date of the change in affiliation and whether the lawyer wishes to continue the representation, and that the lawyer should be prepared to provide the client with information about the new firm sufficient to enable the client to make an informed decision — including any pertinent information regarding conflicts of interest affecting representation by the lawyer's new firm. The **Opinion** also notes, however, that communications exceeding the foregoing requirements imposed by the ethical rules — "for example, an active solicitation of the client to leave the lawyer's current firm and join the lawyer at the new firm" — could run afoul of the lawyer's obligations under partnership law, corporate law or the common law of obligations of employees. And, the **Opinion** notes, under such law a departing lawyer "may also be obliged to inform the lawyer's firm, at or around the time the lawyer so notifies clients," of the planned departure; but observes that there appears to be no ethical significance to whether the client or the lawyer is first informed. The **Opinion** notes that another question frequently posed to the Bar's ethics counsel is whether a departing lawyer, prior to departure, may recruit other lawyers or non-lawyer personnel to accompany the lawyer to the new firm; it observes that this issue depends primarily if not entirely on law other than ethics law, such as the common law of interference with business relations and fiduciary obligations.

Opinion 273 also addresses the issue of what files or other documents a departing lawyer may take with him or her in leaving a firm, observing that this question is only partially answered by the Rules of Professional Conduct. As to client files, the initial inquiry is as to who will continue to represent the client after the lawyer's change of affiliation, which is determined by Rule 1.16(d)'s requirement that the lawyer who parts company with the client must "surrender . . . papers and property to which the client is entitled." After noting prior opinions with regard to the limited availability of retaining

liens to secure unpaid fees, under the DC Rules, the **Opinion** observes that other questions of ownership, as between lawyer and client, and between departing lawyer and departed firm, are not governed primarily by the Rules of Professional Conduct, but rather by statutory and common law rules. The **Opinion** also points out that when a lawyer has departed for another firm, Rule 7.5(a)'s prohibition on use of a firm name that is misleading requires omission of the lawyer's name from the name of the former firm. And the **Opinion** points out that the lawyer's obligation to protect confidences and secrets of clients under Rule 1.6 continues as to clients left behind in the former firm and applies as well to confidential information in documents the lawyer brings

along to the new firm. The **Opinion** also addresses retaining liens under DC Rule 1.8(i) [see 1.8:101, below] and disqualifications, relating to clients of the migrating lawyer's former law firm, under Rule 1.10(b) [see 1.9:300, below].

DC Ethics Opinion 270 (1997), discussed more fully under 1.16:500 below, held that where a subordinate lawyer learns that an employing lawyer has sent a client what purports to be copies of correspondence written on the client's behalf, but where the letters were in fact never sent, the subordinate lawyer, if continuing to represent the client, has a duty under Rule 1.4 to see to it that the client is informed of the deception.

DC Ethics Opinion 252 (1994) discussed the obligations of a lawyer appointed guardian ad litem in a child abuse and neglect proceeding with respect to potential tort claims of the child. The opinion concluded that although such a guardian ad litem does not have an obligation to initiate tort claims on behalf of a child, nonetheless the lawyer/guardian who identifies significant potential claims is obligated by, *inter alia*, Rule 1.4 to notify the child or those responsible for the child's care of the potential claims.

DC Ethics Opinion 238 (1993) relied on Rule 1.4(a) as well as Rule 1.5(b) in concluding that, when a written fee agreement is required, the agreement must adequately inform the client of the basis or rate of the fee. [See also discussion of **Opinion 238** under 1.5:210, below.]

DC Ethics Opinion 221 (1991) addressed an employment agreement between a firm and its lawyers that limited communications by a departing lawyer with clients of the firm. The **Opinion** referred to Rule 1.4 in holding that such a restriction, insofar as it prohibited the departing lawyer from responding to client-initiated inquiries, was impermissible.

Under the Code, failures to communicate with a client were generally addressed under DR 6-101(A)(3). See, e.g., **In re Rosen, 470 A.2d 292 (DC 1983)**.

DC Ethics Opinion 116 (1982), interpreting DR 6-101(A)(3), *inter alia*, held that in ordinary circumstances a lawyer who drafts a will for a client is not ethically obliged to inform the client of subsequent changes in the law that might make a change in the will desirable, nor obliged so to advise former clients; but *does* have such an obligation where the client has entrusted his or her estate planning to the lawyer on a continuing basis.

DC Ethics Opinion 284 (1998), discussed more fully under 1.5:500 below, addresses the obligations of a lawyer who uses a temporary lawyer in the representation of a client, with respect to both disclosure of that fact to the client and permissible billing for the work of the temporary lawyer.

1.4:300 Duty to Consult with Client

- Primary DC References: DC Rule 1.4(b)
- Background References: ABA Model Rule 1.4(b), Other Jurisdictions
- Commentary: ABABNA § 31:501, ALI-LGL § 20, Wolfram § 4.5

In In re Chisholm, 679 A.2d 495 (DC 1996), the court approved the imposition of a six-month suspension and payment of restitution on a lawyer arising out of his failure over a period of more than six years to pursue an appeal from a deportation order entered against his client. This failure was found to involve the violation of numerous rules including Rule 1.4(a) and (b), for failure to keep the client reasonably informed about the status of the matter and failure to explain the matter to the client to the extent reasonably necessary to permit the client to make informed decisions.

In **In re Hunter, 734 A.2d 654 (DC 1999)**, the Court approved the imposition of reciprocal discipline upon a lawyer who had been suspended by the US District Court for ethical violations arising out of her representation of a criminal defendant in a case in which an officer with whom the lawyer was romantically involved had participated in the arrest of a co-defendant and was to be a government witness at trial. The District Court had found the lawyer's conduct violative of, *inter alia*, Rules 1.3(a),1.4(b), 1.7(b)(4), 8.4(a) and 8.4(d).

DC Ethics Opinion 256 (1995) addressed the problem of inadvertent disclosure of privileged information to opposing counsel, concluding, *inter alia*, that a lawyer who does not learn of the inadvertence until after reading the privileged material (*i.e.*, who was not forewarned that the material was transmitted by mistake) is free to make use of the material in furtherance of the representation of the lawyer's client. The **Opinion** observed in a footnote (n. 7), however, that this did not imply that a lawyer *must* retain or use inadvertently disclosed materials but suggested that, depending on the significance of the documents, this might be a matter on which consultation with the client is necessary, under Rules 1.2(a) and 1.4(b). **[Opinion 256** is also discussed at 1.6:220 and 8.4:400 below.]

DC Ethics Opinion 235 (1993) held (at a time when DC law did not yet provide for the creation of "limited liability partnerships" or "limited liability companies") that lawyers in a firm organized under the law of another jurisdiction as one of those kinds of entities could practice in the District of Columbia under the name of the firm, provided that the name used included the full identifying phrase, and not merely the abbreviation "LLP" or "LLC". The opinion observed in passing that Rules 1.4(b) and 7.1(a) were satisfied by use of the abbreviation "PC" or "PA" in the case of an incorporated law firm, since DC law specifically provided for such entities. [This opinion has effectively been overruled by amendment of the DC Code to authorize both LLPs **(DC Code § 41-143 to 148)** and LLCs **(DC Code § 29-1301 et seq.)**.]

DC Ethics Opinion 228 (1992) held that, although a lawyer is likely to be disqualified by Rule 3.7 from representing a client at trial because the lawyer is a necessary witness, this does not disqualify the lawyer from continuing the representation in pretrial matters. It also observed that, once it becomes apparent that a lawyer likely will be disqualified under Rule 3.7, the lawyer is obliged by Rule 1.4(b) to inform the client of this development and seek the client's consent to continued pretrial representation.

1.4:400 Duty to Inform the Client of Settlement Offers

- Primary DC References: DC Rule 1.4(c)
- Background References: ABA Model Rule 1.4, Other Jurisdictions
- Commentary: ABABNA § 31:501, ALI-LGL § 20, Wolfram § 4.5

As noted under 1.4:101 above, DC Rule 1.4 includes in paragraph (c) a requirement that a lawyer who receives an offer of settlement in a civil case or a proffered plea bargain in a criminal case inform the client promptly of the substance of the offer. In the Model Rule, this is treated only in Comment [1], and there only with the precatory verb *should*.

In **In re Peartree, 672 A.2d 574 (DC 1996)**, the court approved imposition of reciprocal discipline on the basis, *inter alia*, of the failure of the respondent to communicate a settlement offer, which would have been a violation of DC Rule 1.4(c) (and Rule 1.4(a) as well).

In **DC Ethics Opinion 263 (1996)**, the inquirer was a lawyer representing victims of domestic violence in proceedings in Superior Court. One remedy for such clients is a Civil Protective Order (CPO), prohibiting the respondent-perpetrator from coming into physical proximity of the petitioner-victim. When a CPO is violated, the petitioner may bring a motion for criminal contempt against the respondent, and in such a case, an indigent respondent is entitled to have counsel appointed to represent him in the criminal contempt proceeding. The petitioner may also move to modify the terms of the CPO to make it more inclusive, but the lawyer appointed to defend against the contempt motion will not necessarily represent the respondent in respect of the motion to modify. The principal question presented was whether, in a case in which the appointed lawyer's representation was limited to the contempt motion, the petitioner's lawyer was barred by Rule 4.2 from communicating directly with the respondent about a possible modification of the protective order without the consent of respondent's lawyer. The **Opinion** concluded that the two proceedings were sufficiently closely related to constitute one "matter" for purposes of Rule 4.2, so that the petitioner's lawyer could not contact the respondent absent his lawyer's consent. The **Opinion** also concluded that, if respondent's lawyer withheld consent to direct contact, then that lawyer would have an obligation pursuant to Rule 1.4(a) to pass on to the respondent any communications from the petitioner's lawyer.

1.5 Rule 1.5 Fees

1.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.5
- Background References: ABA Model Rule 1.5, Other Jurisdictions
- Commentary:

1.5:101 Model Rule Comparison

Prior to the changes made in the Model Rules on the recommendation of the Ethics 2000 Commission, paragraph (a) of DC Rule 1.5 and its Model Rule counterpart were identical. The Model Rule version was changed in 2002 by rephrasing the basic obligation of charging only a reasonable fee and extending the reasonableness requirement to expenses, but no corresponding change was made in the DC Rule. The numbered subparagraphs of paragraph (a), listing factors to be considered in determining reasonableness, remain identical in the two Rules. All of the remaining provisions of the DC Rule, however, differ, generally significantly, from the Model Rule.

Paragraph (b) of the DC Rule *requires* a written statement of the hourly rate or other basis of the fee when the "lawyer has not regularly represented the client"; MR 1.5(b) states that a writing is preferable, but not required, in these circumstances. Comments [2] and [3] to the DC Rule elaborate on the writing requirement, making clear, *inter alia*, that the requirement of a written statement of the rate or other basis of a fee can be satisfied by a standardized letter, memorandum or pamphlet. That paragraph in the Model Rule was modified in the Ethics 2000 Commission changes by adding a requirement that the scope of the representation and the expenses for which the client will be responsible be communicated to the client, and this change has also been made in the DC Rule. There were two further changes in the Model Rule's paragraph (b) that were not copied by the DC Rule: the limitation of the Rule's requirements to clients who have not previously been represented by the lawyer was omitted, and the addition of an exception for instances where the lawyer will charge a regularly represented client on the same basis or rate. The DC Rules Review Committee viewed the latter provision as suggesting that a lawyer could unilaterally change a fee agreement without the client's agreement.

Paragraph (c) of the DC Rule, dealing generally with contingent fees, also was the same as in the Model Rule before 2002 and they remain so in substance, each having been modified, in slightly different phraseology, to add a requirement that a contingent fee agreement state whether the client is to be liable for expenses regardless of outcome.

Paragraph (d) of the DC Rule does not, like its Model Rule counterpart, forbid contingent fees in certain domestic relations matters, though it does retain the Model Rule's prohibition of contingent fees in the representation of criminal defendants. DC

Comment [7] states that contingent fees in domestic relations cases, "while rarely justified," are not forbidden, and without explaining why they are rarely justified goes on to explain that they are permitted in order to enable clients who could not otherwise afford a lawyer to get representation. Neither the Ethics 2000 Commission nor the Rules Review Committee recommended any change to this paragraph.

Paragraph (e) of both the DC Rule and the Model Rule, on division of fees, are in substance the same, though phrased somewhat differently. The Model Rule was modified in 2000 to drop a requirement in subparagraph (1) for a written agreement when each lawyer involved in a representation assumes joint responsibility; the DC Rule never had such a requirement.

Paragraph (f) of the D.C. Rule, which has no counterpart in the Model Rule, was added effective November 1, 1996 as a result of a recommendation of the Peters Committee, which in turn responded to a request by Bar Counsel. In effect, it restores DR2-108(A)'s prohibition on an *illegal* fee, by stating that fees prohibited either by paragraph (d) or by law are per se unreasonable.

Numerous changes in the Comments to Model Rule 1.5 were made pursuant to Ethics 2000 Commission recommendations, but changes to the DC Rule were few and modest.

1.5:102 Model Code Comparison

DR 2-106(A) prohibited illegal or clearly excessive fees. Rule 1.5(a) shifts the standard from excessiveness to reasonableness — but, by reason of the 1996 amendment just described, preserves the prohibition on illegal fees. However, the factors for determining reasonableness are substantially the same as those in DR 2-106(B) for determining excessiveness. The requirement of a writing, in paragraph (b) of DC Rule 1.5 with respect to clients not regularly represented, and in paragraph (c) of both the DC and the Model Rule with respect to contingent fee arrangements, had no counterpart in the Model Code, although EC 2-19 stated that it is usually "beneficial" to have a writing, particularly when the fee is contingent. Rule 1.5(d) continues the prohibition in DR 2-106(C) of contingent fees in criminal cases. Rule 1.5(e) allows division of fees if the division is proportionate to the services performed by each lawyer *or* each lawyer assumes joint responsibility for the representation; DR 2-107(A)(2) allowed division of fees only when the division was in proportion to the services performed and responsibility assumed. Both the Rule and the Code provisions require that the client be fully informed and consent, but the DC Rule requires that the client be fully informed in writing. Both require that the total fee be reasonable.

1.5:200 A Lawyer's Claim to Compensation

- Primary DC References: DC Rule 1.5
- Background References: ABA Model Rule 1.5, Other Jurisdictions
- Commentary: ABABNA § 41:101, ALI-LGL §§ 38-41, Wolfram §§ 9.1=9.6

In **Hamilton v. Ford Motor Co., 636 F.2d 745 (DC Cir 1980)**, the court held that attorneys fees awarded as a sanction for discovery abuse pursuant to FRCP Rule 37 belong to the client, not the client's lawyers, where the representation is pursuant to a retainer agreement providing only that the lawyers' fee would be one-third of any recovery. The court relied on its earlier decision in **In re Laughlin, 265 F.2d 377 (DC Cir 1959) (per curiam)**, where lawyers who had represented the natural guardian of an infant in a personal injury suit pursuant to a contingency fee agreement had sought additional compensation for handling the matter on appeal, and the court held that in the absence of a specific provision for additional fees the retainer agreement must be construed to include the services rendered on appeal.

1.5:210 Client-Lawyer Fee Agreements

DC Ethics Opinion 238 (1993) emphasizes that when a written fee agreement is required by Rule 1.5(b), the agreement must adequately inform the client of the basis or rate of the fee. In this instance, the opinion found the agreement inadequately specified what if any charges would be assessed for consultations beyond a single one identified in the agreement.

1.5:220 A Lawyer's Fee in Absence of Agreement

In **Lewis v. Secretary of HHS, 1990 US Dist LEXIS 16684 (DDC 1990)**, a lawyer who had successfully represented a Social Security claimant had secured an award of fees pursuant to 14 USC § 406, to be paid out of the benefits recovered. On the claimant's motion, the Court set aside the finding that the claimant had not agreed to pay the lawyer any fee. The Court noted, *inter alia*, that there was no retention letter, but the decision did not turn on the lack of a writing, or make any reference to Rule 1.5.

1.5:230 Fees on Termination [see 1.16:600]

Kaushiva v Hutter, 454 A.2d 1373 (DC), cert. denied, 464 US 820 (1983), sets out the DC rule regarding the entitlement of a lawyer who was discharged before completion of services to be rendered pursuant to a contingent fee agreement: namely, that if the engagement is terminated by the client without cause, and if at the time it is terminated the lawyer has substantially performed the engagement, the lawyer is entitled to the full amount of the fees specified in the fee agreement; but if the lawyer renders less than substantial performance, *quantum meruit* is the appropriate measure of the lawyer's entitlement. The DC Court of Appeals had occasion to revisit the **Kaushiva** rule in **In Re Waller, 524 A.2d 748 (DC 1987)**, where it reviewed a split decision of the DC Board on Professional Responsibility. The respondent Waller had entered into a one-third contingent fee agreement in a personal injury action; had been discharged by the client early on, without fault on his part; and had continued nonetheless to pursue the representation and had obtained a settlement offer from an insurance carrier, on the basis of which he claimed a substantial fee. A majority of the Board on Professional Responsibility found that Waller had charged an excessive fee in the circumstances, but three dissenting members were of the view that he had substantially performed the engagement up to the point of termination, and that this meant, under **Kaushiva**, that he was entitled to the entirety of the fee. The DC Court of Appeals, agreeing with the majority of the Board, held in substance that "substantial performance" referred to substantial performance of the entire engagement, not merely that portion of the engagement preceding termination.

DC Ethics Opinion 264 (1996) [discussed more fully at 1.5:420 below] addresses the applicability of Rule 1.5(a)'s requirement of reasonableness to the amount of a fee advance that may properly be retained by the lawyer upon premature termination of the engagement.

DC Ethics Opinion 37 (1977) addresses three questions concerning provisions in a contingent fee retainer agreement respecting premature termination of the representation: whether the agreement could provide that, in the event the client discharged the lawyer, the lawyer would be permitted to charge an hourly rate or a percentage of the largest offer received as of the date of discharge, whichever was greater; whether such a provision would also be permissible if termination came about as a result of withdrawal by the lawyer, rather than discharge by the client; and whether it would be ethically proper to include in the retainer agreement a provision allowing the lawyer to collect the stipulated fee directly out of any ultimate recovery. The Committee opined that, with appropriate cautions and limitations, all three of the provisions would be ethically proper under the Code.

1.5:240 Fee Collection Procedures

DC Ethics Opinion 298 (2000) expanded upon **DC Ethics Opinion 60 (undated),** discussed immediately below. While the "Statement of Principles with Respect to the Practice of Law" formulated by representatives of the ABA and collection agencies which was the principal focus of **Opinion 60** concerned the proper conduct of collection agencies, **Opinion 298** focussed on the lawyer's ethical obligations in connection with the use of collection agencies. It held that lawyers may not sell client accounts outright to such agencies, but must retain sufficient control of the accounts to insure that the lawyer's ethical obligations with respect to such accounts are observed. The principal obligation thus entailed is that of preserving client confidences and secrets, under Rule 1.6: as to this, **Opinion 298** held that a lawyer could properly disclose to the collection agency only such information as is reasonably necessary to recover the debt; and then only if the lawyer has assurance, pursuant to Rule 5.3, that the agency will itself preserve the confidentiality of such information. **Opinion 298** also reiterated the observation in **Opinion 60** that fee litigation should be a last resort, after every effort has been made to settle the matter amicably, and called attention to the requirement that DC lawyers must arbitrate fee disputes if the client so requests; see 1.5:250, below.

DC Ethics Opinion 60 (undated) concluded that referring unpaid fees to a collection agency was not prohibited by the Code, though relevant considerations with respect to such referrals were set out in "Statement of Principles with Respect to the Practice of Law," formulated by representatives of the ABA and collection agencies, and that the Code did not prohibit lawsuits by lawyers to collect delinquent fees.

DC Ethics Opinion 59 (undated) addressed at some length an inquiry by Bar Counsel as to the ethical propriety under the Code of a lawyer asserting a retaining lien on a client's file for the purpose of collecting unpaid fees when the lawyer is discharged. The Legal Ethics Committee opined in substance that assertion of a retaining lien in such circumstances is not itself unethical, but that the client's interests would prevail over the lawyer's rights where (a) adequate security was given, (b) the client could not afford to pay, or (c) the file was necessary to defend against a serious criminal charge; and that lawyers' conduct in general should be guided by the directive in DR 2-110(A)(2), that a lawyer withdrawing from a matter take reasonable steps to avoid "foreseeable prejudice" to the former client. [A series of subsequent DC Ethics Opinions and the subsequently adopted DC Rule 1.8(i) have put stringent limits on use of retaining liens to collect delinquent fees: see 1.8:1140 and 1.16:500, below.]

1.5:250 Fee Arbitration

Rule XIII of the DC Court of Appeals Rules Governing the District of Columbia Bar has provided, since January 1, 1995, that lawyers "subject to the disciplinary jurisdiction of this Court" shall be deemed to have agreed to binding arbitration of disputes over fees and disbursements for legal services when such arbitration is requested by a present or former client, if (i) the client was a resident of the District of Columbia when the lawyer was engaged, or (ii) a substantial portion of the services were performed in the District of Columbia, or (iii) the services included representation before a DC court or government agency. The Rule provides that, unless the lawyer and client agree otherwise, the arbitration shall be before the DC Bar's Attorney-Client Arbitration Board, pursuant to the rules promulgated by that Board.

In **Haynes v. Kuder, 591 A.2d 1286, reh'g denied, in part, 1991 DC App Lexis 204 (DC 1991)**, a client sued her former lawyer for malpractice in a domestic relations matter, and the lawyer removed the dispute to compulsory arbitration on the basis of a provision in the engagement letter requiring arbitration of fee disputes. The lawyer argued successfully that the arbitration covered malpractice claims as well as fee disputes because it referred to "defenses or counterclaims to such a claim [for unpaid fees], whether based on a claim of inadequate representation or any other ground." *Id.* at 1289. Noting the holding of **DC Ethics Opinion 190 (1988)** that a lawyer must make full disclosure regarding the ramifications of an agreement to arbitrate, the court held (with one judge dissenting) that adequate disclosure had been made in the agreement itself. *Id.* at 1291-92.

DC Ethics Opinion 218 (1991) asserted that a clause in retainer agreements providing for mandatory arbitration of fee disputes before the DC Attorney Client Arbitration Board was permissible so long as the client is advised in writing of the availability of counselling by the ACAB staff and the client consents in writing. The Committee distinguished **DC Ethics Opinion 211 (1990)**, which held that a lawyer could not insist on an agreement committing the client to binding arbitration of both fee and malpractice disputes unless the client was advised by other counsel, on the basis that the agreement before it concerned only fee disputes and not malpractice as well; and that as to fee disputes it referred only to the ACAB and not to the American Arbitration Association as well.

1.5:260 Forfeiture of Lawyer's Compensation

In **Hendry v. Pelland, 73 F.3d 397 (DC Cir 1996)**, the court held that former clients were entitled, on proof of a breach of duty of loyalty by the lawyer (consisting in this instance of representation of multiple clients with conflicting interest, in violation of DR 5-105), to forfeiture of fees even in the absence of proof of any injury.

1.5:270 Remedies and Burden of Persuasion in Fee Disputes

[The discussion of this topic has not yet been written.]

1.5:300 Attorney-Fee Awards (Fee Shifting)

- Primary DC References: DC Rule 1.5
- Background References: ABA Model Rule 1.5, Other Jurisdictions
- Commentary: ABABNA § 41:311, Wolfram § 16.6

Fee shifting is a subject not addressed by DC Rule 1.5, which deals only with the propriety of fees, not with who pays them; rather, fee-shifting is governed by the common-law American Rule, which requires litigants to pay their own attorney's fees, and by the common-law and statutory exceptions to the Rule.

1.5:310 Paying for Litigation: The American Rule

In **Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)**, the Supreme Court reasserted the primacy of the American Rule, holding that with limited common-law exceptions, "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* at 262. The Court later reiterated in **Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters & Joiners, 456 U.S. 717 (1982)**, that attorneys' fees cannot be awarded in the absence of a common-law exception, or an express statutory provision authorizing such fees.

Alyeska Pipeline recognized several common-law exceptions. First, the common-fund or common-benefit exception allows "a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including attorney's fees, from the fund or property itself or directly from the other parties enjoying the benefit." 421 U.S. at 257. Second, attorneys' fees can be equitably assessed for "willful disobedience of a court order . . . as part of the fine to be levied." *Id* at 258 (citation omitted). Third, they may be awarded when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id*. at 258-59 (citation omitted). Finally, the Court recognized that a statute or a provision of a contract may provide for fee-shifting. *Id*. at 257.

1.5:320 Common-Law Fee Shifting

Both the D.C. Circuit and the D.C. Court of Appeals have consistently followed the Supreme Court's formulation of the modern American Rule and the exceptions to it laid out in **Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)**, albeit sometimes in variant phraseology. In **Bebchick v. Washington Metropolitan Area Transit Commission, 805 F.2d 396 (DC Cir 1986)**, the D.C. Circuit described the "three judge-made exceptions" to the American Rule: (1) "willful violation of a court order"; (2) "bad faith or oppressive litigation practices"; and (3) "where the successful litigants have created a common fund for recovery or extended a substantial benefit to a class." *Id*. at 402 n.18 (quoting Justice Marshall's dissent in **Alyeska Pipeline, 421 U.S. at 275**). The D.C. Court of Appeals presented the three judicially created exceptions in the same order as the Court in **Alyeska Pipeline** in **In Re Antioch University, 482 A.2d 133 (DC 1984)**: (1) creation or defense of a common fund; (2) willful disobedience of a court order; and (3) bad faith, vexatious, wanton or oppressive actions. *Id*. at 136.

Bad Faith or Oppressive Litigation

The most commonly invoked exception to the American Rule is that for litigation brought in bad faith or for the purpose of oppressing the other party. In **1901 Wyoming Ave. Coop. Assoc'n v. Lee, 345 A.2d 456, 464-65 (DC 1975)**, the court defined the bad faith exception as "where a party brings or maintains an unfounded suit or withholds action to which the opposing party is patently entitled, as by virtue of judgement or because of a fiduciary relationship, and does so in bad faith, vexatiously, wantonly, or for oppressive reasons." In **Schlank v. Williams, 572 A.2d 101, 108 (DC 1990)**, the court reasoned that because the intent behind the bad faith exception is deterrence, not the compensation of worthy litigants, the exception should be applied only in extraordinary circumstances. In **Launay v. Launay, Inc., 497 A.2d 443, 450 (DC 1985)**, the court reasoned that, because the bad-faith exception applies only in exceptional circumstances, there must be either an explicit finding that the losing party acted in bad faith or support in the record to justify such a finding.

Wrongful Involvement in Litigation

A variant of the bad faith litigation exception is the exception for wrongful involvement in litigation. The D.C. Circuit in **Nepera Chemical, Inc. v. Sea-Land Service, Inc., 794 F.2d 688 (DC Cir 1986)**, described the wrongful involvement in litigation exception (which it also referred to as the "third-party exception," *id*. at 697) as "permitting a plaintiff to recover from the defendant reasonable attorneys' fees incurred in prior litigation against a third party where they were a natural consequence of the defendant's wrongful act." *Id*. at 696. In **Safeway Stores, Inc. v. Chamberlain Protective Services, Inc., 451 A.2d 66 (DC 1982)**, the court explained that, to "enjoy the benefit of this narrow exception, a party must show that: (1) [t]he plaintiff must have incurred attorney's fees in the prosecution or defense of a prior action; (2) the litigation ordinarily must have been with a third party and not with the defendant in the

present action; and (3) the plaintiff must have become involved in such litigation because of some tortious act of the defendant." *Id*. at 69 (alteration in original). In a subsequent case, **Dalo v. Kivitz, 596 A.2d 35 (DC 1991)**, the court, refusing to apply the exception where the litigation was between the same two parties, noted that the exception is commonly applied where clients have been forced into litigation by their lawyer's prior malpractice. *Id*. at 37-38. **Auxier v. Kraisel, 466 A.2d 416 (DC 1983)**, held that, although the recovery of attorneys' fees under the wrongful-involvement-in-litigation exception is limited to a reasonable amount, a distinction should be made between fees that had in fact been paid and those that had been billed but not yet paid: as to the former, the amount paid is *prima facie* proof of reasonableness. *Id*. at 420-21.

Common Fund or Common Benefit

The DC Circuit in **Swedish Hospital Corp. v. Shalala, 1 F.3d 1261 (DC Cir 1993)**, determined that the percentage-of-fund method of calculating is preferable to the lodestar method in common-fund class action cases, *id*. at 1265-71; a view reiterated by the court in **Democratic Central Committee v. Washington Metropolitan Area Transit Commission, 3 F.3d 1568, 1573 (DC Cir 1993) (per curiam)**. For fee-shifting cases in which the lodestar method may still apply, the court furnished a detailed example of that method's calculation process in **Bebchick v. Washington Metropolitan Area Transit Commission, 805 F.2d 396 (DC Cir 1986)** (a common fund case).

An extension of the common-fund exception — the common-benefit exception — was recognized by the Supreme Court in **Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970)**. The exception covers cases where a common benefit accrues to a group of which the prevailing party is a member but where the benefit does not take the form of a fund. *Id*. at 392. The exception was first recognized by the D.C. Court of Appeals in **District of Columbia v. Green, 381 A.2d 578 (DC 1977)**, where the plaintiffs seeking an award of fees had successfully prevented the assessment of an illegally increased property tax on a large number of District of Columbia residents. *Id.* at 579. Applying the elements of a common-benefit case as identified by the Supreme Court in **Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)**, the court in **Green** held that the benefited class was reasonably small, with easily identifiable members, even though it consisted of 77,485 taxpayers, and the court determined that both the benefit and the cost of the benefit could be traced with accuracy. *Id*. at 583-84. The court held, however, that although a benefit common to the class had been conferred, making appropriate an award of attorney's fees to be borne by the beneficiaries, the fees could not appropriately be drawn from the District of Columbia's general public funds because the fit between those benefited (single family residential taxpayers) and those who would be burdened if general public funds were drawn on (all DC taxpayers) was too inexact. *Id*. at 584-85. The court remanded the case for a determination of the feasibility of assessing the members of the benefited class to pay the attorneys' fees sought. *Id*. at 586-87.

On the basis that the common-benefit exception applies only to those who have primarily prevailed in the underlying litigation, the court in **In Re Antioch University, 482 A.2d 133 (DC 1984)**, refused to uphold an award of fees to former law school deans against the university in a dispute over the administration of law school funds where the plaintiff deans had not prevailed in the underlying lawsuit. *Id*. at 137-38.

Disobedience of a Court Order

One of the exceptions to the American Rule discussed in **Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)** was for "willful disobedience of a court order . . . as part of the fine to be levied on the [offending] defendant," *id*. at 258-59, but in the District of Columbia as in many other jurisdictions the disobedience need not necessarily be *willful*.

In **D.D. v. M.T., 550 A.2d 37 (DC 1988)**, the court stated that in cases of civil contempt, "the contemnor is ordinarily required to pay the aggrieved party's counsel fees, even in the absence of a finding of willfulness." *Id*. at 44. In **Link v. District of Columbia, 650 A.2d 929 (DC 1994)**, where the District argued that the **D.D. v. M.T.** proposition was only dictum, the court was at pains to hold squarely that "the judge has the authority in a civil contempt proceeding to make an award of counsel fees in order to compensate the aggrieved party for an expense caused by the contemnor's noncompliance." *Id*. at 931 n.3. In so holding, the court also squarely addressed the fact that the Supreme Court in **Alyeska Pipeline** had referred only to "willful disobedience of a court order," pointing out that that case had not involved any disobedience of a court order nor any need for discussion of whether a finding of willfulness was a prerequisite to the award of attorney's fees in a civil contempt proceeding. *Id*. at 931-32. The court drew a distinction between fees incurred in obtaining a court order and those incurred in seeking to enforce the order by contempt, approving the award of fees only for the latter, reasoning that, because that litigation would not have been necessary had the losing party complied with the original court order, the party prevailing in the contempt hearing should not be forced to bear the cost of such corrective litigation. *Id*. at 932. The court also addressed the trial judge's view, reflected in a nominal fee award, that the award was appropriately limited to a "token sum because the fees would be paid from the public fisc and because the aggrieved party was represented without charge by a nonprofit legal services organization," *id*. at 930, and held that neither consideration was relevant in determining the appropriate amount of the fee to be awarded. *Id*. at 934.

Both the **D.D. v. M.T.** and the **Link** decisions relied on the decision of the District Court in **Motley v. Yeldell, 664 F. Supp. 557, 558 (DDC 1987)**, which also held that willfulness is not a requisite for the award of attorneys' fees for contempt. While the D.C. Circuit has not directly ruled on the issue, the court in **Food Lion, Inc. v. United Food & Commercial Workers International Union, 103 F.3d 1007 (DC Cir 1997)**, stated in a dictum that it saw "no reason why a district court should not be authorized to include legal fees specifically associated with the contempt as part of the compensation

that may be ordered to make the plaintiff whole, even absent a showing of willful disobedience by the contemnor." *Id*. at 1017 n.14.

The exception does not require that there have been a finding of contempt. Thus, in **Fullard v. Fullard, 614 A.2d 515 (DC 1992)**, attorneys' fees were held to be properly awarded on the basis of a violation of a court order despite the fact that the complainant's motion for contempt for defiance of the court order had been denied. *Id*. at 517-18.

Valid Contractual Provision

In **Urban Masonry Corp. v. N&N Contractors, Inc., 676 A.2d 26 (DC 1996)**, a contractual dispute involving conflicting fee-shifting provisions, the court held that contractual ambiguity does not require presumptive reversion to the American Rule and that, in such cases, the ambiguity must be resolved by the fact-finder. *Id*. at 33-34. Because the details of fee-shifting under this exception are contract-specific, the law of contracts determines case outcomes. *Id*. In **Oliver T. Carr Co. v. United Technologies Communications Co., 604 A.2d 881 (DC 1992)**, for example, the court upheld a contractual fee-shifting arrangement for breach of contract, and applied the contractual provision allowing for the award of "secondary fees," which are fees awarded incurred in litigation brought to enforce the contract's fee-shifting provisions. *Id*. at 885-86.

In numerous cases the courts recognize the contractual exception without applying it to the case at hand. See, *e.g.*, **Nepera Chemical, Inc. v. Sea-Land Service, Inc., 794 F.2d 688, 696-97 (D.C. Cir. 1986)**.

1.5:330 Statutory Fee Shifting

As noted in **Copeland v. Marshall, 641 F.2d 880 (DC Cir. 1980) (en banc)**, unless it is otherwise provided by the statute, the amount awarded under statutory fee shifting is determined by "the market value of services rendered." *Id*. at 894. The discussion that follows addresses only District of Columbia fee-shifting statutes, not federal ones. The District of Columbia Code provides for fee shifting in numerous circumstances. The common element among the provisions is the intention of encouraging individuals to act for the public good by lessening the personal financial burden of litigation. The fee-shifting provisions discussed below are organized under the following broad subject headings:

1. Civil Rights Proceedings;
2. Real Property and Housing-Related Proceedings;
3. Citizens' Suits and Enforcement of Environmental Regulations;
4. Eminent Domain;
5. Banking and Other Financial Transactions;
6. Proceedings on Bond or Undertaking;
7. Attachment and Garnishment;
8. Custody Proceedings;
9. Other Family Division Proceedings;
10. Consumer-Protection Proceedings;
11. Employment/Labor-Related Proceedings;
12. Anti-Fraud and Whistleblower Protection Proceedings;
13. Franchise Distributorship-Related Proceedings;
14. Insurance-Related Proceedings;
15. Elections, Initiative and Referendum Process;
16. Freedom of Information Act Proceedings;
17. Proceedings for Injury to Trade; and
18. Proceedings Regarding Corporations, Cooperatives, Partnerships and Associations.

<u>Civil Rights Proceedings</u>

The District has utilized the incentives created by fee shifting in multiple statutes seeking to protect civil rights of its citizens. The **DC Human Rights Act (DCHRA), DC Code Ann. §§ 1-2501 et seq. (1992 & Supp. 1997)**, provides in § **1-2556** a cause of action "in any court of competent jurisdiction" for claims of unlawful discriminatory practices with potential relief including (by reference to § **1-2553(a)(1)(E)**) "reasonable attorney fees." In **Shepherd v. ABC, Inc., 862 F. Supp. 486 (DDC 1994)**, the court held that the rules governing the determination of federal fee awards generally govern DCHRA fee awards as well. *Id*. at 502-03.

Civil fee-shifting provisions are also found supplementing criminal penalties. It is a crime in the District to commit a criminal act that demonstrates "an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital

status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation of the victim." **DC Code Ann. § 22-4001, 4003 (1992)**. In addition to any criminal prosecution, an aggrieved person under this act may also sue for injunctive relief or damages, and may recover reasonable attorneys' fees and costs. **DC Code Ann. § 22-4004(a) (1992)**.

Victims of violent crime may sue for compensation of economic losses resulting from the crime. The statute allows "[i]n addition to the amount of compensation awarded to a successful claimant, a reasonable fee may be awarded to the claimant's attorney for services rendered in connection with an appeals proceeding under this chapter. The fee may not exceed 10% of the claimant's award or $500, whichever is less." **DC Code Ann. § 3-432(g) (Supp. 1997)**.

In the District, it is illegal to deny any civil right, or public or private employment, to a person solely by reason of his or her having received services, voluntarily or involuntarily, for mental retardation. **Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, DC Code Ann. §§ 6-1901 et seq**. Aggrieved individuals may sue for recompense, and persons found to have abused any rights or privileges protected by the statute are liable for damages as determined by law, for court costs, and for reasonable attorneys' fees. **DC Code Ann. § 6-1974(a)(c) (1995)**. Attorneys' fees also are available, under **DC Code Ann. § 6-1973(a) (1995 & Supp. 1997)**, to an "interested party" suing to "compel the rights afforded mentally retarded persons." Attorneys' fees also may be available to a customer of a facility in an action against the Director of the facility or the District of Columbia for failure to provide "a program adequate for habilitation and normalization pursuant to the customer's individual habilitation plan." **DC Code Ann. § 6-1973(b)**.

Similarly, **Chapter 20 of Title 6 of the DC Code** protects the rights of mental health patients and restricts the disclosure of mental health information. The chapter provides that defendants found to have negligently violated or willfully or intentionally violated the provisions of the chapter are liable for varying damages plus the costs of the action and reasonable attorneys' fees. **DC Code Ann. § 6-2061(a)-(b) (1995)**.

Like provisions also protect the rights of elderly citizens. A resident of the District of Columbia may file suit for injunctive relief (**DC Code Ann. § 6-3541 (1995)**) or damages (§ **6-3542**) to enforce the provisions of the Code pertaining to the Long-Term Care Ombudsman Program within the Office of Aging. **DC Code Ann. §§ 3501 et seq**. Under **DC Code Ann. § 6-3543 (1995)**, a court must award attorneys' fees to a resident who prevails in such an action. The Program was established to advocate the rights of the elderly and, among other things, provides for the monitoring of quality of care and services within long-term care facilities and the investigation of complaints regarding care in such facilities.

Two other sections of the **DC Code, Sections 23-554 and 37-106.2**, are concerned with protecting citizens' privacy rights. A person whose wire or oral communication is intercepted, disclosed, or used, without a properly obtained authorizing order from a

court, may sue the interceptor, including the District, for damages and reasonable attorneys' fees and other litigation costs reasonably incurred. **DC Code Ann. § 23-554 (1996)**.

DC Code § 37-106.2(b) prohibits the disclosure of library circulation records by any officer, employee, or agent of the public library to a third party, "except with the written permission of the affected library patron or as the result of a court order." An affected library patron whose records are requested may file a motion in the Superior Court of the District of Columbia requesting that the records be kept confidential. **DC Code Ann. § 37-106.2(b)(2) (1990)**. Subsection (d) of the statute further states that the aggrieved public library patron "may also bring a civil action against the individual violator for actual damages or $250, whichever is greater, reasonable attorneys' fees, and court costs." **DC Code Ann. § 37-106.2(d)**.

Real Property and Housing-Related Proceedings

Real property and housing-related proceedings are particularly rife with inequities that fee shifting may help to balance. **DC Code Ann. § 45-2592 (1996)**, for example, provides that the "Rent Administrator, Rental Housing Commission, or a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party in any action under this chapter, except actions for eviction." In **Ungar v. District of Columbia Rental Housing Commission, 535 A.2d 887 (DC 1987)**, the court stated that the award of attorneys' fees to prevailing parties authorized by the statute was discretionary and thus did not automatically repeal the American Rule in this context; the court further clarified that it did not merely incorporate the "vexatious conduct" exception to that rule, and that the award of fees was presumptive and should be withheld only if "the equities indicate otherwise." *Id*. at 891-92. In **Tenants of 500 23rd Street, N.W. v. District of Columbia Rental Housing Commission, 617 A.2d 486 (DC 1992)**, the court clarified that the presumption applies only to prevailing housing tenants and not to prevailing housing providers. *Id*. at 487-88. However, the court pointed out that prevailing housing providers could be awarded fees in cases of frivolous or unreasonable suits without a showing of subjective bad faith. *Id*. at 489-90. In yet another housing-related claim in **Hampton Courts Tenants' Association v. District of Columbia Rental Housing Commission, 573 A.2d 10 (DC 1990)**, the court held that because the purpose of the fee-shifting statute is to encourage tenants to enforce their rights, the prevailing tenant should be awarded fees in landlord-initiated as well as tenant-initiated proceedings. *Id*. at 13.

Also protective of tenants, **Section 45-1621(a)** of the Code requires an owner who converts rental housing into a condominium or cooperative to provide a "relocation payment to each tenant who does not purchase a unit or share or enter into a lease or lease option of at least 5 years' duration." A tenant may sue an owner who fails to make such payment, and the tenant is "entitled to costs and reasonable attorney fees for bringing the action." **DC Code Ann. § 45-1621(d)(3) (1996)**. The District's provisions, however, are not concerned solely with tenants' rights. In fact, an aggrieved owner, tenant, or tenant organization may seek enforcement of any right or provision

under **Chapter 16 of Title 45 of the Code**, which governs rental housing conversion and sale, through a civil action in law or equity and, upon prevailing, may seek an award of costs and reasonable attorneys' fees. **DC Code Ann. § 45-1653 (1996)**.

Yet another provision concerned with tenant quality of life encourages tenants to police their residences. **Section 45.2559.2(a)** allows a civic association or community association to bring an action to abate a nuisance, which may result in eviction, if a court determines that the complained of activity constitutes a nuisance or a "drug haven." The statute allows the court to award court costs and reasonable attorneys' fees to a prevailing plaintiff in an action brought under this subchapter. **DC Code Ann. § 45-2559.7a (Supp. 1997)**.

Two final provisions address living conditions at retirement homes and health care facilities. Pursuant to **DC Code Ann. § 32-1454 (1993)** a court must award costs and reasonable attorneys' fees to any plaintiff who prevails in an action brought under **Title 32, Chapter 14**, which concerns living conditions at various health care facilities. Actions contemplated include actions for injunctive relief, mandamus, or damages for violations of living standards, actions pertaining to discharge, transfer or relocation from long-term care facilities, the operation and construction of facilities, and to statements of the rights of residents with respect to agencies and facilities. **DC Code Ann. §§ 32-1451-55 (1996)**. In addition, the statute contemplates actions arising out of violations of **Section 32-1453(b)**, which prohibits retaliatory action on the part of owners, administrators, employees, or licensees of facilities against a resident, his or her representative or the Long-Term Care Ombudsman for the exercise of enumerated rights.

Citizens' Suits and Enforcement of Environmental Regulations

Citizens of the District aggrieved by environmental regulatory violations may bring suits under a number of environmental provisions and recover attorney's fees. For example, citizens may sue violators of the District's underground storage tank management provisions. The court in such an action may award costs of litigation, including reasonable attorney and expert witness fees, "to the prevailing or substantially prevailing party if the court determines an award is appropriate." **DC Code Ann. § 6-995.11(e) (1995)**.

Any person aggrieved by the failure of a generator of low-level radioactive waste in the District to comply with the requirements of **Chapter 37** of **Title 6** of the **Code** may also sue for relief in any court of competent jurisdiction. In addition to any declaratory or injunctive relief deemed necessary by the court, reasonable attorneys' fees and court costs may be awarded to the prevailing party, if not the District government, for actions brought under this section. **DC Code Ann. § 6-3705 (1995)**. Owners or operators of a commercial fleet of motor vehicles are subject to **Chapter 20** of **Title 40** of the **Code**, which requires registration with the District, the purchase of a certain percentage of "clean fuels" for the fleet, maintenance of records and periodic filing of reports. Any aggrieved person may file suit to compel a fleet's compliance with the chapter, and the

court may grant whatever declaratory or injunctive relief it deems appropriate, including reasonable attorney's fees and court costs to prevailing parties, other than the District government. **DC Code Ann. § 40-2006 (Supp. 1997)**.

An affected employee of a District government or quasi-governmental agency or entity established pursuant to interstate compact may sue to have a work site determined to be hazardous to the health of an employee and brought into compliance with Occupational Safety and Health Association standards. "Reasonable attorney's fees shall be awarded to the affected employee . . . should the affected employee prevail in the suit, or if, prior to order by the court, the suit is settled in substantial conformity with the relief sought in the petition." **DC Code Ann. § 36-1222(b) (1997)**.

The Office of Recycling mandates minimum recycled content for all corporations registered in the District that sell or distribute more than a minimum amount of paper specified by the statute, and persons subject to the mandate may apply for an exemption. Any interested person may file a written petition for judicial review of such exemption, whether granted or denied, in the District of Columbia Court of Appeals. That Court may award reasonable attorneys' fees and court costs to a prevailing party who appeals the approval or intervenes to defend denial of an exemption under this section. **DC Code Ann. § 6-3421(a)-(e) (1995)**.

Eminent Domain

Following a condemnation proceeding, the Mayor has the option to abide by the verdict of the jury and occupy the property appraised by it, or to abandon the proceeding within a reasonable time. "If the proceeding is abandoned, the court shall award to the owner or owners of the property involved therein such sum or sums as will in the opinion of the court reimburse the owner or owners for all reasonable costs and expenses, including reasonable counsel fees, incurred by him or them in the proceeding." **DC Code Ann. § 16-1321 (1997)**.

Banking and Other Financial Transactions

The District has manifested a particular concern for consumers in financial service-related transactions, as illustrated by many fee-shifting provisions in this field. **Section 2-2613** of the Code addresses securities fraud, providing that persons who fail to prove that they did not know or should not have known in the exercise of reasonable care the falsity of statements made in the course of a sale or offer for sale of a security shall be liable to the person purchasing such security. The statute authorizes the purchaser to bring a civil action to recover the consideration paid for the security with interest and with costs and reasonable attorneys' fees less the amount of any income received on the security, upon the tender of the security, or for damages if the violator no longer owns the security. **DC Code Ann. § 2-2613(a) (1994)**.

Under **DC Code Ann. § 2-2645 (1994)**, an individual also may be awarded attorneys' fees in a suit brought against an investment adviser for violation of **Sections 2-2632**, **2-2534**, and **2-2635** of the Code, pertaining to unlawful advisory activities. The

Superintendent of the District of Columbia Office of Banking and Financial Institutions may suspend or revoke the license of any licensee if the licensee or any owner, director, officer, member, partner, stockholder, employee, or agent of the licensee, while acting on behalf of the licensee, for various violations of the section. The provisions of the section may be enforced by orders from the Superintendent to either cease or correct such violation. Further, the Superintendent may request the DC Corporation Counsel to sue for the enforcement of an order issued, and the statute authorizes the Corporation Counsel to seek attorneys' fees and costs. **DC Code Ann. § 26-1018 (Supp. 1997)**.

Banks or other regulated financial institutions offering to make or procure a loan secured by a first or subordinate mortgage or deed of trust on a single- to four-family home to be occupied by the borrower are required to provide the borrower with a financial agreement executed by the lender, which contains certain disclosures and requirements enumerated in **DC Code Ann. § 26-1013(a) (Supp. 1997)**. "A borrower aggrieved by any violation of this section shall be entitled to bring a civil suit for damages, including reasonable attorney's fees, against the lender." **DC Code Ann. § 26-1013(b)(3)**.

Borrowers aggrieved by prohibited unfair or usurious practices, including usurious interest rates on loans, misrepresentations, misleading statements or advertising, unlawful acceleration or waiver clauses in contracts, may also sue for damages or other appropriate relief, including reasonable attorneys' fees. **DC Code Ann. § 28-3314 (1996 & Supp. 1997)**.

Section 45-2803 of the Code requires lenders to disburse funds to be lent, in loan transactions involving first or second deeds of mortgage, to a settlement agent before or at a settlement closing. Any person suffering a loss due to the failure of a lender or of a settlement agent to cause disbursement as required by this chapter shall be entitled to recover, in addition to the amount of actual damages, double the amount of any interest collected in violation of this chapter, plus any reasonable attorneys' fees incurred in the collection of that amount. **DC Code Ann. § 45-2807(a) (1996)**.

Several provisions of the Code concern funds transfers and the respective liabilities of banks and their customers. Senders of funds who cancel or attempt to cancel a funds-transfer order already received by a bank, will be liable, whether or not cancellation or amendment is effective, to the bank "for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment." **DC Code Ann. § 28:4A-211(f) (1996)**.

On the other hand, a receiving bank failing to execute a payment order it was obliged by express agreement to execute is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. **DC Code Ann. § 28:4A-305(d) (1996)**. Reasonable attorneys' fees are recoverable if demand for compensation is made and refused before an action is brought on the claim. **DC Code Ann. § 28:4A-305(e)**.

A bank may also be liable for failing to give notice of a payment transfer on behalf of a beneficiary's account for interest from the date when notice should have first been given. **DC Code Ann. § 28:4A-404(b) (1996)**. Under this section, a plaintiff whose demand for interest is made and refused before an action is brought on the claim may recover reasonable attorneys' fees. *Id*.

Banks may also be liable for wrongful dishonoring of letters of credit, and reasonable attorneys' fees and other expenses of litigation "must be awarded to the prevailing party in an action in which a remedy is sought." **DC Code Ann. § 28:5-111(a) & (e) (Supp. 1997)**.

Finally, the District's Uniform Commercial Code provides "[i]f a document has been lost, stolen, or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any person comply with such order. . . . The court may also in its discretion order payment of the bailee's reasonable costs and counsel fees." **DC Code Ann. § 28:7-601(l) (1996)**.

Proceedings on Bond or Undertaking

Pursuant to **DC Code Ann. § 15-111**, a party also may recover counsel costs arising out of a proceeding "to recover damages upon a bond or undertaking given to obtain a restraining order or preliminary or pendente lite injunction." **DC Code Ann. § 15-11 (1995)**. In **Taylor v. Frenkel, 499 A.2d 1212 (DC 1985)**, the court held that for purposes of recovering attorneys' fees under this statute, it is irrelevant that the bond has been posted pursuant to a court-approved agreement between the parties rather than by order of the court following a preliminary injunction hearing. *Id*. at 1215.

Attachment and Garnishment

Fee shifting also may be authorized where a garnishee's answer to interrogatories denies possession of all or part of the defendant's property or credits, or where the answer states that the garnishee possesses less than the plaintiff's judgment amount, and the plaintiff challenges the garnishee's answer. If judgment is rendered in favor of the garnishee, the court must order the payment of attorneys' fees. **DC Code Ann. § 16-553 (1997)**. See also **DC Code Ann. § 16-522 (1997)** (to the same effect, but this section pertains to attachment and garnishment generally, whereas § **16-553** pertains to attachment and garnishment after judgment); **DC Code Ann. § 16-529(a) & (d) (1997)** (where property is alleged to be fraudulently transferred, such property is attached, with the alleged fraudulent assignee or transferee as the garnishee, and the latter may recover costs if plaintiff prevails or costs and reasonable attorneys' fees if defendant prevails).

Further, in any garnishment action, the judgment creditor must file receipts recording amounts received and outstanding until vacation of the judgement with the clerk of the court. If the judgment creditor fails to file such reports, an interested party may move the court to compel the defaulting judgment creditor to appear in court and make an accounting forthwith. "The court may, in its discretion, enter judgment for any

damages, including a reasonable attorney's fee suffered by, and tax costs in favor of, the party filing the motion to compel the accounting." **DC Code § 16-574(b) (1997)**.

Custody Proceedings

A variety of fee shifting provisions pertain to child custody proceedings. Under **Section 16-918** of the Code, a court may appoint an attorney to represent a child in a custody proceeding and may then order "either or both of the parties" to pay the court-appointed attorneys' fees. **DC Code Ann. § 16-918(b) & (c) (1997)**. In **Kelly v. Clyburn, 490 A.2d 188 (DC 1985)**, the Court preliminarily addressed the question of the timeliness of a motion for attorney's fees under **Section 16-918** and found that such a motion is "a collateral issue to the main cause of action," rather than "an amendment to the judgment," so that the question of timeliness is dependent on whether the opposing party is unfairly prejudiced or surprised by the post-judgment motion. *Id*. at 190. Turning to the merits of the motion, the Court observed that the amount of the fee as well as who should pay the fee is a matter within the discretion of the court and also held, as to the latter issue, that the court may order "partial payment from both parties." *Id*. The Court reversed the lower court's award of fees, finding that the trial judge had failed to exercise an "informed" judgment. *Id*. at 191. The Court held that the fee inquiry under **Section 918(b)** should be fact-specific and that the decision should be informed by the guidelines set forth under statutes awarding attorneys' fees in support, divorce and alimony cases (**DC Code Ann. §§ 16-911(a)(1), 16-914(a), 16-916 (1981)**), as well as the "common law necessaries doctrine applicable to child custody and support cases as described in **Moore v. Moore, 391 A.2d 762, 779 (DC 1978)**." *Id*. More specifically, the Court observed that the decision as to the award of attorney's fees in support and custody cases should be guided, along with other relevant factors, by: "(1) the necessity for the services of an attorney; (2) the quality and nature of the work performed; and (3) the financial ability of the party ordered to pay." *Id*. (citations omitted). In certain circumstances, the Court also considered "the fault of the nonaggrieved party" to be a relevant factor. *Id*.

Fee shifting also comes into play for other custody disputes. The Code allows the Superior Court in its discretion to decline to exercise its jurisdiction over custody cases when it determines that the court of another state is a more appropriate forum. **DC Code Ann. § 16-4507(a) (1997)**. Further, "[i]f it appears to the Superior Court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in the District, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses." **DC Code Ann. § 16-4507(g)**.

In some cases, the Superior Court may also decline jurisdiction if a petitioner, who has wrongfully taken a child from another state, seeks an order or modification of an order from the court. **DC Code Ann. § 16-4508(b) (1997)**. In its discretion, the court may dismiss the petition and charge the petitioner seeking the decree with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. **DC Code Ann. § 16-4508(c)**.

Similarly, a person violating a custody decree of another state whose violation makes it necessary to enforce the decree in the District may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his or her witnesses. **DC Code Ann. § 16-4515(d) (1997)**.

Family Division Proceedings

Evidencing concerns like those in custody-related statutes, the District has authorized fee shifting in family- or other child-related proceedings. In proceedings involving delinquency, need of supervision, or neglect of a child, the parent or other person legally obligated to support the child may be ordered to pay fees for an attorney appointed by the Family Division of the Superior Court, upon a finding that the parent or other person legally responsible for supporting the child can afford to pay. In neglect cases, the fees in issue will compensate an attorney appointed to represent the parent or other financially responsible person, while in other proceedings under the relevant chapter, the fees will compensate an attorney appointed to represent the child. **DC Code Ann. § 16-2326 (1997)**.

In interstate family support proceedings, a responding tribunal may assess reasonable attorneys' fees only on behalf of a prevailing obligee, and "may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law." **DC Code Ann. § 30-343.12(b) (Supp. 1997)**.

The District has also held employers of delinquent obligors responsible for support. Except upon a showing of exigent circumstances beyond a holder's (of wages of a delinquent obligor) control, "if a holder fails to withhold earnings or other income in accordance with this chapter, judgment shall be entered against the holder for any amount not withheld and for any reasonable counsel fees and Court costs incurred by the obligor, caretaker, custodian, or their representative." **DC Code Ann. § 30-513 (1993)**.

Consumer Protection Proceedings

The Code contains a number of consumer-protection-related provisions that call for or at least allow fee shifting. In one such provision, **Section 28-3905(g)(5) (Supp. 1997)**, the Office of Adjudication may award counsel's fees to a consumer found to have been injured by a merchant's unlawful trade practices. The court in **Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1071-72 (DC 1992)**, explicitly held that an administrative law judge in the Office of Adjudication is not empowered under this provision to award attorneys' fees to "victorious merchants." By contrast, another provision in that same section allows the court to award attorneys' fees to the prevailing party — whether merchant or customer — when suit is brought in D.C. Superior Court "for a remedy, enforcement, or assessment or collection of a civil penalty, when any violation, or failure to adhere to a provision of a consent decree . . . or an order . . . [relating to claims of unlawful trade practices] has occurred." **DC Code Ann. § 28-3905(i)(3)(B) (Supp. 1997)**.

The Code also allows a court, in its discretion, to award attorneys' fees to a consumer who prevails in an action against a creditor arising from a direct installment loan or credit sale. **DC Code Ann. § 28-3813(e) (1996)**. In this area, the Code affords limited protection to creditors, authorizing the insertion of fee-shifting provisions into agreements regarding consumer credit sales or direct installment loans. **DC Code Ann. § 28-3806 (Supp. 1997)**. However, this provision caps the amount of the attorneys' fees at 15% of "the unpaid balance of the obligation." *Id*.

In another consumer-protection-related provision, **Section 28-4607(c) (1996)**, a court is required to award attorneys' fees to a consumer prevailing in an action for damages against a consumer credit service organization.

Yet another consumer protection statute forbids unconscionability in consumer leases. A lessee who sues complaining of unconscionability and prevails is entitled to reasonable attorneys' fees; however, when the court finds that "the lessee claiming unconscionability has brought or maintained an action he or she knew to be groundless" that lessee may be assessed reasonable attorneys' fees payable to the party against whom the claim was made. **DC Code Ann. § 28:2A-108(d)(1) & (2) (1996)**.

On a related topic, under **DC Code Ann. § 47-3154(b) (1997)**, reasonable attorneys' fees also may be awarded an "aggrieved" individual for a violation of **DC Code Ann. §§ 47-3152 and 47-3153**, which restrict the use of certain consumer identification information (i.e., credit card information and customers' address and telephone numbers) by merchants presented with payment by check or credit card.

Employment/Labor-Related Proceedings

The employment and labor area is yet another area where courts have been concerned with unequal bargaining positions and with disparities in the wealth of parties. The numerous fee-shifting statutes in this field illustrate this concern. For example, the Superior Court will allow the prevailing party to recover reasonable attorneys' fees in a wrongful discharge suit brought by an employee against a covered "contractor." **DC Code Ann. § 36-1503(a) & (b) (1997)**.

Under the **District of Columbia Family and Medical Leave Act, DC Code Ann. §§ 36-1301 et seq., DC Code Ann. § 36-1309(b)(7) (1997)**, an aggrieved employee also may be entitled to attorneys' fees if he or she prevails in an administrative action brought to enforce the Act against an employer. Attorneys' fees may be awarded by an arbitrator or a hearing examiner from the Office of Employee Appeals where an employee/appellant appeals a final agency decision under **DC Code Ann. § 1-606.3 (1997)**, regarding such matters as resolving a grievance, disputing a performance rating, an adverse action or a reduction-in-force, or deciding the classification of a position under the provisions of the Comprehensive Merit Personnel Act, **DC Code Ann. §§ 1-601.1 et seq**. If the employee prevails, the arbitrator or hearing examiner may order the agency to pay attorneys' fees if "payment is warranted in the interest of justice." **DC Code Ann. § 1-606.8 (1992)**.

The denial of benefits is a particularly sensitive area where fee shifting provisions are to be found. Among other things, the above-referenced **Comprehensive Merit Personnel Act** contains provisions relating to employee retirement benefits, including a provision establishing a Section 401(a) Trust (a trust forming part of a stock bonus, pension or profit-sharing plan of an employer for the exclusive benefit of employees.) **DC Code Ann. §§ 1-627.1-.14 (1992 & Supp. 1997)**. Any participant or beneficiary of such a trust may bring suit for injunctive or other relief for any violation of the retirement program provisions or any of the other provisions set forth in **DC Code Ann. §§ 1-627.1-.14**, and § **1-627.14** permits a court, in its discretion, to award attorneys' fees to the party prevailing in such an action. In a related provision concerning the District as an employer, **Chapter 7 of Title 1 of the Code** provides that participants or beneficiaries under the District's Retirement Program may sue to enforce rights, clarify rights to future benefits, or enjoin any act or practice that violates any provision of this chapter or the terms of a retirement program. In such an action, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party. **DC Code Ann. § 1-747 (1992)**.

Yet another benefit provision, **Chapter 16 of Title 36 of the Code**, requires all employers to grant parents at least 24 hours of leave yearly to attend a child's school-related events. **Section 36-1604(a)** requires the Mayor to provide an administrative procedure pursuant to which a person for whom parental leave benefits are claimed to have been withheld may file a complaint against an employer alleged to have violated this chapter, and requires that such procedure include the provision of reasonable attorneys' fees. **DC Code Ann. § 36-1604(b)(7) (1997)**.

Similarly, allowing employees to participate in jury duty is a benefit mandated by the District. It is illegal for an employer to deprive an employee of employment or threaten, or otherwise coerce an employee with respect to employment because the employee receives a summons, responds to a summons, serves as a juror, or attends court for prospective jury service. Employees discharged for responding to jury duty may bring a civil action for recovery of wages lost, reinstatement of employment, and for damages. The statute provides that, "[i]f an employee prevails in an action under this subsection, that employee shall be entitled to reasonable attorney fees fixed by the court." **DC Code Ann. § 11-1913 (1995)**.

Further, employers must pay employees their usual compensation less the fee received for jury service. Employees who fail to do so may be sued by an employee for recovery of wages or salary lost as a result of the violation, and a prevailing employee is entitled to reasonable attorneys' fees fixed by the court. **DC Code Ann. § 15-718(d) (1995)**.

Other compensation issues to which fee shifting applies concern minimum wages, withheld wages, and worker's compensation benefits. Pursuant to **DC Code Ann. § 36-220.11(c) (1997)**, in an action brought by an employee to recover damages from an employer for failure to pay minimum wage, the court "shall allow for reasonable attorney's fees and costs." That statute also provides that when the Mayor "take[s] an assignment of the wage claim in trust for the assigning employee" and files suit to

"collect the claim," "the defendant shall be required to pay the costs and reasonable attorney's fees as may be allowed by the court." **DC Code Ann. § 36-220.11(e)**.

In any statutorily authorized action by an employee or representative brought to recover unpaid wages and liquidated damages from an employer, the court must award costs and reasonable attorneys' fees to be paid by the defendant to the prevailing plaintiff. **DC Code Ann. § 36-108 (a) & (b) (1997)**.

A dispute over workers' compensation also may give rise to an award of attorneys' fees. Under **DC Code Ann. § 36-330 (1997)**, attorneys' fees may be awarded in several circumstances. An employee seeking benefits may sue an employer or carrier who declines to pay any compensation or who declines to pay disputed additional compensation upon the Mayor's written recommendation of disposition, on the ground that there is no liability for compensation within the provisions of this chapter. Reasonable attorneys' fees, not to exceed 20 percent of the actual benefit secured, approved by the Mayor or court, are required to be assessed against the employer or carrier. **DC Code Ann. § 36-330(a), (d) & (c) (1997)**.

The employer may delay or avoid altogether liability for attorneys' fees where the dispute concerns duration or degree of disability, by offering to submit the matter to a physician chosen by the Mayor and to abide by the findings in an independent medical report. However, the employer will nonetheless have to pay attorneys' fees if the employee "is successful in review proceedings." **DC Code Ann. § 36-330(b)**. In certain cases (not specifically enumerated in the statute) the employee/claimant may have to pay attorneys' fees, in which case the fee "may be made a lien upon the compensation due under an award." **DC Code Ann. § 36-330(c)**. The court in **Baghini v. District of Columbia Dep't of Employment Services, 525 A.2d 1027 (DC 1987)** held that the 20 percent cap applies whether the fees "are paid by the employer, the employer's insurance carrier, or the claimant." *Id*. at 1029. In all cases, any amount paid in fees must be approved by the Mayor or the Court and the statute imposes a penalty including a fine of not more than $1,000 or imprisonment for not more than one year, or both imprisonment and fine, for any person who receives fees or "other consideration" for representing a claimant, without the approval of the Mayor or the court, or "who makes it a business to solicit employment for a lawyer, or for himself in respect of any claim or award for compensation." **DC Code Ann. § 36-330(e)**.

Two further provisions of the **Code**, **Sections 36-803(d) (1997)** and **6-913.3 (1995)**, address unfair practices in employment. One of them prohibits the administration of lie detector tests to employees or persons seeking employment. An employer violating this section may be sued by a person whom the employer required to take a polygraph or similar examination, for damages plus reasonable attorneys' fees. **DC Code Ann. § 36-803 (1997)**.

Finally, **DC Code Ann. § 6-913.3(a), (b) & (c) (1995)** prohibits employers from discriminating against employees or applicants on the basis of the use of "tobacco or tobacco products," although the provision in no way limits the ability of employers to

enforce lawful anti-smoking rules in the workplace, and allows a discretionary award of attorneys' fees to the prevailing party in a suit alleging violation of the statute.

Anti-Fraud and Whistleblower Protection

The Code has a number of provisions aimed at curbing fraud and encouraging the reporting of fraudulent practices. As an incentive, many of these provisions include fee shifting mechanisms. For example, **Section 1.616.5** provides for attorneys' fees to the prevailing party in an action, authorized by the statute, whereby "[a]ny citizen . . . [who] commence[s] a suit in the Superior Court of the District of Columbia on behalf of the District government to recover funds which have been improperly paid by the District government while there exists any conflict of interest on the part of the employee or employees directly or indirectly responsible for such payment." **DC Code Ann. § 1-616.5(a)(1) (1992)**.

Citizens in the District may also bring a qui tam action for procurement-related fraud. The statute provides "[i]f the District or the qui tam plaintiff prevails or settles an action . . . the *qui tam* plaintiff shall receive an amount for reasonable expenses, including costs and attorneys fees." **DC Code Ann. § 1-1188.9(e)(5) (Supp. 1997)**. The statute also provides that "[i]f the District does not proceed with the action and the *qui tam* plaintiff conducts the action, the court may award to the defendant reasonable attorneys fees and expenses if the defendant prevails in the action and the court finds that the claim of the *qui tam* plaintiff was frivolous, vexatious, or brought solely to harass." **DC Code Ann. § 1-1188.9(e)(6)**.

Section 1-1188.10(a) (Supp. 1997) of the Code also seeks to prevent employers, including the District of Columbia, from preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed pursuant to **Section 1-1188.8**. Employers, including the District of Columbia, found to violate this section shall be required to pay, in addition to other remedies, litigation costs and reasonable attorneys' fees, necessarily incurred. **DC Code Ann. § 1-1188.10(c)**.

Section 1-616.3 (1992) allows an employee to sue the District if he or she believes that the District has taken retaliatory action for whistleblowing. The statute provides for the payment by the District of the employee's or former employee's reasonable costs and attorneys' fees, if the employee or former employee is the prevailing party. **DC Code Ann. § 1-616.3(c)(6)**. Alternatively, reasonable attorneys' fees and court costs may be awarded to the District "if the Court determines that an action brought by an employee or former employee under this section was not well grounded in fact and not warranted by existing law." **DC Code Ann. § 1-616.3(d)**.

Franchise Distributorship-Related Proceedings

The District, like many states, has addressed the inequities that often result from franchises or distributorship relationships, and has included fee shifting as part of its

equalization. Under **DC Code Ann. § 29-1206 (1996)**, either party to a franchise may sue in D.C. Superior Court for a violation of **Title 9, Chapter 12, of the DC Code**. This chapter addresses, among other things, termination, cancellation, and failure to renew a franchise as well as transfer, assignment, or sale of a franchise. The statute provides that if the franchisee prevails in the action, it "shall be entitled to the costs of the action including, but not limited to, attorney's fees." *Id*.

Numerous remedies are available to retail dealers who sue their distributors for unfair business practices. Under a marketing agreement, any other statute or act, or law or equity, a retail dealer may maintain a civil action against a distributor for various unfair business practices pertaining to interfering with marketing relations. "The court may, unless the action was frivolous, direct that costs of the action, including reasonable attorney and expert witness fees, be paid by the distributor." **DC Code Ann. § 10-226(a)(3) (1995)**.

Insurance-Related Proceedings

The insurance industry is heavily regulated in the District, as in other states, and a number of fee-shifting provisions are found in this context. **Chapter 36 of Title 35** immunizes the Mayor, the Mayor's authorized representatives, or an examiner appointed by the Mayor for any statements made or conduct performed in good faith while carrying out the required examinations of all insurance or surety businesses in the District, subject to the insurance laws. **DC Code Ann. § 35-3607(a) (1997)**. Further, any of those persons "shall be entitled to an award of attorney's fees and costs if the person is the prevailing party in a civil cause of action for libel, slander, or any other relevant tort arising out of activities in carrying out the provisions of this chapter and the party bringing the action was not substantially justified in doing so. For purposes of this section, the term 'substantially justified' means a proceeding that had a reasonable basis in law or fact at the time that it was initiated." **DC Code Ann. § 35-3607(d)**.

In other insurance proceedings, if an insurer fails to pay an insured's personal injury benefits in a timely manner (*i.e*., within 30 days of receipt of "reasonable proof of the fact and amount of loss sustained"), the insurer may be required to pay the fees incurred by an attorney retained by the insured in an action to recover the overdue benefits. **DC Code Ann. § 35-2110(c) (1997)**. However, an insurer may recover the attorneys' fees incurred in "defending against a claim that is or was fraudulent in some significant respect." **DC Code Ann. § 35-2110(e)(2)**. The court in **Messina v. Nationwide Mutual Ins. Co., 998 F.2d 2 (DC Cir. 1993)**, held that a showing of bad faith on the part of the insurance company was not a prerequisite to recovery of attorneys' fees under the D.C. statute. Rather, the insured need only show that the benefits in issue were not paid promptly. *Id*. at 5.

Finally, any person may apply to the court overseeing the liquidation of an insurance company for an order for discharge and related action. Should that application be denied, the applicant "shall" be directed to pay the attorneys' fees incurred by the liquidator in opposing the application. **DC Code Ann. § 35-2844(b) (1997)**.

Elections, Initiatives, Referenda and Political Process

The DC Code uses fee shifting to protect the referendum process as well. For example, persons submitting any initiative or referendum measure that is subsequently rejected by the Board of Elections and Ethics may appeal to the Superior Court for a writ in the nature of mandamus to compel the Board to accept such measure and, if successful, may be awarded court costs and reasonable attorneys' fees. **DC Code Ann. § 1-1320(l) (1992)**. On the other side, any registered qualified elector of the District of Columbia may protest inappropriate or unlawful initiatives of the Board, and may be awarded court costs and reasonable attorneys' fees. **DC Code Ann. § 1-1320 (1997)**. **Johnson v. Danneman, 547 A.2d 981 (DC 1988)** clarified two points under this statute. First, the court stated that the section does not authorize a fee award to proposers who intervene in defense of proposed initiative language. *Id*. at 983. On the other hand, the court stated that attorneys' fees under the section may not be assessed against a losing challenger. *Id*. at 985.

Finally, a citizen of the District of Columbia may be awarded attorneys' fees under **DC Code Ann. § 1-1457(d) (1992)** if he or she prevails in a mandamus suit brought to enforce the DC Code provisions relating to lobbyists, including prohibited lobbying activities and the registration of lobbyists (assuming, as to the latter provisions, that the Board of Elections has failed to take appropriate enforcement action).

Freedom of Information Act Proceedings

The District, like other defendants, is not exempt from fee shifting, particularly in the important context of information provision. Persons prevailing in an action to compel disclosure of documents requested under the District of Columbia's Freedom of Information statute, **DC Code Ann. § 1-1527(c) (1992)**, may be awarded attorneys' fees by the Superior Court. However, the statutory award of attorneys' fees does not apply to an individual representing himself or herself *pro se* in such an action, whether that individual is an attorney or a lay person. See **Donahue v. Thomas, 618 A.2d 601, 606-07 (DC 1992)** (*pro se* non-attorney not entitled to attorneys' fees); **McReady v. Dep't of Consumer & Regulatory Affairs, 618 A.2d 609, 615-16 (DC 1992)** (*pro se* attorney not entitled to attorneys' fees, but may be entitled to costs). In addition, the court in **McReady** made clear that in order to "prevail[]" within the meaning of the statute, an individual must show a "causal nexus . . . between the action . . . and the agency's surrender of the information." *Id*. at 616 (citation omitted).

Proceedings for Injury to Trade

The District of Columbia government may itself be awarded attorney's fees if it prevails in an action brought by the Corporation Counsel alleging that the District government has been "injured in its business or property by a violation of [Title 28, Subtitle II, Chapter 45]" of the D.C. code, pertaining to restraints of trade. **DC Code Ann. § 28-4507(a) (1996)**. Individual persons similarly injured "may bring a civil action for damages, for appropriate injunctive or other equitable relief, or for both" including as

determined by the court, "the costs of suit including reasonable attorney's fees." **DC Code § 28-4508(a) (1996)**.

Likewise, contractors may sue for injury to their trade. Actual or prospective bidders, offerors or contractors may protest the unlawful solicitation or award of a contract to the District's Contract Appeals Board. The statute allows a one-sided fee shifting, however, stating that "[t]he Board may dismiss, at any stage of the proceedings, any protest, or portion of a protest, it deems frivolous. In addition, the Board may require the protester to pay the agency attorneys fees, at the rate of $100 per hour, for time counsel spent representing the agency in defending the frivolous protest or its frivolous part." **DC Code Ann. § 1-1189.8(g) (Supp. 1997)**.

A plaintiff may bring an action brought to recover damages for misappropriation of a trade secret and attorneys' fees may be awarded to the "prevailing party if: (1) [a] claim of misappropriation is made in bad faith; (2) [a] motion to terminate an injunction is made or resisted in bad faith; or (3) [w]illful and malicious misappropriation exists." **DC Code Ann. § 48-504 (1997)**.

The District has also decided that sales of cigarettes below cost may be injurious enough to agencies of the District, individual persons, or trade association representatives of any such person, that an action may be brought in the Superior Court to prevent, restrain, or enjoin such a violation or obtain monetary damages, including reasonable attorneys' fees. **DC Code Ann. § 28-4525(a) & (b) (1996)**.

Finally, a merchant may bring a suit to recover damages and penalties for theft, fraud, or shoplifting, and attorneys' fees and costs "shall be awarded . . . without regard to ability to pay." **DC Code Ann. 3-446 (1994)**.

Proceedings Regarding Corporations, Cooperatives, Partnerships and Associations

Various statutes concerning corporate relations contain fee-shifting provisions, including those for derivative actions, recordkeeping, separation of partners from a partnership, and assessments in support of Business Improvement Districts. A plaintiff bringing a derivative action on behalf of a limited partnership may recover reasonable expenses, including reasonable attorneys' fees, under the Uniform Limited Partnership Act. **DC Code Ann. § 41-499.14 (1990)**. Similarly, for successful derivative actions brought on behalf of limited liability companies, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees. On the other hand, if the action is terminated, the court may require the plaintiff to pay the defendant's reasonable expenses, including reasonable attorneys' fees, "incurred in defending the action if it finds that the action was commenced without reasonable cause or the plaintiff did not fairly and adequately represent the interests of the members and the limited liability company in enforcing the right of the limited liability company." **DC Code Ann. § 29-1346 (1996)**.

In contrast to suing on behalf of the organization, when a partner is separated prior to the winding up of a partnership, he or she may sue the partnership to determine the

buyout price of his or her interest, any offsets, or other terms of the obligation to purchase. The statute provides that "[t]he court may assess reasonable attorney's fees . . . for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith." **DC Code Ann. § 41-157.1(i) (Supp. 1997)**.

In the District, cooperative associations are required to make annual reports to the Recorder of Deeds, and "any member of the association or the United States Attorney for the District of Columbia may by petition for mandamus against the association and its proper officers compel such filing to be made, and in such case the court shall require the association or the officers at fault to pay all the expenses of the proceeding including counsel fees." **DC Code Ann. § 29-1135 (1996)**.

Finally, **Chapter 22 of Title 1** provides for the establishment of Business Improvement Districts (BIDs) whereby neighboring businesses may organize in the form of a nonprofit corporation for the purpose of promoting economic development in the District. BIDs are authorized to levy assessments on business owners who are members of the BID, and may recover from delinquent owners all costs of collection, including court costs and reasonable attorneys' fees. Interestingly, this provision does not require that an action be filed in court for the recovery of attorneys' fees. **DC Code Ann. § 1-2284(a)-(f) (Supp. 1997)**.

1.5:340 Financing Litigation [see 1.8:600]

1.5:400 Reasonableness of a Fee Agreement

- Primary DC References: DC Rule 1.5(a)
- Background References: ABA Model Rule 1.5,(a) Other Jurisdictions
- Commentary: ABABNA § 41:301, ALI-LGL § 34, Wolfram § 9.3.1

DC Ethics Opinion 300 (2000) addressed the ethical implications of a lawyer's accepting an ownership interest in a corporate client as compensation for legal services, and specifically considered the application of Rules 1.5(a) and 1.8(a), and the potential applicability of Rule 1.7(b)(4), to such a fee arrangement. As respects the requirement of Rule 1.5(a) that the fee be reasonable, the **Opinion** pointed out that Comment [4] to that rule recognizes that a fee paid in property instead of money may be subject to special scrutiny because of questions concerning both the value of the services and the lawyer's special knowledge of the value of the property. It also observed that in determining reasonableness, uncertainty as to the value of the property may mean that the fee is a contingent one, so as to bring into play factor (8) under Rule 1.5(a); and that the adeqacy of disclosures and explanations made by the lawyer would also be relevant to the determination. The Opinion further pointed out that the reasonableness of such a fee must be assessed as of the time the ownership interest is transferred as a fee, not at a future time when the value of that interest may turn out to be other than anticipated.

Addressing Rule 1.8(a), the **Opinion** pointed out that that Rule's provisions with respect to a lawyer's acquiring an ownership interest in a client, which unquestionably apply to a lawyer's taking such an interest as a fee, shares with Rule 1.5(a) requirements of both adequate disclosure and reasonableness, but adds requirements that the fee arrangement be "fair" to the client, that the arrangement, and the disclosures with respect thereto, be in writing; that the client be given an opportunity to seek the advice of independent counsel; and that the client consent to the arrangement in writing.

Finally, the **Opinion** pointed out that Rule 1.7(b)(4) may be invoked by such a fee arrangement, by way of giving the lawyer a financial interest that could adversely affect the lawyer's professional judgment on behalf of the client--an issue that may be susceptible of resolution by appropriate disclosure and consent under Rule 1.7(c).

DC Ethics Opinion 184 (1987) concluded that it was not ethically improper to charge a reasonable fee for legal services related to the processing of an administrative claim for personal injury benefits under the DC No Fault Act. The fee proposed to be charged in that instance was "nominal".

DC Ethics Opinion 138 (1984) concluded that a lawyer might ethically participate in an attorney fee financing mechanism that a committee of the DC Bar had proposed but cautioned that, before suggesting that a client seek a line of credit from a bank participating in the fee financing plan, the lawyer must take care to ensure that the arrangement is in the client's interest.

DC Ethics Opinion 60 (undated) asserted (following the earlier **Opinion 11 (1975)**) that a finance charge on the unpaid balance of a fee does not in itself make the fee excessive within the meaning of DR 2-106(A), provided that the rate of interest is not excessive and that the charging of interest has been agreed to by the client at the inception of the representation.

DC Ethics Opinion 310 (2001) reaffirmed the conclusion of the two earlier **Opinions** that a finance charge on unpaid fees is permissible so long as the client has agreed to it, and added that where such an arrangement was not initially agreed to, but the client is in arrears, the lawyer may, as a condition for continuation of the engagement, ask that the fee agreement be modified to provide for a finance charge on unpaid fees accrued thereafter.

Opinion 310 also pointed out that although fee arrangements might be viewed as business transactions with a client, involving the same sort of adverseness between the interests of lawyer and client as the transactions that are governed by Rule 1.8(a), they are not subject to the elaborate safeguards of that Rule, but rather only to Rule 1.5's more flexible standard of reasonableness.

1.5:410 Excessive Fees

In In re Cleaver-Bascombe, 892 A.2d 396 (DC 2006), the Court approved a finding by the Board that the respondent, who had been appointed by the Superior Court under the Criminal Justice Act to represent the defendant in an extradition proceeding, had submitted a voucher claiming payment for her services which listed several items of time purportedly spent in that representation that had not in fact been spent at all. The Court also approved the Board's conclusion that the respondent had thereby violated DC Rules 1.5(a), 3.3(a), 8.4(c) and 8.4(d). As respects the Rule 1.5(a) violation, the Court agreed with the Board's conclusion that charging *any* fee for work that has not been performed is *per se* unreasonable and so in violation of that Rule. With respect to the sanction to be imposed, however, the Court remanded the matter to the Board for a determination as to whether the submission of the false voucher had been the product of deliberate falsification, on the one hand, or on the other, record-keeping so shoddy that despite a lack of wrongful intent it was "legally equivalent to dishonesty."

See also **In re Bernstein, 774 A.2d 309 (DC 2001)**[summarized under 1.5:730, below], where the fee involved was not only excessive but also illegal.

In **In Re Morrell, 684 A.2d 361 (DC 1996)**, the court upheld the recommended disbarment of a lawyer who had misappropriated hundreds of thousands of dollars from a client, received compensation from his law firm for representing the client and received compensation directly from the client for the same work, and taken a kickback, in violation of DR 1-102(A)(3) and (4), the predecessors of Rule 8.4(b) and (c), and DC DR 9-103(A) and (B), the predecessors of Rule 1.15.

In **In Re Richardson, 602 A.2d 179 (DC 1992)**, the Court approved the imposition of reciprocal discipline on a lawyer who had been disciplined by the Florida Bar for charging clearly excessive fees in violation of DR 2-106. He had charged a couple $10,555.99 for probating an estate worth $22,000. The Florida court had determined that reasonable fees and costs would have been $2,650.29. Respondent had also charged the couple $1,444.93 for preparation of a will, where the Court found that a generous fee would have been $400; and $1,273.97 for general services, for which the Court found that he should have charged no more than $200 or $300. The respondent's billing practices included charging 20 minutes for each phone call, even if no one answered the phone, and a minimum of 45 minutes per page for each document prepared.

In **In Re Waller** [discussed under 1.5:230 above], the DC Court of Appeals affirmed discipline imposed on a lawyer by the Board on Professional Responsibility for charging an excessive fee in violation of DR 2-106(A) where, among other things, the lawyer had claimed entitlement to one third of a settlement offer that he had negotiated after being discharged by the client.

In **In Re Haupt, 444 A.2d 317 (DC 1982)**, the court affirmed discipline imposed by the Board on Professional Responsibility for a variety of ethical lapses, including the

charging of an excessive fee in violation of DR 2-106(A) by reason of the respondent's retention of a $450 fee in violation of an order of the bankruptcy court.

In **In Re Willcher, 404 A.2d 185 (DC 1979)**, the court upheld a decision by the Board on Professional Responsibility holding fees to be excessive in violation of DR 2-106(A) when the lawyer, after taking the fees, performed no services at all.

In **DC Ethics Opinion 211 (1990)** a fee agreement provided that a 15 percent collection charge would be added to an unpaid fee if the lawyer and client went to arbitration on a fee dispute and the lawyer prevailed. The opinion concluded this provision made the fee excessive under DR 2-106(A).

DC Ethics Opinion 155 (1985) concluded that a prepaid legal services plan might inadvertently involve the charging of excessive fees.

DC Ethics Opinion 42 (1977) held that it would not necessarily be unethical for a lawyer to enter into a fee agreement providing for a contingent fee based on the amount of the judgment or settlement in a personal injury case, but providing additionally for hourly fees in the event of a judgment appealed by the defendant: the test would be whether the resulting total fee was "clearly excessive."

1.5:420 "Retainer Fees:" Advance Payment, Engagement Fee, or Lump-Sum Fee

DC Ethics Opinion 264 (1996) explains that a retainer tied directly to the provision of legal services, rather than designed solely to ensure availability, constitutes a special retainer, which is earned upon provision of the contemplated services rather than upon receipt. It follows that a law firm must return unused portions of such a retainer. The Opinion also holds, following **DC Ethics Opinion 113 (1981)**, that under the DC Rules, a special retainer or fee advance becomes the property of the law firm upon receipt; may be commingled with the law firm's own funds; and must not be commingled with client funds in a client trust account. [For discussion of the practical problem that may be presented by the fact that the DC Rule with respect to when a fee advance becomes the lawyer's property differs from the Rule in other potentially pertinent jurisdictions, see 1.15:101, below.]

DC Ethics Opinion 238 (1993) concluded that an agreement for a fixed fee must cover all reasonably foreseeable services that may be necessary to provide competent services within the scope of the representation.

1.5:430 Nonrefundable Fees

See **DC Ethics Opinion 264 (1996)** [discussed under 1.5:420, above].

DC Ethics Opinion 103 (1981) asserted, in general terms, that a retainer agreement providing for a minimum nonrefundable fee in the event of early termination of the engagement might result in a clearly excessive fee in violation of DR 2-106 if, for example, the engagement were terminated before significant work has been performed.

1.5:500 Communication Regarding Fees

- Primary DC References: DC Rule 1.5(b)
- Background References: ABA Model Rule 1.5(b), Other Jurisdictions
- Commentary: ABABNA § 41:110, ALI-LGL § 38, Wolfram § 9.2,2

DC Rule 1.5(b) *requires* a written statement of the basis or rate of the fee if the lawyer has not regularly represented the client, whereas the Model Rule says only that the communication should *preferably* be in writing. Bar Counsel regularly enforces the requirement of a written statement regarding the fee — ordinarily, in connection with some other asserted violation. See **In re Drew, 693 A.2d 1127 (DC 1997)** (more fully discussed under 1.1:200, above), where the Board on Professional Responsibility determined that the respondent had violated Rule 1.1(a) by multiple failings in two criminal representations, and in addition had violated Rule 1.5(b) in one of the two; **In re Williams, 693 A.2d 327 (DC 1997)** (informal admonition for violation of DC Rule 1.5(b) and (c)). Comments [2] and [3] to the DC Rule elaborate on the requirement of a writing.

DC Ethics Opinion 267 (1996) addressed an inquiry about the ethical propriety of two different methods of billing. One method involved provision to the client of a written fee schedule listing matters for which a standard fee was charged and identifying some other matters to be billed on a "time basis." The schedule would not identify the "time basis" rates to be applied, nor would the statements submitted to the client from time to time for services rendered. The amount charged for "time basis" services might incorporate a number of different charges in addition to the time charges of the lawyers who actually worked on a matter, including a set fee described as an "administrative or processing fee," amounting to between 10 and 20 percent of the dollar value of time charged; a levy based on the hourly rate of the originating lawyer, though not necessarily reflecting time actually worked on the matter by that lawyer; and a "value billing" premium of 20 to 200 percent of the basic hourly rate. None of these additional charges would be explained to the client. The Opinion held that billing on this basis would violate Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit and misrepresentation; Rule 7.1(a)(1)'s prohibition of false or misleading communications about the lawyer's services; and Rule 1.5(b)'s requirement of written advice regarding the "basis or rate" of the fee the client will be charged. The Opinion reiterated the statements in **DC Ethics Opinion 185 (1987)** that the lawyer owes his client the "utmost duty of candor and fair dealing," and in **DC Ethics Opinions 4 (1975), 25 (1976) and 29 (1977)** that "the attorney bears the responsibility for seeing that there is no misunderstanding as to fee arrangements." The other billing arrangement addressed in the Opinion was called the "attorney charge," which, the Opinion noted, is not a term with a widely understood meaning, but which in this instance meant that a fee schedule listed matters for which fees would be billed on a basis that took into account the effort involved, the expertise and efficiency of the responsible lawyer, whether the matter was handled on an expedited basis, and the originating lawyer's charge for supervision or administration; and which also advised as

to the likely general range of the resulting fee and warned that the fee might even be above that range, depending on the complexity of the matter and whether there were issues requiring unusual time and effort. The Opinion concluded that, if the description was an accurate portrayal of the manner in which fees would in fact be calculated, the billing method would satisfy Rule 1.5(b)'s requirement of a clear communication of the basis or rate of the fee; otherwise, not only that rule but also Rules 8.4(c) and 7.1(a)(1) would be violated. Finally, apropos of the notice to the client that the estimated range of fees might be exceeded for matters that were unusually complex or time-consuming, the Opinion noted that, as stated in Comment [1] to Rule 1.5, when a cost estimate becomes substantially inaccurate, "a revised estimate should be provided to the client."

DC Ethics Opinion 284 (1998) addresses in some detail a lawyer's obligations when employing a temporary lawyer in the representation of a client. The principal issues are whether the use of such a lawyer must be disclosed to the client (a point mainly governed by Rule 1.4) and how the lawyer may bill the client for the temporary lawyer's time (which falls under Rule 1.5). As to the first, the Opinion concludes that disclosure is required only if the information would be material to the representation — for example, if the temporary lawyer will not be available to complete the engagement. As to billing, the Opinion asserts that the time of the temporary lawyer can be charged for in the same fashion as if he or she were a regular employee, and the employing lawyer is under no obligation to disclose the actual cost of the temporary lawyer. However, if there is a division of fees with the temporary lawyer, notice to and consent by the client are required by Rule 1.5(e). And if the employing lawyer pays a "placement agency" for referral of the temporary lawyer, and passes on that charge to the client, no markup may be added to it, for otherwise the lawyer would be making a false or misleading statement about the lawyer's services, in violation of Rule 7.1(a) and Rule 8.4(c).

See **Lewis v. Secretary of HHS** [discussed under 1.5:200 above].

See also **DC Ethics Opinion 238 (1993)** [discussed under 1.5:210 above].

1.5:600 Contingent Fees

- Primary DC References: DC Rule 1.5(c)
- Background References: ABA Model Rule 1.5,(c) Other Jurisdictions
- Commentary: ABABNA § 41:901, ALI-LGL § 35, Wolfram § 9.4

See Hamilton v. Ford Motor Co. and **In re Laughlin** [discussed under 1.5:200 above].

DC Ethics Opinion 208 (1989), responding to an inquiry from Bar Counsel, concluded that, when a lawyer has been retained under a contingent fee agreement that does not specify how the fee will be determined or paid in the event of a structured settlement, the lawyer's fee should be paid as a percentage of each periodic payment received by the client.

DC Ethics Opinion 179 (1987) concluded that, where the client is a business applying for a license, the lawyer handling the application does not violate the prohibition of DR 2-106(B) on excessive fees by accepting a reasonable contingent fee that takes the form of a small, noncontrolling equity interest in the client.

DC Ethics Opinion 115 (1982) concluded that contingent fees are ethically permissible in nonlitigation matters, provided that they are reasonable and compensate only for legal services to which the amount recovered can reasonably be connected.

See also **DC Ethics Opinion 42 (1977)** [discussed under 1.5:410 above] and **DC Ethics Opinion 37 (1977)** [discussed under 1.5:230 above].

1.5:610 Special Requirements Concerning Contingent Fees

Several special requirements regarding contingent fees are set out in the text of Rule 1.5(c): the fee agreement must be in writing and must state the method by which the fee is to be determined, including the percentage(s) for the lawyer in the event of settlement, trial or appeal; and must specify what expenses paid by the lawyer are deducted from the recovery and whether such expenses are deducted before or after the fee is calculated. In addition, the lawyer must provide the client a detailed written statement on conclusion of the matter.

In **In re Bettis, 855 A.2d 282 (DC 2004)**, the respondent had undertaken to represent a client with respect to injuries received in an automobile accident on a contingent fee basis, but had failed to put the fee agreement in writing, as required by DC Rule 1.5(c). (As explained under 1.5:101, above, DC Rule 1.5(b) effectively requires a written fee agreement in all new engagements, but paragraph (c) of the DC Rule, like that paragraph of the Model Rule, also requires the terms of a *contingent* fee agreement to be spelled out in some detail.) The Court observed that a single violation of Rule 1.5(c) generally results in an informal admonition, the lightest of possible sanctions, but in this case the respondent had also violated Rule 1.15(b) by failing to pay a claim for medical

expenses out of the proceeds of a settlement [see 1.15:220, below], and what was then DC Rule 1.17(a)[now renumbered as 1.19(a)] by failing to designate the account into which the settlement proceeds were deposited as an escrow or trust account [see 1.19:200, below]. Even taken together, these three violations, in the factual setting of this case, would not have called for a major disciplinary sanction, and the Court declined to accept the Board's recommendation of a thirty-day suspension with a fitness review before reinstatement as being too harsh since it would amount to a *de facto* suspension of a year-and-a-half or longer while the respondent's fitness was established. In place of this sanction, the Court imposed a public censure and a two-year period of probation during which the respondent's practice would be monitored.

Paragraph (b) of the DC Rule prohibits contingent fees in criminal cases (though not, like the Model Rule, in domestic relations matters).

1.5:700 Unlawful Fees

- Primary DC References: DC Rule 1.5(d)
- Background References: ABA Model Rule 1.5(d), Other Jurisdictions
- Commentary: ABABNA §§ 41:914, 41:926; § 48, Wolfram §§ 9.3.2, 9.4

The **District of Columbia Criminal Justice Act, DC Code §§ 11-2601 et seq.**, includes in § **11-2606(b)** a provision making it a crime for any person entitled to compensation under the Act to ask or receive any additional compensation for services rendered. See **Willcher v. United States, 408 A.2d 67 (DC 1979)** (affirming the conviction of a lawyer for violation of the provision). As noted in 1.5:101, above, paragraph (f) was added to DC Rule 1.5 effective November 1, 1996, on recommendation of the Peters Committee, so as to reinstate DR 2-108(A)'s prohibition on *illegal* fees.

In **In Re Hudock, 544 A.2d 707 (DC 1988)** (per curiam) the DC Court of Appeals approved reciprocal discipline imposed by the Board on Professional Responsibility on a Virginia lawyer who had violated DR 2-108(A) by charging an illegal fee. The lawyer had charged a one-third contingency, $5,000 out of a $15,000 Workmen's Compensation award. The commission that had made the award had included $2,500 in fees, but the lawyer had collected an additional $2,500. Since attorneys fees on Workmen's Compensation matters were by statute subject to the commission's approval, and the extra $2,500 was not approved, it was illegal.

DC Ethics Opinion 200 (1989) concluded that a lawyer's retaining a fee paid from funds that were traceable to the client's embezzlement did not constitute receipt of an unlawful fee when the lawyer had informed the client at the outset of the representation that she would not accept payment from money obtained illegally, and she did not learn of the criminal source of the fee until the representation was substantially completed.

1.5:710 Contingent Fees in Criminal Cases

DC Ethics Opinion 262 (1995) states that the prohibition of contingent fees in criminal cases does not apply to a representation of a client seeking a writ of error *coram nobis*. The proceeding on such a writ is a civil case even though it aims to set aside or correct a criminal conviction.

1.5:720 Contingent Fees in Domestic Relations Matters

DC Rule 1.5(d), unlike its Model Rule counterpart, does not include a prohibition on contingent fees in domestic relations cases. DC Comment [7] states that they are rarely justified but not forbidden.

DC Ethics Opinion 161 (1985) concluded that contingent fee arrangements in child support cases, where the fee is contingent on the child support being obtained and is to be deducted from the child support payments, were not necessarily prohibited under the Code, despite the assertion in EC 2-20 that contingent fee arrangements in domestic relations cases are rarely justified. The opinion warned, however, that such fees might well be excessive if, for example, they took too big a bite out of the support payments.

1.5:730 Other Illegal Fees in DC

In **In re Bernstein, 774 A.2d 309 (DC 2001)** the lawyer respondent had represented a client in a workers' compensation proceeding before the Industrial Commission of Virginia (the "Commission"), negotiated a settlement under which the employer was to pay the client $30,000, and then entered into an agreement with the client under which he would receive $9,000 out of the settlement as a fee. The Commission, whose approval was required, approved only a fee of $6,000, but the lawyer, without informing the client of the Commission's action, retained the full $9,000 his client had agreed to. The lawyer was found to have engaged in dishonesty in violation of Rule 8.4(c), by reason of taking a fee in excess of that awarded, and failing to tell the client what the Commission had awarded; and in addition, to have violated Rule 1.5(a) because the fee he took, being in excess of what the Commission awarded, was illegal and therefore unreasonable. It may be noted, as to the Rule 1.5 violation, that the predecessor Model Code provision, DR 2-106(A), explicitly prohibited "illegal" as well as "excessive" fees: see **In re Travers, 764 A.2d 242 (DC 2000)** (penalizing, as a violation of DR 2-106(A), a lawyer's acceptance of attorney fees from an estate without filing a petition for such fees in the probate court, as was then required by statute).

1.5:800 Fee Splitting (Referral Fees)

- Primary DC References: DC Rule 1.5(e)
- Background References: ABA Model Rule 1.5(e), Other Jurisdictions
- Commentary: ABABNA § 41:701, ALI-LGL § 59, Wolfram § 9.24

DC Rule 1.5(e) is more explicit than the Model Rule about what the client must be told about a proposed division of fees, and requires that the information be conveyed in writing. Comments [9] to [14] to the DC Rule elaborate on the subject.

The general topic of referral fees, prohibited (with only narrow exceptions) by MR 7.2(c) but largely allowed by DC Rule 7.1(b)(5), is addressed under 7.2:400, below. Pertinent in that connection is **DC Ethics Opinion 286 (1999)**, there discussed, which addresses contingent referral fees.

The written disclosure requirements of Rule 1.5(e)(2) were very strictly enforced in **In Re Confidential (J.E.S.), 670 A.2d 1343 (DC 1996)**, where the DC Court of Appeals sustained a decision of the Board on Professional Responsibility imposing discipline (an informal admonition) on a lawyer who had shared a fee with another lawyer without fully complying with Rule 1.5(e)(2). The lawyer's engagement letter to the client had identified the other lawyer as co-counsel, but it did not specify what the division of fee would be (50-50), or the contemplated division of responsibility, or "the effect of the association of lawyers outside the firm on the fee to be charged." The court rejected the lawyer's contention that he had substantially complied with the Rule.

In **In re Bell, 726 A.2d 205 (DC 1998)** the Court imposed reciprocal discipline of public censure for violation of Rule 1.5(e) against two lawyers who had split a contingent fee without knowledge or consent of the client (whom one of the lawyers had referred to the other).

DC Ethics Opinions 197 (1989) and 151 (1985) address the division of fees between a law firm and a lawyer designated as "of counsel" to the firm, in each instance opining that whether the "of counsel" is to be considered equivalent to a partner or associate in the law firm within the meaning of DR 2-107(A), so as to allow fee-sharing without preconditions, depends on the nature of the particular of counsel arrangement.

Similarly, **DC Ethics Opinion 109 (1981)** concluded that an undisclosed, unconsented-to division of a fee with a lawyer who purported to be but was not in fact a partner in the law firm was a violation of DR 2-107(A).

DC Ethics Opinion 65 (1979) concluded that it violated DR 2-107(A) for a law firm to include in an employment contract a provision that for the first two years after termination of a lawyer's employment with the firm the lawyer must pay the firm 40 percent of net billings received for work performed on behalf of a client of the former firm. **DC Ethics Opinion 77**, distinguishing this earlier Opinion, found that an

employment agreement providing liquidated damages for solicitation of the law firm's clients by a departing lawyer was not unethical.

1.6 Rule 1.6 Confidentiality of Information

1.6:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.6
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary:

1.6:101 Model Rule Comparison

Both Model Rule 1.6 and its DC Rule counterpart were significantly modified in similar ways as a result of the comprehensive reviews conducted by the ABA Ethics 2000 Commission and the DC Rules Review Committee, respectively, and both were also amended to reflect a recommendation of the ABA Corporate Responsibility Task Force. However, even after those changes, the two rules retain some fundamental differences.

The most important difference lies in the two rules' respective descriptions of just what it is that they protect from disclosure: the Model Rule protects, with specified exceptions, "information relating to representation of a client," while the DC Rule preserves the key operative terms of the predecessor provision in the Model Code, DR 4-101, "confidences" and "secrets." The Model Rule provides no definition of "information relating to representation of a client," while the DC Rule provides in 1.6(b) the identical definitions that were set out in DR 4-101: "confidence" is defined as information protected by the attorney-client privilege "under applicable law" and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client." The Model Rule prohibition extends to information "relating to" a representation whether acquired before, during or after the representation and apparently to information obtained from public sources, and the prohibition applies without regard to any client request or assessment by the lawyer of the likely effect on the client of a disclosure. This coverage is substantially broader than that of the predecessor Model Code provision. The breadth of coverage concerned the Jordan Committee and prompted it to borrow from DR 4-101 the narrower statement of what information, in addition to client confidences, the lawyer must hold close and not misuse.

Another difference, not changed in either of the respective reviews, is that DC Rule 1.6(a) prohibits, with specified exceptions, a lawyer not only from knowingly revealing client information but also from knowingly using it to the disadvantage of the client (a prohibition that in the Model Rules is found in a separate rule, MR 1.8(b), but without the qualifying "knowingly"), and from using it for the advantage of the lawyer or a third person (which is not explicitly dealt with in the Model Rules). In the discussion below, "disclose" or "disclosure" will sometimes be used to encompass whatever "use" of information either body of rules forbids or allows.

The circumstances in which otherwise protected information may be disclosed, covered in Model Rule 1.6(a) and (b), are addressed by paragraphs (c), (d) and (e) of the DC Rule. Both Rules make exception, generally in different provisions and in somewhat different phraseology, for disclosure with client consent (DC Rule 1.6(e)(1); Model Rule 1.6(a)), when impliedly authorized in order to carry out the representation (DC Rule 1.6(e)(4); Model Rule 1.6(a)), to defend the lawyer against charges or claims relating to the client (DC Rule 1.6(e)(3); Model Rule 1.6(b)(5)), or to collect a fee (DC Rule 1.6(e)(5); Model Rule 1.6(b)(5)). Both also have an exception relating to prevention of reasonably certain death or substantial bodily harm (DC Rule 1.6(c)(1); Model Rule 1.6(b)(1)), although the DC Rule limits this exception to circumstances where the threat is presented by criminal acts, a restriction dropped from the Model Rule per the Ethics 2000 Commission's recommendation.

Additionally, both Rules had added to them pursuant to the recommendation of the ABA Corporate Responsibility Task Force exceptions to prevent a client crime or fraud reasonably certain to result in substantial injury to the financial interests or property of another, or to prevent or mitigate such injury, when the lawyer's services have been employed in connection therewith (DC Rule 1.6(d)(1)&(2); Model Rule 1.6(b)(2) & (3)). This addition eliminated a certain discordance between both Rules, which prior to the amendments had forbidden disclosure of covered information relating to client misconduct that was likely to injure financial interests or property of others, and the SEC's regulations governing lawyers' conduct, implementing a requirement of the Sarbanes-Oxley law, 17 CFR Part 5, which permitted (but did not require) lawyers to disclose client confidences relating to under specified circumstances.

Both Rules also had added to them exceptions to allow a lawyer get legal advice about the lawyer's conduct (DC Rule 1.6(e)(6); Model Rule 1.6(b)(4)), with the Model Rule but not the DC provision limited to advice about compliance with the Rules. This new provision of the DC Rule is consistent with the holding of **Jacobs v. Schiffer, 47 F. Supp. 16, 21 (D.D.C. 1999), rev'd and remanded on other grounds, 204 F. 3d 259 (D.C.Cir. 2000)**, where the District Court construed DC Rule 1.6 to allow a lawyer to disclose client confidences in order to obtain legal advice concerning the lawyer's ethical obligations

Pursuant to an Ethics 2000 Commission recommendation, Model Rule 1.6 was amended to add an exception for disclosure to comply with other law or court order (Model Rule 1.6(b)(6)); the DC Rule already had a similar provision, in what is now designated as 1.6(e)(2)(A). The DC Rule also has two other provisions allowing disclosure that are not found in the Model Rule: one allows it to prevent bribery or intimidation of witnesses, jurors, court officials or others involved in proceedings before a tribunal (DC Rule 1.6(c)(2)); the other, applicable only to government lawyers, allows disclosure when permitted or authorized by law (DC Rule 1.6(e)(2)(B)).

The DC Rule also has several further provisions not found in the Model Rule.

DC Rule 1.6(f) requires a lawyer to exercise reasonable care to prevent employees, associates and others whose services are used by the lawyer from disclosing client information. Model Rules 5.1 and 5.3, like DC Rules 5.1 and 5.3, address generally supervisory responsibilities of lawyers and may cover all the ground that DC Rule 1.6(f) covers.

DC Rule 1.6(g) states that the lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's services.

DC Rule 1.6(h) provides that the duty of confidentiality applies to information a lawyer learned before becoming a lawyer in providing assistance to another lawyer. See 1.6:260 below.

DC Rule 1.6(i) makes the strictures of Rule 1.6 applicable to information acquired by a member of the DC Bar Lawyer Counseling Committee or a "trained intervenor" for that Committee in the course of counseling another lawyer.

Similarly, DC Rule 1.6(j), added by the DC Court of Appeals effective May 1, 1998, on the recommendation of the DC Bar, extends the Rule's protection as "confidences and secrets" to communications between persons serving the DC Bar Lawyer Practice Assistance Committee and lawyers being counseled by that Committee. Model Rule 8.3(c) concerns information gained by a lawyer or judge as a member of an approved lawyers assistance program. To the extent that such information would be confidential if communicated by client to lawyer in a privileged setting, the lawyer or judge is relieved by MR 8.3(c) of what would otherwise be an obligation to report certain violations of the Rules under MR 8.3(a). DC Rule 8.3(c) states more broadly that the obligations of Rule 8.3 to report misconduct do not require disclosure of information protected by Rule 1.6. [See 8.3:400 below.]

DC Rule 1.6(k) (which was proposed by the Sims Committee) states that the client of a government lawyer is the agency that employs the lawyer absent express provision to the contrary in law, regulation or order.

Rule 1.6(k) (then designated 1.6(j)) was mentioned in **DC Ethics Opinion 313 (2002)** (discussed more fully under 1.11:200, below), addressing the applicability *vel non* of Rule 1.11 to a former Navy JAG officer representing a court martial defendant he had also represented while in service.

1.6:102 Model Code Comparison

Paragraphs (a) and (b) of DC Rule 1.6, limiting the Rule's reach to "confidences" and "secrets," and defining those terms, are substantially identical to DR 4-101(A) and (B). Paragraph (c), whose provisions are described in 1.6:101 above, differs substantially from DR 4-101(C)(3), which permitted a lawyer to reveal a client's confidences or secrets when the client had an intention to commit any crime. Subparagraphs (d)(1) and (2) are substantially identical to DR 4-101(C)(1) and (2), except that the Disciplinary Rule did not contain the reference to government lawyers. Subparagraph (d)(3) is similar to, but more limited than, DR 4-101(C)(4), which permitted a lawyer to disclose client confidences or secrets "to the extent necessary to defend himself or an employee against an accusation of wrongful conduct." [See 1.6:101 above.] DR 4-101 did not contain the concept of implied authorization contained in subparagraph (d)(4). Subparagraph (d)(5) is the same as DR 4-101(C)(4), except that the new rule adds the phrase "to the minimum extent necessary" when referring to the exception allowing a lawyer to reveal a client's confidences or secrets in an action to establish or collect lawyer fees. Paragraphs (e) and (f) have no counterparts in the Model Code, although these concepts were reflected in the Ethical Considerations. Paragraphs (g), (h) and (i) are all provisions without antecedent in the Model Code.

1.6:200 Professional Duty of Confidentiality

- Primary DC References: DC Rule 1.6
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA § 55.101, ALI-LGL § 59-66, Wolfram §§ 6.1, 6.7

1.6:210 Definition of Protected Information

The DC Rules retain the terms "confidences" and "secrets" which were dropped in the Model Rules. Confidences are information protected by the attorney-client privilege. Secrets are

> other information gained in the professional relationship that the client has requested to be held inviolate, or the disclosure of which would be embarrassing, or would be detrimental to the client.

Comment [5] to DC Rule 1.6 acknowledges that confidentiality is given effect through legal doctrine defining the attorney-client privilege and work product immunity. It admonishes that the Rule is not intended to cover or affect how judges interpret those two bodies of law. The definition of "confidences" is important when evidence is sought from a lawyer through compulsion of law since only matters within the attorney-client privilege or work-product doctrine can be protected in that situation.

The duty to protect secrets applies to a much broader range of material than confidences and in a broader range of circumstances. Comment [6] to DC Rule 1.6 states explicitly that secrets need not be communicated in confidence by the client. The Comment goes on to say that secrets, unlike confidences, exist "without regard to the nature or source of the information or the fact that others share the knowledge." The Comment justifies this scope by explaining that it reflects "not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client."

The "secrets" protected by DC Rule 1.6 played a role in the determination of whether a defendant convicted in a criminal case might have a valid claim of ineffective assistance of counsel in **McCrimmon v. United States, 853 A.2d 154 (DC 2004).** The ineffective assistance claim rested on the fact that the defendant's court-appointed counsel had had a conversation with a man who was interested in retaining him in an unrelated criminal matter, who turned out to have been involved in the crime in which the defendant was involved and had pled guilty and become a "crucial" prosecution witness in the defendant's trial. The legal issue was whether by reason of that conversation, defendant's counsel had an "actual conflict" within the meaning of **Cuyler v. Sullivan, 446 U.S. 335 (1980)**. On appeal, the Court of Appeals reasoned that information the witness had imparted to the lawyer in that conversation would not be protected by the attorney-client privilege, since the witness had waived that privilege by admitting his guilt in a plea bargain, and had told the prosecutor the information that might be used in impeaching him as a witness. The Court also noted, however, that that information would constitute "secrets" within the meaning of DC Rule 1.6, both by *embarrassing*

the witness and possibly by *prejudicing* him as well. **853 A.2d at 163.** In addition, the Court observed that Rule 1.7(b)(4) might also apply, since it prohibits a lawyer from representing a client in a matter in which the lawyer's judgment may be affected by duties to other parties unless the client consents. *Id***.** The Court remanded the case to the trial court for a determination of whether the defendant's lawyer believed that he was ethically restrained in cross-examing the witness; if so, its impact, if any, on the defendant's consent, and whether it afffected the defensive strategy in the cross-examination, so as to have created an "actual conflict" resulting in ineffective assistance of counsel.

In **Herbin v. Hoeffel, 806 A.2d 186 (DC 2002)**, the Court addressed a claim resting on allegations that a lawyer in the DC Defender Service had sent to Virginia Law enforcement officials a confidential pre-sentence report from a criminal case in which the plaintiff had been involved, enabling the officials to serve a search warrant on the plaintiff which resulted in "physical pain and suffering and emotional damage." Considering only the claim on its face, in the context of an appeal from a dismissal for failure to state a claim on which relief could be granted, the Court held that the allegations stated a claim for breach of fiduciary duty by the defendant lawyer in disclosing client "secrets" (as defined in Rule 1.6), and that such a disclosure would be sufficiently serious to constitute "extreme and outrageous conduct," and thus to support a damage claim for infliction of emotional distress. A subsequent decision in this case, three years later, in **Herbin v. Hoeffel, 886 .2D 507 (DC 2005),** finally disposed of all of the plaintiff's claims against the defendants. All of those claims rested on the premise that the lead defendant, a lawyer in District of Columbia Public Defender Service, had represented the plaintiff in a professional capacity, so that her disclosure of unfavorable information about him to the Virginia authorities violated her professional obligations to him in various ways. This dispositive decision by the Court of Appeals affirmed the trial court's decision granting summary judgment to the defendants on the ground that there had never been a lawyer-client relationship between the parties.

In **In re Gonzalez, 773 A.2d 1026 (DC 2001)**, the respondent lawyer, in a motion to withdraw from representation of a client in a proceeding before a Virginia court, accused the client of missing appointments, failing to provide necessary information and making misrepresentations to him as her attorney. The client complained to DC Bar Counsel. Applying the choice of law provision of DC Rule 8.5(b)(1), the DC Board on Professional Responsibility looked to the Virginia ethics code and found the respondent had disclosed a client's "secrets," in violation of DR 4-101(A) of the Virginia Professional Responsibility Canons. (That provision defined "secret" in terms identical to those of DC Rule 1.6(b), as referring to "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.") The Hearing Committee had been of the view that the information here disclosed was not "information gained in the professional relationship" because it hadn't come to the respondent as a result of his fact-gathering," but the Board gave that language a broader reading and the Court of Appeals agreed.

In **DC Ethics Opinion 246 (Revised) (1994)**, the inquiring lawyer represented a client in a malpractice action against the client's former lawyer. The conduct alleged to constitute malpractice included conduct that may have violated a rule of professional conduct and raised a substantial question of the previous lawyer's honesty, trustworthiness or fitness to practice so as to require a lawyer with knowledge of the conduct to report it pursuant to DC Rule 8.3(a). The inquirer said that to subject the previous lawyer to a disciplinary proceeding could adversely affect that lawyer's ability to satisfy a judgment in the malpractice action and thus be detrimental to the client. The Opinion concluded, first, that knowledge of the previous lawyer's conduct, acquired by the inquirer in the course of the malpractice representation and having the potential to be detrimental to the client, was a "secret" within Rule 1.6; second, that the disclosure of the conduct in the malpractice action, on the client's authorization, did not necessarily constitute a waiver of the protection of Rule 1.6; and, third, that, in the absence of client consent to further revelation, under Rules 1.6 and 8.3(c) the inquirer need not and indeed could not report the previous lawyer's conduct. The Committee, in a footnote, recognized that in a much-discussed case, **In re Himmel, 533 N.E.2d 70 (Ill. 1988)**, the Illinois Supreme Court reached a contrary result but noted that the misconduct reporting rule in that state exempted only "privileged information." **Opinion 246, n.4.**

A client's identity may be information protected by Rule 1.6. See **DC Ethics Opinions 214 (1990), 124 (1983)**. So may the fact of the representation; see **DC Ethics Opinion 138 (1984)**.

The Legal Ethics Committee also has opined that redaction of a client's name from documents may be insufficient to protect client confidences and secrets that could be revealed by identifying facts in the documents. **DC Ethics Opinion 223 (1991)**.

DC Ethics Opinion 266 (1996) states that knowledge of a client's whereabouts may be a confidence or a secret under DC Rule 1.6.

DC Ethics Opinion 14 (1976) holds that the attorney's duty to protect a client's confidences and secrets extends to lawyer work product.

DC Ethics Opinion 99 (1981) says that, if there is a "colorable basis" for asserting that statements were made in the course of the attorney-client relationship, the lawyer must resolve the question in favor of the existence of the relationship and in favor of preserving confidentiality. The opinion goes on to say:

> The colorable basis standard obtains even when — as here — the lawyer's personal view is that the attorney/client relationship either never e[x]isted or was terminated prior to the disclosure at issue.

This view was restated in **DC Ethics Opinion 186 (1987)**.

Two ethics opinions have identified material that is not a confidence or secret protected by Rule 1.6 and its predecessor. **DC Ethics Opinion 217 (1991)** notes that a body of

knowledge possessed by a firm's lawyers that includes general terms on which disputes before a tribunal have been resolved "as distinguished from the fact that a particular entity accepted particular terms" may not be a secret within the meaning of Rule 1.6. In discussing rules regarding simultaneous representation, **DC Ethics Opinion 175 (1986)** says that a legal theory developed by a lawyer while retained by a client is not a "client secret." The Committee found that DR 4-101 was not

> intended to preclude the subsequent use of legal ideas developed or acquired while retained by a client, even when such use of those ideas will adversely affect the former client.

1.6:220 Lawyer's Duty to Safeguard Confidential Client Information

DC Rule 1.6(a) prohibits a lawyer not only from revealing a confidence or secret of the lawyer's client but also from using such information to the disadvantage of the client or for the advantage of the lawyer or of a third person (unless permitted by another provision).

DC Rule 1.6(e) requires a lawyer to exercise reasonable care to prevent the lawyer's "employees, associates and others whose services are utilized by the lawyer" from improperly using information protected by the rule. Comment [10] gives detail on sharing of information within a firm and consultation with other lawyers. Comment [11] permits giving "limited information. . . to an outside agency necessary for statistical bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes." The lawyer, however, must exercise "due care in selection of an agency" and warn the agency that the information must be kept confidential.

DC Rule 1.6(f) admonishes that the duty to preserve confidences and secrets continues after termination of the lawyer's employment.

DC Rule 1.6(g) reminds that the confidentiality duty applies to information learned prior to becoming a lawyer if the information was obtained "in the course of providing assistance to another lawyer."

Jacobs v. Schiffer, 47 F. Supp. 2d 16 (DDC 1999), rev'd on other grounds, 204 F.3d 259 (DC Civ. 2000) held that a government lawyer seeking advice of his personal counsel as to his rights and obligations, personally and professionally, and as a potential whistleblower, does not violate DC Rule 1.6(a) by disclosing to his counsel information relevant to that advice even though such information consists of confidences or secrets of the lawyer's governmental client. In so holding, the Court rejected a contention that such disclosure is governed by Comment [10] to the Rule, which states that, absent client consent, a lawyer should not "seek counsel from another lawyer if there is a reasonable possibility that . . . the client's confidences or secrets would be revealed to such lawyer." The Court found this Comment inapposite because it is addressed to a lawyer seeking advice of another lawyer in furtherance of the client's interests, not the lawyer's own. 47 F. Supp. at 20. And, more broadly, the Court concluded that the prohibition of Rule 1.6(a) against unconsented disclosure of client confidences and secrets was not invoked at all by communications from the lawyer to his personal counsel:

> [A] government lawyer does not, under Rule 1.6, "reveal" his client's confidences and secrets when he discloses to his personal attorney -- with the express understanding that the information will go no further -- only those confidences and secrets that the latter needs in order to advise the government lawyer of his rights and obligations as a possible whistleblower. The personal attorney becomes, in practical effect,

> simply a learned alter ego of the government lawyer and equally duty-bound to treat the confidences and secrets of the government lawyer's client as his own.

Id. The fundamental propositions set forth in this passage presumably apply also, *mutatis mutandis*, to nongovernmental lawyers seeking counsel about their personal and professional obligations in connection with representations they have undertaken.

Also involved in the case was an issue as to whether the government lawyer/plaintiff had a constitutional right to share, without pre-disclosure clearance by the agency, the nonpublic information he possessed with lawyers at "public interest and professional organizations committed to civil rights, whistleblower rights, government accountability, and environmental enforcement." *Id.*. at 23. On this issue, the Court held that in the circumstances a pre-disclosure requirement

> does not infringe . . . [plaintiff's] constitutional rights insofar as it may inhibit disclosure of nonpublic information to unspecified individuals of unnamed public-interest organizations.

Id. Although the Court did not specifically address Rule 1.6 in this connection, it did observe that

> Such disclosure would greatly increase the risk of harm to the agency's legitimate interests while affording [plaintiff], for present purposes, simply the opportunity to shop the case, which is hardly a sine qua non of adequate legal advice.

Id.

In **In re Gonzalez, 773 A:2d 1026 (2001)**, discipline was imposed on the basis of disclosures made in connection with a lawyer's motion for leave to withdraw from representation of a client whom the lawyer accused of failing to pay fees and otherwise cooperate. The motion, and copies of letters attached thereto, had asserted that the client had not only missed appointments and failed to provide necessary information, but also made misrepresentations to the lawyer. The court agreed with the Board on Professional Responsibility that while these assertions did not disclose "confidences", they did disclose "secrets" as those terms were defined in Virginia's then counterpart of D.C. Rule 1.6(b); and observed --

> We think it obvious that a public allegation by a client's own lawyer that the client deliberately lied to him would be 'embarrassing' to the client and "would be likely to be detrimental" to her, within the meaning of [the rule].

Id. at 1029. The Court also rejected a contention that the information in question should not be deemed to be "information gained in the professional relationship" between the lawyer and the client. *Id*.

DC Ethics Opinion 296 (2000) [which is more fully discussed under 1.7:330, below] addressed a situation where a law firm jointly represented an employer and its alien employee in seeking a visa for the employee, without any advance understanding as to whether client confidences with respect to the representation would be shared, and where the employee reported in confidence the information that she had fabricated the credentials on which the visa had been based. The **Opinion** held that absent explicit consent of the employee, Rule 1.6 forbade the firm to disclose the falsification to the employer, even though as a result the employer client was left employing a dishonest worker whose visa had been obtained pursuant a petition signed by the employer under penalty of perjury. The **Opinion** asserted that the firm must withdraw from its representation of both; could provide no more by way of explanation than stating that it had also withdrawn from representation of the client and identifying the ethical provision that required withdrawal; and that it might make the withdrawal "noisy" by disaffirming the visa petition (which the firm had signed), but only if there was a reasonable likelihood of harm resulting from *future* reliance on the false petition.

DC Ethics Opinion 327 (2005) [which is more fully discussed under 1.7:330, below] addressed a situation where a law firm jointly represented several clients under retainer agreements that expressly provided that information disclosed in connection with the representation "may be shared" with the law firm's other clients in the same matter. The Opinion stated that if one client informs its lawyer before disclosing confidential information that he or she intends to reveal something that may not be shared with the law firm's other clients, the lawyer must explain that it cannot keep such confidences, and can generally withdraw from representing the disclosing client. However, if the client discloses the information, the lawyer has an affirmative obligation to the non-disclosing clients to disclose information that might affect their interests in the matter.

DC Ethics Opinion 297 (2000) [which is more fully described under 1.11:200, below] pointed out that where a former government lawyer's representation of a private client in connection with a matter in which the lawyer participated while in government is not barred by the post-employment prohibition in Rule 1.11, it may nonetheless face an obstacle by reason of the lawyer's possession of relevant confidences or secrets of the governmental client which cannot, absent government consent, be disclosed or used in the private representation; and (again absent governmental consent) that obstacle may become a barrier to *any* representation, under Rule 1.7(b)(2), if the lawyer's inability to disclose or use the information would adversely affect the representation of the private client.

DC Ethics Opinion 303 (2001) [which is more fully discussed under 7.1:220 below] addresses the ethical rules affecting the sharing of office space by unaffiliated lawyers, including in particular the need to take appropriate measures to protect client confidences and secrets.

DC Ethics Opinion 306 (2001) [which is more fully discussed under 5.7:200 below], which addressed the ethical responsibilities of a lawyer who is also a licensed insurance broker, pointed out that the lawyer's obligations of confidentiality under Rule 1.6(a)

might be an obstacle to the lawyer's selling insurance products to the client, since information protected by that obligation could be relevant to the insurer's evaluation of the proposed transaction.

DC Ethics Opinion 290 (1999) addressed an inquiry by a law firm that defends insureds and is paid by their insurer to do so, as to its obligations of confidentiality in dealing with an outside agency retained by the insurer to audit its legal bills. The **Opinion** held that under both Rule 1.6 and Rule 1.8(e)(3) of the D.C. Rules (the latter corresponding to MR 1.8(f)(3)), a lawyer so retained may not, absent consent of the client insured, disclose information relating to the representation that is either a "confidence" or a "secret" protected by Rule 1.6 to the insurer, or *a fortiori*, to an auditor retained by the insured.

DC Ethics Opinion 282 (1998) [more fully discussed under 1.6:320, below] addressed the problem presented by the conflict between a lawyer's duty under DC Rules 1.6(e) and 5.3 to see that non-lawyer collaborators preserve client confidences and secrets, and the statutory duty imposed on a social worker collaborator to report suspected child abuse or neglect.

DC Ethics Opinion 275 (1997) held that a law firm that had been contacted by a potential class action plaintiff and received confidential information about the action from the potential client could not, after the firm and the potential client had failed to reach agreement on the terms of the engagement, seek to identify another client to represent in the same or substantially related matter. In this instance, the information furnished to the firm by the potential client included numerous materials that the latter had assembled with a view to pursuing the claim — some of them publicly available, and others not. The potential client had emphatically stated, in writing, that he expected the firm to hold all the materials he provided in confidence; and the Legal Ethics Committee observed that this made them all "secrets" within the meaning of D.C. Rule 1.6(b), whether or not they were matters of public record. The Committee further pointed out that even though the claimant had not become a client of the firm, a lawyer's confidentiality obligations begin as soon as a potential client consults with a lawyer, per Comment [7] to D.C. Rule 1.6. The Opinion went on to point out that although lawyers in the firm who had received the confidential information from the potential client would be so barred by Rule 1.6, nonetheless under DC Rule 1.10(a) (as amended effective November 1, 1996), disqualification of a lawyer under such circumstances would not be imputed to the lawyer's firm if that lawyer were effectively screened from any matter as to which the lawyer was disqualified. In the present instance, however, the Opinion concluded that this escape hatch would not be available to the inquiring law firm, since "too many lawyers (virtually the whole litigation section) had been exposed to the potential clients' confidential information, and too many discussions around the firm had occurred before the firm broke off its negotiations with the potential client to make walling-off a practical and effective solution."

In **United States v. Bruce, 89 F.2d 886 (DC Cir 1996)**, the Court addressed a criminal defendant's claim that his court-appointed lawyer had had a conflict that resulted in his rendering ineffective assistance by reason of the lawyer's having disclosed to the trial judge, in an ex parte hearing in which he was seeking to be relieved of the appointment to represent the defendant, that the defendant had insisted that he lie to the Court. The Court observed that the lawyer had probably violated Rule 1.6 in making this disclosure to the trial court, but held that the disclosure did not make the lawyer's assistance ineffective because there was no showing that the quality of the lawyer's representation of the defendant was adversely affected.

D.C. Ethics Opinion 281 (1986) addressed the issue, much mooted in the opinions of other ethics committees, of the ethical propriety of transmitting by unencrypted e-mail information protected by Rule 1.6. The Opinion concluded, contrary to some of those other opinions, that use of unencrypted electronic mail is not, by itself, a violation of Rule 1.6. This conclusion rested on three considerations that earlier opinions to the contrary were said to have overlooked. The *first* factor was that all methods of transmitting information are in some degree subject to interception, and the Rule does not require absolute assurance but only reasonable efforts to maintain confidentiality. The *second* was that information travelling over the Internet is disassembled in transit, and therefore extremely difficult to intercept. *Third* and finally, interception of electronic communications over the Internet, like telephone conversations, is illegal under the Electronic Communications Privacy Act of 1986 as amended in 1994, 18 U.S.C. § 2511(1); moreover, that Act provides, in 18 U.S.C. § 2517(4), that no otherwise privileged communication intercepted in violation of the Act will thereby lose its privileged character. The Opinion went on to note that it may be necessary in certain circumstances to use extraordinary means to protect client confidences.

DC Ethics Opinion 312 (2002) (which is more fully discussed under 1.9:300, below) addresses the question of what information may or may not be disclosed for purposes of conflicts checks when a lawyer moves between firms. **DC Ethics Opinion 273 (1997)** (discussed more fully at 1.4:200, above) addresses more generally the issues raised by the movement of lawyers between firms.

DC Ethics Opinion 256 (1995) principally concerns the duties of a lawyer who receives a document containing an opposing client's confidences or secrets sent by that client's lawyer by mistake. The Opinion also deals with the possibility that the "sending" lawyer has violated, among others, Rule 1.6(a). The Committee noted that Rule 1.6(a) provides that a lawyer shall not "knowingly" reveal or misuse a client confidence or secret and thus a truly inadvertent, merely negligent, failure to safeguard does not violate Rule 1.6. The Opinion warns, however, that DC Rules 1.6(e), 5.1(b), and 5.3(b) regarding duties to supervise others on the care to be taken with protected information might be implicated. If the disclosure resulted from the lawyer's inadvertence alone, a question could be raised under Rule 1.1 (Competence).

DC Ethics Opinion 223 (1991) said that a federally funded legal services support center has a duty to resist turning over client log forms and notes and correspondence

regarding assistance to field attorneys on cases. Redaction was considered insufficient to protect client confidences and secrets in some instances.

DC Ethics Opinion 214 (1990) says that a client's being in arrears in payment does not relieve a firm of its obligation to resist disclosure of a client's identity in response to an Internal Revenue Service summons.

The following Ethics Opinions were decided under the predecessor DR 4-101 but should remain pertinent.

DC Ethics Opinion 158 (1985), stated the proposition, now incorporated in DC Rule 1.6(f), that the duty of confidentiality survives the termination of the lawyer-client relationship. See also the discussion of **DC Ethics Opinion 273 (1997)**, under 1.4:200, above (addressing the confidentiality obligations of a lawyer changing firms).

DC Ethics Opinion 324 (2004) states the proposition that the duty of confidentiality extends beyond the death of the client. The Opinion addresses an lawyer's obligations when a spouse who is executor of a deceased spouse's estate requests documents and files retained by the lawyer in connection with its representation of the decedent. The Opinion states that the lawyer may provide the information to the spouse/executor (i) if the information is not a confidence or secret, or, (ii) if it is a confidence or secret and the lawyer has reasonable grounds for concluding that the release of the information is impliedly authorized to further the deceased client's interests in settling the client's estate.

DC Ethics Opinion 96 (1980) says that the duty to retain client confidences and secrets after a lawyer-client relationship ends governs even the conduct of a lawyer not acting as a lawyer. Thus, a lawyer employed by a corporation who worked on its defense against a government antitrust claim could not, after leaving the corporation's employ and becoming a computer consultant, provide litigation support to law firms representing private clients suing the former employer on substantially related antitrust claims.

DC Ethics Opinion 148 (1985) discussed whether a duty of confidentiality arose with respect to communications by an employee of a government agency with a government lawyer. The Opinion concluded that the government lawyer who advises a government employee on the employee's official duties does not have an attorney-client relationship with the employee that gives rise to a duty not to reveal the employee's confidences to the agency.

DC Ethics Opinion 137 (1984) concerned duties of lawyer spouses whose legal employment might bring them into conflict. It primarily addressed DR 5-101 and DR 9-101 but commented as follows regarding DR 4-101:

> We believe that it is enough simply to remind lawyers of their professional responsibilities in this regard. We see no reason to assume that a lawyer who is married will violate his professional responsibilities

> any more when the other spouse is an attorney than when the spouse is not.

DC Ethics Opinion 128 (1983) stated that a lawyer may not donate papers to a university archive if they contain confidences or secrets of clients unless the clients have consented.

DC Ethics Opinion 99 (1981) [see 1.6:210] set out a "colorable basis" test, requiring a lawyer to resolve questions whether confidential information was received in an attorney-client relationship in favor of the client even if the lawyer's personal view is that the information is not protected.

DC Ethics Opinion 92 (1980) set out guidelines for safeguarding confidential information for lawyers volunteering in the DC Corporation Counsel's office.

1.6:230 Lawyer Self-Dealing in Confidential Information [see also 1.8:300]

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.6:240 Use or Disclosure of Confidential Information of Co-Clients

DC Ethics Opinion 230 (1992) ruled that a lawyer retained to represent a trust represents the trust and not any particular trustee. The Opinion said that Trustee B therefore was entitled to know about communications between the inquiring lawyer and B's co-trustee A during the time they were co-trustees, but that the inquirer could not reveal to B communications with A that were had after B was no longer a co-trustee.

The following opinions were decided under the predecessor Code but probably remain relevant.

In **DC Ethics Opinion 94 (1980)**, the salaried general counsel of a trade association asked whether he could take on the representation of a related educational association with fees going to the trade association. The Committee answered affirmatively but said that either the educational association would have to agree in advance that its confidences and secrets could be shared with the trade association or the trade association would have to stipulate in advance that the inquirer did not have to share with it confidences and secrets of the educational association.

The inquirer in **DC Ethics Opinion 14 (1976)** represented a corporate client and had formerly represented an officer of the corporation in that officer's individual capacity. The corporation had waived the attorney-client privilege as to documents subpoenaed by a grand jury. The Opinion ruled that the lawyer could disclose documents applying only to the corporate client but could not disclose anything related to the former individual client without that client's consent. The Opinion warned of the dangers of joint representation, which "frequently if not invariably . . . intertwine the interests of the joint clients."

1.6:250 Information Imparted in Lawyer Counseling Programs

DC Rule 1.6(h) makes special provision for lawyer counselling programs, providing both that they shall be deemed to create a lawyer-client relationship between counsellor and counselee and that communications in the course of and associated with such counselling shall be treated as confidences or secrets under paragraph (b). Similar provision is made in DC Rule 1.6(i) for communications made in the course of the DC Bar Law Practice Assistance Program. These provisions are explained in Comments [30]-[38]. A parallel but more limited provision in the Model Rules offering protection to confidential information imparted in connection with lawyer protection programs is found in MR 8.3(e). [See 8.3:400]

1.6:260 Information Learned Prior to Becoming a Lawyer

Paragraph (g) of DC Rule 1.6 spells out a point that is probably implicit in the counterpart Model Rule: namely, that a lawyer has an obligation of confidentiality with respect to confidences and secrets learned prior to becoming a lawyer but in the course of providing assistance to another lawyer — as a summer associate, for example (or a law clerk, or paralegal, or secretary). DC Rule 1.10(b) includes language (not found in the Model rule) making clear, however, that the disqualification of the individual lawyer in such circumstances is not imputed to the lawyer's colleagues — a provision of substantial benefit to firms that are subject to the DC Rules. See also Comment [21] to DC Rule 1.10.

1.6:300 Exceptions to Duty of Confidentiality--In General

- Primary DC References: DC Rule 1.6(c) & (d)
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA § 55:101, ALI-LGL §§ 59-66, Wolfram §§ 6.1, 6.7

DC Rule 1.6(c) says that a lawyer may reveal client information (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent the lawyer's disclosure or (2) to prevent bribery or intimidation of witnesses, jurors, court officials, or other persons in proceedings before a tribunal if the lawyer believes disclosure will prevent the act. DC Rule 1.6(d) says a lawyer may use or reveal information: (1) with client consent; (2) when permitted by the rules, law or court order or when a government lawyer is permitted or authorized by law; (3) to defend against a charge of wrongdoing; (4) when impliedly authorized by a client; and (5) regarding collection of a fee. Each of these includes qualifying language admonishing that disclosure be kept to the minimum necessary to accomplish the purpose.

DC Ethics Opinion 259 (1995) noted that Rule 1.6(c), allowing a lawyer to reveal client information to prevent a crime likely to result in death or substantial bodily harm, differed from the former DR 4-101(C)(3), which allowed revelation of the intent of a client to commit any crime and the information necessary to prevent it. Thus, in the absence of a law requiring a lawyer for a fiduciary to disclose client information to prevent wrongdoing that would harm a beneficiary financially, see Rule 1.6(d)(2)(A), the lawyer for the fiduciary could not make such a disclosure.

DC Ethics Opinion 324 (2004) [discussed in detail under 1.6:220] explains that Rule 1.6(d)(4) would authorize a lawyer's disclosure to a deceased client's spouse/executor of the client's information that furthers the client's interest in settling the client's estate.

1.6:310 Disclosure to Advance Client Interests or with Client Consent

DC Rule 1.6(d)(1) says that a lawyer may use or reveal client confidences or secrets with client consent but only after full disclosure.

However, **DC Ethics Opinion 309 (2001)** (more fully discussed under 1.7:240, below) warns that waivers permitting the adverse use or disclosure of confidential information may not be implied from advance waivers of conflicts of interest.

DC Rule 1.6(d)(4) says that a lawyer may use or reveal client confidences or secrets when the lawyer has "reasonable grounds" to believe the client has "impliedly authorized disclosure." Comment [9] gives the example of admitting facts in litigation that cannot be disputed and by making a disclosure in negotiation that facilitates a satisfactory conclusion.

Comment [10] terms it a "matter of common knowledge" that a law office exposes client information to nonlawyer employees and cautions the lawyer to exercise care in hiring and training such employees. The comment also reminds lawyers that a confidentiality obligation to multiple clients requires consent of all. It also says there should be client consultation before associating with another lawyer and that advice should not be sought from another lawyer, without client consent, if there is a possibility that the client's identity or confidence or secrets would be revealed.

Comment [11] acknowledges that a lawyer may give limited information to outside agencies that provide such services as statistical, bookkeeping, accounting, data processing, banking, printing and other legitimate purposes. The lawyer is cautioned to exercise due care in selecting the agency and to warn the agency that the information must be kept confidential.

DC Ethics Opinion 299 (2000) [which is discussed more fully under 1.6:495, below] suggested that a former corporate officer seeking to obtain consent of a corporation that had ceased to operate to disclosure by its former counsel of information subject to the attorney-client privilege, might be able to petition a court to appoint a receiver or trustee for the corporation to decide whether to exercise the corporation's right to consent to disclosure of the information.

1.6:320 Disclosure When Required by Law or Court Order

DC Rule 1.6(d)(2) permits use or revelation of client confidences and secrets when "required by law or court order," and by a government lawyer when "permitted or authorized by law." Comment [26] says a lawyer *may* comply with "final orders of a court or other tribunal of competent jurisdiction." (The corresponding Model Rule 1.6, Comment [20] says the lawyer *must* comply.) The DC Comment also says that the lawyer "should not comply" until the lawyer has made "every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it."

Adams v. Franklin, 924 A.2d 993 (DC 2007) involved a discovery dispute turning on the extent to which the ethical obligation of confidence imposed on a lawyer by DC Rule 1.6 prevented the defendant from eliciting from the plaintiff's former counsel on deposition four items of information about a demand letter that the lawyer had sent to the defendant on the plaintiff's behalf. These four bits of information were (1) whether the letter was genuine, (2) whether the former counsel had sent the letter, (3) whether he had represented the plaintiff at the time, and (4) where the lawyer had learned of the information set out in the letter. The trial court had held that all of this information was subject to discovery, and the plaintiff appealed. The Court of Appeals held that although the first three items of information might be protected as "secrets" as that term is defined in DC Rule 1.6(b), that protection was subject to an exception when disclosure was required by a court order, under what is now DC Rule 1.6(e)(2)(A), and as explained in what is now Comment [28]. Although the Court recognized that if the information in dispute had constituted a "confidence" under DC Rule 1.6, then its protection might not be so readily overridden by court order, but held that none of the first three items of information sought involved communications between the plaintiff and the lawyer; so as to meet a basic requirement of the privilege; and as to the fourth item, involving information as to where the lawyer had learned the information stated in the demand letter, no privilege applied because whatever information the plaintiff had communicated for the purpose of inclusion in the demand letter could not have been intended to be kept in confidence.

DC Ethics Opinion 288 (1999) addressed the potential problems under Rule 1.6 that are faced by a lawyer in responding to a Congressional subpoena calling for the production of documents pertaining to the representation of a current or former client and containing confidences or secrets that the client does not wish to have disclosed. The **Opinion** held that the lawyer has a professional responsibility to seek to quash or limit the subpoena, on all available grounds, but recognized that, if the Congressional body issuing the subpoena overrules such motions and threatens to hold the lawyer in contempt, there is no mode of review available to the lawyer and at that point disclosure is "required by law" within the meaning of DC Rule 1.6(d)(2)(A). The **Opinion** also pointed out that the lawyer should consult with the client about the possibility that the client might, through other counsel, seek a court order enjoining the lawyer from complying with the subpoena.

DC Ethics Opinion 282 (1998) addressed a problem potentially presented when a lawyer engages a social worker to provide services in connection with the representation of a client. The problem arises from the fact that **DC Code § 2-1352** imposes upon social workers and certain other professionals (but not lawyers), when they reasonably suspect that child abuse or neglect has taken place, to report the suspected abuse "immediately" to appropriate authorities. The **Opinion** noted that a lawyer is required by D.C. Rule 1.6(e) to exercise reasonable care to prevent "others whose services are utilized by the lawyer" from disclosing confidences or secrets of a client, and a parallel obligation under Rule 5.3(b) to make reasonable efforts to ensure that the conduct of a nonlawyer retained by a lawyer "is compatible with the professional obligations of the lawyer." The **Opinion** also noted that while DC Rule 1.6(e) incorporates the exception to a lawyer's obligation of confidence provided by Rule 1.6(e)(2) when disclosure is "required by law," but found this not applicable in the circumstances, since the DC Code provision did not require disclosure of child abuse by *lawyers*. Thus, the **Opinion** noted, circumstances under discussion involved a conflict between the lawyer's ethical obligation to see to it that non-lawyer assistants preserve the client's confidences and secrets, onthe one hand, and the social worker's statutory obligation to disclose child abuse, on the other. Observing that the ethical requirements could not override statutory ones, the **Opinion** concludes that what the lawyer must do in such circumstances is to explain to the client, pursuant to Rule 1.4(b), the risk attendant upon the lawyer's retaining a social worker to assist in the representation of the client.

DC Ethics Opinion 214 (1990), written after the Rules of Professional Conduct were adopted but before they became effective, concerns a law firm's obligation when it receives an Internal Revenue Service summons requiring disclosure of a client's identity, which was a client confidence or secret. The Legal Ethics Committee said that the firm could not voluntarily comply with the summons even though a provision of the Internal Revenue Code requiring disclosure of names of and identifying information about persons engaging in certain transactions was such a law as might, under DR 4-101(C)(2) [soon to be Rule 1.6(d)(2)(A)], justify disclosure of client information. The Legal Ethics Committee said that there were questions of coverage of the statute and that "until these were resolved definitively" by a court in a particular case, the firm could not ethically disclose its client's name. See also **DC Ethics Opinion 124 (1983)**.

DC Ethics Opinion 223 (1991) concerned the Legal Services Corporation's statutory authority to obtain information from its grantees. The Committee said that this authority was "insufficiently narrow and specific" to permit as "required by law" disclosure to the LSC of confidences and secrets contained in a log of field attorneys' requests for assistance from the lawyers of a grantee support center.

DC Ethics Opinion 219 (1991) said that a regulation of a federal agency having the force and effect of law constitutes "law" within the meaning of Rule 1.6(d)(2)(A). The Opinion treated as a question of law and therefore declined to opine on whether a regulation of the Patent Office requiring the revelation of client fraud was such a regulation and therefore overrode Rules 1.6 and 3.3. The Legal Ethics Committee said

that, in any event, before making even a disclosure "required by law," a lawyer must give the client the opportunity "to investigate and pursue any good faith challenge to the regulation."

Disclosure When Required by Court Order

DC Ethics Opinion 214 (1990), introduced in 1.6:320 above, said, as noted there, that a law firm could not voluntarily comply with an Internal Revenue Service summons requiring disclosure of a client's name, which was a client secret or confidence in the circumstances. The Opinion went on to describe the firm's duties if the IRS went to court to have its summons enforced. First, the firm must, as witness in the court and perhaps as advocate for the client's position, **Opinion 214 n.5**, assert the client's objections to disclosure. Then, if the court ordered enforcement, the law firm need not risk a finding of contempt, see **DC Ethics Opinion 83 (1980)**, but, if it did not itself appeal the order, must notify the client of the order and thereby give the client an opportunity to appeal before complying with the order. The Legal Ethics Committee said that the relevant provisions of the forthcoming DC Rule 1.6, Comment [26], supported "the trend" of the Committee's prior decisions under DR 4-101(C)(2). See **DC Ethics Opinions 14 (1976), 83 (1980), 124 (1983), 180 (1987)**.

1.6:330 Disclosure in Lawyer's Self-Defense

DC Rule 1.6(d)(3) permits a lawyer to use or reveal client confidences or secrets "to the extent reasonably necessary" to establish a defense to a criminal or disciplinary charge or to a civil claim. The charge or claim must be "formally instituted" and based upon conduct in which the client was involved. It also allows use or revelation "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client," whether formal or otherwise. Comment [22] says that this provision means that a lawyer may not disclose a client's confidences or secrets to defend against informal allegations of third parties. Even if the third party has instituted a proceeding formally, the lawyer is supposed to advise the client of the action and request the client "respond appropriately, if it is practicable and would not be prejudicial to the lawyer's ability to establish a defense." Comment [23] expands on the scope of a lawyer's freedom to respond to a client's allegations regarding the attorney's work.

In **In re Confidential, 701 A.2d 842 (DC 1997)**, the respondent to a disciplinary complaint resisted a subpoena duces tecum from Bar Counsel on the ground that enforcement of the subpoena would compel disclosure of confidential information in violation of Rule 1.6. The court pointed out that Rule 1.6(d)(3) permits disclosure of information otherwise protected by the Rule "to establish a defense by a . . . disciplinary charge . . . or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." In this case the respondent contended that, to the extent the exception rested on the client's waiver of the privilege by filing a complaint, the waiver here had been revoked by the client's withdrawal of the complaint. The court held that this argument was overruled by DC Bar Rule XI, § 19(c), which provides, inter alia, that a complainant's failure to prosecute a charge does not in itself justify abatement of an investigation by Bar Counsel.

DC Ethics Opinion 171 (1986) construed the predecessor Code provision, DR 4-101(C)(4), as permitting Attorney A to give testimony revealing client confidences or secrets in defense of Attorney B, deeming Attorney B to be an "associate" although the two lawyers were in different firms. B had been retained by A to act as trial counsel for a mutual client. The Code provision allowed disclosure necessary to defend a lawyer "or his employees or associates." DC Rule 1.6(e) permits this testimony more explicitly by saying that a lawyer's "employees, associates, and others whose services are utilized by the lawyer" may reveal information permitted to be disclosed by DC Rule 1.6(c) and (d).

DC Ethics Opinion 58 (undated), decided under the prior Code, found that a lawyer could not defend himself in a regulatory agency's disciplinary investigation by revealing bills submitted to clients who were not otherwise involved in the investigation, without the consent of those clients. The lawyer wished to submit bills from other clients to show that the inaccuracies of concern to the agency were isolated incidents, not a pattern of conduct. The Legal Ethics Committee expressed sympathy for the fact the lawyer might be "substantially disabled from raising a critical defense."

Nonetheless, the Committee held that this result was required by the Code. DC Rule 1.6(d)(3) likewise limits a lawyer's self-defensive use or disclosure of client confidences or secrets to those matters "in which the client was involved."

1.6:340 Disclosure in Fee Dispute

DC Rule 1.6(d)(5) permits a lawyer to use or reveal confidences or secrets "to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee." Comments [24] and [25] amplify this provision and caution that the section should be construed narrowly.

DC Ethics Opinion 298 (2000) [which is discussed more fully under 1.5:240, above] addresses the applicability of Rule 1.6(d)(5) and Comments [24] and [25] thereto in the context of a lawyer's use of collection agencies to recover unpaid fees.

DC Ethics Opinion 236 (1993) cites comments to DC Rule 1.6 emphasizing that disclosures to collect fees should be "as narrow as possible" and that the lawyers should use devices like John Doe pleadings, in camera proceedings or protective orders "where possible to avoid the unnecessary disclosure of information." The inquirer's client had filed for bankruptcy, and the bankruptcy proceeding was being treated as a "no assets" proceeding. The inquirer asked whether, as part of an effort to collect its fees, the firm could disclose information on the client's assets in the bankruptcy proceeding. In addition to the previous admonitions about narrow disclosures, the Legal Ethics Committee cautioned that the inquirer "must have a good faith expectation of recovering more than a *de minimis* amount of the outstanding fee." The Committee warned that the lawyer's right to disclose client confidences or secrets to collect a fee does not extend to permitting disclosures for other purposes such as bringing a potential fraud to the attention of the court no matter how "salutary" that policy concern might be.

DC Ethics Opinion 218 (1991) approved a law firm retainer agreement providing for mandatory arbitration of fee disputes before the DC Bar Attorney-Client Fee Arbitration Board with client consent. In doing so, the Legal Ethics Committee stated that arbitration, "which is not open to the public, furthers the purposes of Rule 1.6(d)(5) by protecting the client from a public airing of confidential matters."

1.6:350 Disclosure to Prevent a Crime

The DC Rules permit no disclosure to prevent a crime except as described in 1.6:360 and 1.6:370, below

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.6:360 Disclosure to Prevent Death or Serious Bodily Injury

Under DC Rule 1.6(c)(1), a lawyer may reveal client confidences and secrets "to the extent reasonably necessary" to prevent a criminal act that the lawyer reasonably believes is likely to result in death or serious bodily harm absent the lawyer's revelation.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.6:370 Disclosure to Prevent Financial Loss

The DC Rules do not allow revelation to prevent financial loss except to the degree that Comment [19] to DC Rule 1.6 permits a lawyer who has withdrawn under Rule 1.16(a)(1) or Rule 1.16(b)(1) or (2) to retract or disaffirm any opinion, document, affirmation, or the like that contains a material misrepresentation by the lawyer that the lawyer reasonably believes will be relied upon by others to their detriment.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.6:380 Physical Evidence of Client Crime [see 3.4:210]

DC Rule 1.6 does not address this issue. Comments [5]-[7] to DC Rule 3.4 do address it, however: see 3.4:210 below.

See also the discussion of **DC Ethics Opinion 242 (1993)** in 1.6:395, below. **Opinion 242** concerns reconciling confidentiality obligations under Rule 1.6 with obligations to notify a third person of that person's property in the lawyer's possession, the lawyer's duty to return such property, and the duty to give an accounting of such property.

1.6:390 Confidentiality and Conflict of Interest

Comment [5] to DC Rule 1.7 says that a lawyer's ability to represent parties with common interests in a part of a case but whose interests may be adverse in another part of the case may be limited because of confidences and secrets the lawyer gains during the joint representation. **DC Ethics Opinion 248 (1994)** refused to preclude altogether representation of co-plaintiffs in an employment discrimination matter, who had a common interest in demonstrating discrimination but might fall out over the relief to be granted, but cited Comment [5] and its reference to confidences and secrets protected under DC Rule 1.6 as a consideration that cast doubt on the wisdom of the joint representation.

DC Ethics Opinion 237 (1992) responded to an inquiry by the Public Defender Service regarding the propriety of representing Client 2 when Client 1, a former client of the Service, is the complainant or an essential government witness. The Committee said that, even if DC Rule 1.9 was satisfied, DC Rule 1.6 might prohibit the subsequent representation of Client 2 if the representation would violate Rule 1.6 because of the prohibition on using a confidence or secret to the client's disadvantage or for the advantage of another. The Opinion went on to point out that DC Rule 1.10 does not impute knowledge of confidences among lawyers in a firm so that, if (as was, indeed, the case as represented to the Legal Ethics Committee) it was PDS lawyer A who had represented Client 1 and now PDS lawyer B proposed to represent Client 2, lawyer B, having no confidences or secrets of Client 1, would not be disqualified from representing Client A. Comment [5] to DC Rule 1.7 says that a lawyer's ability to represent parties with common interests in a part of a case but whose interests may be adverse in another part of the case may be limited because of confidences and secrets the lawyer gains during the joint representation. **DC Ethics Opinion 248 (1994)** refused to preclude altogether representation of co-plaintiffs in an employment discrimination matter, who had a common interest in demonstrating discrimination but might fall out over the relief to be granted, but cited Comment [5] and its reference to confidences and secrets protected under DC Rule 1.6 as a consideration that cast doubt on the wisdom of the joint representation.

1.6:395 Relationship with Other Rules

There are numerous cross-references to DC Rule 1.6 in other DC Rules and Comments. The following inventories those of significance.

DC Rule 1.2, Comment [7], concerns a lawyer's responsibilities upon learning of a client's ongoing wrongdoing. It cautions that, on the one hand, the lawyer may reveal client information only within exceptions listed in DC Rule 1.6 but that, on the other, the lawyer must avoid furthering the wrongful purpose.

The 1996 amendments to the DC Rules by the DC Court of Appeals include new Comments [13]-[18] to DC Rule 1.7 on conflicts as applied to organization clients. These relate to simultaneous representation of an organization client and a client whose interests are adverse to the interest of an affiliate or constituents of the organization. Comment [14] says that representation of a constituent must be tested by, among other things, reference to duties under DC Rule 1.6. It says that representation of the organization and its constituent or affiliate would be improper if, during the course of representation of the organization client, the lawyer had acquired confidences or secrets of the organization client or affiliate or constituent that could be used to the disadvantage of any of them.

The 1996 amendments also added Comment [25] to Rule 1.7, regarding businesses affiliated with a lawyer or firm. Its final sentence cautions that a lawyer's interest in a related enterprise serving the lawyer's clients requires "unusual care" to fashion a relationship among the lawyer, client, and related enterprise to ensure that confidences and secrets are properly preserved under Rule 1.6 "to the maximum extent possible."

DC Rule 1.8(e)(3) and Comment [6] include a prohibition on accepting compensation from another for representing a client unless information relating to representation of the client is protected, as required by DC Rule 1.6.

DC Rule 1.10(b) prohibits representation by a firm when a lawyer who becomes associated with the firm had represented a client whose interests are materially adverse and about whom the lawyer had acquired information protected by DC Rule 1.6 that is material to the matter. DC Rule 1.10(b) also refers to DC Rule 1.6(g) regarding information acquired prior to becoming a lawyer while providing assistance to another lawyer. DC Rule 1.10(b) provides that this is a basis for personal disqualification, but that disqualification is not imputed to others in the firm.

The Comments to DC Rule 1.10 include a number of references to DC Rule 1.6. Comments [4] and [5] to DC Rule 1.10 say the government is entitled to protection of confidences under DC Rule 1.6 as well as DC Rule 1.11.

The 1996 amendments to the DC Rules added Comments [7]-[9] to DC Rule 1.10, addressing a proviso added to paragraph (a) of that Rule, excepting from imputation the disqualification of an individual lawyer resulting from an initial interview with a prospective client. Comment [8] cautions that DC Rule 1.6 requires an attorney who

has talked with a prospective client about undertaking representation to disclose information to others "only to the minimum extent necessary to enable the firm to determine whether it may ethically accept the proposed representation, and if so, whether it desires to do so." If the firm declines the representation, the disqualification of the lawyer who received confidences from the prospective client need not be imputed to others in the firm if "affirmative steps" are taken "as soon as an actual or potential conflict is suspected" in order to prevent distribution of information by the personally disqualified lawyer except what was necessary to investigate the conflict. Measures must also be taken to ensure that information about firm clients who may have a conflict with the prospective client is not given to the personally disqualified lawyers.

Comments [15] and [16] to DC Rule 1.10 point out that a firm disqualification under DC Rule 1.10(b) occurs only when a lawyer joining the firm has actual knowledge of information protected by Rule 1.6. Comment [17] warns that, independent of firm disqualification concerns, a lawyer moving from one professional position to another has a continuing duty under DC Rule 1.6.

Comment [21] to Rule 1.10 concerns confidences protected by DC Rule 1.6 that were received by the lawyer while assisting another lawyer, and before becoming a member of the bar. That lawyer's firm is not disqualified from any representation by the lawyer's possession of confidences or secrets so acquired; rather, the disqualification is limited to the lawyer involved and not imputed to others in the firm. Of course, the lawyer must protect the confidences and secrets.

The final references to DC Rule 1.6 in DC Rule 1.10 concern lawyers assisting the District of Columbia Office of Corporation Counsel and the District of Columbia Financial Responsibility and Management Assistance Authority. Comment [22] says that special rules are warranted because of the need for this assistance on a temporary basis. Comment [22] cautions, however (without explicitly referring to Rule 1.6), that safeguards must be in place to protect client confidences and secrets from disclosure. Comment [25] says this type of association with those governmental entities should be declined if there is a concern that duties to other clients under DC Rule 1.6 might be compromised. Comment [25] goes on to say that it is not anticipated that this will happen often. Comment [26] reminds that the fact of some client representations is not public and that information thus may be protected by Rule 1.6. Consequently, it is not anticipated that participating firms always will be required to do formal "conflicts checks" with respect to matters in which lawyers participating in the governmental offices are involved. Comment [26] warns, however, that sufficient consultation to "honor the requirements of Rule 1.6" must take place.

DC Rule 1.11(d) requires a lawyer associated with a former government lawyer who accepts a representation, from which the former government lawyer would be personally disqualified under DC Rule 1.11(a), to make certain notifications. DC Rule 1.11(f) says these notifications generally should be public unless the public department or agency is convinced by the notifying lawyer that public disclosure is inconsistent with DC Rule 1.6 or provisions of law.

DC Rule 1.13 Comment [3] says that communications by a constituent of an organizational client are protected by Rule 1.6 if they are made in the constituent's organizational capacity. This protection does not make the constituent a client of the lawyer. Comment [3] cautions the lawyer not to make disclosures of the organization's confidences or secrets to the constituent except as impliedly authorized by the organization to carry out the representation. Comment [6] to DC Rule 1.13 says that the Rule does not limit or expand the lawyer's responsibility under DC Rule 1.6 (as well as Rules 1.8, 1.16, 3.3, and 4.1).

DC Rule 1.15(b) requires a lawyer to notify a client or third person upon receiving funds or other property in which the client or third person has an interest. The paragraph goes on to require the lawyer to "promptly deliver" the property to the person entitled to it and, "upon request by the client or third person," to give a "full accounting regarding such property, subject to Rule 1.6." Both of these requirements are prefaced by the phrase "[e]xcept as stated in this Rule or otherwise permitted by law or agreement with the client."

DC Ethics Opinion 242 (1993) considered what a lawyer should do when the lawyer receives property from a client that may belong to another but, if turned over, would reveal a client confidence or secret. The lawyer had internal company records of a client's former employer that were given to the lawyer by the client. The former employer knew generally that the client had some documents but not their specific identity. The former employer had asserted a claim to the documents and requested their return, but the client wanted access to the documents to write a book and asserted ownership claims to at least some copies of the documents. Furthermore, the client did not want to reveal to the former employer which documents the client had. The Opinion struggled with the obligation to notify the third party about property in the lawyer's possession and the obligation to turn over property and give an accounting as against the Rule 1.6 duty of confidentiality. The Opinion said that the reference to Rule 1.6 "literally applies only to the delivery and accounting duties" and not to the notice duty in the preceding sentence of DC Rule 1.15(b). It said the inquirer's obligation depended initially on whether the client had any legitimate claim to custody or use of the documents, "an issue of fact and law beyond the Committee's power to resolve." It said that DC Rule 1.15 did not address the lawyer's obligation to turn over property when it was unclear to whom the property belonged. If the client had no plausible claim of ownership, the Opinion held that DC Rule 1.6 "may preclude return of the documents to the company," but it would not preclude the inquirer from holding them to preserve them. In that instance, the Opinion directed that retaining custody of the documents would be the proper course with "future disposition to be governed or directed by a court order or by some agreement of the parties." The Opinion said it might be possible to satisfy Rule 1.15(b)'s duty of notification without a violation of DC Rule 1.6 by giving a generalized notice since the former employer was aware that the client had some documents. The Opinion reached the conclusion that DC Rule 1.6 precludes the documents from being turned over by drawing an analogy to Comment [5] to DC Rule 3.4, which reconciles the lawyer's confidentiality obligations with the duty to turn over physical evidence. Comment [5] to Rule 3.4 cautions that the lawyer

is "generally forbidden to volunteer information about physical evidence received from a client without the client's consent after consultation." The Opinion said that, to the degree there was a difference in obligations under Rule 3.4 and 1.15, it concerned obligations to the government or the court with respect to "evidence." It reasoned that obligations to third parties were the same whether the property in question was evidence or not. In the final paragraph, the Opinion warned that legal liability questions could arise from this fact situation that are beyond the scope of the ethical rules, *e.g.*, permitting the client to use company documents might breach the inquirer's fiduciary duty or cooperation with the client might subject the inquirer to claims of wrongful interference or participation in the client's breach of fiduciary obligations to the former employer.

DC Rule 2.2 Comment [8] says that Rule 1.6 is an important factor in determining the propriety of a lawyer's serving as an intermediary between two or more clients. Complying with the lawyer's duty to keep each client informed and at the same time to protect client confidences and secrets is said to "require[] a delicate balance." The Comment says that, if the balance cannot be maintained, common representation is improper. Because the attorney-client privilege does not apply as between commonly represented clients, the Comment cautions that it must be assumed that if litigation ensued between the clients the privilege would not protect communications and the clients should be so advised.

DC Rule 2.3(b) says that, "[e]xcept as disclosure is required in connection with a report of an evaluation" of a matter affecting a client for the use of someone other than the client (as provided in DC Rule 2.3(a)), information relating to the evaluation is protected by DC Rule 1.6. This tips the confidentiality balance to disclosure when it is "required in connection with a report" under DC Rule 2.3. Comment [5] says that questions about the legal situation of a client at the "insistence of the client's financial auditor" are to be resolved under a procedure set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

DC Rule 3.3(d) says that a lawyer who

> receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the tribunal unless compliance with this duty would require disclosure of information otherwise protected by Rule 1.6, in which case the lawyer shall promptly call upon the client to rectify the fraud.

DC Rule 3.3 Comment [6] says that the lawyer usually cannot present false evidence if the lawyer learns of the client's intent to present such evidence before it is presented. Even then the comment refers to "rare instances" in criminal cases when the lawyer is unsuccessful in dissuading a criminal defendant client from going forward and the lawyer "is unable to withdraw without causing serious harm to the client." DC Rule 3.3(b), as expanded upon in Comment [7], says that a lawyer may permit a client who is

a defendant in a criminal case to "present false testimony in very narrowly circumscribed circumstances in a very limited manner." DC Rule 3.3(b) requires the lawyer to withdraw rather than offer the false testimony "if this can be done without seriously harming the client." DC Rule 3.3 Comment [8] defines serious harm to the client and says it is "more than the usual inconveniences" entailed by withdrawal such as delay or increase in cost. Comment [8] says such circumstances exist only when a client "would be significantly prejudiced, such as by express or implied divulgence of information otherwise protected by Rule 1.6." Comment [8] repeats the possibility of withdrawal as a remedy but says that the narrative testimony option of Rule 3.3(b) can be used in extreme circumstances such as those previously described in which DC Rule 1.6 otherwise would be violated.

DC Ethics Opinion 213 (1990) discussed the inquirer's question under both the Code and the Rules since this was the period just before the DC Rules became effective. The inquirer had argued that a prior lawyer's representation of a criminal client was ineffective assistance of counsel because the former lawyer failed to secure enforceable process upon a witness whose testimony allegedly would have exculpated the defendant. While the court was considering the matter, the inquirer located the witness, who denied making the exculpatory statements although another witness had given an affidavit that such statements were made. The Legal Ethics Committee said that the inquirer did not have an ethical obligation to inform the court of the witness' denial of the exculpatory statements under DR 7-102 or DC Rule 3.3. Information learned from interview of the witness was deemed protected by DR 4-101 and DC Rule 1.6 and thus could be revealed only if permitted by the Rules or required by law or court order. The Committee found that the "simple existence of conflicting witness statements" did not by itself give "knowledge" that one such statement is false. The Committee cited **Butler v. United States, 414 A.2d 844, 850 (DC 1979)**, and the cases cited therein.

The reconciliation of Rule 1.6 and duties to turn over physical evidence is addressed in this section in the review of **DC Ethics Opinion 242**, above, and in the discussion of Comments [5]-[7] to DC Rule 3.4, in 3.4:210 below.

DC Rule 4.1(b) says a lawyer

> shall not knowingly: . . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment [3] to Rule 4.1(b) says that the Rule recognizes that substantive law may impose duties to disclose information "to avoid being deemed to have assisted the client's crime or fraud" but says that the disclosure requirements are subject to obligations under DC Rule 1.6.

DC Rule 8.1(b) exempts information protected by DC Rule 1.6 from the general requirement to disclose facts necessary to correct misapprehensions known to have arisen in admission or disciplinary matters, and to respond to reasonable demands for information arising from those processes. Comment [3] points out that a primary

example of such exemption is information gained while representing a bar applicant or lawyer subject to a disciplinary proceeding.

DC Rule 8.3(c) limits the duty to report misconduct of other lawyers by saying that it "does not require disclosure of information otherwise protected by Rule 1.6." Comment [2] repeats this limitation but says a lawyer should encourage a client to consent to disclosure "where prosecution would not substantially prejudice the client's interest." **DC Ethics Opinion 246 (1994)**, discussed in 1.6:210 above, reviews a difficult reconciliation of Rule 1.6 and 8.3 duties in light of DC's broad definition of client secrets.

DC Rule 8.3 Comment [5] refers to Rule 1.6(h), which protects information gained by lawyers participating in lawyer counseling programs of the DC Bar Lawyer Counseling Committee.

1.6:400 Attorney-Client Privilege

- Primary DC References: DC Rule 1.6(b)
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA § 55:301, ALI-LGL §§ 68-85, Wolfram §§ 6/3-6/5

The attorney-client privilege "protects confidential communications made between clients and their attorneys …for the purpose of securing legal advice or services." **In re Lindsey, 148 F.3d 1100, 1103 (DC Cir. 1998)** (citing **In re Sealed Case, 737 F.2d 94, 98-99 (DC Cir. 1984)**).

DC Rule 1.6(b) defines "confidence" as information protected by the attorney-client privilege under applicable law. In the District of Columbia local courts, the "applicable law" is the local law of attorney-client privilege. In the District's federal courts, on the other hand, the applicable law depends on whether local or federal law is to be looked to for the rules of decision. As Fed. R. Evid. 501 makes clear, in a civil proceeding in which local law supplies the rules of decision, the local law of attorney-client privilege applies. In a proceeding in which federal law provides the law of decision, the applicable law is the law of privilege as developed by the federal courts. See **Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1512 (DC Cir. 1993).** Although there do not appear to be any cases specifically addressing differences between the District's law of privilege and the federal law of privilege, readers should bear in mind that there may be such differences.

1.6:410 Privileged Communications

The privilege protects communications that relate to facts of which a lawyer was informed by a client or would-be client in order to obtain legal assistance. **In re Sealed Case 737 F.2d 94, 98-99 (DC Cir. 1984)**; **Athridge v. Aetna Cas. and Sur. Co., 184 FRD 181, 188 (DDC 1998)** (refusing to protect an insurer's claims files because "[n]one of [the] information was communicated to an attorney…let alone…for the purpose of seeking legal advice.) The privilege generally does not protect communications that merely disclose that the client retained the lawyer for a particular purpose. See **Evans v. Atwood, 177 FRD 1, 4 (DDC 1997)** (explaining that when an agency official asks an agency lawyer for an interpretation of a statute, the communication would not be protected even though its disclosure signals the agency's plans.)

The general subject matter of a representation is not ordinarily privileged, nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, but in exceptional cases it may be demonstrated that privilege does apply to such information. See **United States v. Legal Services for New York City, 249 F.3d 1077, 1080 (DC Cir. 2001)**.

The recipient of the client's communication must be either a member of the bar or the "subordinate" of one, and the lawyer must be acting in his capacity as such. **In re**

Sealed Case, 737 F.2d at 98-99. The law does not protect communications in which a person consults a lawyer "not as a lawyer but as a friend or as a business advisor, or banker, or negotiator…."' **In re Lindsey, 148 F.3d 1100, 1106 (DC Cir. 1998)**) (quoting **1 McCormick on Evidence § 88, at 322-24 (4th ed. 1992)**).

Although the privilege applies to in-house counsel as it would to any other lawyer, **Neuder v. Battelle Pacific Northwest National Laboratory, 194 FRD 289, 293 (DDC 2000)**, where business and legal advice are intertwined, the latter must predominate to be protected, and when the legal advice is merely incidental to business advice, the privilege doesn't apply. *Id*. at 292. Thus, in-house counsel's attendance at a meeting whose function is to make a business decision does not make all documents generated and distributed in connection with the meeting privileges. *Id*. at 293. A communication from a lawyer to an investigator employee on the client's behalf is not covered by the privilege unless it would reveal confidential information provided by the client. **Alexander v. FBI, 192 FRD 12 (DDC 2000)**.

1.6:420 Privileged Persons

The privilege belongs to the client, or to a person who seeks to become a client. **In re Sealed Case 737 F.2d 94, 98-99 (DC Cir. 1984)**.

Pilates, Inc. v. Georgetown Bodyworks Deep Muscle Message Centers, Inc., 201 FRD 201 (DDC 2000) held that a corporation was not entitled to assert attorney-client privilege on behalf of a former corporate owner of trademarks that it had acquired, where there was no change of control of the former corporation, nor a purchase of assets other than the trademark.

1.6:430 Communications "Made in Confidence"

A client's communication is "made in confidence" if the client says or writes something in the expectation that no one else will ever learn its contents. See **Evans v. Atwood, 177 FRD 1, 4-5 (DDC 1997)**; **Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 FRD 4 (DDC 1991)** (explaining that the preliminary draft of a letter sent by a client to his lawyer might not be protected if the client intended eventually to reveal the contents of the letter to third parties in the form of a final draft.)

In **Cobell v. Norton, 213 FRD 69 (DDC 2003)**, the Court held that a memorandum discussing and responding to legal advice that had been received in a privileged document from counsel, but which bore no legend labeling it as confidential, and which had been produced to a special master without any accompanying statement to the effect that it was confidential, was not privileged because it was not shown to have been intended to be confidential when first created.

See **Adams v. Franklin, 924 A.2d 993 (DC 2007)**, which is more fully discussed under 1.6:320, where information furnished by a client to a lawyer for inclusion in a demand letter was held not to be privileged because if it was intended for inclusion in such a letter it could not have been expected to be held in confidence.

1.6:440 Communications from Lawyer to Client

In addition to protecting communications from clients, the privilege protects communications from the lawyer to the client if they "rest" on confidential information obtained from the client. **In re Sealed Case 737 F.2d 94, 99 (DC Cir. 1984)**. A communication "rests" on confidential information when "disclosure of its contents [would] necessarily and inevitably disclose a communication from the client which the client intended to be confidential." **Boca Investerings Partnership v. United States, Civil Action No. 97-602, 1998 U.S. Dist. LEXIS 11870, at *6 -*7, *17 (DDC June 9, 1998)** (protecting sections of an opinion letter in which the lawyer described the client's proposed transaction, but declining to protect other sections of the letter in which the lawyer discussed the transaction's tax consequences.)

The privilege does not protect communications from lawyer to client that convey information obtained from third parties. **Montgomery v. Leftwich, Moore and Douglas, 161 FRD 224, 226 (DDC 1995)**; **Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 FRD 4, 10 (DDC 1991)** (refusing to protect a map and various charts prepared by a lawyer for the client's use because although the data related to the client's business, it probably had been collected from third parties.)

1.6:450 Client Identity, Whereabouts, and Fee Arrangements

The privilege does not ordinarily protect communications that disclose a client's identity. See **United States v. Hunton & Williams, 952 F. Supp. 843, 856 (DDC 1997)**(applying federal precedent regarding privilege). The privilege also does not protect fee arrangements. See **Montgomery v. Leftwich, Moore and Douglas, 161 FRD 224, 226 (DDC 1995)**.

There appears to be no pertinent DC judicial authority regarding the applicability *vel non* of the privilege to information relating to a client's "whereabouts." But see **D.C. Ethics Opinion 266 (1996)** (holding that the client's whereabouts may be protected information under Rule 1.6(a)).

1.6:460 Legal Assistance as Object of Communication

To warrant protection, the client's communication must be for the purpose of obtaining either "'(i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding….'" **In re Sealed Case 737 F.2d 94, 98-99 (DC Cir. 1984)(**quoting **United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D.Mass. 1950)**); see also **In re Lindsey, 148 F.3d 1100, 1106 (DC Cir. 1998)** (holding that Deputy White House Counsel's advice regarding political, strategic, and policy matters would not be protected).

In **Jones v. United States, 828 A.2d 169 (DC 2003)**, the appellant, who had been convicted by a jury of first degree sexual abuse and felony murder, appealed the trial court's denial of his claim of privilege regarding a conversation he had had with his girlfriend, who was a government lawyer without criminal law experience. Citing authority emphasizing that one seeking advice from a friend who is also a lawyer can invoke the privilege only if the advice is given as a lawyer, not as a friend, the Court pointed out that the nature of the relationship is a factual question for the Court to decide; and that the critical question is what the putative client, not the lawyer/friend, understands the relationship to be. *Id*. at 175-76. Here, the trial court had determined that the lawyer/girlfriend's advice had been given as a friend, not as a lawyer. The Court of Appeals also observed that there was no controlling precedent governing appellate review of a trial court ruling on the application of the privilege, although it noted that the federal courts were divided over whether a *de novo* or a "clear error" standard should apply in cases involving both application and waiver of the privilege. It then decided that where, as here, the trial court's determination rested on a factual finding, the "clear error," or "plainly wrong" standard of review applies. *Id*. at 174.

1.6:470 Privilege for Organizational Clients

The privilege protects communications between employees of the same organization for the purpose of seeking legal assistance. See **Boca Investerings Partnership v. United States, 31 F. Supp. 2d 9, 11 - 12 (DDC 1998)**. The organization's lawyer involved in the communication must, however, be acting as a lawyer rather than as a management advisor. Id**.** at 12. Because organization lawyers often perform multiple functions, the courts must

> examine the circumstances to determine whether the lawyer was acting as a lawyer rather than as business advisor or management decision-maker. One important indicator of whether a lawyer is involved in giving legal advice or in some other activity is his or her place on the corporation's organization chart. There is a presumption that a lawyer in the legal department or working for the general counsel is most often giving legal advice, while the opposite presumption applies to a lawyer…who works for…[the] management or business side of the house.

*Id***.** (citing **In re Sealed Case, 737 F.2d 94, 99 (DC Cir. 1989)).** But a lawyer's place on an entity's organization chart is "not always dispositive." *Id.*

Nesse v. Shaw Pittman, 206 FRD 325 (DDC 2002) addressed the question whether certain notes taken by a law firm partner in meetings concerning a lawsuit against the firm were protected from disclosure by attorney-client privilege or work-product doctrine. One of the firm's partners, who served as general counsel to the firm, was conducting an internal investigation of the case, and notes taken at meetings with him about the case, or at meetings where his confidential advice about the case was discussed, were held to be covered by the privilege, but notes of a meeting among partners other than the general counsel about the case, and not focused on communications to or from the general counsel, were held not to be protected either by the privilege or as work-product.

Federal Trade Commission v. GlaxoSmithKline, 294 F.3d 141 (DC Cir. 2002) reversed a district court decision rejecting a claim of privilege for certain corporate documents on the basis that the corporate defendant had failed to preserve the privileged status of the documents because they had been widely distributed both within the company and to various outside public relations and government affairs consultants. The Court of Appeals held that the applicable standard was whether "the documents were distributed on a 'need to know' basis or to employees that were 'authorized to speak or act' for the company," *id*. at 349 (quoting **Coastal States Gas Corp v. DOE, 617 F.2d 854, 863 (DC Cir. 1980)**. It held that the company's privilege log and an affidavit sufficiently established that the documents had been circulated only to specifically named employees and contractors, all of whom were "needed to provide input to the legal department and/or receive the legal advice and strategies formulated by counsel." *Id.*

1.6:475 Privilege for Governmental Clients

The privilege also protects communications between employees of a government agency for the purpose of obtaining legal assistance. See **Tax Analysts v. IRS, 117 F.3d 607, 618 (DC Cir. 1997)**. As in the case of other organizational clients, the agency employee must be seeking legal assistance on behalf of the agency. See **Hollar v. IRS, Civil Action No. 95-1882, 1997 U.S. Dist.**

12846, at *11 - *13 (DDC Aug. 7, 1997) (holding that communications between IRS revenue agents and agency lawyers were protected because "advice solicited …was sought in connection with litigation and debt collection").

Although the privilege for government clients is "rather absolute" in civil cases, **In re Lindsey, 148 F.3d 1100, 1107 (DC Cir. 1998),** it does not apply when a government client is represented by a government lawyer before a grand jury, and the lawyer has information "relating to the commission of possible crimes" by his client or others, *id* . (holding that a Deputy White House Counsel could not invoke the privilege to avoid testifying before a grand jury regarding conversations with the President).

1.6:480 Privilege of Co-Clients

When a lawyer represents two clients in the same matter, and one client later sues the other, neither can invoke the privilege to protect conversations he had with the lawyer while they were co-clients. See **Athridge v. Aetna Casualty and Sur. Co., 184 FRD 181, 186 (DDC 1998)** (citing **Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co., 743 F.2d 932 (DC Cir. 1984**, and observing that the principle applies when an insured sues its insurer, with the result that the insurer cannot protect, from discovery by the insured, documents created by the lawyer the insurer had hired to represent the insured). See also **Hillerich & Bradsby Co. v. MacKay, 26 F.Supp. 2d 124, 126 - 27 (DDC 1998)** (citing **In re Regents of the Univ. of Cal., 101 F.3d 1386. 1389 (Fed.Cir. 1996);** treating two parties who used the same lawyer to prosecute a patent application -- one party being the inventor and the other a company that had retained the inventor as a consultant and had a contractual right to the patent -- as co-clients on the basis of their "common legal interest," and holding that neither could invoke the privilege against the other.)

1.6:490 Common-Interest Arrangements

The "common interest rule" allows individuals who share a common interest to share information without waiving their privilege vis-à-vis third parties. See **Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (DDC 1995)**. Their communication must satisfy three conditions: "(1) the disclosure is made due to actual or anticipated litigation; (2) for the purpose of furthering a common interest; and (3) the disclosure is made in a manner not inconsistent with maintaining confidentiality against adverse parties." *Id.* (citing **United States v. AT&T, 642 F.2d 1285, 1298-99 (DC Cir. 1980)**).

The "common interest rule" is also referred to as the "common interest privilege," and as the "joint defense privilege," see **In re Sealed Case, 29 F.3d 715, 716, 719 n.5 (DC Cir. 1994)**.

In determining whether the common interest rule/privilege applies, the courts will consider whether the parties shared a common interest in the litigation as of the time when the information is shared. See **AT&T, 642 F.2d at 1298-99** (citing **In re United Mine Workers of Am. Employee Benefit Plans Litig., 159 FRD 307 (DDC 1994)**).

In **Minebea v. Papst, 228 FRD 13 (DDC 2005)** the court summarized the foregoing propositions about common interest arrangements, with additional case citations, and added the following additional propositions, together with citations that are here omitted: (1) The rule presupposes the existence of an otherwise valid attorney-client privilege; (2) it applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine; (3) although a written agreement is the most effective method of establishing the existence of a joint defense agreement, an oral agreement whose existence, terms and scope are proved by the party asserting it will be enforceable as well; and (4) the party asserting the attorney-client or work product privilege always bears the burden of demonstrating that the information, communications or documents sought to be shielded are in fact privileged. **Id. at 15-16.**

United States ex rel. Purcell v. MWI Corporation, 209 FRD 21 (DDC 2002) held that in a qui tam action under the False Claims Act in which the government chooses to intervene, there is a "joint-prosecutorial," or "common interest privilege" between the relator and the government.

1.6:495 Duration of Attorney-Client Privilege

The Supreme Court has made it clear (in a 6-to-3 decision) that the privilege continues after the client's death to protect communications between a client and his lawyer that were privileged at the time they were made. **Swidler & Berlin v. United States, 524 U.S. 399 (1998), rev'g 124 F.3d 230 (DC Cir. 1997)**.

DC Ethics Opinion 324 (2004) [discussed in more detail in 1.6:220] observes that the attorney-client privilege "usually extends beyond the death of a client," citing the **Swidler & Berlin** decision.

DC Ethics Opinion 299 (2000) held that a lawyer's obligation to preserve the confidences and secrets of a corporate client continues not merely after termination of the client-lawyer relationship, but also after the corporate client has ceased operations. The inquiry to which the **Opinion** responded arose because the inquirer, who had represented the corporation in question, had had a request from counsel for a former officer of the corporation, seeking information that the inquirer believed to be subject to the attorney-client privilege. The **Opinion** made clear that the inquirer was bound to preserve not only the "confidences" of the former client (i.e., information covered by the privilege), but also its "secrets," absent an exception pursuant to paragraph (c) or (d) of Rule 1.6. No exception under paragraph (c) was suggested by the facts presented, leaving only the possibilities, under paragraph (d), of consent of the former client, given by a corporate successor (if there was one), or a court order. The **Opinion** pointed out that a former officer of the corporation would not have authority to give consent on behalf of the corporation, but that the former officer might be able to petition a court to appoint a receiver or trustee for the corporation to decide whether to exercise the corporation's right to consent to the disclosure that was sought.

1.6:500 Waiver of Attorney-Client Privilege

- Primary DC References: DC Rule 1.6(b)
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA § 55:416, ALI-LGL §§ 78-80, Wolfram § 6.4

The law governing waiver of the attorney-client privilege is guided by the principle that "courts will grant no greater protection to those who assert the privilege than their own precautions warrant." **Piedmont Resolution, L.L.C. v. Johnston, Rivlin & Foley, L.L.P., CA No. 96-1605, 1997 U.S. Dist. LEXIS 269, at *6 (DDC Jan. 13, 1997)** (quoting **In re Sealed Case, 877 F.2d 976, 980 (DDC 1989)**). Thus, the holder of the privilege "must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure," **SEC v. Lavin, 111 F.3d 921, 929 (DC Cir. 1997)**, for "[i]n the attorney-client context, this court adheres to a strict rule on waiver of privileges." *Id.*

1.6:510 Waiver by Agreement, Disclaimer, or Failure to Object

The privilege can be waived by express agreement, and when waived is forfeited as against both the party to the agreement and third parties. See **Piedmont Resolution L.L.C. v. Johnston, Rivlin & Foley, L.L.P., CA No. 96-1605, 1997 U.S. Dist. LEXIS 269, at *1 - *3, *6 - *7 (DDC Jan. 13, 1997)** (finding that the plaintiff waived its privilege regarding a business transaction as against the defendant by signing a letter to the United States Secret Service waiving its privilege in order to cooperate in an investigation).

There appear to be no pertinent DC authorities regarding waiver by "disclaimer."

Failure to make timely objection to a subpoena duces tecum issued by the Federal Trade Commission, as required by Commission Rule of Practice 2.7(d), was held to constitute waiver of claims of privilege in **Federal Trade Commission v. Glaxosmithkline, 208 FRD 8 (DDC 2001).**

Courts may find that the privilege has been waived if a lawyer fails to claim the privilege at the appropriate time. See **Boca Investerings Partnership v. United States, Civ. No. 97-602, 1998 U.S. Dist. LEXIS 11840, at *6 - *7 (DDC Jan. 20, 1998).** In determining whether to hold a privilege waived by delay in asserting it, courts will apply the criteria governing discovery sanctions generally: "the effect of the conduct … on the court's docket, whether it has prejudiced that party's opponent, and whether deterrence is necessary to protect the integrity of the judicial system." *Id***.** at *7 (citing **Bristol Petroleum Corp. v. Harris, 901 F.2d 165, 167 (DC Cir. 1990)**). In addition, "the sanction must never be any more severe than it need be to correct the harm done and to cure the prejudice created to the other party, unless the opposing party's behavior has been so flagrant or egregious that deterring similar conduct in the future in itself warrants the sanction…." *Id***.** at *7 - *8 (holding that plaintiff's inclusion of a general statement of privilege rather than a document-specific privilege log in its

initial response to the defendant's discovery request neither prejudiced the defendant, nor constituted an "egregious assault upon an efficient discovery process" warranting waiver).

In **Bowles v. National Association of Home Builders, 224 FRD 246 (DDC 2004),** the defendant was found to have waived both the attorney-client privilege and related work product immunity by failing, after learning that the plaintiffs had the protected materials in her possession, to "take reasonable steps to reclaim the protected material," **id. at 253 (**quoting **SEC v. Lavin,** cited above, **111 F. 3d at 930**). The plaintiff was a former executive of a wholly-owned subsidiary of the National Association of Home Builders (NAHB), who had been fired because she objected to a proposed royalty agreement between the parent and the subsidiary, and therefore refused to sign the agreement in her official capacity. She was suing the parent company to recover the large severance payments to which she was entitled under her employment agreement, but this decision dealt with cross motions by the parties relating to confidential documents that had been prepared by counsel for the parent and the subsidiary regarding the legal validity of the royalty agreement that occasioned the parties' parting of the ways. In correspondence prior to the filing of the case, plaintiff's counsel informed defendant's counsel that plaintiff had some of those confidential documents and was returning them to the defendant but keeping copies of them. Defendant's counsel then demanded return of all such documents and copies thereof. After the suit was filed, the parties' respective positions with regard to the confidential documents relating to the legality of royalty agreement escalated into a motion by plaintiff to compel production of all such documents in the defendant's possession, and a cross motion by the defendant to compel the plaintiff to return all such documents in her possession. There was no dispute as to whether the documents in dispute were, at creation, clothed with either the attorney-client privilege or attorney work-product privilege; the dispute was solely whether the defendant had waived both privileges, by failing promptly to take appropriate measures to recover the copies of the privileged documents that it knew were in the plaintiff's possession.

The plaintiff argued that the defendant NAHB had waived any privilege by furnishing the documents to its subsidiary, at a time when the two entities were adverse to each other with respect to the proposed royalty agreement, but the defendant argued that the materials were shared by NAHB with its subsidiary for the purpose of persuading it to accept the proposed agreement, and that disclosure in such circumstances did not amount to a waiver of otherwise applicable privileges with respect to anything but the particular documents so disclosed -- in other words, the disclosure did not constitute a waiver with respect to the subject matter of the documents that were shared. The court noted that the waiver of privilege with respect to documents disclosed during settlement discussions was an issue of first impression in the DC Circuit, although there was authority in other jurisdictions, *id*. at 252, but found it unnecessary to decide that issue because the record was so clear that NAHB had "failed to take any legal action to assert its privilege or otherwise to recover the documents in plaintiff's possession for more than a year after plaintiff informed NAHB that she possessed the comments," *id*. at 253. In reaching this conclusion, the court canvassed the case authority in the District of

Columbia as well as other jurisdictions dealing mainly with the sufficiency of efforts to recover the protected materials that had been inadvertently disclosed. The Court then turned to the question whether NAHB's waiver of the privilege with respect to the disclosed documents constituted a subject matter waiver. Recognizing that different standards governed this question as applied to the attorney-client privilege and to attorney work product privilege, but after canvassing DC Case authority as to both, concluded that in this case, there had been a subject matter waiver as to both. *Id*. at 257-60**.**

1.6:520 Waiver by Subsequent Disclosure

As a general matter, "any disclosure by a holder of a privilege inconsistent with maintining the confidential nature of [the privileged] communication waives the privilege." **SEC v. Lavin, 111 F.3d 921, 933 (DC Cir. 1997)**(citing **In re Sealed Case, 676 F.2d 793, 818 (DC Cir 1982).** Thus, the voluntary disclosure of privileged material to third parties waives the privilege. See **In re Sealed Case, 121 F.3d 729, 741 (DC Cir. 1997)** (citing **In re Sealed Case, 676 F.2d at 809**); **Piedmont Resolution, L.L.C. v. Johnston, Rivlin, and Foley, L.L.P., CA No. 96-1605, 1997 U.S. Dist. LEXIS 269, *1 - *3, *6 - *7 (DDC Jan. 13, 1997)** (finding that the plaintiff waived its privilege regarding a business transaction by discussing the transaction with United States Secret Service Agents).

At least in the District of Columbia federal courts, the privilege is lost even if the disclosure is inadvertent. **In re Sealed Case, 877 F.2d 976, 980 (DC Cir. 1989)** (holding that inadvertent disclosure of a privileged document waived the privilege with respect to that document and five related documents). "Short of court-compelled disclosure … or other equally extraordinary circumstances, [the court] will not distinguish between various degrees of voluntariness in waivers of the attorney client privilege." *Id.* See also **Wichita Land & Cattle Co. v. American Fed. Bank, 148 FRD 456 (DDC 1992)** (requiring a law firm to comply with an adverse party's discovery request for two privileged documents mistakenly made available to opposing counsel, among 40 boxes of documents, for preliminary review); **In re United Mine Workers of Am. Employee Benefit Plans Litig. 156 FRD 507 (DDC 1994)**(same, re privileged documents inadvertently included in three of 60 boxes released to opposing counsel for review).

The court will consider a document "disclosed" for the purpose of finding waiver when the person who has received the documents has learned the "gist" of the material. **Wichita Land & Cattle Co., 148 FRD at 459** (citing **Chubb Integrated Sys. Ltd v. National Bank of Washington, 103 FRD 52, 63 (DDC 1984)**). And waiver by disclosure applies not only to the disclosed communications, but also to "'all other communications relating to the same subject matter.'" **In re Sealed Case, 121 F.3d at 741** (quoting **In re Sealed Case, 676 F.2d at 809)**; **Corporation for Pub. Broad. v. American Auto. Centennial Comm'n, Civ. No. 97-1810, 1999 U.S. Dist. LEXIS 1072, at *6 (DDC Feb. 2, 1999)** (holding that the defendant's inadvertent disclosure of a letter from its lawyer to its president describing the plaintiff's policy on editorial control required disclosure of all other documents relating to plaintiff's policy). The courts may limit the scope of the waiver, however, when "the client has merely disclosed a communication to a third party, as opposed to making use of it." **Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 FRD 4, 12 (DDC 1991)** (quoting **In re Sealed Case, 676 F.2d at 809 n. 54**).

A party may not "selectively disclose part of a privileged communciation in order to gain an advantage in litigation." **Securities and Exchange Comm'n v. Lavin, 111 F.3d at 933** (citing **In re Sealed Case, 676 F.2d at 818)**

Disclosure of part of a document, however, does not necessarily waive the privilege in regard to redacted parts. See **Holland v. Island Creek Corp., 885 F.Supp. 4, 7 (DDC 1995)**. Similarly, disclosure of a draft does not necessarily waive the privilege for other drafts of the same document. See *id***.** at 8.

Disclosure of privileged materials among officials of the same agency does not waive the privilege. See **Evans v. Atwood, 177 FRD 1, 6 (DDC 1997)**. As has been mentioned, when disclosure has been compelled by the court, and in other "equally extraordinary circumstance[s]," the privilege will not be waived. **In re Sealed Case, 877 F.2d at 980**.

Alexander v. FBI, 198 FRD 306 (DDC) held, *inter alia*, that sending of the final draft of a letter to a third party doesn't waive privilege otherwise applicable to previous drafts of the letter, *id*. at 311; that a letter inspired by confidential communications but not disclosing the substance of the communications, doesn't waive the privilege, *id*. at 314; and that lower-level corporate employees' disclosure of communications with corporate counsel doesn't waive privilege, since the privilege is that of the corporation, and power to waive it rests solely with management, *id*. at 315.

In **Sparshott v. Feld Entertainment, Inc., 2000 U.S. Dist. LEXIS 13800 (DDC 2000)**, the court held that the privilege covering taped telephone conversations between an employee and his lawyers, was not waived when the employee, placed on leave and locked out of his office, forgot to remove the tape from a dictaphone when allowed to visit the office in order to retrieve his belongings. The employee's neglect or failure to recall that the tape was in the machine on the "stressful day in question" was not, the court observed, an affirmative act such as throwing a confidential document into the garbage.

Another exception to waiver by subsequent disclosure is provided by the "common interest" or "joint defense" privilege, which permits a client and his lawyer to discuss protected information in the presence of other parties with whom the client is engaged in a joint defense without forfeiting the client's privilege. See 1.6:490, above.

1.6:530 Waiver by Putting Assistance or Communication in Issue

The privilege is waived if the client puts the privileged material "in controversy." **Ideal Elec. Sec. Co., Inc v. International Fidelity Ins. Co., 129 F.3d 143, 151 (DC Cir. 1997)** (holding that the privilege with respect to a lawyer's billing statements was waived because the adverse party needed them to defend itself against the client's suit to recover fees that had been paid to the lawyer).; **Estate of Cornwell v. AFL, 197 FRD 3 (DDC 2000)** (privilege waived as to testimony regarding reasonableness of Board of Trustees' decision denying benefits claim, where defendants had put that reasonableness in issue).

In **Mineba Co., LTD v. Papst, 355 F.Supp.2d 518 (DDC 2005)**, the court referred to the waiver of privilege resulting from a party placing otherwise privileged material in issue as an "implied" or "at issue" waiver, and went on to observe that "[t]he purpose of the implied waiver doctrine is to prevent 'and abuse of the privilege,' that is, to prevent the confidentiality protected by the privilege from being used 'as a tool for manipulation of the truth-seeking process …[A party asserting privilege] cannot be allowed, after disclosing as much as [it] please, to withhold the remainder' " [quoting **In re Sealed Case, 676 F.2d 793, 807 (DC Cir. 1982**].

The privilege is also waived by a claim of ineffective assistance of counsel. See **Eldridge v. United States, 618 A.2d 690, 693 n.3 (DC 1992)** (citing **Doughty v. United States, 574 A.2d 1342, 1343 (DC 1990)**).

1.6:600 Exceptions to Attorney-Client Privilege

- Primary DC References: DC Rule 1.6(b)
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA §§ 55:901 *et seq*., ALI-LGL §§ 81-84, Wolfram § 6.4

Even where the privilege applies, the courts may allow discovery if the party seeking the privileged information demonstrates a compelling need for it. See **Carl v. Children's Hosp., 657 A.2d 286, 293 (DC 1995), rev'd on other grounds, 702 A.2d 159 (DC 1997)(en banc)**. The court will balance the "importance of the … privilege against [the discovering party's] need for the information, considering such factors as whether the information sought goes to the heart of, or is crucial to, [the party's] discovery claims, and the issues framed by the pleadings." *Id***.** See also **Neku v. United States, 620 A.2d 259, (DC 1993)** (applying a balancing test when privilege prevents defendant from exercising Sixth Amendment right to confront adverse witness). This may be a point on which the local and the federal courts of the District of Columbia differ: see **FDIC. v. Cafritz, Civil Action No. 91-883, 1991 U.S. Dist. LEXIS 11152, at *12 (Apr. 12, 1991)** ("[T]here is no express 'balancing test' in this Circuit.").

A more specific exception is that the privilege may not be invoked by a lawyer to resist a subpoena from Bar Counsel for records relating to the lawyer's representation of particular clients, even if those clients have not complained of the lawyer's conduct that is being investigated. See **In re Confidential, 703 A.2d 1237, 1238 (DC 1997)(dictum)**.

1.6:610 Exception for Disputes Concerning Decedent's Disposition of Property

DC Ethics Opinion 324 (2004) [discussed in more detail in 1.6:220] discusses the testamentary exception to attorney-client privileged and concludes that a lawyer may reveal a deceased client's confidential information to the client's executor if the lawyer has reasonable grounds for concluding that release of the information is impliedly authorized in furthering the client's interests in settling the client's estate.

1.6:620 Exception for Client Crime or Fraud

The privilege does not protect communications made "'for the purpose of getting advice for the commission of a fraud or crime….'" **Crane v. Crane, 614 A.2d 935, 938 (DC 1992)** (quoting **United States v. Zolin, 491 U.S. 554, 563 (1989)**). The party seeking to overcome the privilege on the basis of this exception for client crime or fraud must show that the client's conduct meets two conditions. First, "the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." **In re Sealed Case, 107 F.3d 46, 49 (DC Cir. 1997)** (citing **In re Sealed Case, 754 F.2d 395, 399 (DC Cir. 1985)**; **United States v. White, 887 F.2d 267, 271 (DC Cir. 1989)**). Second, the client must have carried out the "crime or fraud." *Id.* See, *e.g.*, **In re Grand Jury Subpoena to Carter, Misc. Action No. 98-068, 1998 U.S. Dist. LEXIS 19497, at *4 - *5 (DDC Apr. 28, 1998)** (applying crime-fraud exception to Monica Lewinsky's communications to her lawyer on the basis of evidence that she made the communications with the intention of furthering her own perjury and obstruction of justice). It need not be shown that the lawyer knew the client intended to commit a wrongful act. See *id*. at *4 - *5 (citing **In re Sealed Case, 676 F.2d 793, 812 (DC Cir. 1982)**).

In re Public Defender Service, 831 A.2d 890 (DC 2003) offered an extended treatment of the law relating to the crime-fraud exception to the attorney-client privilege. The case involved a grand jury subpoena to a Public Defender Service (PDS) lawyer representing a client awaiting trial for murder. A witness who had implicated the defendant in the murder, who was being held in jail on unrelated charges, had been intimidated by inmates who were associates of the defendant into signing two statements recanting what he had told the government about the defendant. A grand jury was convened to instigate this as obstruction of justice, and it had issued the subpoena to PDS seeking any documents in its possession written or signed by the witness (and presumably also seeking testimony about them). PDS filed a motion to quash, invoking the attorney-client privilege, and the government responded with a claim that the crime-fraud exception applied. The government's response was supported by the ex parte submission of a detailed proffer by an assistant United States Attorney, describing the circumstances, signed but not sworn to, and unaccompanied by any evidentiary support. The motions judge before whom the matter came for decision held for the government and ordered the subpoena complied with and when PDS refused to comply, held it in civil contempt. The Court of Appeals reversed, holding that the government had not established the crime-fraud exception, primarily because it hadn't made a showing that communications between the PDS lawyer and his client were actually in furtherance of an ongoing or future crime or fraud. It also held, however, that the witness's coerced statements were not covered by the attorney-client privilege, though they might be subject to a limited Fifth Amendment "act of production" privilege.

In the course of its decision, the Court addressed a number of issues, including the standard for judicial review, the burden of proof, as to both the privilege and the crime-fraud exception, the standard of proof for the latter, the substance of the showing

necessary to establish the crime-fraud exception, and the propriety of the government's submission in support of its opposition to the motion to quash being ex parte.

With respect to the standard for judicial review, the Court noted that while trial court determinations of motions to quash are typically reviewed for abuse of discretion, "the justification for that comparatively deferential standard of review is largely absent when the motion to quash is based on a claim of attorney-client privilege." *Id.* at 898. Since the issue whether privilege applies is mainly a matter of law, the Court concluded, review should be de novo.

As to burden of proof, the Court stated that the party asserting the privilege has the burden of proving that the Communications in question are protected, and that the burden then shifts to the opposing party to demonstrate the applicability of the crime-fraud exception. *Id.* at 902-03. The standard of proof for the latter is a prima facie showing, which "need not rise to the level of dispositive proof, but it must at least have some substance." *Id.* (quoting **Crane v. Crane, 614 A.2d 935, 941 (DC 1992) (Terry, J., concurring)**. In this connection, the Court explained,

> We borrow the probable cause standard from the Fourth Amendment and case law expounding on its meaning in that context. Adapted to the present context, the test for determining probable cause is whether the totality of the facts and circumstances presented would warrant a reasonable and prudent person in the belief that the attorney-client communications in question were in furtherance of an ongoing or future crime or fraud as explained in this opinion.

Id. at 904.

As to the fact that the government's submission in support of its crime-fraud contention had been ex parte, the Court held that this was justified by the fact that the information in the submission was subject to grand jury secrecy. *Id.* at 904-05. However, the Court found the unsworn narrative proffer in this case insufficient, since it lacked any "grand jury testimony, affidavits, or comparable evidence." *Id.* at 905. The Court did not decide the case on this ground, however, because there seemed to be no real dispute about the accuracy of the material facts asserted in the government's proffer. Rather, turning to the substance of the showing that must be made to establish the crime-fraud exception, the Court held that the key element was that the communication between the client and attorney must "further a crime, fraud or other misconduct," *id.* at 906 (quoting **United States v. White, 887 F.2d 267, 271 (DC Cir. 1989)**), which the communication in issue here did not do because PDS never had any intention of making use of the coerced statements of the witness. In this connection, the Court declined to follow either the case authority requiring that the intended crime or fraud have been accomplished (*cf.* **In re Grand Jury Subpoena to Carter**, above), or the authority to the effect that the mere intent of the client to use the attorney consultation to further an illegal scheme constitutes an abuse of the attorney-client relationship that forfeits the privilege. Rather, the Court held that the communication must in some way *further* the

unlawful scheme, which typically can be shown by "evidence of some activity following the improper consultation, on the part of either the client or the lawyer, to advance the intended crime or fraud," i*d.* at 910, which was not the case here.

Although rejecting the government's crime-fraud claim, the Court held that the privilege, though applicable to communications between the defendant and his PDS lawyer about the coerced witness statements, would not apply to the statements themselves, unless those were protected by the privilege against self-incrimination in the possession of the client; but that the only such protection potentially applicable here would be an "act of production" privilege; and the Court remanded the case for a determination on this point.

There are slight differences in the test for the crime/fraud exception as applied in the attorney-client privilege context, on the one hand, and in the work-product immunity context on the other. As explained in **In re Sealed Case, 223 F.3d 775, 778 (DC Cir. 2000)**,

> To establish the exception to the attorney-client privilege, the court must consider whether the client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act," and establish that the client actually "carried out the crime or fraud." *In re Sealed Case*, 107 F.3d 46, 49 (D.C.Cir. 1997). To establish the exception to the work-product privilege, courts ask a slightly different question, focusing on the client's general purpose in consulting the lawyer rather than on his intent regarding the particular communication: "Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud?" *Id*. at 51.

If the transaction with which the attorney-client consultation is connected is not in fact a crime, then the crime/fraud exception does not apply. See **In re Sealed Case, 223 F.3d 775 (DC Cir. 2000)** (holding that the court must defer to the Federal Election Commission's determination that the prohibition of 2 USC §441e(a) on contributions by foreign nationals to political committees did not apply in the circumstances, so that the discussion of such contributions here, between counsel and a client political committee, did not involve crime within the meaning of the crime/fraud exception).

1.6:630 Exception for Lawyer Self-Protection

There appear to be no pertinent DC authorities regarding an exception to the privilege for "lawyer self-protection." See, however, DC Rule of Professional Conduct 1.6(d)(3) and (5), discussed under 1.6:330 and 1.6:350, respectively, above.

1.6:640 Exception for Fiduciary-Lawyer Communications

The privilege does not protect communications made by an employer regarding its role as administrator of the company's employees benefit plan against discovery by employees relating to the plan. See **M.A. Everett v. USAIR Group, Inc., 165 FRD 1, 4 (DDC 1995)** (citing **Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906, 909 (DDC 1982)**). The employees, the Court asserted, are the attorney's "true" clients because they are the plan's beneficiaries. ***Id*.**

1.6:650 Exception for Organizational Fiduciaries

Wessell v. City of Albuquerque, 2000 WL 1803818 (DDC 2000) was a decision involving a third-party subpoena in a suit by a group of non-union employees against their employer, the City of Albuquerque, challenging an agreement between the city and a union local providing for "fair share fees" to be deducted from the payroll of non-union employees. The subpoena sought certain documents from the parent international union; the union resisted on grounds of privilege and work-product; but the plaintiffs argued successfully that the fiduciary-beneficiaries exception applied.

See also ALI-LGL §§ 84 and 85.

1.6:660 Invoking the Privilege and Its Exceptions

The party claiming privilege "bears the burden of proving that the communications are protected." **In re Lindsey, 148 F.3d 1100, 1106 (DC Cir. 1998)**. The showing must be more than a "blanket assertion of privilege," *id.*; it must "'conclusively prove each element of the privilege.'" *Id.* (quoting **SEC v. Gulf & W. Indus., 518 F. Supp. 675, 682 (DDC 1981)**). In order to allow adverse parties to contest the claim, a party claiming privilege must describe "the nature of the documents, communications, or things not produced or disclosed." **Blumenthal v. Drudge, 186 FRD 236, 243 (DDC 1999)** (quoting Fed. R. Civ. P. Rule 26(b)) In particular, the description should include at least "the parties to the communications, the dates on which the communications occurred and their general subject matter." *Id*. at *17 - *18. Thus, in **Animal Legal Defense Fund, Inc. v. Department of the Air Force, 44 F. Supp.2d 295 (DDC 1999),** the Court rejected the following statement, relied on by the defendant to invoke the privilege, as lacking any facts to substantiate the claim of privilege: "Information concerning confidential communication between an Air Force attorney and her client relating to a legal matter for which the Air Force sought advice was withheld in order to ensure that Air Force officials continue to receive sound legal advice and advocacy from their attorneys."

1.6:700 Lawyer Work-Product Immunity

- Primary DC References: DC Rule 1.6
- Background References: ABA Model Rule 1.6, Other Jurisdictions
- Commentary: ABABNA § 91:2211, ALI-LGL §§ 87-93, Wolfram § 6.6

In contrast to the subject of attorney-client privilege (see 1.6:400, above), there do not appear to be any differences between the jurisprudence of the local courts and the federal courts of the District of Columbia on this subject. And Rule 26(b)(3) of the DC Superior Court Civil Rules is identical to Fed .R. Civ. P. Rule 26(b)(3) (which, of course, codifies the holding of **Hickman v. Taylor, 329 U.S. 495 (1947))**.

1.6:710 Work-Product Immunity

[Although work-product *immunity* appears to be the favored term in academia, and tends to emphasize the distinction from attorney-client *privilege* (despite their frequent overlapping), the treatment of lawyer work-product by the courts often uses the term *privilege* rather than *immunity*; and the two terms will be used interchangeably in the discussion below.]

"The work product doctrine … creates a 'qualified privilege' for materials prepared by an attorney … in anticipation of trial." **Parks v. United States, 451 A.2d 591, 607 (DC 1982)** (citing **United States v. Nobles, 422 U.S. 225, 237-39 (1975)** and Super. Ct. R. Civ. P. Rule 26(b)(3)). The materials can also be prepared by the lawyer's agent, see **Wash. Bancorporation v. Said, 145 FRD 274, 276 (DDC 1992)** (citing Fed. R. Civ. P. Rule 26(b)(3)). The types of materials covered by the privilege include "'interviews, statements, memoranda, correspondence, [and] briefs.'" **Hager v. Bluefield Reg'l Med. Ctr., Inc., 170 FRD 70, 76 (DDC 1997)** (quoting **Hickman v. Taylor, 329 U.S. 495, 511 (1947)**). The cases are divided as to whether the "material" in question may be intangible. Compare **Director of the Office of Thrift Supervision v. Vinson & Elkins, L.L.P., 168 FRD 445, 448 (DDC 1996)** (citing **Hickman, 329 U.S. at 511:** "What lawyers remember is just as privileged as what they write down."), with **Athridge v. Aetna Cas. and Sur. Co., 184 FRD 200, 209 (DDC 1998)** ("[T]he work-product privilege contained in Fed. R. Civ. P. Rule 26 (b)(3) applies only to documents and tangible things….").

The privilege does not apply to materials prepared "'in the ordinary course of business or for other nonlitigation purposes.'" **In re Sealed Case, 146 F.3d 881, 887 (DC Cir. 1998)** (quoting **Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1515 (DC Cir. 1993)**); **Western Trails, Inc. v. Camp Coast to Coast, Inc., 139 FRD 4, 12 (DDC 1991)** (finding that charts prepared by the defendant's lawyer as part of the development of a new corporate policy were not entitled to immunity because even though the defendant was aware that the new policy could give rise to litigation challenging the policy, the charts were created in the ordinary course of business).

The work-product immunity applies to criminal as well as civil proceedings, see **Parks, 451 A.2d at 607**, including grand jury proceedings, see **In re Grand Jury Proceedings, 5 F. Supp. 2d 21, 39 (DDC 1998)**. In a criminal proceeding, a defendant may invoke the privilege against a co-defendant, as well as against the government. See **Parks, 451 A.2d at 607.** Work-product immunity may be invoked during trial as well as pretrial. See **Parks, 451 A.2d at 607** (citing **Nobles, 422 U.S. at 239**).

To determine whether material was prepared "in anticipation of litigation," courts will ask "'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" **In re Sealed Case, 146 F.3d at 884** (quoting **Senate of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 586 n.42 (DC Cir. 1987)**). Under this standard, the lawyer "must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *Id.* See also **Hager, 170 FRD at 77** (holding that a letter prepared by the plaintiff's lawyer regarding the legality of the plaintiff's contract with his employer was "in anticipation of litigation"). Thus, in **Evans v. Atwood, 177 FRD 1, 8 (DDC 1997)**, the Court found that an internal memorandum from the general counsel's office of the defendant agency seeking additional lawyer staffing, in part to defend against the plaintiffs' lawsuit, was not entitled to protection as work product because the memorandum did not disclose "what those lawyers have done and will do to prepare for trial nor their thought processes as they prepare for trial," and that another internal memorandum advising the defendant's employees that the plaintiff had filed a lawsuit and explaining how the employees should prepare responses to requests for documentation and other inquires was not entitled to protection because the memorandum did not reveal "anything about the thought processes of the defendants' attorneys or the actual information they are collecting as they prepare for trial."

The court may find that material was prepared in anticipation of litigation even in the absence of a specific claim asserted by an adverse party at the time of its preparation: the absence of a specific claim "represents just one factor that courts should consider in determining whether the … privilege applies." **In re Sealed Case, 146 F.3d at 886-87** (holding that notes made by a lawyer hired by the Republican National Committee to advise the party regarding a proposed loan were entitled to immunity, even though neither the Democratic National Committee nor the Federal Election Commission had made a specific claim regarding the loan, because of the recent "intense focus" within the District of Columbia on claims of campaign finance violations and the public criticism of the RNC's relationship with the loan recipient.) See also **Equal Employment Commission v. Lutheran Social Services, 186 F.3d 959 (D.C. Cir. 1999)** (holding that the entirety of a report of an investigation by outside counsel prompted by anonymous memoranda accusing the organization's president of creating a hostile work environment for female employees was protected by the work product privilege because the organization had had the investigation done because it "feared litigation," even though it had not been sued at the time). See also **Nesse v. Shaw Pittman, 202 FRD 344, 348 (DDC 2001)** (an angry call from a former client, demanding that law firm "fix" a problem, sufficed to warrant anticipation of litigation

on the part of a law firm, for work-product immunity purposes, even though the firm did not give written notice to its insurance carrier until two months later.) In addition, the privilege applies even if the material was prepared in anticipation of a different trial, "so long as it was prepared in anticipation of some litigation by a party to the present litigation." **Western Trails, Inc., 139 FRD at 9** (citing **Eckert v. Fitzgerald, 119 FRD 297, 299 (DDC 1988)**).

The work-product immunity can be overcome. **Parks, 451 A.2d at 608**. The showing required to overcome it depends on whether the work-product consists of facts or opinions. See *id.* For "fact work-product," the party seeking access must show that "he or she has a 'substantial need' for the material and 'is unable without undue hardship to obtain the substantial equivalent of the material by other means." *Id.* For "opinion work-product," the party seeking access must show "extreme necessity." *Id.*

Nesse v. Shaw Pittman, 206 FRD 325 (DDC 2002) addressed the question whether certain notes taken by a law firm partner in meetings concerning a lawsuit against the firm were protected from disclosure by attorney-client privilege or work-product doctrine. One of the firm's partners, who served as general counsel to the firm, was conducting an internal investigation of the case, and notes taken at meetings with him about the case, or at meetings where his confidential advice about the case was discussed, were held to be covered by the privilege, but notes of a meeting among partners other than the general counsel about the case, and not focused on communications to or from the general counsel, were held not to be protected either by the privilege or as work-product.

In **In re Grand Jury Proceedings, 201 F. Supp. 2d 5 (DDC 2001)**, a lawyer's notes regarding the legitimate sources of the funds that were to be used to pay fees were held not to be covered by the work product doctrine and so were subject to production in response to a grand jury subpoena, because "the nature and form of an attorney's fee arrangement really have nothing to do with the substance of the litigation that the lawyer is retained to advise the client about." *Id*. at 13.

1.6:720 Ordinary Work-Product

"Ordinary work-product" is also called "fact work-product." It is material that contains "no mental impressions, conclusions, opinions, or legal theories…." **Parks v. United States, 451 A.2d 591, 608 (DC 1982)**; see also **In re Sealed Case, 124 F.3d 230, 236 (DC Cir. 1997)** (holding that a lawyer's notes of an interview of a client were ordinary work-product if "the context suggests that the lawyer has not sharply focussed or weeded the materials"); **Washington Bancorporation v. Said, 145 FRD 274, 278-79 (DDC 1992)** (holding that the FDIC's index of 2400 boxes of documents was ordinary work-product because it was "too vast and too basic" for the court to conclude that it would reveal "important aspects of [the FDIC's] understanding of [its] case[s].") Ordinary work-product covers materials reflecting facts learned in preparation for trial but not the facts themselves. See **Parks, 451 A.2d at 608** (citing **Hickman v. Taylor, 329 U.S. 495, 504 (1947);** holding that the trial court erred in sustaining a co-defendant's objection to a defense witness's testimony on the grounds of work-product immunity).

The party seeking access to ordinary work-product "must show that he or she has a 'substantial need' for the material and 'is unable without undue hardship to obtain the substantial equivalent of the material by other means.'" *Id*. (quoting Fed.R.Civ.P. Rule 26(b)(3)). See **Washington Bancorporation, 145 FRD at 279 – 80** (holding that the defendant had a substantial need for the FDIC's index of 2400 boxes because re-creating the index would entail substantial expenditure of money and time). The party seeking access always prevails if the material contains "admissible evidentiary facts." **Parks, 451 A.2d at 609**.

An exception to the privilege for ordinary work-product is that criminal defendants are entitled to "discover specific types of information within the government's control, including any written record of the defendant's relevant statements." **Davis v. United States, 641 A.2d 484, (DC 1994)** (citing Super. Ct. R. Crim. P. Rule. 16(a)(3)).

1.6:730 Opinion Work-Product

Opinion work-product is material that contains the "fruits of the attorney's … mental processes." **Parks v. United States, 451 A.2d 591, 608 (DC 1982)**. It is the "opinions, judgments, and thought processes of counsel." **In re Sealed Case, 124 F.3d 230, 235 (DC Cir. 1997)** (quoting **In re Sealed Case, 676 F.2d 793, 809-10 (DC Cir. 1982))**. See also **Director of the Office of Thrift Supervision v. Vinson & Elkins, L.L.P., 168 FRD 445, 446-47 (DDC 1996)** (suggesting, but not deciding, that a lawyer's interview notes are opinion work-product because "as distinguished from verbatim transcripts or first-person statements….in choosing what to write down and what to omit, a lawyer necessarily reveals his mental processes"); but see **In re Sealed Case, 124 F.3d at 236** (holding that interview notes were ordinary work-product because "the context suggests that the lawyer has not sharply focussed or weeded the materials").

The party seeking access to opinion work-product must show "'extreme necessity.'" **Parks, 451 A.2d at 608** (quoting **United States v. AT&T, 86 FRD 603, Guideline No. 18 at 632 (DDC 1979)**; see also **In re Sealed Case, 124 F.3d at 235** (citing **In re Sealed Case, 676 F.2d at 809–10;** must show "extraordinary justification").

If the material sought is a combination of both ordinary and opinion work-product, courts will review the document *in camera* to determine what part is ordinary and what is opinion, **Parks, 451 A.2d at 608** (citing **AT&T, 86 FRD, Guideline No. 3 at 608**), and will apply the appropriate standard to each part, *id.* (citing **Saunders v. United States, 316 F.2d 346, 350-51 (1963)**). If the material sought is a blend of fact and opinion, courts will apply the extreme necessity test. See *id.* The party seeking access always prevails in showing extreme necessity if blended material contains "admissible evidentiary facts." *Id.*

1.6:740 Invoking Work-Product Immunity and Its Exceptions

The right to invoke work-product immunity belongs to both the client and the lawyer. See **Hager v. Bluefield Reg'l Med. Ctr., Inc., 170 FRD 70, 76 (DDC 1997)** (citing **Moody v. IRS, 654 F.2d 795, 801 (DC Cir. 1981)**). Government lawyers are also entitled to invoke work product immunity, see **Grove v. Dep't of Justice, 802 F. Supp. 506, 514 (DDC 1992)** (citing **NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154 (1975)**), but they may not withhold evidence of possible criminal conduct from a grand jury, see **In re Lindsey, 158 F.3d 1263, 1282-83 (DDC 1998)**. The immunity can only be invoked by a party to the lawsuit, see **Athridge v. Aetna Cas. and Sur. Co., 184 FRD 200, 209 (DDC 1998)**. The language of Fed. R. Civ. P. Rule 26(b)(3) and of its identical counterpart in the D.C. Superior Court's rules makes this clear.

The party resisting discovery has the burden of showing that the materials are in fact work-product. See **Parks v. United States, 451 A.2d 591, 608 (DC 1982)** (citing **United States v. AT&T, 86 FRD, Guideline No. 14, at 626**). When that showing has been made, the burden shifts back to the party seeking discovery to show why the privilege should be overcome. See *id* (citing **AT&T, 86 FRD, Guideline No. 4, at 609)**).

1.6:750 Waiver of Work-Product Immunity by Voluntary Acts

The disclosure of work-product to third parties ordinarily waives the immunity. See **In re Lindsey, 158 F.3d 1263, 1282 (DC Cir. 1998)** (citing **In re Sealed Case, 29 F.3d 715, 719 (DC Cir. 1994)** and **United States v. AT&T, 642 F.2d 1285, 1300-01 (DC Cir. 1980)**); see also**Wichita Land & Cattle Co. v. American Fed. Bank, F.S.B., 148 FRD 456, 459 (DDC 1992)** (finding that a law firm waived its work-product claim by inadvertently including privileged documents in a set of boxes made available as part of discovery). "There are instances where disclosure of attorney work product to third parties will not waive the protection, but where disclosure to an adversary in litigation constitutes waiver of attorney-client privilege, it also effects a waiver of the work product rule." *Id.* at 461 (citing **Chubb Integrated Sys. Ltd. V. National Bank of Wash., 103 FRD 52, 63 (DDC 1984))**. In determining whether material was "disclosed," courts will consider whether the party that received the documents has learned the "gist" of the material. See *id.* at 459 (citing **Chubb Integrated Sys. Ltd., 103 FRD at 63 (DDC 1984)**).

The disclosure of work-product to third parties waives the immunity as to the documents disclosed. See **In re United Mine Workers of Am. Employee Benefit Plans Litig. 159 FRD 307, 310 (DDC 1994)** (citing **Wichita Land & Cattle Co., 148 FRD at 460-61**), but does not ordinarily constitute waiver as to the subject matter of the documents. See *id.* at 312 ("[A] subject matter waiver of the attorney work product privilege should only be found when it would be inconsistent with the purposes of the work product privilege to limit the waiver to the actual documents disclosed.") (citing **In re Sealed Case, 676 F.2d 793, 817 (DC Cir. 1982)**).

In **Rockwell International Corp. v. U.S. Department of Justice, 235 F.3d 598 (2001)**, a case involving invocation of work-product privilege as a ground for refusing production under Exemption 5 of the Freedom of Information Act, the court observed that the purpose of the work-product privilege is not to protect materials of the attorney, but to "protect the adversary trial process itself." *Id.* at 605 [quoting **Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 864 (DC Cir. 1980)**]. The court went on to say that voluntary disclosure to a third person does not constitute waiver of the work-product privilege, unless the disclosure under the circumstances is inconsistent with maintenance of secrecy from the party's adversary. *Id.* [citing **United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (DC Cir. 1980)**]. Applying the latter formulation, the court went on to hold that the work-product privilege had not there been waived by disclosure to a Congressional committee, or by selective quotation from the work-product documents in a public report.

However, the "common interest rule" applicable to the attorney-client privilege, see 1.6:490, above, has application also, *mutatis mutandis*, to work-product immunity. Thus, the disclosure of work-product to third parties may not waive the immunity if the third party "is a lawyer whose client shares an overlapping 'common interest.'" **In re Lindsey, 158 F.3d 1263, 1282 (DC Cir. 1998)(dictum)** (citing **In re Sealed Case, 29 F.3d at** 719 and **United States v. AT&T, 642 F.2d at 1300-01**, and observing that "the

President in his private persona shares some areas of common interest with the Office of the President") . The protection provided by the common interest rule is not limited to co-parties. See **United Mine Workers, 159 FRD at 313** ("So long as transferor and transferee anticipate litigation against a common adversary on the same or similar issues, they have a strong common interest in sharing the fruits of the trial preparation efforts.") (quoting **AT&T, 642 F.2d at 1299**).

1.6:760 Waiver of Work-Product Immunity by Use in Litigation

The work-product privilege is waived by the client if the lawyer's conduct is placed "at issue," **Hager v. Bluefield Reg'l Med. Ctr., Inc., 170 FRD 70, 78 (DDC 1997)** which includes use of the lawyer as an expert witness, see *id.*

1.6:770 Exception for Crime or Fraud

The crime-fraud exception applies to work product immunity as well as to the attorney-client privilege. Indeed,

> An exception or waiver of the work product privilege will also serve as an exception or waiver of the attorney-client privilege, since the coverage and purposes of the attorney-client privilege are completely subsumed into the work product privilege.

In re Sealed Case, 676 F. 2d 793, 812 (DC Cir. 1982).

There are slight differences in the test for the crime/fraud exception as applied in the attorney-client privilege context, on the one hand, and in the work-product immunity context on the other. As explained in **In re Sealed Case, 223 F.3d 775, 778 (DC Cir. 2000)**,

> To establish the exception to the attorney-client privilege, the court must consider whether the client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act," and establish that the client actually "carried out the crime or fraud." *In re Sealed Case*, 107 F.3d 46, 49 (D.C.Cir. 1997). To establish the exception to the work-product privilege, courts ask a slightly different question, focusing on the client's general purpose in consulting the lawyer rather than on his intent regarding the particular communication: "Did the client consult the lawyer or use the material for the purpose of committing a crime or fraud?" *Id*. at 51.

Where it is the lawyer's conduct, rather than the client's, that gives rise to the crime-fraud exception, so that the lawyer is barred from asserting the work product privilege, it may be that the client will still be able to assert it: "[T]he client's interest in preventing disclosures about his case may survive the misfortune of his representation by an unscrupulous attorney." **Moody v. IRS, 654 F. 2d 795, 801 (DC Cir. 1981)**. In determining whether the privilege will prevail,

> A Court must look to all the circumstances of the case, including the availability of alternate disciplinary procedures, to decide whether the policy favoring disclosure outweighs the client's legitimate interest in secrecy. No court should order disclosure . . . in discovery if the disclosure would traumatize the adversary process more than the underlying legal misbehavior.

Id.

1.7 Rule 1.7 Conflict of Interest: General Rule

1.7:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.7
- Background References: ABA Model Rule 1.7, Other Jurisdictions
- Commentary:

1.7:101 Model Rule Comparison

DC Rule 1.7 as originally adopted was quite different in structure and phraseology from Model Rule 1.7, albeit not in substance, and although the changes made to the Model Rule pursuant to recommendations of the Ethics 2000 Commission and those later made to the DC Rule pursuant to those of the Rules Review Committee bring them slightly closer, there remain major differences between them in structure and phraseology. Reflecting the differences in the respective black letter Rules, the Comments to the DC Rule differed markedly from those of the Model Rule, but the Ethics 2000 Commission added a number of new Comments to the Model Rule, and most of those were picked up in the revision of the DC Rule, so that the respective sets of Comments now have considerable overlap.

The Jordan Committee, although "recognizing the desirability of accepting the ABA language whenever feasible," rejected the ABA approach to Rule 1.7 for three reasons. First, the ABA draft was termed "confusingly organized and ambiguously worded." Second, the "reasonably believes" standard in subparagraphs 1.7(a)(1) and (b)(1) of the Model Rule was rejected as a subjective one that would be difficult to understand and enforce. The Jordan Committee also termed the standard inaccurate in failing to recognize that in certain situations dual representation is prohibited even if the lawyer subjectively "believes" that no conflict exists and the clients consent. Third, through different wording in the rule and a definition of "consent" in the Terminology section, the Committee articulated the higher standard of "full disclosure" rather than "consultation" as a requisite for consent.

The rule as rewritten by the Jordan Committee began by specifying, in paragraph (a), that a lawyer may not advance adverse positions for different clients in the same matter, even with consent. This category of non-consentable conflicts was not then explicitly recognized in MR 1.7 (although as will be seen it has been since). Paragraph (b) then set forth types of conflicts that are prohibited absent consent, including taking a position for one client adverse to another client even if the matter on which the other client is represented is unrelated, and (drawing upon language in DR 5-101(a) not carried forward in MR 1.7) situations in which a lawyer's representation of a client will or may be impaired by the lawyer's personal interests or responsibilities to third persons. As the Jordan Committee stressed and Comment [4] expressly notes, the non-consentable conflict prohibition in DC Rule 1.7(a), by operating on positions taken in matters rather than on representations generally, leaves room for a lawyer to represent two clients in a

particular phase of a matter where their interests are not adverse, while not representing both clients in the phase in which their interests are adverse.

The Peters Committee proposed, and the Court of Appeals adopted effective November 1, 1996, a number of changes to DC Rule 1.7 and its accompanying comments. The changes addressed the following points:

- Paragraph (a), addressing non-consentable conflicts, was revised to include conflicts with a position advanced on the lawyer's own behalf.

- Paragraph (b)(1) was narrowed to apply only to matters involving a "specific party or parties," so as not to apply to general lobbying activities.

- Paragraph (c)(2) with its reference to compliance with all other applicable rules as a prerequisite to consent, was deleted, and corresponding changes were made in Rule 1.3 and the Scope section of the Rules, all with a view to making clear that Rule 1.3 does not impose requirements regarding conflicts that are additional to those in Rule 1.7. [See 1996 Amendments, under 1.3:200 above]

- A new paragraph (d) was added, to address the frequently encountered problem of conflicts that arise after a representation is undertaken that were not reasonably foreseeable at the time the representation commenced, providing that in such circumstances the lawyer is not required to withdraw from the representation unless the conflict also arises under paragraphs (b)(2), (b)(3) or (b)(4). This was intended to eliminate an unfair "veto power" which Rule 1.7(b)(1) could have been understood to give one client where, as a result of events that were not reasonably foreseeable when the representation of another client on a different matter commenced, that representation became adverse to the first client.

- A new Comment [11] (now renumbered as [19]) was added, providing that a lawyer is generally not required to inquire concerning the full range of a client's interests, and that Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. DC Bar Counsel has called this a "scienter requirement." Becker, "New Rules of Professional Conduct," Washington Lawyer, Dec. 1996, at 8.

- New Comments [13]-[18] (now renumbered as [21]-[27]) were added to address conflicts involving corporate affiliates.

- Comment [3] (formerly [2]) was revised to distinguish "adverse positions" from "inconsistent or alternative positions" advanced on behalf of a single client.

- Former Comment [3], which had discussed the term "matter" in a fashion that made it appear that general lobbying was subject to paragraph (b)(1), was omitted.

- A new Comment [25] (now renumbered as [36]) was added, amplifying in four areas the obligations of a lawyer or law firm with an interest in a related business that is not a law firm. The areas addressed were: a lawyer's recommendation to a client to use non-legal services; a related entity's referral of its customer to the lawyer; possible conflicts created by work of the related enterprise; and preservation of confidences. The DC Rules did not then have a specific rule on a lawyer's participation in law-related or ancillary businesses like MR 5.7 which was added to the Model Rules in 1991, but the DC Rules did not forbid such participation. These comments provide guidance for a lawyer's association with an ancillary business enterprise.

The ABA Ethics 2000 Commission proposed, and the House of Delegates adopted, a substantial revision of the structure of Model Rule 1.7, making it easier to parse and apply, and in addition making some significant changes of substance. Under that new structure, paragraph (a) defines a current conflict of interest and prohibits it unless paragraph (b) applies, and paragraph (b) states that paragraph (a)'s prohibition does not apply if four conditions are met: (1) the lawyer reasonably believes she will be able to provide competent and diligent representation to each client involved, (2) the representation isn't prohibited by law, (3) the representation doesn't involve the lawyer's assertion of a claim by one client against another client that the lawyer is representing in the same proceeding before a tribunal, and (4) each client gives informed consent, confirmed in writing. The first of these four conditions, set by subparagraph (b)(1), in effect replaces the vague provisions of paragraphs (a)(1) and (b)(1) of the original Model Rule, which called for the lawyer to make judgments as to whether a relationship with an existing client or the representation of a new one will be "adversely affected" by a conflict, with a more precise and practical requirement that the lawyer determine whether she will be able to provide diligent and competent representation to both clients. Subparagraph (b)(2)'s requirement that the representation not be illegal was new, as was subparagraph (b)(3)'s recognizing that a lawyer cannot properly argue opposing sides of an issue for different clients in the same proceeding, but both of these reflected court decisions and ethics opinions holding that conflicts involving either of these circumstances were non-consentable. The requirement of client consent in subparagraph (b)(4) was not a new one, but it was termed "informed consent" rather than as "consent after consultation,"and a new requirement was added, that the consent also be "confirmed in writing."(Both "informed consent" and "confirmed in writing" were defined terms that had been added to the Terminology under the new Model Rule 1.0).

The DC Rules Review Committee recommended retaining the structure and language of DC Rule 1.7, with just one significant substantive change: the addition to paragraph (c) of a subparagraph (2), borrowed verbatim from paragraph (b)(1) of the revised Model Rule, making it a requirement of a lawyer's representation of multiple clients despite the presence of a conflict that the lawyer reasonably believe that she will be able to provide competent and diligent representation to each affected client. The only other, minor substantive change made to the DC Rule was changing the required client "consent" in what was now a new subparagraph (c)(1) to "informed consent," a defined

term that had also been added to the Terminology in the new D.C. Rule 1.0. The Rules Review Committee did not recommend adoption of the additional change in the corresponding provision of the Model Rule requiring that the consent be "confirmed in writing." The Committee also did not recommend following the revised Model Rule in its new subparagraph (b)(2), making a conflict that is prohibited by law non-consentable. And paragraph (a) of the DC Rule had long since recognized the non-consentability of a lawyer advancing two or more adverse positions in the same, which had been newly added to the Model Rule as subparagraph (b)(3).

The recommendations of the Ethics 2000 Commission led to extensive modifications to the Comments to Model Rule 1.7. One of the original 15 Comments was dropped, the remainder substantially modified, and 21 new Comments added. The recommendations of the Rules Review Committee dropped one of the existing Comments to the DC Rule and made only minimal changes to the remainder, but also added 24 new comments, some but not all borrowed from the Model Rule. Among the new Comments that were not borrowed from the amended Model Rule are three, numbers [37]-[39], addressing sexual relations between lawyer and client. The revised Model Rules addressed that subject in a new paragraph (j) to Rule 1.8, but the Rules Review Committee recommended dealing with it instead by Comments to Rule 1.7.

Another recommendation of the Ethics 2000 Commission, endorsed with respect to the DC Rules by the Rules Review Committee, was to delete Rule 2.2 (Intermediary) and consolidate the tereatment of common representations and intermediation in Rule 1.7. What are now Comments [14] through [18] to DC Rule 1.7, under the caption Special Considerations in Common Representations, were derived from the commentary to former DC Rule 2.2. (See 2.2:101, below.)

1.7:102 Model Code Comparison

Rule 1.7 represents a complete revision of DR 5-101(A) and DR 5-101. It makes no use of the "appearance of impropriety" standard derived from Canon 9 which was applied by courts and ethics authorities in many conflicts decisions. The Rule is, however, intended to codify objective criteria that developed under DR 5-101(A) and DR 5-105 and in the case law under Canon 9.

1.7:200 Conflicts of Interest in General

- Primary DC References: DC Rule 1.7
- Background References: ABA Model Rule 1.7, Other Jurisdictions
- Commentary: ABABNA § 55:101, ALI-LGL §§ 121-124, Wolfram §§ 7.1-7.6

1.7:210 Basic Prohibition of Conflict of Interest

DC entirely redrafted MR 1.7, with the aim of clarifying the rule and identifying explicitly a category of non-consentable conflicts. See 1.7:101 above.

In **In re Butterfield, 851 A.2d 513 (DC 2004)**, the Court of Appeals approved a thirty-day suspension for violation of DC Rule 1.7(b)(1) and (2) by reason of the respondent's failure to perform a conflicts check before undertaking an engagement and failure, after becoming aware of the conflict, to take action to notify the affected parties and attempt to obtain waivers from them or, failing that, to withdraw from the engagement.

DC Ethics Opinion 276 (1997) addressed an inquiry relating to lawyers undertaking to mediate cases under the Superior Court's Alternative Dispute Resolution Program, specifically addressing the issue of potential conflicts between the parties to the mediation and clients of the mediating lawyer's law firm. The Opinion pointed out that although a mediator does not enter into an attorney-client relationship with either of the parties to the mediation (and in consequence is not within the purview of Rule 2.2) the lawyer is likely to acquire confidential information from each of the parties to the mediation, the possession of which could have an adverse impact upon the representation of existing firm clients, by reason of Rule 1.7(b)(4). The Opinion also held that a lawyer acting as mediator was obliged to impart the results of the conflicts check to the parties to the mediation. This obligation, the Opinion explained, rises from Rule 8.4(c) (prohibiting "conduct involving . . . misrepresentation") because the lawyer would be misrepresenting her status as a neutral if she knew in fact of a client relationship that impaired her neutrality. The Opinion also concluded that the conflicts check necessary for participation in a mediation does not normally also require a check for representation of constituents of a corporate party to the mediation.

1.7:220 Material Adverse Effect on Representation

There appear to be no DC court decisions that specifically focus on the materiality of the adverse effect of a conflict on a representation.

DC Ethics Opinion 297 (2000) [which is more fully described under 1.11:200, below] pointed out that where a former government lawyer's representation of a private client in connection with a matter in which the lawyer participated while in government is not barred by the post-employment prohibition in Rule 1.11, it may nonetheless face an obstacle by reason of the lawyer's possession of relevant confidences or secrets of the governmental client which cannot, absent government consent, be disclosed or used in the private representation; and (again absent governmental consent) that obstacle may become a barrier to <u>any</u> representation, under Rule 1.7(b)(2), if the lawyer's inability to disclose or use the information would adversely affect the representation of the private client.

1.7:230 Perspective for Determining Conflict of Interest

Comment [25] (formerly [17]) to DC Rule 1.7 makes clear that DC employs an "objective observer" standard as to whether a particular representation or interest would impair the lawyer's effectiveness. See the discussion of **DC Ethics Opinions 257 (1995), 177 (1986) and 169 (1986)** under 1.7:500, below.

1.7:240 Client Consent to a Conflict of Interest; Non-Consentable Conflicts

DC Rule 1.7 is distinctive in expressly recognizing, in Rule 1.7(a), a category of non-consentable conflicts. As to consentable conflicts, the discussion that follows addresses the principles applicable to consent under Rules 1.7, 1.8 and 1.9.

DC Ethics Opinion 309 (2001) addressed in comprehensive fashion the permissibility of advance waivers of conflicts of interest. After canvassing a broad range of decisional and scholarly authority, and noting the lack of square decisional authority in DC jurisprudence, the **Opinion** concurred with the weight of such authority in holding that as a general matter advance waivers are not ethically forbidden. To be permissible, however, there must be "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences" thereof, per Rule 1.7(c); and the client must have "information reasonably sufficient to prmit the client to appreciate the significance of the matter in question," per Terminology ¶ [3], and to allow the client to make "a fully informed decision" with awareness "of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation," per Rule 1.7, cmt [19]. The **Opinion** asserted that this will ordinarily require *either* that the consent be specific as to the types of potentially adverse representation and adverse clients contemplated, or else that the waiving client has available in-house or other independent counsel.

The **Opinion** also noted that the lawyer must make full disclosure of known facts, and so cannot seek a general waiver when he or she knows of a specific impending adverseness unless it is disclosed; though it also pointed out, referring to Rule 1.7 cmt. [19], that if the lawyer can't disclose the adverseness because of an obligation to maintain a client's confidences, then the lawyer can't seek a waiver. It also emphasized that, as Rule 1.7(a) makes clear, a conflict arising from a lawyer being on both sides of a matter is unconsentable.

The **Opinion** recognized that the DC Rules don't require that waivers be in writing, but endorsed the recommendation of **ABA Formal Opinion 93-372** that they be written. It also observed that a lawyer's decision to act in reliance on an advance waiver should be informed by reasoned judgment; thus, "a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is in litigation in which the existence or fundamental health of the other client is at stake." In a footnote, the **Opinion** pointed out that "[w]aivers permitting other adverse use or disclosure of confidential information . . . may not be inferred from waivers of conflicts of interest."

An Appendix to the **Opinion** offers a sample text for an advance waiver.

DC Ethics Opinion 317 (2002), building upon the analysis of advance waivers of conflicts of interest in **Opinion 309** (discussed immediately above), examines in considerable detail the repudiation of such waivers by a previously consenting client. The **Opinion** recognizes that repudiation of a previous waiver of conflicts is not explicitly addressed by the DC Rules, nor by any DC judicial authority (although the Court in **Griva v. Davidson, 637 A2d 830, 846 (DC 1994)** had observed that consent to dual representation *may* be subject to revocation); but that it *is* addressed both by the **Restatement** and by the Model Rules (as amended in 2002).

The **Opinion's** treatment of the subject begins and ends by emphasizing the desirability of recognizing, in the agreement by which the client initially consents to the conflict, the possibility that the client will later have a change of mind, and spelling out clearly therethere whether the revoking client will have a right to continued representation by the lawyer and, if the lawyer is permitted to withdraw, whether the lawyer may continue to represent the other clients involved. Absent such advance agreement, the **Opinion** suggests, the questions whether the lawyer may withdraw from representing the repudiating client, or may continue the representation of the other affected clients, should be resolved through a somewhat different approach than is applied by the **Restatement** or by the Model Rules, although the results under any of the three would appear to be largely the same. Both of these other authorities, the **Opinion** observes, start with the premise that just as a client can fire a lawyer at any time, so the client also has the unqualified right to revoke a prior consent to a conflict. The **Restatement** (as interpreted by the **Opinion**) then considers whether the revocation was justified: if it was justified, the lawyer must withdraw from representation of the other clients, and if it was not justified, then whether the lawyer must withdraw from the other representation turns on whether would result in "material detriment" to either the non-revoking client or the lawyer, by reason of their having acted in reliance on the waiver. **Restatement §122, comment f.** The Model Rule, more broadly but less helpfully, takes the view that whether the lawyer can withdraw from representing the revoking client "depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result." MR 1.7 cmt [21]. The **Opinion** views both of these approaches as involving "the somewhat metaphysical question whether a conflict waiver is irrevocable or revocable with possible adverse consequences for the revoking client," and adopts instead an approach that asks, "what rules govern whether the lawyer may (or for that matter, must) withdraw from representing one or both of the clients whose adversity was the reason for the waiver?"

The **Opinion's** approach, while perhaps less "metaphysical" than those of the **Restatement** and the Model Rule, is surely not less elaborate. The **Opinion** first points out that if the client's revocation of consent amounts to a discharge of the lawyer, then the lawyer *must,* per Rule 1.16(a)(3), withdraw from the representation. It then observes that even if the client's change of mind doesn't amount to discharge of the lawyer, withdrawal will be required if continuing the representation would result in a

violation of any of the Rules, per Rule 1.16(a)(1). Further, withdrawal would be permitted, per Rule 1.6(b)(3), if the client had "fail[ed] substantially to fulfill an obligation to the lawyer regarding the lawyer's services; or, per Rule 1.1.16(b)(4), if "obdurate" or "vexatious" conduct on the part of the client has rendered the representation "unreasonably difficult." And, finally, if the matter is before a tribunal, the tribunal might conclude the lawyer had "other good cause" for withdrawal, per Rule 1.16(b)(3). As to whether in these circumstances the lawyer may continue to represent the non-revoking clients, the **Opinion** points out that under Rule 1.7(d), dealing with "thrust upon" conflicts, the lawyer might be permitted to continue the representation of both clients, so long as (i) the revival of the conflict wasn't reasonably foreseeable, and (ii) the conflict doesn't involve the risk of "punch-pulling," as contemplated by Rule 1.7(b)(2), (3) or (4). ("Thrust upon" conflicts are discussed in **Opinion 292**, which is summarized under 1.7:260, below). Otherwise, the **Opinion** suggests, if there has been detrimental reliance by the non-revoking client or by the lawyer, the lawyer ordinarily should continue representing the other client. And whether the lawyer may or must then withdraw from continuing to represent the revoking client will be governed by Rule 1.16 and Rules 1.7 and 1.9, per the analysis described above.

DC Ethics Opinion 301 (2000) addressed the question whether a lawyer proposing simultaneously to representing two clients as plaintiffs against a common defendant in separate lawsuits with overlapping subject matter must first obtain consent of both plaintiffs. The **Opinion** concluded that in the particular circumstances presented, such consent was not necessary. The inquiring law firm represented a plaintiff class of special education students in a class action against the District of Columbia in a federal District Court, complaining of failure to meet the District's obligations under the Individual with Disabilities Education Act. During the pendency of that action, one of the members of the plaintiff class was abducted and assaulted, allegedly as a result of the failure to provide adequate transportation services. The question presented was whether potential conflicts of interest would prevent the law firm's representation of that member of the plaintiff class, and his mother, in a tort action against the District of Columbia. The **Opinion** pointed out that Rule 1.7 contemplates three categories of potential conflict of interest situations: (1) those in which representation is "absolutely forbidden," because the conflict falls under Rule 1.7(a), and is unconsentable; (2) those where the dual representation is permissible only with client consent, per Rule 1.7(b) and (c); and (3) those where the dual representation is permissible even without consent, under Rule 1.7(b). In determining whether client consent was necessary, the **Opinion** explained, the key issue is whether one representation "will be or is likely to be adversely affected" by the other, so as to come under Rule 1.7(b)(2) or (b)(3). The necessary determination of likelihood *vel non* has an objective as well as a subjective element, as Comment [7] makes clear by its reference to an "objective observer" having "any reasonable doubt." The **Opinion** concluded that that objective threshold of likelihood was not reached in the circumstances presented because, among other things, in both suits the plaintiffs would be on the same side of the central issue (the obligation of the District of Columbia to provide adequate transportation services); the plaintiffs were seeking different relief (in one case injunction, the other damages); success in one

suit shouldn't interfere with the chances of success in the other; one case would be tried by a jury, the other by a judge; and any actual conflict was unlikely to escape notice, since both representations were public in nature.

DC Ethics Opinion 269 (1997) addresses the disclosures that are appropriate when seeking consent to a simultaneous representation of a corporation and one of its constituents such as an officer or employee, or of multiple corporate constituents, that would otherwise violate Rules 1.7(b)(2) or (3). Appropriate disclosures in this context may include "the lawyer's pre-existing relationship with the two clients, whether one of the clients is an expected source of additional, unrelated legal work for the lawyer, and who will be paying the lawyer's fees." The disclosure "should also address the fact and consequences of a possible disqualification of the lawyer from further representation of the client in the event the dually-represented clients take positions actually adverse to each other in the same matter," consequences including "the inconvenience, expense and possible legal risk associated with the need for the client to retain new counsel." **Opinion 269** also discusses the disclosures called for in connection with securing consent for a lawyer to withdraw from representing one of two clients in a matter who have become adverse and continue to represent the other client in that matter. There must be disclosure to the to-be-discontinued client of the consequences of granting consent and disclosure to the ongoing client of any limitations on that client's continued representation. "Perhaps the most significant area to be addressed in disclosures to both clients is how the lawyer's confidentiality obligation to the client to be terminated will be protected, and how the representation of the continuing client will be affected by the lawyer's continuing confidentiality obligation to the terminated client."

DC Ethics Opinion 268 (1996) states that, while the consent of both clients is required to proceed with representations that would otherwise violate Rule 1.7(b)(1), the consent required to proceed with a representation that would otherwise violate Rule 1.7(b)(2) or (3) may be of only one of the clients involved, depending on "the nature of the issues, the amount of money at stake, and the likelihood that either client would otherwise be substantially and foreseeably affected by the outcome of the other's matter." This had been implicit in the holding of **DC Ethics Opinion 232 (1992)**.

DC Ethics Opinion 265 (1996), dealing specifically with positional conflicts, states that general prospective waivers are "often, by definition, not fully informed, since the precise nature of the future conflict may not be known at the time." Such waivers may not be enforceable, "especially where the client is not a sophisticated consumer of legal services and therefore not well equipped to foresee the future costs and benefits of such a decision."

Written disclosures are not required in order for consents to be effective, but are "desirable." **DC Ethics Opinion 257 (1995)**. See also **DC Ethics Opinions 248 (1994), n. 7**; **DC Ethics Opinion 86 (1980)**; Comment [20] to DC Rule 1.7.

The disclosure required for informed consent from a client with respect to an arrangement that would otherwise violate Rule 1.7(b)(4) under which an insurance

company refers clients to a law firm and the law firm's interest in receiving continuing referrals might affect the lawyer's advice or representation on matters affecting the insurance company includes the percentage of the law firm's total fees that it receives from the referrals. **DC Ethics Opinion 253 (1994)**. Citing **In re James, 452 A.2d 163, 167 (DC 1982), cert. denied, 460 U.S. 1038 (1983)**, the Opinion holds that full disclosure requires "a detailed explanation of the risks and disadvantages to the client."

DC Ethics Opinion 248 (1994) addresses the disclosures required for informed consent by two persons, who allege that they were denied the same job as a result of improper discrimination, to representation by the same lawyer for the liability phase of their case. The lawyer would have to set forth "the possible risks, consequences, and costs of joint representation, including the risk that each client may need new counsel at a later phase of the proceeding, and that even with the clients' consent the court may disqualify" the attorney. The lawyer would have to disclose "the various ways in which the clients' interests could come into conflict, the possible hampering of both their respective claims if they were to agree not to take conflicting positions, the possible added cost and disruption if it were necessary for either or both to get new counsel later, and the complications concerning compensation if a contingent fee were contemplated." The lawyer would also have to caution that bifurcation of the proceeding might not occur, that relief issues could arise at any stage in settlement discussions, and that having confidences of both clients could prelude the lawyer's continuing as attorney for only one. See also **DC Ethics Opinion 217 (1991)** ("frank discussion of Rules 1.9 and 1.6").

Opinion 248 also cites **Griva v. Davison, 637 A.2d 830, 846 (DC 1994)**, for the proposition that a client is not necessarily precluded from withdrawing a consent that was granted at a time when no conflict existed if an actual conflict later arises (though neither the opinion nor **Griva** specifically addresses whether consent can be withdrawn if the potential future conflict and its potential consequences were fully disclosed at the time of the original consent).

DC Ethics Opinion 165 (1986) held that consent to representation of multiple clients must be renewed after further disclosure if there are material changes in the pertinent circumstances.

DC Ethics Opinion 163 (1986) held that while consent should normally precede a representation, it could be retroactive when reasonable conflict-detection procedures did not surface the issue.

DC Ethics Opinion 158 (1985) stated that, where consent of a former client is sought to a representation that would otherwise violate what is now Rule 1.9, disclosure to the former client should include what issues may arise as to which that client's confidences could be useful, and "in most cases the former client should be cautioned that he may wish to obtain or consult a new lawyer before consent is provided."

DC Ethics Opinion 143 (1984), endorsed in Comment [6] to DC Rule 1.7, allows a lawyer to represent both parties to an uncontested divorce where the parties have agreed on the terms for divorce and other special circumstances, described under 1.7:310 below, are present, and where there is consent by both spouses after full disclosure. The lawyer "must affirmatively caution each potential client that consent to joint representation will disable a lawyer from providing either client with separate or confidential advice with respect to a number of issues that one or the other may not have considered." The Opinion specified a number of such issues, and said that the lawyer must not merely list such issues, but must give the potential clients enough information to ensure that "they understand the significance of the advice as to separate issues of which they will be deprived." The lawyer must also advise the spouses as to the emotional and cost impact of a withdrawal by the lawyer, should conflicts arise. The disclosures must be to each spouse separately.

DC Ethics Opinion 140 (1984), discussed the disclosures required in order for a driver and a passenger in a suit against the second driver concerning an automobile collision to consent to joint representation.

DC Ethics Opinion 86 (1980) stated that the disclosures necessary in order for a client to consent to continued representation in litigation by an attorney who is sued for conduct in the litigation include discussion of the possibility that the suit may affect the attorney's vigor in pursuing the client's case or inclination to suggest settlement.

Full disclosure, for purposes of obtaining consent to a conflict, requires the attorney to call any "possible problem of impaired judgment — not simply the underlying facts — to the attention of his or her client, insofar as such possibility is reasonably foreseeable." **DC Ethics Opinion 68 (1979)**.

Griva v. Davison, 637 A.2d 830, 845 (DC 1994), held that a lawyer's disclosure obligation in seeking consents to dual representation is not satisfied by the fact that one client consults his own counsel. "Where dual representation creates a potential conflict of interest, the burden is on the attorney involved in the dual representation to approach both clients with an affirmative disclosure so that each can evaluate the potential conflict and decide whether or not to consent to continued dual employment." A client's inaction does not qualify as affirmative consent.

Avianca, Inc. v. Corriea, 705 F. Supp. 666, 681 (DDC 1989), held that it was inadequate disclosure to a corporation for a lawyer to disclose business relationships potentially adverse to the corporation only to corporate officers involved in those business relationships.

"Full disclosure means just that — affirmative revelation by the attorney of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation. A client's mere knowledge of the existence of his attorney's other representation does not alone constitute full disclosure." **Financial General**

Bankshares, Inc. v. Metzger, 523 F. Supp. 744, 771 (DDC 1981), vacated, 680 F.2d 768 (DC Cir. 1982).

DC Ethics Opinion 92 (1980), rejecting some ethics authorities that treat governmental entities as incapable of consent, held that, if a governmental entity can grant consent as a matter of the general law, the consent is effective under the ethics rules. **DC Ethics Opinions 268 (1996)** and **50 (1978)** treated governmental entities as capable of giving consent.

1.7:250 Imputation of Conflict of Interest to Affiliated Lawyers [see 1.10:200]

See DC Comments [23] and [24] to Rule 1.7, and the discussion of Rule 1.10 below.

1.7:260 Sanctions and Remedies for Conflicts of Interest

DC Rule 1.7(d), added in 1996, provides that a lawyer need not withdraw from a representation because of conflicts under Rule 1.7(b)(1) that arise unforeseeably, so long as there is no violation of Rules 1.7(b)(2)-(4).

DC Ethics Opinion 292 (1999) addressed what it termed the "thrust upon" provision of DC Rule 1.7(d) in circumstances where a current client ("Client A") represented by a law firm in a longstanding ERISA litigation became adverse by reason of its merging with a company that was adverse in pending administrative proceedings before the FCC to two other current clients (Clients "B" and "C") that the law firm was representing in those proceedings. The merger was subject to approval by the FCC in a separate proceeding, and Clients B and C (represented by the law firm) filed comments in that proceeding that, while not flatly opposing the merger, sought the imposition of conditions that would protect the interests they were seeking to advance in the earlier proceedings in which they were represented by the law firm.

The law firm sought consent of all three clients for continuation of all these representations. Clients B and C granted the consent, but client A would consent only to the law firm's continued representation of clients B and C on matters where they were not adverse to client A. Nor would client A agree to allow the law firm to withdraw from its representation in the ERISA litigation (which antedated both of the other representations). Client A and the law firm then jointly requested an opinion from the Legal Ethics Committee on the applicability of DC Rule 1.7(d) in the circumstances.

The resulting **Opinion** noted that the circumstances presented two distinct conflicts, both raising issues as to the applicability of Rule 1.7(d). The first was presented by Client A's becoming, by reason of the merger, an adverse party in the specific proceedings in which the law firm was already representing Clients B and C, a conflict falling squarely under DC Rule 1.7(b)(1). This, the **Opinion** observed, involved a "straightforward" application of the Rule: "The law firm's representation of Clients B and C in [the] ongoing proceedings . . . is precisely the situation that Rule 1.7(d) sought to address." Since there was no conflict under any of the other subparagraphs of DC Rule 1.7(b), the **Opinion** concluded that Rule 1.7(d) clearly meant that the law firm need not withdraw from those representations.

The second conflict, raising a more difficult issue under Rule 1.7(d), arose from the law firm's representing Clients B and C in the administrative proceeding regarding the merger. That proceeding was clearly a new, and technically separate, proceeding from the ones in which the law firm was already representing Clients B and C. The law firm contended, however, that its efforts on behalf of those clients constituted a single representation comprising "a series of efforts to pursue a single objective in multiple forums." Whether single or multiple representations were involved was critical, since under Rule 1.7(d) the time at which the foreseeability of a conflict is tested is at the "outset" of a representation. The **Opinion** concluded that in the particular circumstances presented, the representations of Clients B and C were single, continuous

representations, so that under Rule 1.7(d) the law firm need not withdraw from its representation of them in the merger proceeding. The **Opinion** summarized its reasoning as follows:

> It is probably impossible to state a single rule that addresses all situations in which "thrust upon conflicts" claims are raised. However, we believe that for purposes of applying Rule 1.7(d), the concept of "representation" contains enough flexibility to extend beyond a single discrete proceeding to multiple proceedings that raise a particular identifiable issue or issues and involve common facts, legal theories, claims, defenses and parties. For purposes of Rule 1.7(d), the "onset [*sic*] of representation" will be deemed to occur when the law firm first begins to provide legal services that involve the same facts, legal theories, claims, defenses and parties. If the conflict of interest was not reasonably foreseeable at that point, the law firm can continue its representation without client consent even if a conflict with another firm client is triggered by a subsequent legal proceeding.

The "thrust-upon" provision of DC Rule 1.7(d) is also addressed in **DC Ethics Opinion 317 (2002)** (discussed under 1.7:240, above).

1.7:270 Positional Conflicts

DC Ethics Opinion 265 (1996) addresses whether positional conflicts violate Rules 1.7(b)(2)-(4). The Opinion substantially follows **ABA Formal Opinion 93-377 (1993)**. It holds that the test for positional conflicts, as for other conflicts under Rules 1.7(b)(2)-(4), is whether "an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other." In the case of positional conflicts, this requires considering such issues as "the relationship between the two forums," "the centrality in each matter of the legal issue," "the directness of the adversity between the positions on the legal issue," "the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled," and "whether a reasonable observer would conclude that the lawyer would be likely to hesitate" in either representation or "be less aggressive on one client's behalf because of the other representation." The Opinion rejects the notion that prohibited positional conflicts can occur only in appellate courts, and states that positional conflicts are waivable.

Estate of Heiser v. Islamic Republic of Iran 466 F.Supp.2d 229 (DDC 2006) was a suit by families and estates of American servicemen killed in a bomb attack in Saudi Arabia, against the government of Iran and various Iranian organizations, alleging that they had provided material support and assistance to Hezbollah, which had carried out the bombing. One of the many issues dealt with in this lengthy decision was an apparent positional conflict on the part of the law firm representing the plaintiffs in the action. The issue arose because that firm had represented the Government of Sudan, a defendant in a separate matter in which Iran was one of the defendants, and the firm might take a position in that other matter that was directly contrary to the arguments it made on behalf of the plaintiffs in this case. The Court recognized that DC Rule 1.7 forbids a lawyer, without informed consent of both clients, to represent one client in a matter if the position taken by that client is adverse to the position taken by another client, and quoted **DC Ethics Opinion 265** [discussed immediately above] for the proposition that "the lawyer may not, without informed consent of all parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely effect [sic] the representation of the other." **466 F.Supp.2d at 259.** The Court found that there was no such conflict, and noted that the firm representing the plaintiffs had realized that its representation of the Sudan was likely to present a positional conflict and had terminated its participation in the representation of Sudan. ***Id.***

See also **DC Ethics Opinion 253 (1994), n. 7**.

1.7:280 Relationship to Other Rules (e.g., MRs 1.13, 2.2, 5.7, 6.3, 6.4)

DC Comments [21]-[26], discussed under 1.7:290, immediately below, supplement Rule 1.13 by addressing the application of Rule 1.7 in corporate-family situations.

1.7:290 Identity of Client for Conflicts Purposes

Comments [21]-[26] to DC Rule 1.7 address corporate families. Thus Comment [13] states the general proposition that per Rule 1.13 representation of a corporation does not normally preclude a representation adverse to an affiliate (e.g., parent or subsidiary) of that corporation. Comment [14] recognizes, as did **ABA Formal Opinion 92-365**, that there may be de facto representation of an affiliate if the lawyer representing the corporation had received confidences from it in circumstances where it thought the lawyer was acting for it. Comment [15] also recognizes that there are circumstances where one corporation is effectively the "alter ego" of another corporation, so that if one is a client, so is the other; and that the same applies in the case of a corporation wholly owned by a single individual. Comment [16] goes on to say in substance that if a representation adverse to an affiliate of a corporate client seeks a result that is "likely ultimately to have a material adverse effect on the financial condition" of the client, the representation is forbidden by paragraph (b)(3) of the Rule. Comment [17] then observes that all of the preceding Comments here discussed are subject to contrary understanding between the client and the lawyer. And finally, Comment [18] observes that in all the cases discussed the lawyer must consider carefully whether the consent of the second client is required by paragraph (b)(2) or paragraph (b)(3).

DC Ethics Opinion 268 (1996) holds that, for purposes of conflicts analysis, the client of a lawyer doing volunteer work for city government is not necessarily the entire city, but can be a particular agency. The answer turns on the understanding with the government (which should ideally be clearly defined at the outset in writing), as well as the expectations of the lawyer's other clients. The Opinion holds that the governmental client may properly be regarded as the entire city in a matter "that plainly has City-wide impact or public importance, so that it can fairly be said to implicate the interests of the City generally"; statements in the Opinion suggest that any suit against the Mayor or the City Council, or "attacking some City-wide program or regulation," may be in this category. **Opinion 268** reversed **DC Ethics Opinion 92 (1980)** which treated the entire city as the client. See also **DC Ethics Opinion 62 (1979)**, approving federal lawyers' volunteering to represent children in Superior Court, at least where the "particular organizational element of a specific agency or department" of which the lawyer is an employee does not have an adverse interest in a proceeding in the Court.

DC Ethics Opinion 163 (1986) treats a law firm obtaining advice on behalf of an unidentified client as the client for conflicts purposes.

DC Ethics Opinion 71 and **78 (1979)**, citing **Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978)**, hold that the individual members of a trade association should not be regarded as clients of an attorney for the trade association for conflicts purposes if they did not impart confidences to the attorney and did not understand that the attorney was representing them individually as well as the association.

DC Ethics Opinion 328 (2005) [discussed in more detail in 1.13:500, below], states that when a lawyer represents a constituent of an organization personally, the entity is not a client in a "literal or automatic sense," but that the lawyer must examine the "de facto relationships that arise out of the representation" when considering a new representation that would be adverse to the organization, particularly if the lawyer has had access to the organization's confidential material.

1.7:300 Conflict of Interest Among Current Clients (Concurrent Conflicts)

- Primary DC References: DC Rule 1.7
- Background References: ABA Model Rule 1.7, Other Jurisdictions
- Commentary: ABABNA §§ 51:101, 51:301, ALI-LGL §§ 128-131, Wolfram §§ 7.1-7.3

DC Rule 1.7(b)(1) "is designed to ensure that an attorney will act with undivided loyalty to all existing clients." Undivided loyalty is "a fundamental tenet of the attorney-client relationship." The exception in Rule 1.7(d) is to be read narrowly, as applying only to an existing matter in which another client subsequently becomes involved, not a new matter for one client adverse to another client. **DC Ethics Opinion 272 (1997)**.

DC Rules 1.7(b)(2) and (3) cover multiple representations where, even though "parties are nominally aligned together, there may be a risk that the representation of one will adversely affect the representation of the other," such as where, in litigation, "one client may wish to settle a matter" while the other "may not [wish to settle] and might perceive his/her litigation position to be prejudiced by a settlement by the other client." **DC Ethics Opinion 269 (1997)** (discussing issues relating to representation of a constituent and a corporation in the same matter).

DC Ethics Opinion 268 (1996) held that a lawyer can do volunteer work for a city government client and represent another client adverse to the city government client in a non-substantially-related matter, so long as both clients consent (and there is no violation of Rules 1.7(b)(2)-(4) on the particular facts). As discussed under 1.7:290 above, the Opinion holds that the governmental client, for purposes of conflicts analysis, is not necessarily the entire city, but can be a particular agency. **Opinion 268** overruled **DC Ethics Opinion 92 (1980)**, which required consents of all of lawyer's clients in matters adverse to the city, and even those *potentially* having matters adverse to the city, and which also held that the lawyer could not be adverse to the particular agency for which the lawyer was doing volunteer work, even on an unrelated matter and with consent, and could not be adverse to any city agency on a "closely related" matter.

DC Ethics Opinion 259 (1995) held that, as under DC substantive law a lawyer retained by a personal representative or conservator in connection with a decedent's or ward's estate represents the personal representative or conservator and not the estate, the lawyer cannot bring an action adverse to the personal representative or conservator without consent.

DC Ethics Opinion 240 (1993) addressed the applicability of Rule 1.7 to representations by lawyers in the DC Corporation Counsel's Office in Social Security Act Title IV-D child support proceedings of two custodial parents seeking child support

from the same respondent. Only the discussion of Rule 1.7(a) remains fully pertinent after the 1996 amendments.

DC Ethics Opinion 163 (1986) stated that, in order for a lawyer to represent one client in a matter adverse to another client unrelated to the subject of the lawyer's representation of the latter client, there must not only be consent of both clients; there must also be "no realistic prospect that information conveyed" to the lawyer "by either client in the course of the matter in which it is represented will have any relevance to or utility in the other matter." It was such a risk of misuse of confidential information, the Legal Ethics Committee explained, that accounted for the outcome in **DC Ethics Opinion 131 (1983)**, which held that an attorney could not, even with consent, simultaneously represent a class of agency officials claiming employment discrimination and an agency employee challenging the judgment of one of the class members. See also **Martin v. Potomac Electric Power Co., 1989 U.S. Dist. LEXIS 15407 (DDC 1989)**.

DC Ethics Opinion 94 (1980) held that it is permissible for an attorney employed by one organization to provide services to a related organization that pays the first organization for the attorney's services, but that there must be consent of both where "it is possible that interests will differ and that professional judgment will be affected, however slightly." The clients can agree up front that if a conflict arises the lawyer will withdraw from one representation and continue the other; but sometimes withdrawal from both may be required because of an undue risk that confidences and secrets will be used or revealed.

BCCI Holdings (Luxembourg), S.A. v. Clifford, 964 F. Supp. 468, 487-82 (DDC 1997), found that it would violate DR 5-105 for a lawyer to represent a bank holding company and the company that unlawfully acquired control of it, without consent.

The mere fact of representing two clients that are adverse in some other matter unrelated to either representation, or are competitors, is not a conflict, "unless circumstances are such that the attorney's independent judgment will be or is likely to be affected adversely." **Curtis v. Radio Representatives, Inc., 696 F. Supp. 729, 736 (DDC 1988)**.

Whether a client is a current or former client, and the "hot potato" question — i.e., when it is permissible to terminate a representation so as to convert a client from current to former status for purposes of conflicts analysis — are addressed in 1.9:200 below.

1.7:310 Representing Parties with Conflicting Interests in Civil Litigation

An attorney may, with the informed consent of both, represent two persons who allege they were denied a job as a result of improper discrimination if the representation is limited to establishing liability. **DC Ethics Opinion 248 (1994)**. The Legal Ethics Committee expressed the view that the risk that conflicts would develop in the course of the litigation is so great that genuinely informed consent seems unlikely, but declined to say that the joint representation is altogether prohibited. For a similar but less pessimistic holding, see **DC Ethics Opinion 217 (1991)**.

DC Ethics Opinion 243 (1993) holds that Rule 1.7(a) absolutely bars a lawyer from representing a divorcing husband and wife who seek assistance in reaching agreement as to the terms of their divorce. The Legal Ethics Committee found that Rule 2.2, the rule concerning the lawyer as intermediary, is "basically designed for `joint venture'-type situations," not joint representations where adverseness is inescapable. In contrast, **DC Ethics Opinion 143 (1984)**, which is specifically endorsed in Comment [6] to DC Rule 1.7, holds that a lawyer can represent both parties to an uncontested divorce where the couple is childless, the spouses have relatively equal employment status and educational backgrounds, they have agreed on the terms for the divorce, they want counsel solely to implement those terms at the lowest possible cost, and they have consented to joint representation after full disclosure of the limitations the arrangement entails and the possible pitfalls. Even then, joint representation is impermissible if the lawyer has represented one of the spouses previously "and has become informed of client confidences or secrets potentially relevant to the divorce proceeding which he would not be in a position to disclose to the other client." If a conflict emerges, the lawyer must withdraw from both representations. There must also be consent of both spouses after full disclosure, as to which see the discussion of **Opinion 143** under 1.7:240 above.

DC Ethics Opinion 157 (1985), applying former DR 5-105, indicated that, with disclosure of the potential that the clients will later come to take adverse positions and the attorney will have to withdraw from representing all of them, an attorney can represent both the promoters of and the investors in a tax shelter in asserting common positions in an IRS proceeding. However, this is not permissible if it is "clearly unavoidable" that the clients will become adverse. **DC Ethics Opinion 165 (1986)** states that if a different attorney, acting on behalf of different investors as the named plaintiffs, then brings a purported class action suit against the promoters, the attorney must at least disclose this development and its potential implications, and obtain the clients' direction as to continued joint representation.

DC Ethics Opinion 156 (1985) held that a lawyer may not simultaneously represent a child as a court-appointed guardian ad litem and prospective adoptive parents of the child in an adoption proceeding, even if there is no known conflict between the child and the prospective parents. The guardianship appointment presupposes a need for

separate representation. The child is incapable of consent, and the lawyer cannot provide disinterested consent as guardian to the lawyer's own employment by the prospective parents. The whole issue in the adoption proceeding is "whether the interests of the child and the prospective parents are so common as to permit adoption," and it would be improper to prejudge this issue as a predicate for consent.

DC Ethics Opinion 154 (1986) held that a lawyer may represent multiple applicants in FCC cellular radio license lotteries, with full disclosure and consent of all the clients. If a conflict develops, the lawyer can represent one client against the other if there was consent and permission to use confidences and secrets at the outset. See also, to similar effect, **DC Ethics Opinion 54 (1978)**. This holding seems more carefully considered than the statements in, *e.g.*, **Opinion 157**, *supra*, and **Opinion 140**, *infra*, that a lawyer must withdraw from all representations if a conflict emerges.

DC Ethics Opinion 140 (1984) discussed in detail the circumstances in which an attorney can represent both a driver and a passenger in a suit against the second driver concerning an automobile collision. Generally, the co-clients must not have become adverse to each other and must make an informed decision to forgo claims against each other. If conflicts emerge, the attorney may have to withdraw from both representations. See also **In re Thornton, 421 A.2d 1 (DC 1980)**.

DC Ethics Opinion 136 (1984) held that an attorney may represent, with the consent of both, a police officer in a probate matter and the defendant in an unrelated automobile tort case in which the police officer is the investigating officer and may be a witness for the defendant, or at least "likely would not be subject to any especially probing cross-examination" by the lawyer. The lawyer is not required to disclose the representation of the police officer to the court or opposing counsel in the tort case.

Lawyers with the same legal services organization cannot represent both parties in a contested divorce action. **Borden v. Borden, 277 A.2d 89 (DC 1971)**.

Rule 1.7(b)(1) is violated when a lawyer acts as counsel for a plaintiff class while suing individual class members, and the lawyer's suggestion that those individuals be excluded from the class violates Rule 1.7(b)(2). **Lewis v. National Football League, 146 FRD 5, 11 (DDC 1992)**.

1.7:320 Conflicts of Interest in Criminal Litigation

In **In re Ponds, 888 A.2d 234 (DC 2005),** the Court approved a thirty-day suspension of a lawyer who had been found by the Board on Professional Responsibility to have violated provisions of the Maryland Rules corresponding to DC Rules 1.7(b)(4) and 1.16(a)(1). The respondent had been retained to represent the defendant on a charge of conspiracy to import and distribute cocaine, in the Federal District Court in Maryland. His client pled guilty, and the court after due inquiry accepted the plea, but before the sentencing hearing, the defendant wrote a letter to the respondent accusing him of having coercing him into the guilty plea but also asking respondent to assist him in withdrawing the guilty plea; and the defendant sent a copy of this letter to the judge, along with a request for a hearing on his request to withdraw the guilty plea. At the sentencing hearing, the judge first heard the defendant on his request to withdraw the guilty plea, and denied the request, and although the respondent did not participate in that exchange, he did represent the defendant in the sentencing hearing. This was found by the Board to have violated Rule 1.7 because the defendant's charge that he had coerced the guilty plea gave respondent a personal interest that conflicted with the interests of his client; and since the continued representation violated that Rule, Rule 1.16(a)(1) required his withdrawal.

DC Rule 1.7(b)(4)'s prohibition of a lawyer's representing a client in a matter in which the lawyer's judgment may be affected by duties to other parties, absent client consent, played a role in the determination of whether a defendant convicted in a criminal case might have a valid claim of ineffective assistance of counsel in **McCrimmon v. United States, 853 A.2d 154 (DC 2004).** The ineffective assistance claim rested on the fact that the defendant's court-appointed counsel had had a conversation with a man who was interested in retaining him in an unrelated criminal matter, who turned out to have been involved in the crime in which the defendant was involved and had pled guilty and become a "crucial" prosecution witness in the defendant's trial. The legal issue was whether by reason of that conversation, defendant's counsel had an "actual conflict" within the meaning of **Cuyler v. Sullivan, 446 U.S. 335 (1980)**. On appeal, the Court of Appeals reasoned that information the witness had imparted to the lawyer in that conversation would not be protected by the attorney-client privilege, since the witness had waived that privilege by admitting his guilt in a plea bargain, and had told the prosecutor the information that might be used in impeaching him as a witness. The Court also noted, however, that that information would constitute "secrets" within the meaning of DC Rule 1.6, both by *embarrassing* the witness and possibly by *prejudicing* him as well. **853 A.2d at 163.** In addition, the Court observed that Rule 1.7(b)(4) might also apply, since it prohibits a lawyer from representing a client in a matter in which the lawyer's judgment may be affected by duties to other parties unless the client consents. **Id.** The Court remanded the case to the trial court for a determination of whether the defendant's lawyer believed that he was ethically restrained in cross-examining the witness; if so, its impact, if any, on the defendant's consent, and whether it affected the defensive strategy in the cross-examination, so as to have created an "actual conflict" resulting in ineffective assistance of counsel.

DC Ethics Opinion 232 (1992) held that a lawyer whose firm represents, in a matter unrelated to the criminal case, a suspect in that criminal case can represent a witness in the case in invoking the Fifth Amendment with the consent of only the witness. This does not involve taking a position adverse to the other client in a matter within the meaning of Rule 1.7(b)(1), but consent of the witness is required by Rule 1.7(b)(2) because of the potential that the lawyer would be tempted to counsel the witness against inculpating the suspect. Consent of both clients is required to bargain over inculpatory testimony by the witness, which involves taking a position adverse to another client in a matter within the meaning of Rule 1.7(b)(1).

1.7:330 Multiple Representation in Non-Litigated Matters

DC Ethics Opinion 296 (2000) addressed a situation that underscores the importance, when a lawyer undertakes a joint representation of two clients with potentially differing interests in the subject matter of the representation, of there being a clear understanding in advance (and preferably in writing) as to the potential impact of joint representation of the lawyer's duties to maintain client confidences (under Rule 1.6) and to keep each client reasonably informed (under Rule 1.4). The **Opinion** pointed out that absent a clear understanding that there would be no confidences imparted to the lawyer by one client that could not be shared with the other, the lawyer's inability to share a confidence of one client with the other might present a conflict requiring withdrawal from the representation of both. It also pointed out that although the particular situation addressed involved a joint representation of two clients, the applicable analysis was very close to that which would have been prevailed under Rule 2.2 had the law firm been acting as intermediary rather than advocate.

The inquirer in this instance was a law firm that had been retained by an employer to obtain a visa for an alien employee, but after doing so had been informed by the employee that she had fabricated the credentials that qualified her for the visa. Upon learning of the fabrication, the law firm sent the employee a letter confirming that neither it nor the employee had known of the fabrication, and withdrawing from representation of the employee. The specific question put by the inquirer was whether it was allowed or required to inform the employer (which had signed the petition that was filed with the INS) of this fabrication. The **Opinion** observed that the retainer agreement did not address the impact of the joint representation on client confidences, nor seek consent for the Firm to share confidences of one client with the other. It also observed that a joint representation does not ipso facto imply such consent. In consequence, observing that although the information about the falsification that was reported by the employee to the law firm may not have been a "confidence" within the meaning of Rule 1.6 (since the employee had not reported it in the context of asking for legal advice), it was nonetheless at least a "secret" which the law firm could not share with its other client without the client's consent. The **Opinion** then counseled that the firm should seek the employee's consent to disclosure of the fabrication, but emphasized that if explicit consent was not forthcoming, the firm could not disclose the employee's falsification to the employer. The **Opinion** noted the harshness of the result, given that "the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury," but the firm's obligation to preserve the employee client's secrets prevailed over its obligations to the employer client. Assuming that disclosure could not be made, the **Opinion** pointed out, the firm would have a conflict under Rule 1.7(b)(2) requiring it to withdraw from continued representation of the employer by reason of Rule 1.16(a)(1).

Finally, the **Opinion** addressed the issue of what the firm could tell the employer client (assuming it could not disclose the employee's fabrication) by way of explaining why it

was terminating the representation, stating that there were at least two bits of information the firm could impart: the fact that it had also terminated the representation of the employee, and "what ethical provision led to the termination" -- here evidently referring to the termination with respect to the employer, and therefore pointing to Rules 1.7 and 1.16. The **Opinion** also took note in this connection of the "noisy" withdrawal contemplated by Comment [9] to Rule 1.6, and pointed out that the firm might disavow the INS petition; but it could only do this if there was a reasonable basis to expect that, absent such a disavowal, harm would arise from future reliance on the petition.

DC Ethics Opinion 327 (2005) addressed how issues addressed in **Opinion 296**, immediately above, play out when joint clients agree in advance to share information they provide to a in connection with the representation and underscored the importance of explaining in advance the potential effects of such an agreement. **Opinion 327** held that when joint clients have entered into such an agreement, a law firm has an affirmative obligation to disclose any information obtained from one client bearing on the representation that might affect the interests of the non-disclosing clients once the firm learned the information, even if it knows that the disclosing client did not wish to reveal the information to the other clients.

The inquirer was a law firm representing several clients that previously had been jointly represented by a different law firm. The prior firm's retainer agreements with the joint clients had set forth the understanding that information the clients provided for use in connection with the representation "may be shared" with the firm's other clients in the same matter. The prior firm had withdrawn from representing the several clients after apparently having learned confidential information from one of the jointly represented clients, and it continued to represent only that one client. The inquiry arose when the prior firm refused to comply with the inquiring firm's request to disclose all information relevant to its prior representation of the several clients, including the confidential information that had led to its withdrawal.

The **Opinion** held that the retainer agreement's provision that information "may be shared" with other clients in the same matter constituted consent to the prior firm's disclosure of confidential information obtained during the course of the representation that may be relevant or material to its representation of other clients in the same matter. It further held that where the disclosing client had consented to such disclosure, disclosure to the other clients was required under Rule 1.4.

The **Opinion** also addressed what a lawyer should do when a client that has otherwise consented to disclosure of confidential information to co-clients seeks to withdraw consent for a specific disclosure. The **Opinion** explained that if the client informs the lawyer of its intent before disclosing the confidential information, the lawyer must explain that he or she would be obligated to disclose the information. It also asserted that the lawyer can generally withdraw from representing the disclosing client and continue to represent the others. However, if the lawyer obtains the confidential

information, he or she must reveal the information to the other clients, even if the lawyer knows that the disclosing client did not want the information revealed, because the duty to communicate relevant information attaches at the moment the lawyer learns the information.

DC Ethics Opinion 49 (1978) held that, if both clients desire it, an attorney can represent two companies in reducing a contract between them to writing where they have directly negotiated its terms, even though there remains a potential for disagreements as to details.

Griva v. Davison, 637 A.2d 830, 844 (DC 1994), holds that "a law firm ethically can represent several individuals in creating a partnership after obtaining their informed consent pursuant to Rule 1.7(c)." The firm can also represent the partnership and one or more of its individual partners as to matters affecting the partnership, so long as there is no conflict of positions.

Hendry v. Pelland, 73 F.3d 397, 401 (DC Cir. 1996), found that it was improper for a lawyer to represent joint owners of property in connection with the sale of the property, where the owners disagreed as to objectives and the lawyer did not discuss possible conflicts with them.

Avianca, Inc. v. Corriea, 704 F. Supp. 666, 678-82 (DDC 1989), found it was improper for a lawyer to represent two companies likely to compete for the same business opportunities, and to side with one against the other when their interests did collide.

1.7:340 Conflicts of Interest in Representing Organizations

DC Ethics Opinion 159 (1985), applying former DR 5-105(B) to a question that would now be governed by Rule 1.7(b)(1), held that an attorney for a cooperative association could not represent one member of the association's board against the entire board, because the board is the association for conflicts purposes. For further discussion of this Opinion, see 1.7:500 below. See also **DC Ethics Opinion 259 n. 4 (1995)**.

Griva v. Davison, 637 A.2d 830, 840 n.10 (DC 1994), holds that "a lawyer of an entity cannot represent constituents of an entity when such representation may prejudice the interests of that entity, or when it is unclear what constituents represent the interest of the entity and thus a dispute between constituents makes it impossible to know what the entity's interest are." See also **Financial General Bankshares, Inc. v. Metzger, 523 F. Supp. 744, 765 (DDC 1981), vacated, 680 F.2d 768 (DC Cir. 1982)** (lawyer for corporation must "remain neutral in the face of a corporate client's factional conflict").

A lawyer for a corporation can sue corporate employees for whom he provided free legal services on unrelated matters. **Fielding v. Brebbia, 479 F.2d 195 (DC Cir. 1973)**. See also **Egan v. McNamara, 467 A.2d 733, 738-39 (DC 1983)**.

1.7:400 Conflict of Interest Between Current Client and Third-Party Payor

- Primary DC References: DC Rule 1.7(b)(4)
- Background References: ABA Model Rule 1.7, Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 134, Wolfram § 8.8

1.7:410 Insured-Insurer Conflicts [see 1.7:315 and 1.8:720]

A lawyer hired by an insurance company to represent an insured must be loyal to the insured and must not allow the lawyer's relationship with the insurance company to hinder the representation. **DC Ethics Opinion 173 (1986)** (applying former DR 5-105(B) and (C) and DR 5-107(B)).

1.7:420 Lawyer with Fiduciary Obligations to Third Person [see 1.13:520]

DC Ethics Opinion 259 (1995) stated that, under DC substantive law, a lawyer retained by a personal representative or conservator in connection with a decedent's or ward's estate represents the personal representative or conservator and not the estate.

1.7:500 Conflict of Interest Between Current Client and Lawyer's Interest [see also 1.8:200]

- Primary DC References: DC Rule 1.7(b)(4)
- Background References: ABA Model Rule 1.7, Other Jurisdictions
- Commentary: ABABNA § 51:501, ALI-LGL §§ 125-127, Wolfram § 8.11

DC Rule 1.7(b)(4) was the principal basis for a disciplinary proceeding in **In re Evans, 902 A.2d 56 (DC 2006)**, where the lawyer's conflict of interest arose by reason of the lawyer's representing a client in a matter in that involved a business in which he had a personal financial interest -- a situation specifically addressed by Comment [36] (formerly [25]) to DC Rule 1.7. The respondent in that case owned a title company, and also engaged in a law practice that included probate and real estate matters. His title company was contacted to close a real estate loan, but when it appeared that the property to be encumbered was not owned by the borrower but instead belonged to the unprobated estate of the borrower's deceased mother-in-law, the respondent undertook to represent the borrower in initiating a probate proceeding to secure the borrower's title to the property. He undertook this engagement without advising the borrower of his conflict of interest or getting her informed consent to his proceeding with the engagement despite the conflict of interest, thus violating DC Rule 1.7(b)(4). He then proceeded, in the course of the engagement, to commit a number of errors and omissions, presumably as a result of his conflicting interests, that were found both to have been prejudicial to the administration of justice, in violation of Rule 8.4(d) [more fully discussed under 8.4:500, below] and to have manifested insufficient competence, in violation of Rule 1.1(a) and (b) [more fully discussed under 1.1:210, above].

DC Ethics Opinion 334 (2006) addressed an inquiry by a lawyer who had been approached about selling the lawyer's own media rights related to a representation. The Opinion held that the situation was governed by Rule 1.7(b)(4), not Rule 1.8(c), and thus while the potential for a conflict of interested existed, such a transaction was not absolutely precluded. The Opinion explained that a transaction would be more problematic if its value to the lawyer might vary depending on the lawyer's subsequent actions in the representation. The Opinion emphasized the difficulties involved in obtaining truly informed consent when the lawyer's strategic and tactical decisions might affect the value of the transaction and stated that it would be highly advisable for the client to obtain advice from independent counsel or for the lawyer to obtain objective advice about his or her ability to proceed with the representation.

In re Hager, 812 A.2d 904 (DC 2002) involved a number of ethical violations relating to a case in which the lawyers representing the plaintiffs in a potential class action made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients.

Hager and another lawyer (who was not admitted in DC and so not subject to professional discipline there) had been retained by two health professionals to pursue legal action against Warner-Lambert Co. with respect to its head-lice shampoo Nix, on the ground that it was not effective because a Nix-resistant strain of head lice had evolved. The clients' objective was to protect the public from the product and to compel the company to change its labeling and advertising. The lawyers entered into a contingent fee agreement with the two plaintiffs, undertaking to investigate potential grounds for a class action suit, and specifying that one requirement of such a suit would be that there be 100 class representatives. When 90 consumers/potential class members had been identified, the lawyers commenced negotiations with Warner-Lambert, and a little over a month later arrived at a settlement agreement with the company, most of whose terms were not disclosed to, let alone agreed by, their clients or to the 90 potential members of the class. The principal terms of the agreement were:

> The lawyers would not assert any Nix-related claims against Warner-Lambert on anyone's behalf, including their clients.
>
> Warner-Lambert would stop asserting that Nix was 99% effective, add a money-back guarantee on the label, and form a scientific panel to study lice resistance to Nix.
>
> Warner-Lambert would provide full purchase price refunds to the 90 potential class members/consumers.
>
> Warner-Lambert would pay the lawyers $225,000 for investigating and negotiating potential claims about Nix.
>
> None of the consumers' claims against Warner-Lambert would be released.
>
> The lawyers would maintain in strictest confidence all information obtained in connection with their work on the matter.
>
> Both the lawyers and Warner-Lambert would maintain in strictest confidence the content of the agreement except that the consumer could be informed of their refund rights, the change in the Nix effectiveness claim, the money-back guarantee, and the scientific panel.

On the basis of the foregoing circumstances, Hager was found to have violated not only Rule 1.7(b)(4), as explained below; but in addition Rule 1.2(a) (failure to abide by clients' decision as to whether to accept an offer of settlement); Rule 1.4(a) (failure to

keep clients informed); Rule 1.8(e) (accepting compensation from other than the client without the client's consent); Rule 1.16(a) (failure to withdraw when representation involves violation of the Rules); Rule 1.16(d) (failure to protect clients' interests on withdrawal); Rule 5.6(b) (agreement restricting right to practice); and Rule 8.4(c) (engaging in dishonesty, fraud, deceit, or misrepresentation).

The conflict of interest that violated Rule 1.7(b)(4) was termed by the Court "a classic conflict of interest -- [respondent's] interest in maximizing his fee versus his clients' interest in maximizing the amount paid to them." *Id.* at 913. The Court pointed out that the conflict in itself did not necessarily preclude the lawyer's continuing and concluding the negotiations, because "if that were true, plaintiffs' lawyers would find it difficult, if not impossible, to engage in settlement negotiations once the subject of attorney fees had been broached." *Id.* What was needed and lacking here, however, was client consent. The respondent argued that there had been no actual conflict of interest because he had obtained full relief for his clients and didn't divert to himself any monies that would otherwise have gone to the clients. In response to this, the Court asserted that "Obtaining the best possible outcome for one's clients is never a viable defense to charges of ethical misconduct; the ends do not justify the means." *Id.* at 913-14. The Court also asserted that the fundamental fallacy in respondent's argument lay in its premise that the lawyer has the right to decide what is best for the client: "It is the client, not the lawyer, who decides whether full or acceptable relief has been obtained." *Id.* at 915. Here, the clients hadn't been informed of, let alone agreed to, the settlement the respondent had negotiated.

In **In re Hunter, 734 A.2d 654 (DC 1999)**, the Court approved the imposition of reciprocal discipline upon a lawyer who had been suspended by the US District Court for ethical violations arising out of her representation of a criminal defendant in a case in which an officer with whom the lawyer was romantically involved had participated in the arrest of a co-defendant and was to be a government witness at trial. The District Court had found the lawyer's conduct violative of, *inter alia*, Rules 1.3(a), 1.4(b), 1.7(b)(4), 8.4(a) and 8.4(d).

DC Ethics Opinion 300 (2000) considered the possible applicability of Rule 1.7(b)(4) (along with Rules 1.5 and 1.8) to a lawyer's accepting an ownership interest in a corporate client as compensation for legal services. The **Opinion** is more fully described under 1.5:400, above.

DC Ethics Opinion 306 (2001) [which is more fully discussed under 5.7:200 below], which addressed the ethical responsibilities of a lawyer who is also a licensed insurance broker, pointed out that if such a lawyer sold insurance products to a client there could be an issue under Rule 1.7(b)(4) by reason of the lawyer's having a personal interest in the transaction which could affect the lawyer's professional judgment on behalf of the client.

DC Ethics Opinion 269 (1997) stated that the lawyer for a corporation may be affected, in representing a corporate constituent such as an officer or employee at the

corporation's expense, by the lawyer's personal interest in continuing referrals from or work for the corporation, in which case the representation can be undertaken only with the corporate constituent's informed consent. A criminal lawyer charged with possession of marijuana cannot, absent consent, represent clients being prosecuted by the same office. **DC Ethics Opinion 257 (1995)**. The test in the District under Rule 1.7(b)(4) is an objective one: whether "an objective observer might reasonably believe" that the lawyer's professional judgment on behalf of clients would be colored by the lawyer's personal situation. An objective observer would be concerned that a lawyer in this situation might either become less aggressive in order to curry favor or excessively aggressive out of resentment or anger.

DC Ethics Opinion 253 (1994) found that Rule 1.7(b)(4) may be violated, absent informed consent, by an arrangement under which a lawyer receives client referrals from an insurance company and leases space and receives financing from the insurance company, where the representations may involve providing advice or taking positions adverse to the insurance company or taking positions with which the insurance company disagrees.

DC Ethics Opinion 252 (1994) held that Rule 1.7(b)(4) precludes a lawyer's both acting as guardian ad litem for a child in an abuse and neglect proceeding and representing the child in a tort claim unless a different guardian ad litem is appointed for the tort matter, because of the lawyer's personal interest in the level of the fee for the tort matter. Even if a different guardian is appointed, the lawyer "must be vigilant about potential conflicts" between the two representations.

DC Ethics Opinion 245 (1993) held that Rule 1.7(b)(4) bars a lawyer from accepting a commission from a service provider that the lawyer recommends to the client, such as a registered agent, unless the client consents and the payment is turned over to the client.

DC Ethics Opinion 231 (1992) held that Rule 1.7(b)(4) does not prevent a member of a law firm from taking actions as a legislator that could be adverse to firm clients, where there is no allegation that this adversely affects firm lawyers' professional judgment on behalf of clients. The Legal Ethics Committee stated that it need not decide whether, if there were such an allegation of adverse effect, the rule would apply on a theory that a lawyer's role as a legislator involves responsibilities to or interests in a third party or the lawyer's own interests.

Even though Rule 3.7(a) addresses only representation at trial, a lawyer who will be called upon to testify as a witness at a pre-trial hearing "should carefully consider" whether Rule 1.7(b)(4) bars representation of the client at the hearing because "the lawyer's professional judgment" on behalf of the client "may be adversely affected" by the lawyer's "role as a witness." **DC Ethics Opinion 228 (1992)**.

DC Ethics Opinion 210 (1990) held that an attorney handling federal Criminal Justice Act cases who applies for a job in the U.S. Attorney's Office must disclose to clients the potential that the pendency of the job application could adversely affect the attorney's judgment and performance and the risk of prejudice as a result of the attorney's

withdrawal to take the new position, and must secure client consent to continued representation. This duty arises when the lawyer decides to seek the position. A conflict does not arise with respect to criminal cases the lawyer is handling that are prosecuted by the local, as opposed to the federal, prosecutor's office, however.

DC Ethics Opinion 204 (1989) held that a lawyer could not comment on the lawyer's own behalf in an agency rulemaking proceeding if, at the time the comments are submitted, the lawyer also represents parties with respect to applications or planned applications before the agency that could be prejudiced if the lawyer's comments are adopted and applied to those applications. The decision was under former DR 7-101(A)(3) and related provisions of the Code, but the Legal Ethics Committee indicated that it would reach the same conclusions under then-proposed Rule 1.7. Comment [3] to Rule 1.7 indicates that Rule 1.7(a) should be understood to codify **Opinion 204**, including the notion that a rulemaking whose outcome may be applied retroactively to a pending case is the same "matter" as that case.

The following Opinions applied DR 5-101(A), the predecessor to DC Rule 1.7(b)(4):

DC Ethics Opinion 195 (1988) held that a lawyer could not take a client's assignment of a patent, with the right to sell it, as security for the lawyer's fees for pursuing the patent. This would tend to place the lawyer's interest in a quick sale of the patent for just enough to cover the lawyer's fees in opposition to the client's interest in maximizing the value of the patent.

DC Ethics Opinion 177 (1986) held that the fact that a lawyer had previously been the supervisor of a governmental decisionmaker could constitute a personal interest that would reasonably affect the lawyer's exercise of professional judgment. The discussion has a flavor of a subjective test — whether the lawyer actually feels there would be an effect — that is probably no longer applicable under the objective-observer approach of Comment [7] to Rule 1.7. A similar tenor of subjectivity is found in **DC Ethics Opinion 169 (1986)**, holding that a lawyer could continue to represent an employer-client while also pursuing employment-related claims against it if the lawyer could "reasonably conclude that he will nonetheless be able to fulfill his responsibilities to the client."

DC Ethics Opinion 170 (1986) held that a prepaid legal services arrangement, under which a lawyer received a limited monthly fee and the client had a right to unlimited phone advice, could create a conflict between the lawyer's personal financial interest and the duty of competent and zealous representation.

DC Ethics Opinion 159 (1985) held that a lawyer for a cooperative association could be barred, absent consent, from representing one member of the association's board in a matter adverse to another, "particularly influential" board member because the lawyer "might justifiably fear retaliation by the association, *i.e.*, retaliation by the board," and this could impair the lawyer's professional judgment.

DC Ethics Opinion 147 (1985) held that a defense attorney could not offer a settlement conditioned on waiver by the plaintiff and the plaintiff's lawyer of all or a part of the plaintiff's lawyer's claim for statutory fees, because this would place the plaintiff's lawyer in a conflict position. The Opinion stated that such an offer need not be communicated by the plaintiff's lawyer to the plaintiff, though it may, and in most instances should, be. **Opinion 147** was subsequently modified by **DC Ethics Opinion 207 (1989)**: see 8.4:500, below.

DC Ethics Opinion 144 (1984) held that an attorney who seeks a Criminal Justice Act appointment may not withdraw when the case is assigned to a judge who regularly declines to grant compensation in excess of the statutory limit for cases that are not unusually extended or complex. This is not a situation in which the lawyer's professional judgment would be impaired by the lawyer's own financial interest; the lawyer takes the appointment knowing the fee is determined by statute and judicial discretion.

DC Ethics Opinion 138 (1984) held that a lawyer could refer a client to a bank for a loan to cover the lawyer's services, and could pay the bank $25 for speedy processing of the loan application and notice if the loan was rejected. However, the lawyer could have no interest in the bank and had to be satisfied that the credit arrangements were fair and in the client's interest.

DC Ethics Opinion 133 (1984) held that a lawyer serving as a hearing examiner for the District of Columbia could not represent a private client in a suit against the City in a related area, absent the private client's informed consent.

DC Ethics Opinion 126 (1983) held that it was not necessarily an impermissible conflict for a lawyer to represent a client in defending against an allegation that the client failed to comply with a court order to contribute to the lawyer's fee. In each situation, the lawyer would have to "determine whether his or her financial interest in receiving the payment will affect or reasonably be expected to affect the exercise of his or her professional judgment on behalf of the client."

DC Ethics Opinion 112 (1982) held that government lawyers could not be members of a public employees' union that is the principal adversary of the attorney's employing agency, where "the success of the organization can affect their own financial and other employment interest." On the other hand, a government lawyer may contribute to organizations that oppose the government on various issues, so long as the contribution is not in support of a specific case in which the lawyer is on the other side. See also **DC Ethics Opinion 57 (1978)** (lawyer whose firm practices before agency can make a donation to public interest law firm that practices before agency, even if the public interest law firm is adverse to the lawyer's firm, so long as the donation will not be used in the adverse matter, and even if the lawyer's client objects).

DC Ethics Opinion 101 (1981) addressed an inquiry from a lawyer employed by a federal agency that maintained a Board of Contract Appeals, whose judges are similar to administrative law judges, as to whether the lawyer was subject to any ethical

inhibition under the Code against appearing before the Board by reason of the lawyer's having represented three of the judges in a civil damage suit whose appeal was pending. The Opinion concluded that there was no such ethical inhibition on the lawyer, but suggested that "as a matter of prudence and professional etiquette, albeit not ethical mandate," it might be well to raise with the judges the question of possible recusal or notification to opposing counsel. To similar effect, see **DC Ethics Opinion 114 (1982)**, where the lawyer was in private practice, not government employ, and had represented some 40 officials of a government agency in attempting to prevent adverse reclassification of their civil service grade.

DC Ethics Opinion 86 (1980) held that a lawyer sued for conduct in the course of litigation could continue to represent the client in the litigation with the client's consent.

DC Ethics Opinion 48 (1978) held that client consent is required for a lawyer who is a DC Human Rights Commissioner to handle discrimination cases before federal courts or agencies, because of the risk that the lawyer might have to withdraw if a case is referred to the DC agency, and because of the potential that the lawyer could benefit from steering the client away from the DC agency even though pursuing a local administrative remedy might be preferable to bringing a federal case.

O'Neil v. Bergan, 452 A.2d 337, 345 (DC 1982), held that it is proper for a member of a law firm to represent the firm in defending against a claim against it.

BCCI Holdings (Luxembourg), S.A. v. Clifford, 964 F.Supp. 468, 482 (DDC 1997), held that it would violate DR 5-101(A) for a lawyer to accept undisclosed and unrecorded non-recourse loans from a client.

United States v. Harris, 846 F. Supp. 121 (DDC 1994), found that Rule 1.7(b)(4) was violated where a lawyer had an intimate relationship, undisclosed to her client or the court, with an adverse witness she cross-examined.

In **Palumbo v. Tele-Communications, Inc., 157 FRD 129 (DDC 1994)**, a lawyer took a minority stock interest in a corporation as a fee for a successful discrimination suit against the corporation, and later sat on the corporation's board. In these circumstances, Rule 1.7(b)(4) barred the lawyer and his firm from handling a subsequent class action against an affiliated entity alleging discrimination by that entity as well as by the corporation of which he had been a director, because of the lawyer's potential interest in minimizing his own responsibility as a former director, his duty of loyalty to the company of which he had been a director, and his potential role as a witness for the defense.

Financial General Bankshares, Inc. v. Metzger, 523 F. Supp. 744 (DDC 1981), vacated, 680 F.2d 768 (DC Cir. 1982), held that a lawyer's promoting and acting for a group attempting to acquire control of a corporation, including selling his own shares to the group, while at the same time representing the corporation, without disclosure and consent, violated DR 5-101(A), which has the effect of requiring that any privileges

otherwise accruing to a shareholder be subordinated to the lawyer's fiduciary obligations. See also **Fielding v. Brebbia, 399 F.2d 1003 (DC Cir. 1968)**.

United States v. McDonnell Douglas Corp., 1980 U.S. Dist. LEXIS 12901 (DDC 1980), rejected suggestions that DR 5-101(A) might be violated by representation, by the counsel representing a corporation at the pre-indictment stage of a criminal investigation, of individual defendants and potential trial witnesses as well as the corporation, either on the theory that the lawyer's pecuniary interest in the future business of the individuals might cause the lawyer to represent the corporation inadequately, or on the theory that the lawyer might not aggressively cross-examine the individuals later for fear of disclosing their confidences.

Bachman v. Pertschuk, 437 F. Supp. 973 (DDC 1977), held that a lawyer employed by a federal agency could not act as counsel for a plaintiff class, of which he was a member, in bringing a racial discrimination action against the agency. The court relied, among other things, on the lawyer's divided loyalties and the potential for misuse of his employer's confidences, and on the risk that the lawyer might devote disproportionate attention to issues relevant to the subgroup of the plaintiff class to which he belonged and might favor that subgroup in settlement.

1.8 Rule 1.8 Conflict of Interest: Specific Rules

1.8:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.8
- Background References: ABA Model Rule 1.8, Other Jurisdictions
- Commentary:

1.8:101 Model Rule Comparison

Pursuant to a recommendation of the Ethics 2000 Commission, the title of Model Rule 1.8, which had previously read **Conflict of Interest: Prohibited Transactions**, was revised by deleting the phrase **Prohibited Transactions** and replacing it with **Current Clients: Specific Rules.** The DC Bar's Rules Review Committee recommended that the caption to the DC Rule also be revised to substitute **Specific Rules** for **Prohibited Transactions**, explaining that this change would "avoid any misleading implication that Rule 1.8 prohibits most transactions, rather than allowing them to specified exceptions;" and this change in the rule's caption was adopted by the DC Court of Appeals in 2006. The Committee appeared to have overlooked the other change that had been made in the Model -- the added reference to **Current Clients** -- and neither recommended that it also be made to the DC Rule nor gave any reason for not doing so.

DC Rule 1.8(a), (b), (c), (e), (f) and (h) as originally adopted were identical, or virtually so, to MR 1.8(a), (c), (d), (f), (g) and [former] (i), respectively. The DC Rule did not include a counterpart to MR 1.8(b) on use of client information to the disadvantage of the client, because that subject was covered in the DC version of Rule 1.6. See 1.6:101, above. DC Rule 1.8(d), expanded upon in a Comment [5] unique to DC, was quite different from the counterpart MR 1.8(e). The DC Rule allowed a lawyer to "pay or otherwise provide" expenses of litigation or administrative proceedings, with examples given, and

> other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.

Typical of the latter, according to Comment [5] (now renumbered as [9]), would be "medical expenses and minimum living expenses." MR 1.8(e), in contrast, restricts lawyers to advancing court costs and litigation expenses contingent on the outcome of the matter and paying such costs and expenses for an indigent client.

DC Rule 1.8(g), prohibiting agreements prospectively limiting a lawyer's malpractice liability, omitted the exception in the Model Rule for agreements that are permitted by law and as to which the client is independently represented. The Jordan Committee felt that there was no "clearly articulated basis or perceived need" for the exception, which was new to the Model Rules, and that "the potential for abuse by lawyers seemed to outweigh any benefits."

DC Rule 1.8(i) was limited to addressing lawyer's liens, and omitted the general prohibition in its counterpart MR 1.8(j) on acquiring a "proprietary interest in the cause of action or subject matter of the litigation." The Jordan Committee omitted this prohibition on the grounds that the authorization of contingent fees in Rule 1.5 had "effectively swallowed" it, and that the fairness and consent requirements of Rule 1.8(a) would prevent abuse. The Jordan Committee said that the wording of DC Rule 1.8(i) concerning liens, and new DC Comments elaborating upon it, reflected the "disquiet" expressed in several DC Ethics opinions with the breadth of the previous Code provision allowing the assertion of a lien against a client's papers in the lawyer's possession if the client owed the lawyer money. The Jordan Committee adopted limitations found in **DC Ethics Opinion 59 (undated)** and its progeny, i.e. imposing the lien only against a lawyer's work product and only to the extent that the work product had not been paid for. Even the work product exception would not apply when the client had become unable to pay, i.e. when the client was not willfully withholding the lawyer's fee, or when withholding the work product would present a significant risk of irreparable harm to the client. The Peters Committee recommended, and the Court of Appeals adopted effective November 1, 1996, an amendment to Rule 1.8(i) to eliminate uncertainty as to whether the Rule allowed all three kinds of liens recognized by DC law: *retaining* liens, *charging* liens and *contractual* liens. The new introductory clause to DC Rule 1.8(i) affirmatively stated that a lawyer

> may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but . . . .

at which point the rule picked up the previous language regarding retaining liens on client files and work product. A related new Comment [8] (now [16]) was added on the Peters Committee's recommendation, referring to **Redevelopment Land Agency v. Dowdey, 618 A.2d 153, 159-60 (DC 1992)**, and cases cited therein on substantive DC law as to asserting and enforcing liens against the property of clients.

Other changes in the Comments included modification of Comment [2] to state that a client "should be advised by the lawyer to obtain" — rather than "should have" — the detached advice of another lawyer if a substantial gift is to be made to a non-relative lawyer through a legal instrument; and the addition of a sentence to DC Comment [7](now [15])(corresponding to Model Rule 1.8 Comment [6]) clarifying that the effect of DC Rule 1.8(h) (MR 1.8(i)) was to require consent of all clients represented adversely to one another in a matter by lawyers who are spouses or close relatives.

One of the changes made in Model Rule 1.8 pursuant to recommendations of the ABA Ethics 2000 Commission was a change in the title, to omit "Prohibited Transactions" and substitute "Current Clients: Specific Rules." The DC Rule Review Committee also removed "Prohibited Transactions," but substituted only "Specific Rules." The other changes made in MR 1.8 and its DC counterpart as a result of the recommendations of the Commission and the Committee, respectively, are summarized below.

Model Rule 1.8(a)(3) was changed to elaborate its requirement of client consent (to business transactions between lawyer and client) by adding requirements not only that the consent be informed, but that the required writing be signed by the client and spell out the essential terms of the transaction and the lawyer's role therein. The DC Rule was changed only to add the requirement that the consent be informed.

Model Rule 1.8(c), regarding gifts by a client to the lawyer or the lawyer's family, was substantially elaborated by the Ethics 2000 Commission, but its counterpart DC Rule 1.8(b) was changed only to adopt the Model Rule's change elaborating on the meaning of the term "related persons."

Model Rule 1.8(f)(1) was slightly modified to substitute "gives informed consent" for "consents after consultation." The corresponding DC Rule 1.8(e)(1) was changed by insertion of "give informed" before "consent," but it retained the phrase "after consultation."

Model Rule 1.8(g), regarding aggregate settlements and plea agreements, was amended to require that clients' consent be informed and in writing; the same changes were made in the corresponding DC Rule 1.8(f).

Model Rule 1.8(h)(2), regarding agreements settling claims of malpractice against the lawyer was modified to require that the client be advised of the desirability of seeking the advice of independent counsel and a reasonable opportunity to do so. The same changes were made in the corresponding DC Rule 1.9(g)(2).

The former Model Rule 1.8(i), regarding situations where related lawyers are on opposite sides of a matter, was deleted on the ground of being both over- and underinclusive, and the problem of conflicts in such circumstance was addressed by a new Comment to Model Rule 1.7. Its counterpart, DC Rule 1.8(h), was retained, and modified only by insertion of "informed" before "consent." Its counterpart, DC Rule 1.8(h), was retained and modified only by the insertion of "informed" before "consent."

A new paragraph (j) was added to Model Rule 1.8, forbidding a lawyer's having sexual relations with a client unless the sexual relationship preexisted the lawyer-client relationship. No corresponding provision was added to the DC Rule; instead, the subject was dealt with by adding Comments [37]-[39], which address the possible conflicts implications of such a relationship, to DC Rule 1.7. See 1:7:101, above.

Finally, a new paragraph (k) was added to Model Rule 1.8, addressing the imputation of Rule 1.8's various prohibitions to colleagues of the lawyer affected by those provisions. An identical provision was added as paragraph (j) to the DC Rule.

The revisions of the black letter text of Model Rule 1.8 were accompanied by substantial revisions and additions to its accompanying Comments. Many of these changes were also made in the Comments to DC Rule 1.8.

1.8:102 Model Code Comparison

Paragraph (a) has no direct counterpart in the Model Code, although DR 5-104(A) addresses the same issues. Paragraph (b) has no counterpart in the Model Code. Paragraph (c) is substantially similar to DR 5-104(B). Paragraph (d) makes substantial changes in DR 5-103(B). DC had already amended DR 5-103(B) of the Model Code in 1980 to allow lawyers to pay — as opposed to advancing, with the client assuming responsibility for repayment — litigation costs; but the provision in DC Rule 1.8(d) for providing "other financial assistance" was without precedent in DC's version of the Code. Paragraph (e)(1) is very similar to DR 5-107(A)(1), while paragraphs (e)(2) and (3) add requirements not specified in the Model Code. Paragraph (f) is substantially the same as DR 5-106. Paragraph (g)(1) is substantially similar to DR 5-102(A), while paragraph (g)(2) has no counterpart in the Model Code. Paragraph (h) also has no counterpart in the Model Code. Paragraph (i) is much more restrictive than DR 5-103(A)(1), but reflects the discomfort with retaining liens expressed in opinions applying that provision, including **DC Ethics Opinions 59 (undated), 90 (1980)** and **107 (1981)**.

1.8:200 Lawyer's Personal Interest Affecting Relationship

- Primary DC References: DC Rule 1.8(a)
- Background References: ABA Model Rule 1.8(j), Other Jurisdictions
- Commentary: ABABNA § 51:501 *et seq.*, ALI-LGL § 126, Wolfram § 8.11

1.8:210 Sexual Relations with Clients

There appear to be no DC court decisions or ethics opinions on this subject.

1.8:220 Business Transactions with Clients

A mandatory arbitration agreement covering all disputes between lawyer and client is permissible only if the client is counselled by another attorney. **DC Ethics Opinion 211 (1990)**. Consultation of another lawyer is not required for the effectiveness of an agreement limited to providing for arbitration of fee disputes before the D.C. Bar Attorney-Client Arbitration Board ("ACAB"), if the client is advised in writing of the availability of counselling by ACAB staff, "the lawyer encourages the client to contact the ACAB for counselling and information prior to deciding whether to sign the agreement," and the client consents in writing to mandatory arbitration. **DC Ethics Opinion 218 (1991)**. Cf. **Haynes v. Kuder, 591 A.2d 1286 (DC 1991)**, as discussed in 1.5:250 above.

In **In re Austin, 858 A,2d 959 (DC 2004)**, the respondent was found to have violated both DC Rule 1.8(a) and Rule 8.4(c) by reason of having, over a period of eighteen months, taken advantage of a vulnerable, uneducated elderly client of very limited means by borrowing money from her in a series of ten instances, totaling almost $27,000, and not repaying any more than trifling amounts. He was found to have violated Rule 1.8(a) by failing to advise the client to consult other counsel before agreeing to lend money to the respondent, and Rule 8.4(c) by acts that amounted to theft and fraud, and which the Court also termed "fraudulent acts of dishonesty." *Id*. at 977**.** Although the Board had recommended a sanction of eighteen months' suspension, with reinstatement conditional upon full reimbursement of the loans he had extracted from his client, the Court imposed the sanction of disbarment, with reinstatement also conditioned on full restitution.

In re James, 452 A.2d 163, 167 (DC 1982), cert. denied, 460 US 1038 (1983), found that intent to defraud or other improper motive was not an element of a DR 5-104(A) violation.

The following are cases finding violations of Rule 1.8(a) or its predecessor DR 5-104(A) proven or adequately pled: **In re McLain, 671 A.2d 951, 953 (DC 1996)**; **In re Lenoir, 604 A.2d 14, 15 (DC 1992)**; **Dalo v. Kivitz, 596 A.2d 35, 37 (DC 1991)**; **In re Thompson, 579 A.2d 218, 219 n.2 (DC 1990)**; **BCCI Holdings (Luxembourg), S.A. v. Clifford, 964 F. Supp. 468, 482 (DDC 1997)**; **Avianca, Inc. v. Corriea, 705 F. Supp. 666, 678-82 (DDC 1989)**. See also **Goodrum v. Clement, 277 F. 586 (DC Ct. App. 1922)** (pre-Code decision on attorney-client business transactions).

D.C. Ethics Opinion 319 (2003) addressed the ethical propriety of a lawyer's purchasing a legal claim from a non-lawyer. Disagreeing with **ABA Formal Opinion 51 (1931)**, which interpreted Canon 28's injunction against "stirring up strife and litigation" as prohibiting a lawyer from purchasing choses in action, the **Opinion** held that under the Rules of Professional Conduct there is no prohibition on a lawyer's doing so. The **Opinion** warned, however, that there is a risk in a lawyer's negotiating with a non-lawyer about the purchase of a legal claim, in that the latter may rely on statements the lawyer makes about the value of the claim, and thereby establish a lawyer-client

relationship, bringing Rule 1.8(a) into play. The **Opinion** suggested, therefore, that before negotiating with a non-lawyer who is not represented by counsel, a lawyer should recommend that the non-lawyer seek the advice of counsel.

DC Ethics Opinion 300 (2000) considered the application of Rule 1.8(a) (along with Rules 1.5 and 1.7) to a lawyer's accepting an ownership interest in a corporate client as compensation for legal services. The **Opinion** is more fully described under 1.5:400, above.

DC Ethics Opinion 110 (2001) (more fully discussed under 1.5:400, above) pointed out that although fee arrangements might be viewed as business transactions with a client, involving the same sort of adverseness between the interests of lawyer and client as the transactions governed by Rule 1.9(a), they are not subject to the requirements of that Rule, but rather to the more flexible standard of reasonableness applied by Rule 1.5.

DC Ethics Opinion 306 (2001) (more fully discussed under 5.7:200 below), which addressed the ethical responsibilities of a lawyer who is also a licensed insurance broker, pointed out that if the lawyer sold insurance products to a client, the restrictions of Rule 1.8(a) would apply.

1.8:300 Lawyer's Use of Client Information

- Primary DC References: DC Rule 1.6
- Background References: ABA Model Rule 1.8(b), 1.9)c), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 61, Wolfram § 6.7

DC omits MR 1.8(b) and treats all matters concerning confidences in Rule 1.6.

1.8:400 Client Gifts to Lawyer

- Primary DC References: DC Rule 1.8(b)
- Background References: ABA Model Rule 1.8(c), Other Jurisdictions
- Commentary: ABABNA § 51:601, ALI-LGL § 127, Wolfram § 8.12

As explained under 1.8:101 above, the provision of the DC Rules prohibiting a lawyer from preparing an instrument giving the lawyer or a member of the lawyer's family a substantial gift from a client is paragraph (b) of DC Rule 1.8, rather than paragraph (c) as in the corresponding Model Rule. In **In re Devaney, 870 A.2d 53 (DC 2005)**, a violation of that provision of the DC Rule was held to call for the respondent lawyer's disbarment. In that case, the respondent had prepared three successive codicils for the will of a frail and elderly friend and neighbor that had originally been prepared by another lawyer. The cumulative effect of the codicils was to override the original provisions of the will, which would have left the bulk of the estate to various charitable organizations, and substitute the respondent lawyer's wife and sons as the principal beneficiaries. In addition to violating DC Rule 1.8(b), this conduct was found to have constituted a failure to provide competent representation to this client, in violation of DC Rule 1.1(a). Furthermore, although the respondent was a member of the DC Bar, he resided in Virginia, where the elderly friend was his neighbor, but he was not admitted to practice in Virginia; in consequence he was also found to have violated DC Rule 5.5(a)'s prohibition on a lawyer's engaging in the practice of law in a jurisdiction where the lawyer is not licensed. On appeal, the Court sustained the Board's rejection of respondent's claims that he was not practicing law but was only carrying our the wishes of a friend, and that there was no retainer agreement and therefore no attorney-client relationship. The respondent also contended, unsuccessfully, that he had not been aware of Rule 1.8(b) and therefore should not be disbarred for violating it: as to this, the Court observed that "an attorney is presumed to know the ethical rules governing his behavior, and ignorance neither excuses nor mitigates a violation," *Id*. at 57; and in any event the Court rested its approval of the penalty of disbarment solely on the violation of Rule 1.8(b), without considering what penalty would be appropriate for the violations of Rules 1.1(a) and 5.5(a).

1.8:500 Literary or Media Rights Relating to Representation

- Primary DC References: DC Rule 1.8(c)
- Background References: ABA Model Rule 1.8(d), Other Jurisdictions
- Commentary: ABABNA § 51:701, ALI-LGL § 36, Wolfram § 9.3.3

DC Ethics Opinion 202 (1989), applying DR 5-104(B) and noting that Rule 1.8(c) is substantially similar, holds that a lawyer may not enter into a contingent fee agreement under which the lawyer receives 5% of any negotiated cash advance for the sale of the client's life story to the media where ongoing civil litigation is a substantial part of the client's life story.

DC Ethics Opinion 334 (2006) [more fully discussed under 1.7:500, above] holds that Rule 1.8(c) does not apply when a lawyer is approached about selling his or her own media rights relating to a representation but that such a situation raises issues under Rule 1.7.

1.8:600 Financing Litigation

- Primary DC References: DC Rule 1.8(d)
- Background References: ABA Model Rule 1.8(c), Other Jurisdictions
- Commentary: ABABNA § 51:801, ALI-LGL § 36, Wolfram § 9.2.3

1.8:610 Litigation Expenses

DC Rule 1.8(d) more broadly authorizes the payment of client litigation expenses than MR 1.8(e).

DC Ethics Opinion 166 (1986), applying former DR 5-103(B), held, as Comment [5] to Rule 1.8 now indicates, that, absent a contrary understanding, an attorney may bill a pro bono client for litigation costs. The attorney should advise the client of the attorney's intent to do so.

DC Ethics Opinion 104 (1981), applying former DR 5-103(B), held that where a lawyer is appointed to represent an indigent, the lawyer must advance the expenses necessary for competent representation, and, as a practical matter, must absorb them if there is no mechanism for reimbursement. See also **Arrocha v. McAuliffe, 109 FRD 397, 399-400 & n.4 (DDC 1986)**.

1.8:620 Living and Medical Expenses

DC Rule 1.8(d), significantly expanding MR 1.8(e), authorizes the payment of client medical and living expenses if reasonably necessary to permit the client to institute or maintain litigation. See Comment [5] to DC Rule 1.8.

DC Ethics Opinion 196 (1989), applying DR 5-103(B), the narrower predecessor to Rule 1.8(d), held it proper for a lawyer to refer a client to a finance company that would lend money on the client's claim.

1.8:700 Payment of Lawyer's Fee by Third Person

- Primary DC References: DC Rule 1.8(e)
- Background References: ABA Model Rule 1.8(f), Other Jurisdictions
- Commentary: ABABNA § 51:901, ALI-LGL § 134, Wolfram § 8.8

1.8:710 Compensation and Direction by Third Person

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, above] was a violation of Rule 1.8.(e)'s prohibition on accepting compensation from one other than the client where there in not client consent and/or there is interference with the lawyer's independence of professional judgment. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients. The respondent in the resulting disciplinary proceeding contended that Rule 1.8(e) was not violated because the clients had consented, in the engagement letter, to the lawyers being paid a fee by the defendant. The Court held, however, that

> While clients are allowed to waive future conflicts of interest such as third-party compensation, for such a waiver "to be effective . . . [it] must contemplate that particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given." [Quoting **DC Ethics Opinion 298**, referred to below.]

Id. at 915.

DC Ethics Opinion 289 (1999)[discussed more fully under 5.400, below], addressing various issues potentially presented by a nonprofit organization's program of "cause" litigation involving the representation or third persons, found certain aspects of the program to raise problems of lay interference with the lawyers conducting the litigation, in violation of Rule 1.8(e)(2) as well as Rule 5.4(c).

DC Ethics Opinion 290 (1999) addressed an inquiry by a law firm that defends insureds and is paid by their insurer to do so, as to its obligations of confidentiality in dealing with an outside agency retained by the insurer to audit its legal bills. The **Opinion** held that under both Rule 1.6 and Rule 1.8(e)(3) of the D.C. Rules (the latter corresponding to MR 1.8(f)(3)), a lawyer so retained may not, absent consent of the client insured, disclose information relating to the representation that is either a

"confidence" or a "secret" protected by Rule 1.6 to the insurer, or *a fortiori*, to an auditor retained by the insured.

A corporation may pay the fee of a lawyer for representing a corporate constituent such as an officer or employee so long as Rule 1.8(e) is complied with. **DC Ethics Opinion 269 (1997)**; see also **DC Ethics Opinion 328 (2005)**.

DC Ethics Opinion 225 (1992) finds a prepaid legal services client agreement to satisfy the consent-after-consultation requirement of Rule 1.8(e).

DC Ethics Opinion 176 (1986), applying former DR 5-107(B), held that it does not impermissibly allow a non-lawyer to control a lawyer's professional judgment for a salaried attorney for a union to receive a fee award calculated on the basis of market fees higher than the attorney's salary compensation, and to deposit those fees into a legal assistance fund to be used to provide legal services to union members.

DC Ethics Opinion 155 (1985), applying former DR 5-107(B), held that a law firm could provide legal services to members of an organization under a prepaid legal services plan and pay 10% of the monthly charge for membership in the plan to the organization for the organization's costs of administering the plan, so long as the attorney-client relationship was with the members and the law firm gave undiluted loyalty to the members. The law firm "must not tailor its representation in order to maintain the favor of the parent organization that has arranged and recommended its services."

DC Ethics Opinion 118 (1982), citing former EC 5-13, stated that serious questions are raised by a lawyer's participating in a job action against the lawyer's employer at the behest of a union.

DC Ethics Opinion 30 (1977) held that if a union pays for or recommends a lawyer, the lawyer must represent the client "without in any way tailoring his representation or his advocacy in order to maintain the favor of the union."

1.8:720 Insured-Insurer Conflicts [see also 1.7:410]

An attorney hired by an insurance company to represent an insured must be loyal to the insured, and must not allow the lawyer's relationship with the insurance company to hinder the representation. **DC Ethics Opinion 173 (1986)** (applying former DR 5-105(B) and (C) and DR 5-107(B)).

1.8:730 Lawyer with Fiduciary Obligation to Third Persons [see 1.13:520]

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.8:800 Aggregate Settlements

- Primary DC References: DC Rule 1.8(f)
- Background References: ABA Model Rule 1.8(g), Other Jurisdictions
- Commentary: ABABNA § 51:375, ALI-LGL § 129, Wolfram § 8.15

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.8:900 Agreements Involving Lawyer's Malpractice Liability

- Primary DC References: DC Rule 1.8(g)
- Background References: ABA Model Rule 1.8(h), Other Jurisdictions
- Commentary: ABABNA § 51:1101, ALI-LGL § 54, Wolfram § 5.6.7

1.8:910 Prospective Limitation of Malpractice Liability

DC Rule 1.8(g) is more restrictive than Model Rule 1.8(h). See 1.8:101 above.

DC Ethics Opinion 235 (1993) held that Rule 1.8(g) is not violated by incorporating a law firm under a limited liability statute, "if the individual lawyer who committed the malpractice remains personally liable to the client in all events, and if the client is made aware of the limitation of personal liability of the other lawyers in the law firm who were not involved in the malpractice."

A mandatory arbitration agreement between lawyer and client does not violate Rule 1.8(g). **DC Ethics Opinions 211 (1990)** and **218 (1991)**. However, **Opinion 211** held that such an agreement may not have the effect of reducing the limitations period for malpractice actions, and **DC Ethics Opinion 190 (1988)**, applying DR 6-102, held that such an agreement may not prevent the award of punitive damages for malpractice. Also, **Opinion 218** held that a lawyer may use the rejection in such an arbitration of a defense of inadequate representation as a bar to a subsequent malpractice claim only if the client was counselled by another attorney before entering into the arbitration agreement.

DC Ethics Opinion 193 (1988), decided under DR 6-102(A), held that a corporation could negotiate an agreement with its staff attorneys under which the corporation would indemnify the attorneys for malpractice claims by third parties and waive its right to sue the attorneys for malpractice against the corporation. This was acceptable because the corporation, a sophisticated business, initiated the agreement as a strategy to save malpractice premiums, and was always free to discharge the staff attorneys. This Opinion may not survive the tighter wording of Rule 1.8(g)(1).

1.8:920 Settlement of Legal Malpractice Claim

DC Ethics Opinion 260 (1995) held that, before settling a claim for malpractice with an unrepresented client or former client, a lawyer must allow that person a reasonable period to consult counsel and negotiate the matter.

1.8:1000 Opposing a Lawyer Relative

- Primary DC References: DC Rule 1.8(h)
- Background References: ABA Model Rule 1.8(i), Other Jurisdictions
- Commentary: ABABNA § 51:1301, ALI-LGL § 123, Wolfram § 7.6.6

Decisions such as **DC Ethics Opinion 137 (1984)**, which barred spouses from representing adverse parties even with consent, are superseded by DC Rule 1.8(h), allowing consent.

1.8:1100 Lawyer's Proprietary Interest in Subject Matter of Representation

- Primary DC References: DC Rule 1.8(i)
- Background References: ABA Model Rule 1.8(j), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL §§ 43, 125, Wolfram §§ 8.13, 9.6.3

1.8:1110 Acquiring an Interest in Subject Matter of Representation

DC Rule 1.8(i) omits the general prohibition in MR 1.8(j). See 1.8:101 above.

1.8:1120 Contingent Fees [see also 1.5:600]

DC Comment [3] stresses that contingent fees are permissible if they satisfy Rule 1.5(c).

1.8:1130 Lawyer Liens

Comment [8] to Rule 1.8 refers to the DC substantive law as to lawyer liens generally. [See 1.8:101, above.]

1.8:1140 Retention of Files to Collect Fees

DC Rule 1.8(i) permits retaining liens only on work product that has not been paid for, and only if the client can pay and will not be irreparably harmed by the withholding. [See 1.8:101 above.]

In **In re Arneja, 790 A.2d 552 (DC 2002)**, the respondent sought to justify his foot-dragging in responding to a former client's demand that he turn over the client's files to successor counsel by arguing that he was seeking to protect his claim for fees for the work he had performed, under Rule 1.8(i). The Board on Professional Responsibility found, however, and the Court agreed, that this claim "came only belatedly," and was asserted even after successor counsel agreed to protect respondent's work product lien; and, in addition, that Rule 1.8(i) by its terms precluded reliance on the work product lien where, as here, "withholding the lawyer's work product would present a significant risk to the client of irreparable harm."

The DC Court of Appeals noted in **In Re Waller** [discussed in 1.5:230, above] that "there can be no doubt that where the fee demanded is clearly excessive, counsel cannot properly retain an erstwhile client's papers until counsel's fee is paid." 524 A.2d at 749 n.1.

A lawyer cannot rely on Rule 1.8(i) in refusing to surrender documents to a client, even if the lawyer's fees have not been paid, if the lawyer makes it a condition of such surrender that the client sign a general release from liability. **In re Bernstein, 707 A.2d 371 (DC 1998)**.

DC Ethics Opinions 273 (1997) and 250 (1994) confirm DC's hostility to retaining liens on client files. They indicate that a lawyer may keep copies of files returned to a client, but **Opinion 250**, citing **DC Ethics Opinion 168 (1986)**, states that the lawyer must bear the cost of copying. (**Opinion 168** also stated that this could be varied by agreement.) **Opinion 250** states that the work product provision "should be construed narrowly" and should be relied upon by a lawyer only where "clearly applicable," and only where "the lawyer's financial interests 'clearly outweigh the adversely affected interests of his former client'" (quoting **DC Ethics Opinion 59 (undated)**). **Opinion 250** indicates that pleadings, government orders, papers prepared by persons outside the lawyer's law firm and correspondence to the client are not the lawyer's work product, while drafts, notes and research memoranda are. To be retained pursuant to a lien, work product must relate to the period for which fees were not paid, or, if the period covered by the unpaid fees cannot be clearly identified, "the lawyer may withhold only work product that has clearly not been paid for." A client assertion that irreparable harm would result from retaining files is not conclusive, but "must be given great weight." On the adoption of Rule 1.8(i), which narrowed earlier D.C. authority for retaining liens, see **DC Ethics Opinion 230 (1992)**. Older decisions superseded by Rule 1.8(i) include **DC Ethics Opinions 59 (undated)**, **90 (1980)**, **100 (1981)**, **103 (1981)**, **107 (1981)** and **191 (1988)**.

Finding a violation of Rule 1.8(i): **In re Ryan, 670 A.2d 375, 380 (DC 1996)**. See also 1.16:500 below.

1.9 Rule 1.9 Conflict of Interest: Former Client

1.9:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.9
- Background References: ABA Model Rule 1.9, Other Jurisdictions
- Commentary:

1.9:101 Model Rule Comparison

DC Rule 1.9 as originally adopted was identical to MR 1.9(a). MR 1.9(b) and its associated Comments, regarding disqualification arising from a lawyer's association with a previous firm, were covered in DC Rule 1.10(b) and its associated Comments, reflecting the fact that this material was located in MR 1.10 until a 1989 amendment shifted it to MR 1.9 -- a rearrangement that was not copied in the DC Rules. The DC Rules also omitted MR 1.9(c) and its associated Comment, regarding confidential information of a previous client. The Jordan Committee explained this deletion by saying that all material on confidentiality was placed in DC Rule 1.6 and its Comments.

Comment [2] to DC Rule 1.9 followed Comment [2] to MR 1.9, but language was added stating that the rule is intended to incorporate federal case law defining the "substantial relationship" test. Comments [3] and [4] to DC Rule 1.9 followed Comments [12] and [13] to MR 1.9, but were modified to make clear that any issue of disqualification of a former government lawyer or the firm with which such a lawyer is associated is governed by Rule 1.11, not Rule 1.9.

The only changes in Model Rule 1.9(a) pursuant to recommendations of the ABA Ethics 2000 Commission were replacement of the phrase "consents after consultation" with "gives informed consent," and the addition of a requirement that the consent be confirmed in writing. A change similar to the first of these, but substituting "gives informed consent" for "consents after consultation," was made in DC Rule 1.9 following the recommendation of the DC Rules Review Committee, but the Committee did not recommend that the consent be requird to be in writing.

A number of changes were made in the Comments to the Model Rule, but relatively few to the DC Rule. A significant new Comment [3], discussing when two mattters are "substantially related," and was subsequently copied in a new Comment [3] to the DC.

1.9:102 Model Code Comparison

Subsequent adverse representations were addressed under two Code provisions: DR 4-101 with its obligation to protect a former client's confidences and secrets from disclosure or use by a third party; and Canon 9's admonition to avoid the appearance of impropriety. See, *e.g.*, **Ethics Committee Opinions No. 164 (1986) and 175 (1986)**. The DC version of Rule 1.9 is generally intended to codify the standards utilized by the courts and the DC Bar Ethics Committee in applying DR 4-101 and Canon 9.

1.9:200 Representation Adverse to Interest of Former Client--In General

- Primary DC References: DC Rule 1.9
- Background References: ABA Model Rule 1.9(a), Other Jurisdictions
- Commentary: ABABNA § 51:201, ALI-LGL § 132, Wolfram § 7.4

The purpose of Rule 1.9 "is to assure the preservation of attorney-client confidences gained in the prior representation and to preserve the reasonable expectations of the former client that the attorney will not seek to benefit from the prior representation at the expense of the former client." **DC Ethics Opinion 272 (1997).**

DC Ethics Opinion 269 (1997) holds that where clients who are being jointly represented by the same lawyer become adverse, the lawyer can withdraw from representing one and continue representing the other only with the consent of the client whose representation is discontinued. The lawyer must address how the lawyer's confidentiality obligation to the to-be-discontinued client will be protected and how the representation of the continuing client will be affected by that confidentiality obligation. **DC Ethics Opinion 248 (1994)** suggests that the possession by a lawyer in these circumstances of confidences of both clients could preclude the lawyer from continuing as attorney for only one, citing Rules 1.7(b)(2) and (4). See also **DC Ethics Opinion 232, n.8 (1992)**.

A lawyer who performs services for both buyer and seller in a real estate transaction and does not make clear that the representation is of only one party cannot later represent one of the parties in a dispute with the other relating to the sale. **DC Ethics Opinion 247 (1994)**.

DC Ethics Opinion 240 (1993) addresses the applicability of Rule 1.9 to representations by lawyers in the DC Corporation Counsel's Office in Social Security Act Title IV-D child support proceedings where custody shifts from one parent to another. An attorney who prepared memoranda in support of a law firm's fee claim against a client cannot later represent the client against the firm in connection with the claim. **DC Ethics Opinion 239 (1993)**.

DC Ethics Opinion 175 (1986) held that, in a matter adverse to a former client and not substantially related to the matter on which the former client was represented, a lawyer can use legal expertise and theories gained or developed during the former representation — and indeed would be obligated to do so if necessary to providing adequate representation to the new client — so long as confidences and secrets of the former client are preserved. See also **DC Ethics Opinion 217 (1991)**, holding that general knowledge as to the terms on which disputes before a tribunal tend to be resolved, as distinguished from the particular terms on which a prior client's dispute was resolved, cannot be such a confidence or secret.

DC Ethics Opinion 337 (2007) addressed an inquiry from a lawyer who had been asked to provide expert testimony on behalf of a plaintiff. The defendant's lawyer objected because the expert had formerly been employed by a law firm that had performed work for the defendant. The **Opinion** held that a lawyer who serves as an expert witness for a party typically would not have an attorney-client relationship with the party, and thus Rule 1.9 would not be triggered. It emphasized, however, that the law firm hiring the expert should take steps to avoid any misunderstanding on the part of the client about whether the client and the expert have an attorney-client relationship. The **Opinion** also cautioned that Rule 1.7(b)(4) may impose limitations upon the lawyer and the lawyer's law firm as a result of the lawyer's serving as an expert witness.

United States v. Childress, 731 F. Supp. 547 (DDC 1990), found that there was a sufficient potential for conflict between an alleged co-conspirator that a lawyer had represented at the Public Defender Service and a criminal defendant for whom the lawyer was now entering an appearance to require the lawyer's disqualification.

Other decisions finding a violation of Rule 1.9 are **Berkeley v. Home Insurance Co., 68 F.3d 1409, 1416-17 (DC Cir. 1995)**; **United States v. Davis, 780 F Supp. 21 (DDC 1991)**.

For the pertinent DC authorities regarding consent, see 1.7:240, above.

Whether Client is Current or Former Client; "Hot Potato" Question

Whether a client is a current or a former client is a question of fact. In a "continuing relationship punctuated by periods of inactivity," a client may have a reasonable belief that a lawyer-client relationship exists. The lawyer would be well advised to clarify the situation through a close-out letter, or include a termination clause in the retention letter. **DC Ethics Opinion 272 (1997)**.

Riggs National Bank v. Calumet-Gussin, 1992 U.S. Dist. LEXIS 16475 (DDC 1992), holds that a former client could be sued on an unrelated matter where the representation had ended because of nonpayment of fees. The representation was not current simply because one lawyer who did not know it had ended passed on some information to the former client.

DC Ethics Opinion 272 (1997) addresses the "hot potato" question — when it is permissible to terminate a representation so as to convert a client from current to former status for purposes of conflicts analysis. It rejects authorities in other jurisdictions broadly barring such action, and holds that a lawyer may withdraw from the representation of a client in order to avoid a conflict if withdrawal is permissible under Rule 1.16 because there would be no "material adverse effect" on the client. The Opinion suggests, however, that the outcome might be different if the lawyer (or law firm) had a role in creating the conflict. "In general, we suggest that the more the potential conflict was caused by the actions of the attorney for the benefit of the attorney or a prospective or other client, the less justifiable will be the firm's effort to withdraw and to treat the conflict under the principles applying to former clients." In

the particular case before it, the Legal Ethics Committee found the withdrawal permissible even though the client from whose representation the law firm withdrew had been asked for consent to the adverse representation and had refused. The Committee found it persuasive that the firm was not at the time doing anything for the client in question, and that the conflict arose not because of any action on the firm's part, but because the inactive client had brought suit against another longstanding client of the firm in an area in which the firm had regularly represented that client, but not the client that was suing.

1.9:210 "Substantial Relationship" Test

In **Derrickson v. Derrickson, 541 A.2d 149 (DC 1988)**, the Court discussed the circumstances in which disqualification of a lawyer is required by reason of a conflict with a former client. Because disqualification arises in circumstances where a lawyer potentially should have declined representation, the standards for disqualification apply to consideration of prospective clients. The Court stated that "[w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.'" *Id.* at 151 (quoting **Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37, 42 (DC 1984)**). The Court established a two-prong test to determine whether a lawyer should be disqualified because of a prior representation: (1) whether an attorney-client relationship formerly existed; and (2) whether the current litigation is substantially related to the prior representation. See *id.* If the party seeking disqualification can make these two showings, he establishes an irrebuttable presumption that the lawyer transmitted relevant confidential information to the current client. *Id.* at 151-52.

DC Ethics Opinion 237 (1992), citing **Brown** [a decision discussed more fully under 1.11:200, below], states that the first step in applying the "substantial relationship" test is "an analysis of the facts and legal issues to determine, in the first instance, whether the factual contexts of the two matters overlap." If they do, "further analysis is required." Work on a person's employee benefit plan and work on a subsequent divorce in which the interest of the person's spouse in the plan has significant economic value are "substantially related." Once it is established that matters are substantially related, it is inappropriate to inquire into whether confidences were actually received in the first matter or will be used in the second. **DC Ethics Opinion 227 (1992)**.

DC Ethics Opinion 175, n.2 (1986) describes the **Brown** case as requiring, for matters to be substantially related, that "the facts, legal issues and parties be substantially the same." This does not accurately describe **Brown**, which held — in line with the general federal "substantial relationship" case law that Comment [2] now explicitly states that DC Rule 1.9 incorporates — that the appropriate inquiry is whether the factual context of the two matters overlap, and if so, whether the lawyer was in a position to obtain confidences of the former client that could be used adversely to the former client on behalf of the new client.

DC Ethics Opinion 158 (1985) held that the "substantial relationship" test would bar a lawyer who represented both spouses in family and financial matters and one spouse in a tax matter from representing the other spouse in a divorce, absent consent.

Sequential representation of, first, a child as court-appointed guardian *ad litem*, and then prospective adoptive parents of the child in an adoption proceeding comes within the "substantial relationship" test because "it is obvious that facts made known to the lawyer in the neglect proceeding would have some relevance to the subsequent adoption proceeding." **DC Ethics Opinion 156 (1985)**.

For a "substantial relationship" to be found, an identity of some legal issues between the two matters is not enough; both the facts and the legal issues must be examined. **DC Ethics Opinion 150 (1985)**.

DC Ethics Opinion 96 (1980), applying Code provisions, found that a lawyer formerly employed by a large corporation could not act as a consultant in establishing litigation support systems to be used against the former client. The "substantial relationship" test applied because it was likely the attorney's role as employee of the corporation gave the attorney information that could be drawn upon in the consulting work, including familiarity with the former client's record systems, retrieval capabilities and databases. An ethical violation was found even though the lawyer would not be acting as an attorney in the consulting work.

DC Ethics Opinions 71 and **78 (1979)**, and **DC Ethics Opinion 187, n.3 (1987)**, indicate that a general rulemaking is not a "matter" for purposes of the "substantial relationship" test. **Opinions 71** and **78** permit a lawyer who represented in private practice a trade association that commented on an agency's rules to join the agency and work on drafting guidelines for enforcement of the rules, work on appeals of the rules by parties other than the lawyer's former clients, prepare advisory opinions about the rules, participate in a compliance program, and enforce the rules against former clients where any risk of having received useful confidences from those clients is remote.

DC Ethics Opinion 63 (undated) applies the "substantial relationship" test to a representation in which, in the course of representing a current client, a lawyer may have to cross-examine a former client who will be a witness in a proceeding.

The fact that two matters involve the same area of law and the same general facts is not enough to establish a "substantial relationship." **Laker Airways, Ltd. v. Pan American World Airways, 103 FRD 22, 40 (DDC 1984)**.

1.9:220 Material Adversity of Interest

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.9:230 Relevance of "Appearance of Impropriety" Standard [see also 1.7:230]

The DC Rules, like the Model Rules, abandon the Code's "appearance of impropriety" standard.

1.9:300 Client of Lawyer's Former Firm

- Primary DC References: DC Rule 1.10(b)
- Background References: ABA Model Rule 1.9(b), Other Jurisdictions
- Commentary: ABABNA § 51:2007, ALI-LGL §§ 123, 124, 132, Wolfram § 7.6

1.9:310 Removing Imputed Conflict of Migratory Lawyer

As pointed out under 1.9:101 above, this subject, now dealt with by MR 1.9(b), was until 1989 addressed instead by substantially the same provision, but then designated as MR 1.10(b). The corresponding provision of the DC Rules remains designated as DC Rule 1.10(b). Authority under that Rule and its Code antecedents will be treated here.

DC Ethics Opinion 273 (1997), in the course of addressing a number of ethical issues relating to movement of lawyers between firms (see the fuller discussion of the **Opinion** under 1.4:200, above), discusses the applicability of DC Rule 1.10(b) to the law firm that a migrating lawyer joins. Pointing out that that provision applies a variation of the "former client" provision of Rule 1.9 to the new firm, the **Opinion** states:

> The Rule applies a four-part conjunctive test for disqualification based on the newly arrived lawyer's former legal work: (1) the lawyer must have formerly represented the client; (2) the new matter must be the same as or substantially related to the prior representation; (3) the position of the prospective new client must be adverse to that of the former client; and (4) the lawyer must actually (not just imputedly) have learned information confidential to the former client which is material to the new representation. One notable feature of the Rule is that it leaves open the possibility that a lawyer, such as an associate who had only a peripheral involvement in a matter (as by preparing a research memorandum on a point of law), would not subject his new law firm to a disqualification under Rule 1.10(b) because that lawyer did not learn any client confidences in the course of the representation.

DC Ethics Opinion 312 (2002) addresses, in a fairly comprehensive way, the question of what information may properly be provided to check for conflicts when a lawyer changes firms. It points out that the test for determining whether a lawyer's prior contact with a client is disqualifying, and therefore imputed to the lawyer's associates, reaches less broadly for a lawyer changing firms than for one remaining with the same firm, since the test for the latter is "substantial relationship," under Rule 1.9, which *presumes* that the lawyer acquired disqualifying information in the former representation, while the test for the latter requires that the lawyer have *actually* acquired such information, per Rule 1.10(b). The **Opinion** also emphasizes that potentially disqualifying information may be either "confidences" or "secrets" of the

former client, as those terms are defined by Rule 1.6(b). It goes on to point out, however, that as cmt [8] to Rule 1.6 explains, "secrets" do not include information that has become "generally known," and to observe that it is typically necessary to reveal only the most general information about a former representation in order to determine whether the representation may present a conflict. The **Opinion** then offers some "rough suggestions or guidelines," which are as follows:

> [1] As a general rule, it is merely necessary to compare the client name and general subject matter of the representatiion information that will often be neither privileged nor a secret.
>
> [2] Sometimes identifying a particular issue or subject matter will suffice, without a client name.
>
> [3] If the subject matter but not the client name is sensitive, disclosure of only the name may be sufficient to establish that there is no conflict.
>
> [4] If the identity of the client is the source of a potential problem it may be that providing only the names of persons or entities to whom the client is adverse will do the trick.
>
> [5] At least as a first stage of the process, it may be possible to avoid revealing confidences or secrets by furnishing a list of names that includes both clients and opposing parties, without specifying which are which.

DC Ethics Opinion 164 (1986), applying DR 4-101(B) and DR 9-101 of the Code, held that a law firm was not disqualified from representing a client in a matter if one of its members was formerly in the opposing firm if the lawyer in question did not participate in the matter in his previous employment and did not in that capacity come into possession of any pertinent confidences or secrets.

1.9:320 Former Government Lawyer or Officer [see 1.11:200]

See 1.11:200 below.

1.9:400 Use or Disclosure of Former Client's Confidences

- Primary DC References: DC Rule 1.6
- Background References: ABA Model Rule 1.9(c), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 213, Wolfram § 7.4

The DC Rules omit MR 1.9(c) and cover all matters regarding confidences in Rule 1.6.

1.10 Rule 1.10 Imputed Disqualification: General Rule

1.10:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.10
- Background References: ABA Model Rule 1.10, Other Jurisdictions
- Commentary:

1.10:101 Model Rule Comparison

Paragraph (a) of DC Rule 1.10 as originally adopted was substantively identical to its Model Rule counterpart, but in 1996 a proviso was added to that paragraph of the DC Rule on the recommendation of the Peters Committee, to the effect that any personal disqualification created by a lawyer's receipt of confidential information in an initial interview with a potential client was not imputed to the lawyer's firm. This change in DC Rule 1.10(a) was designed to deal with the problem illuminated by **ABA Formal Opinion 90-358 (1990)**, which pointed out that in an initial interview with a prospective client, before a conflicts check can be made, there is a risk that the interviewing lawyer will learn confidences of the prospective client that effectively disqualify the firm from a pending representation, even though the firm cannot undertake the proposed representation of the prospective client.

In due course the ABA Ethics 2000 Commission proposed a new Rule 1.18 as a solution to this problem. Pursuant to the recommendation of the DC Rules Review Committee, an almost identical Rule 1.18 was also added to the DC Rules, and the former provisions in DC Rule 1.10(a) addressing the problem, being no longer necessary, were deleted.

As originally adopted, both Model Rule and DC Rule 1.10(a) provided that while lawyers were associated in a firm, none of them could knowingly represent a client that any other firm lawyer was prohibiting from representing by Rules 1.7, 1.8(c) [1.8(b) in the case of the DC Rule], 1.9 or 2.2. That paragraph of both Rules was amended in the recent round of extensive amendments to drop the references both to Rule 2.2 (which was being deleted from both Rules) and to Rule 1.8. Both Rules also had added to them provisions excepting from this imputation of disqualification circumstances where the individual disqualification rests on an interest of the individual disqualified lawyer that does not present a significant risk of adversely affecting the representation of the client by other firm lawyers. The Model Rule and the DC Rule use somewhat different language to effectuate this exception, and the Model Rule has the exception in the text of 1.10(a) while the DC Rule has it in a new subparagraph (a)(1). In addition, the DC Rule had added to it a new subparagraph (a)(2) providing a separate exception from the imputation of disqualification if the representation is permitted by Rules 1.11, 1.12 or 1.18.

The provisions in paragraphs (b) and (c) of DC Rule 1.10 as originally adopted, relating to a lawyer's switching firms, were more restrictive than the corresponding Model Rule provisions on imputed disqualification in two significant respects; the more restrictive provisions, however, were largely eliminated by the Peters Committee recommendations that were put into effect in 1996. One of those more restrictive provisions was that DC Rule 1.10(b) disqualified a law firm from representing a person in a matter if a lawyer at the firm had either previously represented a client whose interests were materially adverse in the same or a substantially related matter, *or* , in connection with such a prior representation, had acquired confidential information material to the matter; whereas in the corresponding Model Rule provision (which was originally MR 1.10(b) but was moved to MR 1.9(b) in a 1989 amendment), the conjunction joining the two provisions was *and* rather than *or*. Thus, the DC Rule disqualified the law firm when only one of the two conditions set forth was met, while the Model Rule required both conditions. This disparity between the DC Rule and the Model Rule was largely eliminated by the 1996 amendments by simply substituting *and* for *or* in DC Rule 1.10(b), although there remained some differences in terminology. The other more restrictive aspect of DC Rule 1.10 as originally adopted was that paragraph (c) prohibited a firm from representing a person whose interests were adverse to a client of a lawyer formerly at the firm if the matter was the same or substantially related to a matter handled by the lawyer *or* any lawyer left in the firm had confidential information material to the matter. The corresponding Model Rule provision (which was originally MR 1.10(c) but was changed to MR 1.10(b) after MR 1.10(b) became MR 1.9(b) in the 1989 amendment) prohibited a firm from representing the person only if *both* of these two conditions were met. This disparity was largely eliminated by the 1996 amendments by dropping subparagraph (c)(2) in the DC Rule, which referred to any lawyer remaining in the firm having material information relating to the former representation.

As the respective Rules 1.10 now stand, after adoption of the amendments suggested by the Ethics 2000 Commission and the Rules Review Committee, paragraph (b) of the DC Rule, addressing circumstances where a lawyer has become associated with a firm, largely corresponds to paragraph (c) of the Model Rule, and paragraph (c) of the DC Rule, addressing circumstances where the lawyer has terminated his association with a firm, corresponds to paragraph (b) of the Model Rule. However, in one respect the DC Rule's restriction on lawyers joining a firm, in paragraph (b), is less restrictive than its Model Rule counterpart, in that it does not impute a new lawyer's disqualification to other lawyers in a firm when the new lawyer's disqualification results from that lawyer's having participated in or acquired confidential information material to a matter "under circumstances covered by Rule 1.6(g)" — meaning prior to becoming a lawyer but in the course of assisting a lawyer. [See 1.6:260, above.] Comment [21] to DC Rule 1.10(b) explains that the exception was meant to avoid impairing the mobility of lawyers who previously had been employed in nonlawyer positions such as summer associates and paralegals.

<u>Lending Lawyers to Governmental Entities</u>

Another unique provision of the DC Rule 1.10 is paragraph (e), which permits a lawyer affiliated with a firm to be lent on a full-time but temporary basis to the Office of Corporation Counsel without being considered to be associated with the firm for purposes of imputing disqualification under Rule 1.10(a). Rule 1.10(e) provides, however, that the lawyer's firm cannot appear on behalf of an adversary in a matter in which the firm's lawyer is engaged. This exception to the general rule of imputed disqualification is justified on public interest grounds as allowing law firms to provide assistance to the designated public agency. See Comments [21]-[25] to Rule 1.10. A related provision, DC Rule 1.11(h), provides that lawyers who have been lent to these offices per DC Rule 1.10(e) will upon their return to the firm be treated as former government officers or employees for purposes of Rule 1.11. These provisions, initially applying only to the Office of Corporation Counsel, were adopted by the DC Court of Appeals, upon petition of the DC Bar, in November 1991. In 1995, the provisions of both DC Rules 1.10 and 1.11 regarding lawyers lent to the Office of Corporation Counsel were amended to add similar references to the DC Financial and Management Assistance Authority (commonly known as the "Control Board"). In connection with the 2006 revisions to the DC Rules, the references to the Control Board were deleted in recognition that the Control Board had gone out of existence, and the references to the Office of Corporation Counsel were changed to refer instead to the Office of the Attorney General, in recognition of the renaming of that office.

DC Ethics Opinion 268 (1996) [discussed more fully under 1.7:290 and 1.7:300 above] addresses the applicability of Rule 1.7's restrictions on conflicting representations when a lawyer or law firm provides volunteer legal assistance to the D.C. Corporation Counsel's office while simultaneously representing private clients against the City or its agencies.

1.10:102 Model Code Comparison

DR 5-105(D) of the Model Code provided, without exception, that "if a lawyer is required to decline or withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment." The DC version of DR 5-105(D), like Rule 1.10, made clear that not all grounds for disqualification of an individual lawyer are grounds for disqualifying that lawyer's firm. The DC version permitted the representation of a client by a firm despite the rule of imputed disqualification when a lawyer in the firm was disqualified because of his or her mental condition, because of being discharged by a client, because of a want of competence in a particular area or because of impaired professional judgment generally. See "**Revolving Door," 445 A.2d 615 (DC 1982)** (amending DR 5-105(D) to provide exceptions for disqualifications arising from DR 2-110(B)(3)-(4), DR 6-101(A)(1), and DR 5-101(A)). DC Rule 1.10 achieves the same result in a different way.

1.10.103 Definition of "Firm"

In Comment [1] to Model Rule 1.10, the term "firm" is defined to include lawyers employed in a private firm, in the legal department of a corporation or other organization, and in a legal services organization. The corresponding Comment to DC Rule 1.10 expressly excludes "a government agency or other government entity" from its definition of a firm. This exception follows a recommendation of the Sims Committee intended to avoid the potentially harsh result that would occur if all lawyers in a government agency were disqualified vicariously because one of the lawyers was personally disqualified. See **DC Ethics Opinion 240 (1993)**.

The specific characteristics of an association among two or more lawyers, including the terms of any formal agreement and the sharing of confidential client information, often must be considered in determining whether a "firm" exists. [See 0.4:430] Where lawyers hold themselves out to the public as a single firm, however, they generally are regarded as a firm for purposes of Rule 1.10. See Comment [1]; **DC Ethics Opinion 192 (1988)** (concluding that firms that describe themselves as "associated" or "correspondent" should be regarded as "affiliated" for purposes of imputed disqualification under DR 5-105(D)); **DC Ethics Opinion 247 (1994)** (concluding that an "of counsel" relationship was sufficiently close to impute disqualification under Rule 1.10(a)); **Borden v. Borden, 277 A.2d 89 (DC 1971)** (concluding that Rule DR 5-105(D) vicariously disqualified lawyers employed by the same legal services organization).

1.10:200 Imputed Disqualification Among Current Affiliated Lawyers

- Primary DC References: DC Rule 1.10(a)
- Background References: ABA Model Rule 1.10(a), Other Jurisdictions
- Commentary: ABABNA § 51:2001, ALI-LGL § 123, Wolfram § 7.6

[It should be noted that the subject of imputed disqualification with respect to clients of the former firm of a migrating lawyer, addressed by DC Rule 1.10(b), is dealt with in this narrative under Rule 1.9 [at 1.9:300], since the topical outline reflects the organization of the Model Rules, and the provision corresponding to DC Rule 1.10(b) is now to be found in MR 1.9(b).]

Like its Model Rule counterpart, DC Rule 1.10(a) provides that while lawyers are "associated in a firm" none of them shall knowingly represent a client when one of them would be disqualified under Rule 1.7, 1.8(b) [the Model Rule is 1.8(c)], 1.9, or 2.2.

DC Ethics Opinion 303 (2001) [which is more fully discussed under 7.1:220 below] addresses the ethical restrictions potentially affecting the sharing of office space by unaffiliated lawyers, including the possible hazard of being treated as a "firm" for purposes of imputing conflicts.

In **DC Ethics Opinion 268, n.10 (1996)**, the Legal Ethics Committee, addressing the point that a lawyer assisting the Corporation Counsel's office as a volunteer might have a conflict in accepting a representation that involved opposing lawyers in that office, noted the possibility that a conflict "in the nature of a personal conflict, as opposed to one derived from the lawyer's representation of another client," would not be imputed to other lawyers in a firm. It cited in this connection **ABA Formal Opinion 96-400** ("Job Negotiations with Adverse Firm of Party").

DC Ethics Opinion 255 (1995) held that a lawyer employed elsewhere in a full-time non-legal capacity who provides occasional assistance to a law firm on a contract basis will disqualify the law firm under Rule 1.10(a) if the lawyer is associated with the firm in a matter in which his full-time employment disqualifies him by reason of a personal interest under Rule 1.7(b)(4); but that no such imputed disqualification arises from matters in which the contract lawyer does not participate, so long as clients of the firm are informed of the nature of the relationship and no impression is created that there is a "continuing" (by which the Committee evidently meant "continuous") relationship between the lawyer and the law firm.

DC Ethics Opinion 247 (1994) addressed imputation resulting from an "of counsel" relationship among lawyers. The Opinion initially determined that under DC Rule 1.9 a lawyer is barred from representing a purchaser of real estate in an action against the seller where the lawyer had previously performed some services for both seller and

purchaser in a substantially related matter. The Opinion then considered whether another lawyer who listed himself as "of counsel" to the disqualified lawyer would also be disqualified under Rule 1.10. The Opinion observed that it had previously been decided, under the DC predecessor provision DR 5-105(D), that firms "associated" with or having a "correspondent" relationship to another firm would be disqualified if the other firm were disqualified, in part because the terms fostered an impression of an "ongoing and regular relationship" among all the lawyers in the two firms. See **DC Ethics Opinion 192 (1988)**. The opinion concluded that an "of counsel" relationship is similarly close, so that a lawyer who is "of counsel" to a disqualified lawyer would also be disqualified under Rule 1.10.

Rule 1.10 was the basis for the disqualification of defense counsel in **United States v. Davis**, **780 F. Supp. 21 (DDC 1991)**, where counsel's partner had previously represented a person who was cooperating with police against the defendant, introduced undercover officers to defendant and codefendants, and would testify at trial. The court said that, regardless of whether there had been any actual sharing of confidential information between the partners, there was an appearance of unfairness. The court also determined that counsel's disqualification did not violate the defendant's Sixth Amendment right to counsel. In **Borden v. Borden, 277 A.2d at 93**, the DC Court of Appeals determined that DR 5-105(D), the precursor to Rule 1.10, prevented a lawyer employed by the Neighborhood Legal Services Program from representing a husband in a divorce action when the wife was already represented by a lawyer from the Program. The court was concerned that a different result would "encourage a misapprehension that the special nature of such representation justifies departure from the professional standards."

DC Ethics Opinion 227 (1992), embracing the approach to migratory *nonlawyers* set out in **ABA Informal Opinion 88-1526 (1988)**, says that although a paralegal or other nonlawyer who moves from one law firm to another will be disqualified from working on a matter that is the same as or substantially related to one he or she worked on in the previous firm, the disqualification will not be imputed to the new firm if the paralegal is properly screened. Because Rule 1.10 expressly refers only to "lawyers," the Opinion states, the rule does not impute the paralegal's disqualification to the firm. The Opinion goes on to say, however, that Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) requires a law firm to screen a paralegal who has confidences about a client gained in former employment from the entire matter unless there is client consent to the paralegal's participation in the case.

See also **DC Ethics Opinion 285 (1998)**, discussed under 4.4:200, below (relying on **Opinion 227)**.

1.10:300 Removing Imputation by Screening

- Primary DC References: DC Rule 1.10
- Background References: ABA Model Rule 1.10, Other Jurisdictions
- Commentary: ABABNA § 51:2001, ALI-LGL § 124, Wolfram § 7.6

As just stated, screening is effective in avoiding imputation of the disqualification of peripatetic non-lawyer personnel resulting from their receipt of client confidences while working on a matter for one law firm and then joining a new law firm working on the same or a substantially related matter for an adverse client. **DC Ethics Opinion 227 (1992)**. Screening is, moreover, specifically contemplated under Rule 1.11 as a means of avoiding imputed disqualification when lawyers move from government agencies to practice elsewhere.

Screening without more is not, however, sufficient to avoid imputed disqualification in the case of a migratory *lawyer* whose new firm seeks to represent a person with materially adverse interests to the lawyer's former client at another firm, where the matter is the same or substantially related. See **DC Ethics Opinion 232 (1993)** (treating Rule 1.10(a) as a strict rule of imputed disqualification where lawyers are concerned and concluding that the existence of a screen would not remove the obstacle of imputed disqualification). In addition to screening, consent of the former client is required. **DC Ethics Opinion 279 (1998)** offers a general review of the Rules provisions under which a lawyer may be disqualified; the subset thereof as to which the individual lawyer's disqualification is imputed to other lawyers in a firm, generally pursuant to Rule 1.10(a); and the further subset of circumstances where imputation may be cured by screening. The Opinion also sets out the particular elements of a screen for this purpose. The Opinion makes clear that although screening is effective, together with other measures prescribed by Rule 1.11(c) and (d) with respect to disqualifications arising from former government service, there are only two circumstances where it serves to avoid disqualification under Rule 1.10(a). One of these is where the individual lawyer's disqualification results solely from a consultation with a potential client that was not followed by establishment of a lawyer-client relationship, under the provision added to the Rule in 1996, discussed under 1.10:101, above. As there noted, Comment [9] to the Rule requires the firm to take positive steps to prevent dissemination of any information about the prospective client that is protected by Rule 1.6; and thus of course calls for screening. The other circumstance where screening is effective under Rule 1.10 is where the disqualified individual was not a lawyer at the time that he or she acquired disqualifying information, as specified under Rule 1.10(b), also discussed under 1.10:101, above. Although the Rule only speaks of the firm not being disqualified in such circumstances, and says nothing about screening of the disqualified individual, the Opinion appears to view screening as a prerequisite to avoidance of imputation of the disqualification.

In addressing the elements of a screen, the Opinion notes that it is a subject not addressed by either the DC Rules or any reported decision of the Court of Appeals, but

draws on the previous DC Ethics Opinion 227 (1992) and court decisions elsewhere. The Opinion suggests that

> a screen should prohibit (1) involvement in the matter by the individually disqualified lawyer, (2) discussion of the matter between the individually disqualified lawyer and any firm personnel involved in the representation, (3) access by the disqualified lawyer to any files (including electronically stored files) of the matter from which she is screened, and (4) access by the lawyers working on the matter to any files of the disqualified lawyer relating to the matter.

The Opinion goes on to say that there should also be written notification to all firm personnel and to the clients of the fact and nature of the screen; and, in appropriate circumstances, can include labeling files to reflect the access prohibition, or even maintaining files in a secure location.

1.10:400 Disqualification of Firm After Disqualified Lawyer Departs

- Primary DC References: DC Rule 1.10(c)
- Background References: ABA Model Rule 1.10(b), Other Jurisdictions
- Commentary: ABABNA § 51:2008, ALI-LGL § 124, Wolfram § 7.6.3

As discussed under 1.10:101 above, prior to November 1, 1996, the DC rule was more restrictive than its Model Rule counterpart with respect to disqualifying the remaining lawyers in a firm from which a lawyer representing a client departs.

DC Ethics Opinion 212 (1992) points out that under DC Rule 1.10(c) a law firm may not undertake representation adverse to a former client of a lawyer once at the firm in a matter substantially related to a matter undertaken for the former client even where all firm lawyers who represented the former client have left and no remaining lawyers have confidential client information related to the matter. The Opinion states that under former DR 5-105(D), representation under these circumstances would have been permitted. The Opinion notes, however, that under Rule 1.10(c) a firm is disqualified if either (1) a substantial relationship exists between the new matter taken on by the firm and the matter involving the former client *or* (2) any lawyer in the firm has confidential client information. The Opinion notes that Rule 1.10's drafters were concerned with the "unseemly spectacle" of a law firm's switching sides in a pending case immediately after the departure of all of the lawyers involved on the other side. As discussed under 1.10:101 above, one of the Peters Committee proposals adopted by the Court of Appeals rescinds Rule 1.10(c)(2) and thereby eliminates the second of these grounds for disqualification.

1.10:500 Client Consent

- Primary DC References: DC Rule 1.10(d)
- Background References: ABA Model Rule 1.10(c), Other Jurisdictions
- Commentary: ABABNA § 51:2008, ALI-LGL § 122, 123, Wolfram §§ 7.2, 7.3

Rule 1.10(d) specifically provides that a "disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7." In **United States v. Childress, 731 F. Supp 547 (DDC 1990)**, the court did not vicariously disqualify defense counsel even when it was discovered that the counsel's law partner had represented one of the codefendants in a substantially related matter. In refusing to disqualify defense counsel, the court relied on the codefendant's written waiver of his right to seek the defense counsel's disqualification. See **DC Ethics Opinion 227 (1992)** (observing that screening alone does not enable a law firm to avoid being disqualified by imputation from representing a potential client where a lawyer in the firm had previously represented a client with interests materially adverse to a current client and the matters are substantially related, but that consent of the former client is necessary to avoid such disqualification).

1.11 Rule 1.11 Successive Government and Private or Other Employment

1.11:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.11
- Background References: ABA Model Rule 1.11, Other Jurisdictions
- Commentary: ABABNA

1.11:101 Model Rule Comparison

Although DC Rule 1.11 and MR 1.11 are similar in purpose and general structure, they differ in a number of significant respects, in both the black letter text and the comments. Indeed, since the changes made in both the Model Rules and the DC Rules pursuant to recommendations of the Ethics 2000 Commission and the Rules Review Committee, respectively, they differ also in their titles. Whereas prior to those changes, both versions of the rule were titled **Successive Government and Private Employment**, the Model Rule's title was changed to **Special Conflicts of Interest for Former and Current Government Employees**, and that of the DC Rule to **Successive Government and Private or Other Employment.** The principal difference between the two new titles reflects a major substantive difference that had always existed between the two versions of the rule, which is that, as more fully discussed below, the Model Rule, but not the DC Rule, includes provisions applying to *current* and not just *former* government employees. This is by no means the only difference between the two versions of the rule, however.

There is a minor difference between the two versions of Rule 1.11 in that paragraph (a) of the DC Rule forbids a former government lawyer to "accept other employment," while paragraph (a) of the Model Rule says the lawyer shall not "represent a client" -- in each case in a matter in which the lawyer participated personally and substantially while in government. Prior to the 2002 revision of the Model Rule, there was a further difference in the phrasing of this prohibition in that the quoted phrase in the Model Rule referred to a *private* client, but that word was dropped in the 2002 revision because, as former Comment [4] (now [5]) recognized, another government employer could be the equivalent, for purposes of the rule, of a private client. Similarly, Comment [10] to DC Rule 1.11 says that "other employment" includes employment by an agency of a government other than the government for one of whose agencies the lawyer previously worked. That is, the prohibition applies to a lawyer moving from a federal agency to a District of Columbia agency but not to a lawyer moving from, say, the Federal Trade Commission to the Antitrust Division of the Department of Justice. This comment was elaborated in connection with the 1996 amendments proposed by the Peters Committee, to state that, in the case of subsequent employment with an agency of another government, the first agency can waive its objection; and to clarify that the prohibition does not apply to subsequent representation of the original agency in a new capacity, such as in private practice.

A substantive and significant difference between the two rules' versions of paragraph (a) is that in the DC Rule, the prohibition on linked governmental and post-governmental employment applies not only to the *same* matter, as with the Model Rule, but in addition to a *substantially related* matter. As stated in Comment [4] to the DC Rule, the meaning of the phrase "substantially related" as applied to former government lawyers was elaborated by the DC Court of Appeals in **Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37 (D.C. App. 1984)(en banc)**, which, as discussed in 1.11:200, below, also effectively added that phrase to the DC Code predecessor of the rule, DR 9-101.

Another significant difference is that paragraph (a) of the Model Rule allows for a government agency to consent to a representation by one of its former lawyers otherwise forbidden by the Rule; the DC Rule has no provision for governmental consent (except that, as has been mentioned above, Comment [10] allows a waiver when the second representation is of another government agency).

Another major difference between the two rules is that paragraph (a) of DC Rule 1.11 extends the rule's application to government employees "acting on the merits of a matter in a judicial or other adjudicative capacity" — thus covering judges and other public officers who conduct adjudicative proceedings here rather than in Rule 1.12, where the Model Rules deal with them. The DC Rules Review Committee recommended that DC Rules 1.11 and 1.12 be brought into accord with their Model Rule counterparts in their treatment of judges and other adjudicators, but this recommendation was the only substantive change recommended by the Committee that was not accepted by the Court.

Both DC Rule 1.11 and Model Rule 1.11 impute the disqualification of a former government lawyer to the lawyer's colleagues. This provision of the DC Rule was and is in paragraph (b) and in the Model Rule it was originally included in paragraph (a), but the 2002 amendments split what had been a single paragraph (a) into two paragraphs, and put the imputation provisions into the new paragraph (b). In the DC Rule the imputation is effected by providing that no partner or associate of the disqualified lawyer, or lawyer with an of counsel relationship to that lawyer, may undertake or continue the representation from which the former government lawyer is disqualified; in the Model Rule, the same prohibition is applied to all lawyers in a *firm* with which the disqualified lawyer is associated. "Firm" is a defined term, and a broadly inclusive one; see **Terminolgy** (now Rule 1.0(c)). DC Rule 1.11(b) specifically exempts former judicial law clerks from having their personal disqualification imputed to their lawyer associates. Model Rule 1.12 makes no similar exception for former judicial law clerks.

Both Rules also set out procedures for relieving the imputed disqualification of the former government lawyer's colleagues while leaving that lawyer disqualified: in the Model Rule these procedures are set out in subparagraphs (b)(1)and (2), and in the DC Rule in separate paragraphs (c), (d), (e) and (f). There are some differences between the disqualification procedures in the two rules. In the Model Rule, disqualification is

conditioned on (1) the disqualified lawyer's being timely screened from the matter and apportioned no part of the fee, and (2) the government agency's being given written notice "to enable it to ascertain compliance" with the Rule. The DC Rule provides in paragraph (c) for timely screening and no apportionment of fees from the disqualifying matter, but it also requires in paragraph (d) that certificates attesting to the screening be executed both by the disqualified lawyer and by another lawyer in the firm, and served on the government agency and on all parties in the matter. Paragraphs (e) and (f) of the DC Rule provide for confidential treatment of those certificates where necessary.

Each of the two versions of Rule 1.11 contains a provision giving the term "matter" as used in that Rule a narrower meaning than when it is used elsewhere in the Rules. The Model Rule includes in what is now paragraph (e) (formerly (d)) a two-part definition of the term "matter." The first part of that definition, in subparagraph (e)(1), was copied from 18 USC § 207(a) as it stood prior to the 1989 statutory amendments (discussed in 1.11:610, below), and the DC Rule as originally adopted included a similar definition in its paragraph (g). The second part of the Model Rule's definition of "matter," in subparagraph (e)(2), extends the term to include "any other matter covered by the conflict of interest rules of the government agency." The DC Rule does not have this additional reach, although its Comment [8] makes clear that "If a government agency has adopted rules governing practice before the agency by former government employees, members of the District of Columbia Bar are not exempted by Rule 1.11(e) from any additional or more restrictive notice requirements that the agency may impose." One of the recommendations of the Peters Committee, adopted in 1996, modified the DC Rule's definition of "matter" and moved it to the Terminology section (see 0.4:500 and 1.1080, above). As so modified, the defined term no longer is limited to a "particular matter involving a specific party or parties," and indeed has been broadened specifically to include lobbying activity, but paragraph (g) of DC Rule 1.11 specifies that that Rule applies only to a "matter involving a specific party or parties." The word "particular," which previously had modified "matter" in paragraph (g), was dropped, but the requirement that a "matter" involve *specific parties* still excludes most governmental rulemaking from the coverage of DC Rule 1.11.

DC Rule 1.11 has one further provision (besides paragraphs (e) and (f), discussed above) that has no counterpart in the Model Rule, and the Model Rule has several that are not found in the DC Rule. The unique DC provision is in paragraph (h), which provides that a lawyer who participates in a program of temporary service to the Office of the District of Columbia Attorney General of the kind described in Rule 1.10(e) (see 1.10:101, above) will be treated as having served as a public officer or employee for purposes of paragraph (a) of Rule 1.11. When first inserted into DC Rule 1.11, along with a related provision in Rule 1.10, in November 1991 on petition of the DC Bar, these provision referred to the District of Columbia Office of Corporation Counsel, which was then the name of this office. In 1995 both provisions were revised to add a similar reference to the DC Financial and Management Assistance Authority (commonly called the Control Board), but these references were deleted by the 2006 amendments because that body was no longer in existence.

The most significant provision of Model Rule 1.11 that is not shared by the DC Rule is paragraph (c) (formerly (b)), forbidding lawyers who have "confidential government information" about a person acquired while in government to represent a private client whose interests are adverse to that person, in a matter in which the information could be used to the material disadvantage of that person. The term "confidential government information" is defined in paragraph (c) (and was formerly defined in a separate paragraph (e)) to mean information that was obtained under government authority and that the government is prohibited from disclosing. Although the Jordan Committee recommended including such a provision in the DC Rule, the DC Bar Board of Governors disagreed, believing that the category of information concerned would not be adequately defined and that the provision would needlessly increase the incidence of motions to disqualify.

Two other significant provisions of Model Rule 1.11 that have no counterpart in the DC Rule are subparagraph (d)(2)(i) (formerly (c)(1)), a mirror-image of the prohibition applicable to former government lawyers in paragraph (a), in this instance prohibiting a government lawyer participating while in government in a matter in which the lawyer had participated in private practice; and subparagraph (d)(2)(ii) (formerly (c)(2)), which prohibits a government lawyer from negotiating for private employment in a matter in which the lawyer is involved in a governmental capacity. These two provisions were omitted from what the DC Bar recommended to the Court of Appeals because they had been proposed to the Court along with other amendments to the predecessor Code of Professional Responsibility provisions, as described in 1.11:102 immediately below, and rejected by the Court when it revised the Code in 1982. As revised in 2002, Model Rule 1.11 also provides in subparagraph (d)(1) that a lawyer serving in government is subject to Rules 1.7 and 1.9 (except "as law may otherwise provide"), and this is elaborated in Comment [2]. DC Rule 1.11 has a corresponding provision in its Comment [2], but not in the black letter text..

1.11:102 Model Code Comparison

DC Rule 1.11, like the Model Rule, is very different from DR 9-101(B) of the Model Code, which provided simply that "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." However, the DC Code's provision was substantially revised in 1982 pursuant to recommendations of the DC Bar which had been subjected to extensive exposure to comment and consideration by the Court of Appeals. See "**Revolving Door," 445 A.2d at 618**. As a result, DR 9-101(B) of the DC Code, together with a new DR 9-102 that had no parallel in the Model Code, thereafter contained a set of "revolving door" provisions that were very close in substance to what is now DC Rule 1.11. The DC Code's DR 9-101(B) substituted "participated personally and substantially" for "substantial responsibility," and specifically stated that it applied to acting on the merits of a matter in a judicial capacity, in effect incorporating into DR 9-101(B) what had previously been the separate provision of DR 9-101(A). There was added to the Code a separate definition of the term "matter," taken from 18 USC § 207(a), which was subsequently incorporated verbatim in DC Rule 1.11(g). The new DR 9-102 provided for imputation of an individual lawyer's disqualification under DR 9-101(B), with an exception for judicial law clerks and provisions, close to those now in DC Rule 1.11(c)-(f), for relief from such imputation.

In the transition from these provisions to DC Rule 1.11, in addition to some editorial changes, there were two significant changes from the DC Code. First, the prohibition relating to "substantially related" matters was added, to reflect the decision in the **Brown** case [discussed in 1.11:200, below]. Second, the procedures in paragraph (e) for filing screening documents with Bar Counsel were added.

1.11:103 Definition of "Matter"

The DC definition of "matter," which differed somewhat from the Model Rule definition was, effective November 1, 1996, moved to Terminology, and broadened so as to be of general application throughout the Rules. [See 0.4:500, above.] DC Rule 1.11(g) now provides that the Rule applies to any "matter [as so defined] involving a specific party or parties."

DC Ethics Opinion 297 (2000) [which is more fully described under 1.11:200, immediately below] held that because of Rule 1.11(g)'s limitation of the Rule's application to "matters" involving "a specific party or parties," the Rule did not bar a former government lawyer from representing a private client in a "negotiated rulemaking" in which he had participated while in government (although if the lawyer possessed relevant governmental confidences or secrets that the government did not consent to his using, that might present an obstacle under Rule 1.6 and possibly Rule 1.7).

1.11:200 Representation of Another Client by Former Government Lawyer

- Primary DC References: DC Rule 1.11
- Background References: ABA Model Rule 1.11(a), Other Jurisdictions
- Commentary: ABABNA § 91:4001, ALI-LGL § 133, Wolfram § 8.10

The only judicial authority regarding DC Rule 1.11 (as distinct from its Code predecessor), and apparently the only reported disciplinary proceeding in any jurisdiction arising out of any jurisdiction's version of Model Rule 1.11, is the case of **In re Sofaer, 728 A2d 625 (DC 1999)**. In that case, a former State Department Legal Adviser was found to have violated DC Rule 1.11 by briefly undertaking, three years after leaving government service, a representation of the Government of Libya in connection with the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland. The sanction imposed (and the only sanction sought by Bar Counsel at any stage of the proceeding) was an informal admonition -- the mildest sanction available.

The charge made against the respondent, and ultimately sustained by the Court, was not that the representation of Libya was the *same* as a matter in which he had participated personally and substantially while in government, but that it was *substantially related* to such a matter (so as to come under a prong of the DC Rule that is not found in the corresponding Model Rule). The governmental "matter" in question rested on the fact that, as more fully explained below, the respondent had had some involvement in the US Government's response to the Pan Am 103 bombing (which had occurred during the respondent's time in office). A central, and vigorously contested issue, concerned identification of the particular governmental "matter" in which the respondent was charged to have participated. Other issues addressed by the Court were whether his participation in that "matter" had been "personal and substantial;" whether the subsequent representation of Libya was "substantially related" to the governmental "matter" in which the respondent had participated; whether the respondent had, in the particular circumstances, actually "accepted . . . employment" in the subsequent representation, within the meaning of DC Rule 1.11; and whether the adverse determination in that case would be a deterrent to government service by other DC lawyers.

As to the governmental "matter" on which the charged violation of Rule 1.11 rested, the pertinent circumstances were that the respondent's involvement, in his capacity as Legal Adviser, in the government's response to the Pan Am 103 bombing had consisted of (a) participation in a diplomatic exchange about the bombing with another country than Libya (which was not then the prime suspect in the bombing); (b) receipt of confidential briefings on the course of the federal government's investigation of the bombing; and (c) some participation in the State Department's response to a civil third-party subpoena resting on a claim (later dismissed as wholly unsubstantiated) that the government had been complicitous in the Pan Am 103 bombing. Weaving these three somewhat disparate strands into a single thread, the Board on Professional Responsibility

concluded, and the Court agreed, that "[t]he core of fact at the heart of each piece of legal activity is . . . why and how Pan Am blew up over Lockerbie." *Id.*at 627. The Court concluded, therefore, that "[t]he contours of the bombing and the government's investigation and related responses to it were defined sharply enough to constitute a 'matter' under the Rule." *Id.*

As to the respondent's "personal and substantial participation" in this expansively delineated "matter," the Court rejected the respondent's contention that his participation in each of the activities deemed to comprise the "matter" was too marginal, infrequent or passive to constitute *substantial* participation. The Court observed in this connection that "[t]he fact that respondent played no role in the investigation itself and was not shown to have recommended or taken action based on the briefings is not critical," *id.*, because, as the Board had concluded, "'[a]s chief legal officer of the State Department, [he] was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so.'" *Id.* at 628. The inference here appeared to be that it was the respondent's *capacity* to act, rather than any action actually taken by him, that constituted the requisite "participation."

Approving the Board's conclusion that the two "matters" at issue were "substantially related," the Court observed, relying on its prior decision in **Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37 (DC 1984)(en banc)** (which is discussed immediately below and, as there explained, is the source of the "substantially related" prong of the DC Rule), that "[t]he inquiry is a practical one asking whether the two matters substantially overlap." *Id.* The Court also observed that "Rule 1.11(a) bars participation in overlapping government and private matters where 'it is reasonable to infer [that] counsel may have received information during the first representation that might be useful to the second'; "the actual receipt of . . . information," and hence disclosure of it, is immaterial.'" *Id.* [quoting **Brown, 486 A.2d at 50**].

Respondent argued that the phrase "accept other employment" in Rule 1.11 (differing, it may be noted, from MR 1.11's corresponding phrase "represent a private client") did not apply here because his firm never received, before it withdrew from the representation, the governmental authorization from the Office of Foreign Asset Control (OFAC) that would have been required to pursue the representation. The Court rejected this argument on the ground that the respondent had not just conditionally *agreed* to represent Libya, but as a factual matter had commenced the representation.

Finally, the Court addressed the contention, advanced not merely by the respondent but by a number of former government officials as *amici curiae*, that the finding of an ethical violation in the case would "deter District of Columbia lawyers from entering the government or serving for long once there, lest Rule 1.11(a) trip them up after they enter private practice." *Id.* at 629. Declaring itself "sensitive to the concern . . . that overzealous application of the revolving-door rule would be 'at the cost of creating an insular, permanent, legal bureaucracy'," *Id.* [citing **Brown, 486 A.2d at 47**]," the Court nonetheless concluded that the result here was "well within the heartland of Rule

1.11(a)'s application." *Id.* The Court went on to cite, with approval, Bar Counsel's observation to the effect that a former government official in the respondent's position is free to solicit the views of his or her former agency about a proposed private legal representation, or to consult with ethics advisers in his firm, or with the Legal Ethics Committee of the Bar before undertaking a private representation. *Id.*

In **EEOC v. Exxon Corporation, 202 F.3d 755 (5th Cir. 2000)**, which is discussed more fully under 1.11:610, below, the Court concluded, *inter alia*, that DC Rule 1.11 did not bar testimony by former Department of Justice lawyers, as both fact and expert witnesses, about a settlement in a criminal case that they had prosecuted while in government, even though the testimony was to be offered on behalf of the defendant in the criminal case, in a separate but clearly related suit brought by a different government agency against the same defendant.

Also important authority for the interpretation of Rule 1.11 is the en banc (albeit divided) decision of the DC Court of Appeals in **Brown v. District of Columbia Bd of Zoning Adjustment, 486 A.2d 37 (DC 1984) (en banc)**. The Court there applied the DC Code version of DR 9-101(B) (which, as discussed above, had been substantially modified from the Model Code form two years earlier and which is substantially carried forward in DC Rule 1.11) to a motion to disqualify addressed to two lawyers who had previously been employed by the DC Board of Zoning Adjustment but now were representing a private party in a dispute with the Board relating to a piece of real estate that had been involved in certain matters in which they had participated while with the Board. The heart of the decision was the Court's holding that, under DR 9-101(B), "matters will be deemed the same if substantially related to one another." **486 A.2d at 41-42 & n.4**. On this premise, the Court imported into DR 9-101(B) the well-developed "substantial relationship" case law spawned by **T.C. Theatre Corp. v. Warner Bros Pictures Inc., 113 F. Supp. 265 (SDNY 1953), aff'd, 216 F.2d 920 (2d Cir 1954)**, for dealing with disqualifications in the context of successive representations in the private sector — a test that is now reflected in the black letter text of Rule 1.9. (See Comment [2] to Rule 1.9.)

The fact that Rule 1.11(a) explicitly applies to successive representations involving not only the *same* matter but also *substantially related* ones is a direct result of the **Brown** decision, as Comment [4] recognizes. That Comment goes on to describe the substantial relationship test as embraced in **Brown**, under which a showing that the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation makes a prima facie showing that shifts to the former government lawyer the burden of disproving any ethical impropriety by showing that the lawyer "could not have gained access to information during the first representation that might be useful in the later representation."

Another point of interest in the **Brown** decision is that the Court, after identifying seven concerns "attributable to the revolving door," **486 A.2d at 44-46**, concluded that only three were addressed by DR 9-101(B):

> The lawyer: (1) may disclose confidential information to the prejudice of the government client; (2) may use information obtained through the exercise of government power to the prejudice of opposing private litigants; and (3) while in government, may have initiated, structured, or neglected a matter in the hope of using it later for private gain.

United States v. Childress, 731 F. Supp. 547 (DDC 1990), applied DR 9-101(B) of the DC Code in disqualifying from a criminal representation a lawyer who, during previous employment at the Public Defender Service, had been substantially involved in a case involving a potential co-defendant. In **In re Loigman, 582 A.2d 1202 (DC 1990)**, the Court approved a recommendation of the Board on Professional Responsibility for reciprocal discipline of a lawyer who had violated, *inter alia*, New Jersey's version of DR 9-101(B) (which was apparently the same as the Model Code provision) by accepting (unspecified) private employment in a matter "in which he had considerable responsibility while a public employee." *Id*. at 1202 n.1.

Laker Airways Ltd v. Pan Am. World Airways, 103 FRD 22 (DDC 1984), concerned a motion to disqualify plaintiffs' counsel under DR 9-101(B) of the DC Code as amended in 1982 (but prior to its interpretation by the **Brown** decision), on the basis of a number of instances of participation by counsel, while a federal employee, in matters having some colorable relationship to the suit. The District Court, after addressing the applicable policy considerations, considered each of the grounds in turn and determined that as to each the motion was ill-founded. The court held, among other things, that "rule-making and policy-making activities do not constitute a 'matter' within the meaning of the disciplinary rule for the purposes of disqualifying counsel from a subsequent private lawsuit, and they do not become so unless the activity is narrow in scope and is confined to specified issues and identifiable parties such that it may properly be characterized as 'quasi-judicial' in nature." *Id*. at 34 (footnote omitted).

Committee for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177 (DC 1982), the case on which **Brown** relied as "implicitly" concluding that "same" means "substantially related," addressed a motion seeking to disqualify both defendant's counsel and a consultant, which had been brought under DR 9-101(B) in its original form, identical to the Model Code, before the 1982 amendment. The Court upheld denial of the disqualification as to the consultant because the plaintiffs had not established more than a "hypothetical possibility" that he could have gained relevant confidential information in his governmental capacity and as to defendant's counsel on the ground that the two proceedings were not the same "matter." The case is of little more than historical interest, but it is sometimes cited for the proposition that the revolving door rule is intended to prohibit conduct "which would present even the appearance of impropriety," *id*. at 1188; a proposition that, however, was explicitly disclaimed in the **Brown** decision, see **486 A.2d at 47**. Likewise probably of only historical interest is the decision of the DC Circuit in **Kessenich v. Commodity Futures Trading Comm'n, 684 F.2d 88 (DC Cir 1982)**, which granted a CFTC

motion to disqualify under DR 9-101(B) of the Model Code, essentially on the ground of an appearance of impropriety.

United States v. Philip Morris Incorporated, 312 F. Supp.2d 27 (DC 2004), dealt with a motion to disqualify a former government lawyer on the basis of DC Rule 1.11(a), and his law firm under 1.11(b). The immediate underlying litigation involved an effort by the government to compel production by defendant British American Tobacco Company of certain documents in the possession of its Australian affiliate, BATAS. BATAS, represented by Neil Koslowe and the law firm of Shearman & Sterling, moved to intervene, and the government moved to disqualify both lawyer and firm on the basis of the lawyer's previous involvement, as a Department of Justice lawyer, in advising the Food & Drug Administration and the Department of Health & Human Services regarding proposed rulemaking in which FDA would have asserted jurisdiction over the tobacco industry. The advice had extended not merely to the rulemaking as such, but also to anticipated and actual litigation challenging the proposed rule. The Court did not explicitly acknowledge that had this former work related only to the *rulemaking* it would not have been a "matter involving a specific party or parties" within the meaning of DC Rule 1.11(g) (*cf*, cmt [3]: "The making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11"), but its emphasis on the *litigation* relating to the rulemaking seems to constitute implicit recognition of that limitation. Thus, Koslowe was found to have participated in a "matter" that fell within Rule 1.11, and his having recorded 382 hours working on the matter constituted *personal and substantial participation* therein. The remaining issue was whether that matter and the matter in which Koslowe was engaged before the Court were *substantially related*; here, the Court, applying the DC Court of Appeals' test in **Brown v. DC Board of Zoning Adjustment, 486 A.2d 37, (DC 1984)**, above, found they were. The key passage in **Brown** that the Court relied on was this:

> If the factfinder is persuaded that two matters are substantially related--*i.e.*, that it is reasonable to infer counsel may have received information during the first representation that might be useful to the second--there arises *a conclusive inference* that useful information was, in fact, received.

486 A.2d at 50. Since Koslowe was thus determined to have violated Rule 1.11(a), he was disqualified, and since he had not been screened from contact with the case, the law firm was inescapably disqualified under Rule 1.11(b) as well.

Barnes v. District of Columbia, 266 F. Supp. 2d. 138 (DDC 2003) addressed an issue of timeliness of the notifications of a former government lawyer's screening from a matter in which he or she had previously been involved, required by DC Rule 1.11(d)(1) and (d)(2) to be given to the lawyer's former agency by the lawyer and by his or her law firm, respectively. In this case the agency had been given timely notice of the lawyer's intention of negotiating with the firm and of his acceptance of employment with the firm, but the lawyer had not given the formal notice contemplated by DC Rule

1.11(d)(1) until a month later, and the firm hadn't given its notice under DC Rule 1.11(d)(2) until a month after that. In response to a motion by the defendants to disqualify the law firm on grounds of untimeliness of the two notifications, the Court acknowledged that the Rule's notification provisions implicitly contemplate timeliness, but held that in light of the fact that the lawyer's former agency had early notice of the lawyer's joining the firm, the fact that the screening procedures had been timely put in place (even though the notice thereof was delayed), and the prejudice to the plaintiff if he were to lose his counsel of choice, the firm should not be disqualified.

The defendants in the **Barnes** case were not only the District of Columbia but also two individual police officers, who had chosen to be represented along with the District of Columbia by the Office of Corporation Counsel rather than by private counsel. The police officers contended that they had individual right of loyalty from their former lawyer who had left to join the plaintiff's firm, and that, not themselves being governmental entities, they should not be limited by Rule 1.11's provisions in seeking to disqualify his firm. The Court held, however, that since they had chosen to be represented by government counsel, they had no entitlement to limit that counsel's rights under Rule 1.11 after leaving government service.

DC Ethics Opinion 315 (2002) considered two requests for rulings that a lawyer's involvement in a particular matter while in government did not constitute "personal and substantial participation" in the matter under Rule 1.11(a), so as to bar private employment in the same matter. With respect to the first of these inquiries, as to which the facts regarding the inquirer's involvement as a government lawyer were taken to be undisputed, the **Opinion** held that there had not been personal and substantial participation in the matter; in the second inquiry, there was clearly conflicting testimony as to the key circumstances regarding the extent of the inquirer's participation in the government matter, and the Legal Ethics Committee, observing that it is not a fact-finding body, declined to venture a conclusion as to the question posed. Thus, only the Committee's conclusion as to the first inquiry bears summarizing here. The circumstances of that inquiry, somewhat simplified, were that the inquirer, while an attorney at the Environmental Protection Agency (EPA), had been involved in drafting regulations to implement the Clean Air Act Amendment of 1977. A set of such regulations had been promulgated in 1980 (prior to the inquirer's time at EPA), and challenged in litigation that led to a potential settlement and remand to EPA. There ensued a resulting revision of the regulations; a further court challenge, consolidated with the first; yet another remand; and still further revision of the regulations. The inquirer was first involved in the drafting of this last set of regulations — an involvement that the **Opinion** held did not itself trigger the prohibition of Rule 1.11(c) because the making of rules of general applicability does not constitute a "matter" within the meaning of Rule 1.11(g). That did not dispose of the inquiry, however, because the inquirer had also participated in drafting status reports about the rulemaking to the court in the consolidated litigation, and in discussions with opposing counsel about the timing of the rulemaking. Although finding the issue a "very close question," the **Opinion** concluded that the inquirer's involvement in the litigation was not "personal and substantial" because it was not *substantive*; it was focused not on

resolving the merits of the litigation but only the timing of the final rules that were to be issued as a partial result of the litigation. The **Opinion** also suggested a parallel between this inquiry and the one giving rise to **Opinion 111** (more fully discussed below), where the former government lawyer had never been counsel of record in the matter, so "public appearances should not be offended," and the lawyer hadn't been privy to government confidences in the matter, so there was no suggestion that his involvement in the matter could reasonably be expected to encourage his subsequent private employment.

DC Ethics Opinion 313 (2002) addressed the question whether a former defense lawyer with the Navy Judge Advocate General Corps may continue, in private practice, to represent (in post-conviction proceedings) the same defendant he had represented as court-appointed counsel during a court martial. The **Opinion** concluded that Rule 1.11 does not bar such a representation, by either the former JAG officer or his associates in private practice, because the representation of the same client in private practice as he had represented in military service would not substitute "other employment," as that term is used in the DC version of Rule 111. While the **Opinion's** conclusion turned on the language of the DC Rule, it found support for the result in other considerations as well. The **Opinion** noted that the case was outside the usual run of cases coming under either Rule 1.11 or its statutory counterpart, 18 U.S.C. 207, in that the lawyer's client while in government service was not the government or any agency thereof, but rather an individual; and it cited regulation and judicial authority to this effect, as well as DC Rule 1.6(j) and cmt [38] thereto (both of which recognize that the government lawyer's client may be an individual rather than the government). Although the **Opinion** recognized that Rule 1.11 does not require that the former government employee have been a lawyer while in government service, see **DC Ethics Opinion 84 (1980)** (summarized below), nor that the post-government employment representation involve "switching sides," it concluded that none of the purposes underlying Rule 1.11 would be served by applying its prohibition in these circumstances. It referred in this connection to the description of the two primary purposes of DR 9-101(B), the predecessor provision in the DC Code of Professional Responsibility, in **DC Ethics Opinion 16 (1976)**: preventing the appearance that a lawyer while in public employ may have been influenced by the hope of later personal gain rather than the interests of his public employer, and preventing the appearance of use for the benefit of a private client confidential information from representation of a public agency whose interests are in conflict with those of the private client.

DC Ethics Opinion 297 (2000) addressed an inquiry by a former government lawyer who while in the Interior Department had participated in a "negotiated rulemaking" (a statutorily authorized proceeding involving a "negotiated rulemaking committee" including representatives of groups affected, in a consultative process in advance of formal notice-and-comment rulemaking) as to whether he could represent an Indian tribe with respect to the same ongoing negotiated rulemaking. The **Opinion** first discussed the possible application of two statutory post-employment restrictions, 18 USC §§ 207(a)(1) and (2) [which are discussed under 1.11:610 and 1.11:620, respectively, below], but noted that the Indian Self-Determination Act, P.L. No 93-638

makes section 207 of Title 18 (as well as Section 205) inapplicable to representation of Indian tribes provided specified notice of such representation is given to the appropriate governmental entity -- which notice had been given here. Turning them to DC Rule 1.11, the **Opinion** noted that although the broad definition of the term "matter," in the Terminology of the DC Rules, includes rulemaking, Rule 1.11(g) provides that that Rule applies only to a "matter" that involves "a specific party or parties"--which, as Comment [3] makes clear, ordinarily excludes "the making of rules of general applicability." The **Opinion** concluded that a negotiated rulemaking fell within this exclusion despite the fact that the negotiated rulemaking committee which was evidently central to the process had a membership comprising identifiable parties. The **Opinion** pointed out, nonetheless, that if the inquirer was, by reason of his former governmental position, in possession of relevant "confidences" or "secrets" within the meaning of Rule 1.6, then this might, absent governmental consent, be a bar not merely to the disclosure or use of such confidential information in the representation of the Indian tribe, but also, if the inquirer's inability to make use of the information adversely affected his representation of the new client, a bar to the representation as a whole, under Rule 1.7(b)(2).

DC Ethics Opinion 187 (1987), interpreting, *inter alia*, DR 9-101(B) of the DC Code, held that a former government lawyer is not automatically prohibited from representing a private client in challenging an agency's regulations for which he had been responsible while employed in government, provided that the lawyer does not divulge or make forbidden use of confidence or secrets of the former agency.

DC Ethics Opinion 177 (1986) concerned an inquiry by a lawyer who was formerly employed by a DC government agency that administered a particular legislative act and, while so employed, was in charge of an office that employed lawyers to act as hearing examiners in cases arising under the act. As head of the hearings office, the inquirer was responsible both for administrative matters and for supervising all staff including other hearing examiners. It was her responsibility to assign cases either to herself or to one of the other hearing examiners; she also reviewed all recommended decisions, orders and the like, essentially from an editorial rather than a substantive point of view. Now employed by a private firm, she posed a number of inquiries about the extent to which she could represent private clients in cases before her old office and on appeal from decisions of that office. The Opinion was the first, after the 1982 amendments of the DC Code, to address the meaning of "personal and substantial participation," as used in DR 9-101(B), though four Opinions before that date (nos. **111, 84, 26** and **16**) had addressed the phrase "substantial responsibility" which appeared in the DR 9-101(B) as originally adopted (and in the Model Code provision). The Opinion held that "substantial responsibility" was still relevant in determining whether a lawyer had "participated personally and substantially" in a matter. The Opinion went on to conclude that simply assigning a case to another hearing examiner did not amount to substantial participation, but that any review of a recommended decision of another hearing examiner, or consultation with another hearing examiner, would involve such participation. The Opinion also stated that DR 9-101(B) did not bar the inquirer from writing either a case law summary of opinions issued by her former office or articles

about the office. Finally, it concluded that her firm would not be disqualified from handling matters before her former agency from which she was personally disqualified so long as she was screened as required by DR 9-102.

DC Ethics Opinion 152 (1985) concerned an intra-government question: could a lawyer in the branch of an agency's general counsel's office that advised the agency chairman serve as hearing examiner in a hearing about an employee's grievance against the agency and thereafter advise the chairman on the case? Yes, the Opinion said, if the lawyer was serving as the fact-finding representative of the chairman of the agency in presiding over the hearing; but no, if the lawyer was meant to serve as an independent quasi-judicial officer for the agency in relation to the hearing. The Opinion noted that DR 9-101(B) specifically mentioned only post-government *private* employment, and did not in terms address subsequent *public* employment, but nonetheless held that the DR was best interpreted as applying to both — as, it should be noted, is now explicitly the case with DC Rule 1.11(a). The Opinion buttressed this broader interpretation by pointing out that EC 9-3 was not in terms limited to "private" employment.

DC Ethics Opinion 150 (1985) concerned a former government lawyer who had advised at the pre-complaint stage of an administrative proceeding against a corporation. The Opinion ruled that the lawyer, consistent with DR 9-101(B), could later represent the corporation in a separate, private lawsuit brought by a customer against the corporation that might involve one or more of the same legal issues as the government proceeding, subject to two provisos: (1) that the lawyer had not gained access to any confidences or secrets of the government or of any private entity while in government employ that could be used to the disadvantage of any party in the subsequent private action, and (2) that the two proceedings were not otherwise substantially related.

DC Ethics Opinion 111 (1982) applied the pre-1982 amendment version of DR 9-101(B) (which corresponded to the Model Code version) in determining that a former government lawyer had not had "substantial responsibility" while in government for a case he proposed to take on in private practice.

DC Ethics Opinion 106 (1981), also interpreting DR 9-101(B) in its original form, concerned whether the rule applied to participation in agency rulemaking — a question that turned on the meaning of the term "matter". Relying heavily on **ABA Opinion 342 (1975)**, the Opinion concluded that that term did not include rulemaking.

DC Ethics Opinion 98 (undated) held that DR 9-101(B) of the DC Code (then in its original form) did not prohibit a former staff lawyer in the Public Defender Service who had represented a client in connection with a criminal proceeding from subsequently, in private practice, representing the same client in seeking civil relief with respect to the conviction in the criminal proceeding, even though the criminal and the civil proceeding were the same "matter." This ruling relied on the unique nature of the government employment associated with service as a staff lawyer with the Public Defender Service.

DC Ethics Opinion 84 (1980) addressed the applicability of the original DR 9-101(B) to a lawyer who while serving in government as an economist had been involved in government antitrust proceedings against a corporation; and subsequently, having become a lawyer and left government, was employed by a law firm representing that company in connection with a possible civil antitrust action involving the same competing company as had been involved in the governmental action. The Opinion concluded that DR 9-101(B) applied to the former government service even though the lawyer had not yet become a lawyer at the time of that service, and that he was disqualified from participation in the private civil antitrust case because it was the same "matter" as the governmental proceeding.

DC Ethics Opinions 16 (1976) and 26 (1977) address successive inquiries from the same lawyer, who had previously been assistant director of the office of contract administration of a governmental agency, as to the limitations on post-government employment imposed by DR 9-101(B) (in its original form). In **Opinion 16**, the issue was whether the lawyer would be barred from matters in which he had participated personally and substantially while in government and matters that had been submitted for resolution to the office of contract administration as a result of its official responsibilities, or instead would be more broadly barred from undertaking representation with respect to any contracts that were in existence and for which the office was accountable, during the time he had served as assistant director. The Opinion essentially concluded that the first of these alternatives was the correct one, determining along the way that the word "matter" should be interpreted broadly, to refer to contracts administered by the agency, and not merely to particular sets of factual circumstances and controversies arising under a particular contract, but that "substantial responsibility" was broader than "personal and substantial participation." **Opinion 26** declined the inquirer's invitation to reconsider and adopt a narrower view of "matter," and reaffirmed the position taken in **Opinion 16**. Then, having been more fully advised as to the nature of the inquirer's participation in contracts dealt with by the office of contract administration, **Opinion 26** held that the inquirer had had "substantial responsibility" for such contracts.

1.11:210 No Imputation to Firm if Former Government Lawyer Is Screened

There appear to be no DC court decisions that cast any illumination on the screening, fee-sharing and notice provisions of DC Rule 1.11(c)-(e), on which relief from imputation turns. However, **DC Ethics Opinion 279 (1998)**, which is more fully discussed at 1.10:300, above, provides a detailed description of the screening process, applicable under both Rule 1.11 and, in certain circumstances, under Rule 1.10.

1.11:300 Use of Confidential Government Information

- Primary DC References:
- Background References: ABA Model Rule 1.11(c), Other Jurisdictions
- Commentary: ABABNA § 91:4009, ALI-LGL § 133, Wolfram § 8.10

The DC Rules have no provision corresponding to MR 1.11(c).

1.11:310 Definition of "Confidential Government Information"

The DC Rules do not use this term.

1.11:400 Government Lawyer Participation in Matters Related to Prior Representation

- Primary DC References:
- Background References: ABA Model Rule 1.11(d)(2), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 132, 133, Wolfram § 8.9.4

The DC Rules have no provision corresponding to MR 1.11(d)(2). However, DC Rule 1.9 would cover most circumstances to which MR 1.11(d)(2) would apply.

DC Ethics Opinion 308 (2001) addressed the ethical obligations with respect to former private clients that are applicable to lawyers who leave private employment for government service -- in effect, the other side of the revolving door addressed by DC Rule 1.11 (and a side that *is* addressed by the Model Rule). The constraints are two kinds, relating to preservation of client confidences and secrets, under Rule 1.6(a), and to conflicts of interest, under Rule 1.9. The **Opinion** made clear that both of these rules apply as fully in this context as in that where the lawyer is merely changing employers within the public sector -- with one exception, however, namely, that a lawyer's disqualification under Rule 1.9 from certain matters adverse to a former client (absent client consent) is not imputed to the lawyer's colleagues in government service. (The **Opinion** did, however, recommend screening of the government lawyer in appropriate circumstances.) The **Opinion** also noted that the lawyer in these circumstances owes the same duties to her new government client, such as competence (under Rule 1.1), diligence (Rule 1.3) and avoidance of conflicts (Rule 1.7), as would be the case with a new private client.

1.11:500 Government Lawyer Negotiating for Private Employment

- Primary DC References:
- Background References: ABA Model Rule 1.11(c)(2), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § , Wolfram §

The DC Rules contain no provision corresponding to MR 1.11(c)(2).

1.11:600 Federal Conflict of Interest Statutes and Regulations

Discussed in this section are eleven federal statutory prohibitions and related regulations addressing conflicts of interest on the part of present or former officers or employees of the Federal (and in some instances of the District of Columbia) government. None of the statutory prohibitions is limited in application solely to lawyers, but all apply to lawyers, and that application gets particular attention in this discussion. The conflicts dealt with by the several provisions are, in each instance, conflicts between public responsibilities and private interests. All of the statutory provisions are found in Chapter 11 (Bribery, Graft and Conflicts of Interest) of Title 18 of the United States Code, the Federal Criminal Code.

Seven of the statutory provisions are post-government-employment restrictions, all found in various subsections of 18 USC § 207 and deriving in their present form from Pub. L. No. 87-849, 76 Stat.1119 (1962), as amended by the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, and the Ethics Reform Act of 1989, Pub. L. No.101-194, 103 Stat. 1716 (hereinafter, collectively, the "Act"). (There are a few other federal statutory provisions, not addressed in this discussion, that impose post-employment restrictions with respect to particular agencies: see, e.g., 12 USC § 2242(a), relating to Members of the Board of the Farm Credit Administration; 12 USC § 1812(e), relating to Members of the Board of the Federal Deposit Insurance Corporation; and 28 USC § 594(j)(2), relating to Independent Counsels and their staff.)The other four restrictions, also deriving in their present form from Public Law 87-849 (1962), address various potential conflicts between governmental responsibilities and private interests of government employees arising while they are in office.

<u>The Statutory Post-Employment Restrictions</u>

The seven post-employment restrictions are discussed below in an order slightly different from the order in which they appear in section 207, since the subject matter of one provision, section 207(b), fits it more comfortably at the end rather than in the middle of the series of post-employment provisions. The seven restrictions, in the order in which they are here discussed, are as follows:

> [1] A permanent prohibition (roughly paralleled, as to lawyers, by Rule 1.11) on former executive branch officers or employees making representational communications with or appearances before government agencies in particular matters involving a specific party or parties, in which they participated personally and substantially while in government. (18 USC § 207(a)(1), discussed under 1.11:610, below)
>
> [2] A two-year prohibition on former executive branch employees making representational communications with or appearances before government agencies in particular matters involving a specific party or parties, that were under their

"official responsibility" while in government. (18 USC § 207(a)(2), discussed under 1.11:620, below)

[3] A one-year prohibition on former *senior* executive branch employees making representational communications with or appearances before their former agencies in any matter. (18 USC § 207(c), discussed under 1.11:630, below).

[4] A one-year prohibition on former *very senior* executive branch employees making communications with or appearance before either their former agencies or senior employees of other executive branch agencies. (18 USC § 207(d), discussed under 1.11:640, below).

[5] A one-year prohibition on former members of Congress and certain categories of former employees of the legislative branch making representational communications with or appearances before specified categories of persons and entities in the legislative branch. (18 USC § 207(e), discussed under 1.11:650, below).

[6] A one-year prohibition on former members of Congress and former employees of the legislative and executive branches who are subject to the preceding three prohibitions (i.e., those imposed by 18 USC §§ 207(c), (d) and (e)) representing, aiding or advising foreign governments or political parties with the intent to influence any officer or employee of any department or agency of the United States. (18 USC § 207(f), discussed under 1.11:660, below).

[7] A one-year prohibition on former members of Congress and former employees of either the executive or the legislative branch aiding or advising any person (other than the United States) regarding trade negotiations in which the former members or employees had participated while in government. (18 USC § 207(b), discussed under 1.11:670, below).

Three of these seven prohibitions -- nos. [1], [2] and [4] in the listing above -- apply to former employees of the District of Columbia, as well as of the federal government; the other four apply only to former federal employees.

General Exceptions to the Statutory Post-Employment Prohibitions

Section 207(j) sets out seven general exceptions each of which is applicable to either some or all of the seven post-employment prohibitions contained in section 207. They are as follows:

(1) Official Government Duties: "[A]cts done in carrying out official duties on behalf of the United States or the District of Columbia or as an elected official of a State or local government." (Applicable to all seven of the post-employment prohibitions in section 207.)

(2) State and Local Governments and Institutions, Hospitals and Organizations: Acts done in carrying out official duties as an employee and on behalf of an agency or instrumentality of a state or local government or of any accredited degree-giving institution of higher learning or hospital or medical research organization. (Applicable only to subsections (c), (d) and (e) of section 207.)

(3) International Organizations: "[An appearance or communication on behalf of, or advice or aid to, an international organization in which the United States participates, if the Secretary of State certifies in advance that such activity is in the interests of the United States." (Applicable to all seven of the post-employment prohibitions in section 207.)

(4) Special Knowledge: Making or providing a statement that is based on the individual's own special knowledge in a particular area, provided that no compensation is received therefor. (Applicable only to subsections (c), (d) and (e) of section 207.)

(5) Scientific or Technological Information: "[M]aking of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned . . .." (Applicable only to subsections (a), (c) and (d) of section 207.) **5 CFR § 2637.206** casts some light on this exception, although as a technical matter it implements a predecessor provision,

(6) Testimony: Giving testimony under oath or making statements required to be made under penalty of perjury, subject to certain restrictions on serving as an expert witness. (Applicable to all seven of the post-employment prohibitions in section 207.) **5 CFR § 2637.208**, again implementing a predecessor provision, is also applicable to this exception.

(7) Political Parties and Campaign Committees: Communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national federal campaign committee, a state committee or a political party. Certain limitations apply. (Applicable only to subsections (c), (d) and (e) of section 207.)

EEOC v. Exxon Corporation, 202 F.3d 755 (5th Cir. 2000), addressed the application of the exception for testimony, in section 207(j)(6), in the context of the prohibition of section 207(a)(1) (discussed under 1.11.610. immediately below). There, the EEOC had challenged, as a violation of the Americans with Disabilities Act, Exxon's substance abuse policy, which permanently barred from certain positions employees who had undergone substance abuse treatment. Exxon asserted in defense that the government had required the policy as condition of settling criminal charges arising out of the Exxon Valdez oil spill. Exxon had retained two former Department of Justice lawyers who had been involved in the prosecution and settlement of the Valdez case, to testify as both fact and expert witnesses in support of that defense. The

Department of Justice argued that their testimony would not be within the testimonial exception provided by section 207(j)(6) and so would violate section 207(a)(1), and relied in this connection on the suggestion in **OGE Informal Advisory Opinion 89 x 20 (December 20, 1989)** that the exception applies to *expert* testimony only if it is not compensated. The court rejected this argument, finding no statutory authority or explanation for the limitation or the statutory exception suggested by **Opinion 89 x 20**, and further finding that the testimony proposed to be offered here was within the following exception as set out in 5 CFR § 2637.208(b)(1):

> To the extent that the former employee may testify from personal knowledge as to occurrences which are relevant to the issues in the proceeding, including those in which the former Government employee participated utilizing his or her expertise….

Id at 757

.

The Department of Justice also argued that the testimony would be barred by DC Rule 1.11, and the court acknowledged that that Rule's broader "employment" language might be so construed. It concluded, however, that Rule 1.11 did not bar the testimony:

> No District of Columbia court has so applied the rule, however, and such an application would conflict with the EIGA and various other rules, including those of the District of Columbia. As we have seen, the EIGA allows fact and expert witnesses under certain circumstances. The ABA Model Rules and the corresponding state rules all permit a lawyer to use information that has become publicly known. See ABA Model R. 1.9(c)(1); Tex. Bar R. 1.05(b)(3); D.C. Bar R. 1.6 cmt. 8. These rules suggest that the sharing of public information in itself does not present an ethical bar.

Id. at 758.

The application of the exemption relating to political parties and campaign committees in section 207(j)(7) to former executive branch employees who serve on a Presidential transition team was addressed in an **OLC Opinion dated November 6, 2000**. The issue was whether a candidate for President remains a "candidate," for purpose of the exemption's application to members of the transition team, during the period between becoming President-elect (upon tallying of the votes of the electors, on January 6), and actually taking office, on January 20. Looking beyond the literal terms of section 207(j)(7) to legislative history and purpose, the **Opinion** concluded that the exemption remains applicable to members of a transition team during that period.

<u>The "Clinton Pledge"</u>

A so-called "Clinton Pledge" was put into effect at the commencement of the Clinton administration by **Exec. Order No. 12834**, 58 Fed. Reg. 5911 (1993) (which bore the title *Ethical Commitments by Executive Branch Appointees*), and revoked upon its termination

by **Exec. Order 13184**, 66 Fed. Reg. 695 (2001). The "Clinton Pledge" effectively expanded two of the statutory post-employment prohibitions, section 207(c) (discussed under 1.11:630, below), and section 207(f) (discussed under 1.11:660, below), by imposing on the categories of Executive Branch employees subject to those provisions the requirement of a pledge imposing a contractual commitment to abide by the statutory prohibitions for a longer period than required by statute. **Exec. Order 13184** not only eliminated the pledge requirements, but released those who had signed such a pledge from the obligation to comply with it. In consequence, the "Clinton Pledge" is now of purely historical interest.

The Statutory Restrictions on Conflicts of Interest During Government Service

The four statutory provisions regarding conflicts between governmental responsibilities and private interests of government employees, all of which apply to employees of the District of Columbia as well as the federal government, are the following:

> [8] A prohibition on both payment to and receipt by present or former government employees of compensation derived from services rendered by such an employee or anyone else in representing someone before the government. (18 USC § 203, discussed under 1.11:680, below).
>
> [9] A prohibition on certain representational activities relating to claims against and other matters affecting the government. (18 USC § 205, discussed under 1.11:690, below.)
>
> [10] A prohibition on certain acts by government employees affecting a personal financial interest -- applying, inter alia, to negotiations for post-government employment. (18 USC § 208, discussed under 1.11:695, below).
>
> [11] A prohibition on receipt by government employees of compensation from non-governmental sources for governmental service. (18 USC § 209, discussed under 1.11:699, below).

Interpretive Authority

Authoritative interpretive guidance with regard to most of these statutory prohibitions is sparse.

Regulations issued by the Office of Government Ethics (OGE) that appear as **5 CFR Part 2637** provide authoritative guidance for application of the post-employment provisions as they stood prior to the 1989 amendments: that guidance is in terms applicable only to employees who left government employment before January 1, 1991, the effective date of those amendments, and as to them only with respect to the lifetime prohibition of section 207(a)(1)(the only provision of section 207 that, because of the time limits on the others, remains effective as to such employees). With respect to the amended provisions, and application of the Act to post-1990 departures, the regulations in Part 2637 have some

value, but that value necessarily varies inversely with the degree to which the amendments made substantive changes in the statutory provisions. As of the time this text was most recently revised (September 2001), OGE had issued, in **5 CFR Part 2641**, regulations interpreting and implementing section 207(c), as amended – discussed under 1.11:630, below -- but had not yet adopted regulations interpreting the other provisions of the Act as amended. OGE did promulgate in 1990 a memorandum titled **Summary of Post-Employment Restrictions of 18 USC § 207** (herein the **OGE Summary**), which was redistributed in 1992 and updated and reissued again in February 2000. However, the **OGE Summary** still carries the disclaimer that it "reflects only a preliminary interpretation" of the 1989 and subsequent amendments. *Id*. at 1. It does not address the provisions of section 207(e) (see 1.11:650, below), which set out post-employment restrictions applicable to employees of the legislative branch.

As to the restrictions on conflicts of interest during government service, only section 208 is illuminated by formal regulations, which are found in **Subparts D, E and F of 5 CFR 2635** and in **5 CFR Part 2640**.

Some authority is also to be found with respect to almost all of the statutory provisions in Informal Advisory Opinions of OGE, a sprinkling of court decisions, and an occasional opinion by the Office of Legal Counsel (OLC) in the Department of Justice.

Penalties and Other Remedies

18 USC § 216 sets out criminal penalties and other remedies for all eleven of the statutory prohibitions. The criminal penalties are imprisonment for up to one or up to five years, depending on whether the offense was committee willfully, and/or a fine (as specified by the general fine statute, 18 USC § 3571) of up to $100,000 for a misdemeanor or $250,000 for a felony up to one or to five years in prison, depending on whether the offense was willfully committed; and fines of double these amounts in the case of organizational defendants. In addition, Section 216 makes provision for the Attorney General to bring actions for a civil penalty of $50,000 or the amount of compensation paid or offered for the prohibited conduct, whichever is larger; and for injunctive relief.

"Special Government Employees"

A category of employee that is specifically mentioned in most (though not all) of the eleven statutory prohibitions is that of "special Government employee," a term defined in 18 USC § 202(a) as an officer or employee of the executive or legislative branch or any agency of the United States government or of the District of Columbia who is employed to perform temporary duties, with or without compensation, for no more than 130 days out of any period of 365 consecutive days, or an independent counsel appointed under Chapter 40 of Title 28, or any person appointed by an independent counsel. The term also includes any person serving as a part-time local representative of a Member of Congress in the Member's home district or state, and reserve officers of the armed forces or officers of the National Guard while on active duty for training. An individual is designated a "special Government employee" only if at the time of his or her appointment it is estimated that he or she will fit the literal definition of the term.

OGE Advisory Opinion 00 x 1 (February 15, 2000) provides a quite comprehensive summary of how the various statutory prohibitions apply to Special Government Employees.

1.11:610 Restrictions Arising from Former Government Service: Permanent Prohibition with Respect to Particular Matters Participated in Personally and Substantially (18 U.S.C. § 207(a)(1))

Section 207(a)(1) imposes a permanent bar against a former employee of the executive branch of the United States, or of the District of Columbia, "knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court martial of the United States or the District of Columbia" on behalf of another person in connection with a "particular matter" --

> (A) in which the pertinent government is a party or has a "direct and substantial interest,"
>
> (B) in which the former government employee while in government "participated personally and substantially," and
>
> (C) which involved "a specific party or parties" at that time.

The bar explicitly applies not only to full-time government officers and employees but also to "special Government employees." And although the text of section 207(a)(1) refers only to employees of the executive branch of the federal government, the prohibition applies as well to employees of independent agencies. (This is made clear by the fact that subsections (b), (c) and (d) of section 207 (discussed, respectively, under 1.11:670, 1.11:630 and 1.11:640, below) all explicitly apply to employees of independent agencies as well as those of the executive branch, and all assume that this is also the case with subsection (a), to which each of them makes explicit reference.)

The bar applies to communications to and appearances before the executive and the judicial branches, but not the legislative branch. However, "[f]ormer employees must exercise care in their communications with the legislative branch since such communications may unavoidably also be directed to employees of a department or agency." **OGE Informal Advisory Opinion 93x26 (October 4, 1993).**

Although the prohibition applies to former employees of both the United States and the District of Columbia, section 207(a)(3) makes clear that former federal employees are barred from contacts with officers and employees of the specified entities of the U.S. Government, while former DC employees are prohibited from contacts with the specified entities of the DC Government; neither group is barred from contacts with entities of the other government.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (a)(1) is subject to only four of those exceptions, namely, nos. (1) -- Official government duties; (3) -- International organizations; (5) -- Scientific or technological information; and (6) -- Testimony.

Comparison to Rule 1.11

The statutory bar imposed by section 207(a)(1) is similar to the ethical prohibition imposed by Rule 1.11; it is, indeed, in major respects the model on which the Rule is based. The parallels are that both provisions are permanent, lifetime bars; and that both turn on personal and substantial participation while in government in a particular matter involving a specific party or parties, and on post-government employment in such a particular matter. The key term "matter," moreover, is defined almost identically in the two provisions. There are, however, important differences. The statutory provision is broader in scope in that it applies to all former government employees, whether or not they are lawyers, while the Rule of course applies only to lawyers. But in a very significant way the Rule casts a broader net, for while the statutory provision applies only to representational contacts, with "intent to influence," with any officer or employee of the executive or judicial branches of the government, and so does not prohibit "back office" work, or advice or assistance to another, or representational activities directed to a person or entity other than the government, the Rule prohibits *any* activity on behalf of a client with respect to a tainted "particular matter." And finally, the statute is concerned only with a post-employment "matter" that is the *same* as the governmental matter, and in which at the time of the former employee's post-employment contact with the matter the government is a party or has a direct and substantial interest, whereas the DC Rule's post-employment "matter" need not be *same* as, but may be only *substantially related* to the governmental "matter," and there is no requirement of a continuing governmental interest in order for the Rule's prohibition to apply.

"Particular Matter Involving a Specific Party or Parties"

This phrase is critical in determining the scope of the prohibition of section 207(a)(1), as well as that of section 207(a)(2) (discussed in 1.11:620, immediately below). The term "particular matter" is defined in section 207(i)(3) to include "any investigation, application, request for a ruling or other determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." The final phrase "involv[ing] a specific party or parties," which limits the defined term "particular matter" as used in the prohibitory provisions of section 207, is not defined in section 207(a)(1). However, **5 CFR § 2637.201(c)(1)** sheds some illumination by stating that "[s]uch a matter typically involves

a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties."

"Rulemaking" was added to the list of examples of "particular matters" by the Ethics Reform Act of 1989; before that, rulemaking was not only not included in the examples of a "particular matter," but was expressly excluded from the definition by the pertinent regulations. Thus, **5 CFR § 2637.201(c)(1)**, interpreting section 207 as it stood before the 1989 amendments, draws a distinction between "specific matters" and "policy matters," and declares that "[r]ulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application" were not "particular matters" under section 207 as it stood before the 1989 amendment. It followed that a former government employee could "represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding." *Id.* Thus, the addition in 1989 of "rulemaking" to the examples of a "particular matter" broadened somewhat the scope of the Act's prohibition. The change was not, however, a major one, since "particular matter" must still be read together with the requirement that the matter involve "a specific party or parties": thus, a "rulemaking" will be a "particular matter" only as it involves such specific parties. And "[g]eneral rulemakings do not usually involve specific parties." **OGE Summary** at 4. "Consequently, it is quite possible that an employee who participated in a rulemaking while employed by the Government will, after leaving Government service, be able to appear before his former agency concerning the application of that rule to his new private sector employer without violating the . . . restriction." *Id.* There does not appear to be any authoritative guidance as to what sorts of rulemakings would be construed as involving specific parties under the various subsections of section 207 that are governed by the definition in subsection (i), but some guidance may be provided by the regulations addressing waivers and exemptions under section 208, **5 CFR Part 2640**, making a distinction between a "particular matter involving specific parties" and a "particular matter of general applicability" – the latter being defined to mean a "particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties." See 1.11:695 at "Waivers and Exemptons," below.

OGE Informal Advisory Opinion 90 x 7 (April 17, 1990) rejected an argument that bilateral trade agreements regarding specific products are not matters involving specific parties because they have general application to specific industries, not individual companies, and so are comparable to general rulemakings. The **Opinion** held that the countries that are parties to such trade agreements are "specific parties" within the meaning of section 207(a).

The text of section 207(a)(1)(C) makes clear that the "particular matter" in which the departed employee participated while in government must have involved a "specific party or specific parties *at the time of such participation*." (Emphasis added.) Although the statutory text does not refer to "specific party or parties" in connection with the post-

employment matter, OGE takes the view that the prohibition also requires that the matter involve some specific party or parties at the time of the post-employment communication or appearance, though such parties need not be the same specific parties as were involved at the earlier stage. **OGE Summary** at 4. The **OGE Summary** goes on to say that contracts are always particular matters involving specific parties, and that a Government procurement proposal "has specific parties identified to it when a bid or proposal is received in response to a solicitation, if not before." *Id.*

The prohibition applies only when the "matter" in which the former government employee participated while in government and the matter with respect to which a disqualification may arise after the former government employee leaves the government are the *same* particular matter although, as has been explained, the specific parties involved may be different. "The same particular matter," however, "may continue in another form or in part." **5 CFR § 2637.201(c)(4).** In the determination of whether a "matter" remains the "same," albeit continuing in another form or part, the relevant factors are "the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest." *Id.* In determining whether two situations are part of the same particular matter, "one should consider all relevant factors, including the time elapsed and the extent to which the matters involve the same basic facts or issues and the same or related parties." **OGE Summary** at 4.

OGE Informal Opinion 99 x 6 (September 10, 1999) addressed the question whether a former employee of a government agency who had participated personally and substantially in the formulation of a statement of principles for two acquisition programs for wide-area services, and in addition had so participated in one of the two programs, was barred by section 207(a)(1) from subsequent participation, in a private capacity, in the other program. The **Opinion** concluded that he was so barred because there was too much overlap between the statement of principles and the program it governed, per 5 CFR § 2637.201 (c)(4), for the latter to be treated as a separate particular matter.

OGE Informal Opinion 99 x 23 (December 6, 1999) addressed a situation where a government agency employee had provided a briefing and a written memorandum about a proposed merger that had been announced in the media and that would be subject to review by the agency. At the time no application had yet been filed with the agency regarding the proposed merger. The issue was whether the employee, after leaving government service, would be barred by section 207(a)(1) from private representation regarding the merger, and this turned on whether the merger constituted a particular matter involving a specific party or parties at the time he advised the agency about it, even though it was not yet formally before the agency. The **Opinion** concluded that it did constitute such a particular matter.

It is clear that assignment of a contract with the Government from one contractor to another, and modifications to the terms of the contract, do not necessarily make the resulting contract into a separate "matter" from the original one. **OGE Informal Advisory Opinion 91 x 24 (July 17, 1991.)**

"Personal and Substantial Participation"

Section 207(i)(2) defines the term "participated," but only by non-exclusive example; it says that "'participated' means an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, *or other such action*." (Emphasis supplied). No separate definition is provided in the statutory text for the modifying phrase "personally and substantially." Before the 1989 amendments, the Act did not define "participated" separately; rather, the examples now given in section 207(i)(2) followed the phrase "personally and substantially participated by . . ." in the prohibitory text of the provision. Clearly enough, however, the phrase "personally and substantially" continues substantively to modify "participated." And the regulations interpreting "personally and substantially" as used in the Act before the 1989 amendments clearly continue to offer guidance. Thus,

> To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the former Government employee in the matter. "Substantially" means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participation in a critical step may be substantial.

5 CFR § 2637.201(d)(1). The **OGE Summary** elaborates that "An employee can participate 'personally' in a matter even though he merely directs a subordinate's participation." *Id.* at 4.

In **Shakeproof Indus. Prods Div. of Ill. Tool Workers, Inc. v. United States, 104 F.3d 1309 (Fed. Cir. 1997)**, the plaintiff sought to compel the Commerce Department to disqualify a law firm from representing another party in an antidumping review proceeding involving spring lock washers, on the basis that a member of the firm had been an Assistant Secretary of Commerce for the Import Administration at the time the antidumping investigation began. The critical issue was whether the lawyer in question had participated personally and substantially in the investigation while at the Commerce Department, so as to require his disqualification under either DC Rule 1.11 or section 207(a). Two documents lay at the heart of the dispute. One was the document that had initiated the antidumping

investigation, which had been signed by the Assistant Secretary's deputy. The Commerce Department had found that this did not constitute personal and substantial participation by the Assistant Secretary, and the Court agreed. *Id.* at 1313. The second document, which the Court found to present a closer case, was one by which the Assistant Secretary had approved a particular method for treating voluntary respondents in non-market economy antidumping cases. The Department had concluded that this document "reflected a policy matter of general applicability, not a decision specific to the lock washer case," although it did refer to that case "by way of illustrating the operation of [the] general policy." *Id.* at 1313-14. As to this, the Court asserted that, "[w]hile there is ground for debate about the proper characterization of that document, we conclude that the Commerce Department's characterization was not arbitrary or capricious." *Id.* at 1314.

In **Kelly v. Brown, 9 Vet. App. 37 (1996)**, the then Court of Veterans Appeals (since renamed the United States Court of Appeals for Veterans Claims) considered whether a lawyer should be disqualified from representing the appellant in a case, in light of the prohibitions of section 207(a)(1) or Rule 1.11 of the Model Rules, by reason of his having previously had contacts with the case while employed by the Department of Veterans Affairs. The contacts in question had consisted of signing a motion for an extension of time and a filing transmitting to the Court the decision of the Board of Veterans Appeals here appealed from. The Court concluded that these contacts did not amount to substantial participation in the case, for purposes of either the statute or the Rule.

It should be noted that the "personal and substantial participation" must have occurred when the government officer or employee was acting "as such," which is to say, in the course of his or her official duties. The point is illustrated by **OGE Informal Advisory Opinion 95 x 12 (November 15, 1995)**, which addressed (but did not resolve) the question whether a former government employee who, while in government, had represented a fellow employee with respect to two EEO complaints, could, consistently with section 207(a)(1), continue the representation after departure from government service. The **Opinion** noted that although section 205(a) generally prohibits an employee from acting as agent or attorney for anyone else in a matter in which the United States is a party or has a substantial interest, it does make an exception where the representation is "in the proper discharge of [the employee's] duties." [See 1.11:690, below.] Were this the case, then because the representation would have originally been pursuant to the employee's "official duties," continuation of the representation post-government employment would be prohibited by section 207(a)(1). The **Opinion** also noted, however, that subsection (d) of section 205 permits an employee to represent another who is subject to administrative proceedings "if not inconsistent with the faithful performance of his duties." If this had been the ground of the representation in question, then the post-employment prohibition of section 207(a)(1) would not apply. (The **Opinion** did not reach a conclusion as to which provision of section 205 applied in the particular circumstances to which it was addressed.)

The regulations interpreting section 207 prior to the 1989 amendments provide additional elaboration that appears to remain valid. *First*, they suggest that actions do not constitute "personal and substantial participation" in a matter if they are not taken after consideration of the merits of the matter. For example, "[i]f an officer personally *approves* the departmental budget," he is considered to have participated substantially "only in those cases where a[n individual] budget item is actually put in issue" before him. **5 CFR § 2637.201(d)(1), Example 1** (emphasis added). And even though an officer or employee could or does cause *disapproval* of a matter for failure to comply with administrative control, budgetary, or other non-substantive standards, he or she "should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the . . . [subsequent] representation." **5 CFR § 2637.201(d)(2)**. On the other hand, if an employee has authority to review a matter and to veto it, his or her reviewing it and passing it onto another without other action may constitute "personal and substantial participation." **5 CFR § 2637.201(d)(3)**.

Second, under the regulations "self-disqualification" by a government employee from a particular matter before his agency thereby avoids personal or substantial participation with respect to that matter. **5 CFR § 2637.202(b)(5)**. Such screening, however, does not protect against a finding that a former government employee had "official responsibility" for the screened matters, thereby invoking the two-year prohibition of section 207(a)(2), discussed in 1.11:620, immediately below. *Id.* Indeed, the very fact of screening would suggest that the matter in question was within the bounds of the employee's "official responsibility."

OGE Informal Advisory Opinion 99 x 11 (April 19, 1999) made clear that the substantiality of an employee's participation in a particular matter, for purposes of section 207(a)(1), does not depend on the dollar amount involved in the matter (or in the portion of the matter) in which the employee participates. It also pointed out that the term "substantial" has essentially the same meaning in section 208 as in section 207.

Miscellaneous

In **United States ex rel. Siewick v. Jamieson Science and Engineering, Inc, 214 F.3d 1372 (DC Cir 2000),** the court rejected a claim that a violation of section 207 (presumably referring to 207(a)(1)) in connection with the procurement of a contract with the government had the effect of invalidating invoices submitted to the government pursuant to the contract, so as to give rise to claims under the False Claims Act, 31 U.S.C. §§ 3729(a), 3730(b).

1.11:620 Restrictions Arising from Former Government Service: Two-Year Prohibition with Respect to Particular Matters Under Official Responsibility (18 USC § 207(a)(2))

Section 207(a)(2) of the Act imposes on the same categories of persons that are subject to the lifetime bar of section 207(a)(1) (i.e., former officers and employees of the executive branches of the United States and District of Columbia) a bar on representational contacts with "intent to influence" with regard to particular matters involving a specific party or parties and in which the pertinent government is a party or has a direct and substantial interest, all of these elements being cast in terms identical to those of the lifetime bar. This bar, however, is broader as to subject matter and narrower as to time than the former prohibition. Specifically, rather than imposing a lifetime ban, applying only to matters in which the former government employee participated "personally and substantially," it applies to any particular matter that the former officer or employer "knows or reasonably should know was actually pending under his or her official responsibility . . . within a period of 1 year before termination of his or her service or employment" with the government in question, and the ban applies for just two years after termination of government service.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (a)(2) is subject to the same four of those exceptions as that of subsection (a)(1), namely, nos. (1) -- Official government duties; (3) -- International organizations; (5) – Scientific or technological information; and (6) Testimony.

The discussion of section 207(a)(1), under 1.11:610 above, with regard to the term "particular matter" and the nature of the prohibited representational contacts, need not be repeated here, for the language of the two provisions on those points is identical. As to "official responsibility," that is defined by section 202(b) as "direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions." The **OGE Summary** elaborates that

> The scope of an employee's official responsibility is usually determined by those areas assigned by statute, regulation, executive order or job description. All particular matters under consideration in an agency are under the official responsibility of the agency head, and each is under that of any intermediate supervisor having responsibility for the activities of a subordinate employee who actually participates in the matter. An employee's recusal from or other non-participation in a matter does not remove it from his official responsibility.

Id. at 5. The Regulations also specify that an employee does not have "official responsibility" for the substance of a matter by virtue of "authority to review or make decisions on ancillary aspects of [it] such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations." **5 CFR § 2637.202(b)(3)**.

Since the bar applies only to a matter that the former official "knows or reasonably should know was actually pending . . . within a period of 1 year before the termination of his or her service," it will not apply if the matter was concluded earlier in the former employee's tenure.

The **OGE Summary** states that "[a] matter was `actually pending´ under a former employee's official responsibility if the matter was in fact referred to or under consideration by persons within the employee's area of responsibility." *Id.* at 5.

OGE Informal Advisory Opinion 99 x 11 (April 29, 1999) explained that a matter need only to have been "pending" while under a former employee's "official responsibility," for purposes of invoking section 207(a)(2), and no action need actually have been taken on the matter during that time. The **Opinion** therefore found that an interpretation of the phrase "official responsibility" in section 207(a)(2), as not applying to a matter as to which no employees under the former employee's supervision had no substantial duties, would be erroneous.

The **OGE Summary** confirms that whether a former employee "knows or reasonably should know" that the matter had been under the former employee's official responsibility relates to the state of the former employee's knowledge at the time of the proposed post-employment representation, rather than to awareness of the matter while still in office. *Id.* at 5-6.

"Reasonably should know" appears to suggest some degree of obligation to make appropriate inquiries of the former agency, at least, and perhaps the prospective client as well.

As with the lifetime bar of section 207(a)(1), this bar applies only if the United States (or the District of Columbia) is a party to or has a substantial interest in the matter at the time of the post-employment representation. And as with that bar, this one does not prohibit representation through in-office assistance, such as drafting, counseling, and providing strategic advice. Also as with that bar, it restricts former federal employees only from contacts with agencies of the federal government, and former District of Columbia employees only from contacts with that government. Section 207(a)(3).

1.11:630 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Senior Personnel (18 USC § 207(c))

Section 207(c) imposes on certain former "senior personnel" of the executive branch, including any independent agency, of the federal government (but not, in this case, the DC government) a one-year prohibition on representational communications with or appearances before an officer or employee of a department or agency in which he or she served within one year before leaving government, "with the intent to influence" such officer or employee "in connection with any matter on which such person seeks official action by any officer or employee of such department or agency." Unlike the prohibitions of sections 207(a)(1) and (a)(2), discussed immediately above, this prohibition does not depend on the former official having had any previous involvement in the matter that is the subject of the contacts with his or her former agency. The principal purpose of section 207(c) is to address "the problem of unfair or undue influence by former officials over their former colleagues and subordinates." **S. Rep. 95-170, at 154 (1977).**

"Senior" personnel to whom the prohibition applies are specified by section 207(c)(2) as those who fit in one of the following categories:

> (1) those employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5 [which refers to the Executive Schedule, comprising the five highest pay grades for non-elected Federal government officials];
>
> (2) those paid at a salary equal to or greater than level 5 of the Senior Executive Service [another five-stop scale of pay grades comprising government employees not subject to presidential appointment or Senatorial confirmation];
>
> (3) those appointed by the President to a position under section 105(a)(2)(B) of title 3 [certain White House employees];
>
> (4) those appointed by the Vice President under section 106(a)(1)(B) of title 3 [certain assistants to the Vice President];
>
> (5) active duty commissioned officers paid at pay grade 0-7 [brigadier general] or above; or
>
> (6) those detailed to any of the foregoing positions.

5 CFR § 2641.101. Excluded from the prohibition are *very* senior personnel who are subject to section 207(d) (discussed under 1.11:640, below); and "special Government employees" who served less than 60 days in the one-year period before termination of such

service. And the Director of the Office of Government Ethics is authorized to narrow the scope of the prohibition in various ways, as described below.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (c) is subject to all seven of those exceptions.

The one-year period in which the prohibition applies runs from the date on which employment as a senior employee ends, not the date of leaving government employment, if the two do not coincide. **OGE Summary** at 8. The **OGE Summary** explains that "[t]he purpose of this one-year `cooling off´ period is to allow for a period of adjustment to the new roles for the former senior employee and the agency he served, and to diminish any appearance that Government decisions might be affected by the improper use by an individual of his former senior position." *Id.*

Like the lifetime prohibition and the one-year prohibition in section 207(a), discussed under the two preceding headings, this prohibition applies only to representational communications or appearances with "intent to influence," and not to "behind-the-scenes" assistance. **OGE Summary** at 8. It applies, however, to any "matter" and, unlike those provisions, not merely to a "particular matter" involving a "specific party or parties"; nor need the "matter" involve a direct and substantial government interest. Additionally, as has been mentioned, there is no requirement that the former senior employee have had any prior involvement with the "matter" that is the subject of the communication or appearance. **OGE Summary** at 8. And, unlike the prohibitions in section 207(a), this prohibition applies to contacts only with the person's former agency, not the entire executive branch.

The **OGE Summary** reads the language of the statute literally to prohibit communication with an employee of *any* agency in which the former employee served in the one year period prior to termination of Senior Employee status, not simply the agency in which the former employee served as Senior Employee. *Id.* at 8. Thus, for example, if a former employee served in agency A in a non-Senior Employee post from January 1, 1996 to June 1, 1996 and served in agency B in a Senior Employee post from June 1, 1996 to January 1, 1997, she would be barred from communicating with employees of agency A *and* agency B from January 1, 1997 to January 1, 1998.

Section 207(c)(2)(C), which was added by the 1989 amendments, gives the Director of OGE authority, at the request of a department or agency, to waive the restrictions imposed, with respect to any position or category of positions in the department or agency, upon a determination that (i) the imposition of the restrictions with respect thereto would create an undue hardship in obtaining qualified personnel to fill the position, and (ii) granting the waiver would not create the potential for use of undue influence or unfair advantage.

In addition, section 207(h) authorizes the Director of OGE to designate an agency or bureau within a department or agency as a separate department or agency for purposes of section

207(c) when the Director determines that the agency or bureau performs separate functions that preclude the potential for undue influence over other parts of the parent department or agency. As an exception to this authority, no agency or bureau within the Executive Office of the President may be designated as separate, and designations of other agencies do not apply to persons who are Senior Employees by virtue of categories (1), (3) or (4) under subsection (c)(2), described in the text above. Section 207(h)(2). Thus, to take an example from the **OGE Summary**, OGE could designate the Defense Logistics Agency (DLA) as an agency that exercises functions that are separate and distinct from its "parent" department, the Department of Defense (DOD). *Id.* at 8. An individual formerly serving in the DOD but not the DLA would then be barred by section 207(c) from communicating with an employee of most agencies or bureaus of DOD, but would not be barred as to employees of the DLA. Conversely, an individual formerly serving with the DLA would be barred from communications with DLA employees, but not with employees of other agencies or bureaus of DOD. Prior to the 1989 amendments, the limitation of section 207(c)'s applicability resulting from OGE designations of separate agencies or bureaus did not extend to former officers or employees with official responsibility for supervision of such agencies. See **5 CFR § 2637.205(c)(3)** (interpreting what was then section 207(e), now amended and redesignated as section 207(h), and stating that such persons remained subject to the prohibition of section 207(c) on communicating with employees of the designated agency despite such designation). As a result of the 1989 amendments, the reference to officers or employees with supervisory responsibilities was dropped, so that such persons are no longer excluded on this basis from the effect of separate agency designations by OGE. This change in statutory language would, however, be of no practical effect if the officer or employee were a Senior Employee in category (1), (3) or (4) under subsection (c)(2). Moreover, where the communication related to a particular matter *involving specific parties*, the two year prohibition of section 207(a)(2) (discussed under 1.11:620 above) would apply in any event.

1.11:640 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Former Very Senior Personnel (18 USC § 207(d))

Section 207(d), like section 207(c), discussed immediately above, imposes a one-year prohibition on post-employment representational contacts with "intent to influence"; but unlike section 207(c), it applies only to former *very* senior employees; it prohibits such contacts not only with any such employee's former department or agency but with high-level personnel in *any* department or agency; and it is subject to no limitation by determinations of the Director of OGE. The "very senior personnel" to whom the prohibition applies are

(1) the Vice President;

(2) persons in executive branch positions, including positions with an independent agency, paid at Level I of the Executive Schedule;

(3) persons in the Executive Office of the President paid at Level II of the Executive Schedule or above;

(4) persons appointed by the President under section 105(a)(2)(A) of title 3 [certain White House employees]; and

(5) persons appointed by the Vice President under section 106(a)(1)(A) of title 3 [certain assistants to the Vice President].

With respect to the second of these categories, an **OLC Opinion dated November 3, 2000** advised that the restriction imposed by section 207(d) does not apply to an employee receiving pay *exceeding,* as distinct from *the same as,* that for Level I -- a circumstance applicable to certain employees of the Treasury Department. Those employees would nevertheless be subject to the less stringent restrictions imposed by section 207(a) (discussed under 1.11.630, above).

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (d) is subject to all seven of those exceptions.

There are two categories of persons that the former very senior employee may not make representational contacts with during the one-year period. The first is employees of the department or agency in which the very senior employee served as such within the one-year period preceding termination of his or her government employment. Section 207(d)(2)(A). This is substantially equivalent to the restriction imposed by section 207(c) on former

senior employees, except that there is no comparable provision for designation of separate agencies or exemption of particular positions by OGE.

In addition, very senior employees are prohibited from contacting "any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5" [listing the grades of the Executive Schedule], regardless of whether these persons serve within the very senior employee's former agency. Section 207(d)(2)(B).

The prohibition applies for one year following the date on which the former employee ceased to be a very senior one, and not from the termination of government service, unless the two dates are the same. **OGE Summary** at 9.

Like the prohibition of section 207(c), this one applies to communications or appearances with respect to all matters, regardless of whether they involve specific parties; but, again, it does not prohibit in-office drafting or counseling.

1.11:650 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to the Legislative Branch (18 USC § 207(e))

Section 207(e) of the Act, which was added by the 1989 amendments, applies only to former Members of Congress and to certain former senior officers and employees of the legislative branch. The post-employment restrictions it imposes on persons in the legislative branch are similar to those imposed on executive branch personnel by sections 207(a)(2), 207(b) and 207(c) (addressed in 1.11:620 above, 1.11:670 below and 1.11:630 above, respectively). Its prohibition is on "knowingly mak[ing], with the intent to influence, any communication to or appearance before" specified persons within the legislative branch, "on behalf of any other person (except the United States) in connection with any matter on which [the former Member or employee] seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity." The prohibition lasts for a period of one year from the date on which the former employee left the position giving rise to the prohibition. If the former employee served in more than one position with the legislative branch in the year before leaving government, it is possible that he or she may be prohibited from contacting different groups of legislative employees by virtue of each position. For example, a person serving on a Member's personal staff through June 30, 1998, and then on a committee staff through December 31, 1998, joining a private law firm on January 1, 1999, would be barred from contacting the Member's personal staff until July 1, 1999, and from contacting the committee staff until January 1, 2000.

The categories of legislative personnel who may not be contacted vary depending on the position held by the former Member or government employee. Thus, there are six somewhat intricate levels of prohibited contacts:

> [1] Former Members of Congress (who include, in addition to Senators and Representatives, Delegates and Resident Commissioners to the House of Representatives, sections 207(e)(7)(J) and (K)) are barred from contacting "any Member, officer, or employee of either House of Congress, and any employee of any other legislative office of the Congress." Section 207(e)(1)(B).
>
> [2] Former elected officers of either House of Congress (e.g., the sergeant-at-arms of either House) are barred from contacting "any Member, officer, or employee of the House of Congress in which the elected officer served." Section 207(e)(1)(C). As to employees of a joint committee, the former elected officer is barred from contact if the particular employee's pay is disbursed by the Clerk or Secretary of the House of Congress in which that former officer served. Sections 207(e)(7)(C) and (D).

[3] Former employees on a Member's personal staff who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the House of Congress in which the employee was employed are barred from contacting the Member on whose staff they served, and any employee (regardless of pay level) of that Member. Sections 207(e)(2) and (6). A person is an employee of a Representative if employed "under the clerk hire allowance," section 207(e)(7)(E), and an employee of a Senator if that person "is an employee in a position in the office of a Senator," section 207(e)(7)(F).

[4] Former employees on the staff of any Committee of Congress (defined to include "standing committees, joint committees and select committees," section 207(e)(7)(A)), who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the pertinent House of Congress are barred from contacting any Member or employee (regardless of pay level) of their former committee, and any Member (but not employee) who, even if no longer on that committee, was on it during the year prior to the former staff member's termination. Sections 207(e)(3) and (6)(A).

[5] Former employees on the leadership staff of either House of Congress who for at least 60 days in the aggregate during the one-year period before such employment was terminated were paid at a level equal to or above 75 percent of the basic rate of pay of a Member of the pertinent House of Congress are barred from contacting any Member who is a member of the leadership or any employee (regardless of pay level) on the leadership staff of the House of Congress for which the former employee served. Sections 207(e)(4) and (6). The leadership positions in the respective Houses are set forth at 207(e)(7)(L) and (M). An employee on the leadership staff means an employee of the office of a Member serving in a leadership position in either House, and "any elected minority employee of the House of Representatives." Sections 207(e)(7)(H) and (I).

[6] Former employees of any other legislative office of Congress who, for at least 60 days in the aggregate during the one-year period before such employment was terminated, were in a position for which the rate of basic pay is equal to or greater than that of level V of the Executive Schedule,are barred from contacting employees (regardless of pay level) and officers of the legislative office for which the former employee worked. Sections 207(e)(5) and (6)(B). Included in this provision are officers and employees of the Architect of the Capitol, the U.S. Botanic Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the U.S. Capitol Police, and any other agency, entity, or office of the legislative branch not covered by the prior categories. Section 207(e)(7)(G).

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (e) is subject to six of those seven exceptions, namely, nos. (1) -- Official government duties; (2) -- State and local governments and institutions; (3) -- International organizations; (4) -- Special knowledge; (6) – Testimony; and (7) -- Political parties and campaign committees.

It should be noted that the prohibition applies regardless of whether a former employee is seeking official action by the person contacted: the contact is prohibited if the purpose is to influence action by any Member, officer, or employee of either House. Thus, a former member of Senator X's staff cannot contact Senator X in order to seek Senator X's help to persuade Representative Y to take some action in Representative Y's official capacity. On the other hand, the provision does not prohibit the former member of Senator X's staff from approaching Representative Y directly. The only exception to this is in the case of former employees of other legislative offices, who may not contact employees of their former office for the purpose of influencing official action by that person or any other employee of their former office, but who may contact employees of their former office for the purpose of influencing official action by anyone else, including employees of a different legislative office or Members or staffers of either House of Congress. (This follows from the statutory language of section 207(e)(5), governing former employees of legislative offices, which differs from the formulation of sections 207(a)-(d) with regard to whose action is sought.)

The provisions of section 207(e) are not addressed by any reported court decisions, by Regulations, by the **OGE Summary** or by any OGE opinions. **OGE Informal Advisory Opinion 90 x 17 (October 26, 1990)**, which provides a summary of all the other post-employment restrictions of 18 U.S.C. § 207 as they stood after the 1989 amendments, does not address section 207(e). Thus, little official guidance beyond the language of the statute is currently available.

1.11:660 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Representation of Foreign Governments and Political Parties (18 USC § 207(f))

Section 207(f) was also added to the Act by the 1989 Amendments. It imposes a one-year post-employment prohibition with respect to representation of foreign governments and political parties on all former Members of Congress and former legislative branch employees who are subject to section 207(e) (discussed immediately above), and on former senior and very senior employees of the executive branch, as those categories are defined under sections 207(c) and (d) (discussed under 1.11:630 and 11:640, above). The bar in question is a permanent one for anyone who serves as United States Trade Representative or Deputy Trade Representative. Section 207(f)(2).

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (f) is subject to only three of those exceptions, namely, nos. (1) -- Official government duties; (3) -- International organizations; and (6) -- Testimony.

Section 207(f) goes beyond all the post-employment restrictions discussed above in that it prohibits not only appearances on behalf of a foreign government or political party but in-office activities such as counseling and drafting as well. Specifically, the provision prohibits both "represent[ing] a foreign entity before any officer or employee of any department or agency of the Government of the United States with intent to influence" that person's official decisions, section 207(f)(1)(A), and "aid[ing] or advis[ing] a foreign entity with the intent to influence a decision of any [such] officer or employee," section 207(f)(1)(B). The **OGE Summary** (interpreting the provision only as it applies to Executive Branch employees) points out that this includes such "behind the scenes" activities as drafting a proposed communication to an agency, advising on an appearance before an agency, or consulting on strategies designed to persuade decision-makers to take certain agency action. *Id.* at 11. Such activities are prohibited, however, only if they are intended to help influence "an official discretionary decision of a current departmental or agency employee." *Id.*

Section 207(f)(3) defines the term "foreign entity" as meaning the "government of a foreign country" or a "foreign political party" as those terms are defined in the Foreign Agents Registration Act of 1938 ("FARA"), 22 U.S.C. § 611 et. seq. The "government of a foreign country," as defined under FARA, includes any "person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country" as well as "any faction or body of insurgents within a country assuming to exercise governmental authority . . . [whether or not] recognized by the United States." 22 U.S.C. § 612(e). The definition extends as well to subdivisions and agencies of such governments, however named, to which sovereign authority or functions have been delegated. *Id.* "Foreign political party" is

defined very broadly under FARA to include any "organization or other combination of individuals" whose "aim or purpose," even in part, is to control or influence the government of a foreign country. 22 USC § 611(f). The **OGE Summary** provides some limitation, stating that "[a] foreign commercial corporation will not generally be considered a `foreign entity´ . . . unless it exercises the functions of a sovereign." *Id.* at 11.

1.11:670 Restrictions Arising from Former Government Service: One-Year Prohibition with Respect to Trade or Treaty Negotiations (18 USC § 207(b))

Section 207(b), also added by the 1989 amendments, is unique among the post-employment prohibitions of the Act in that it turns on the use of certain sensitive information rather than on efforts to influence governmental action. Along with section 207(f), it differs from the other five post-employment prohibitions in section 207 in prohibiting the aiding or advising of others and not solely representational contacts with government personnel.

Specifically, section 207(b) provides that for one year after termination of government service, no officer or employee of either the executive or the legislative branch (including Members of Congress) who within one year prior to such termination "personally and substantially participated" in any "ongoing trade or treaty negotiation" and had access to information about the negotiations that is exempt from disclosure under the Freedom of Information Act (FOIA), 5 USC § 552, may, on the basis of such information, knowingly represent, aid or advise any other person (except the United States) concerning such ongoing negotiations.

As described under 1.11:600, above, subsection (j) of section 207 sets out seven general exceptions to some or all of the post-employment prohibitions contained in that section. The prohibition of subsection (b) is subject to only three of those exceptions, namely, nos. (1) -- Official government duties; (3) -- International organizations; and (6) --Testimony.

It should be noted that although this statutory prohibition is limited to a one-year period following employment, a lawyer who is subject to that prohibition will likely be subject to a restraint on use of the information in question that is imposed by Rule 1.6 of the Rules of Professional Conduct, and that is without a time limit. See DC Rule 1.6(f) (making clear that the obligation to preserve confidences and secrets of a client continues after termination of the lawyer's employment).

The meaning of the phrase "personal and substantial participation," also an operative term in section 207(a)(1), is explored under 1.11:610, above. The **OGE Summary** adds that "[i]t is not necessary that a former employee have had actual contact with foreign parties in order to have participated personally and substantially in a trade or treaty negotiation." *Id.* at 6.

"Trade negotiation" is defined by section 207(b)(2)(A) as negotiations taking place after the President has determined to negotiate a trade agreement pursuant to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 ((OTCA) 19 USC § 2902). The **OGE Summary** states that *trade* negotiations become "ongoing" at the earlier of public announcement of a determination by the President or the giving of notice to Congress of his

intention to enter into an agreement, which must be given at least 90 days prior to entering into a trade agreement under 19 U.S.C. § 2903(e)(1)(A). *Id.* at 6. A "treaty," in turn, is defined by section 207(b)(2)(B) as "an international agreement made by the President that requires the advice and consent of the Senate." According to the **OGE Summary**, *treaty* negotiations become ongoing "at the point when both (1) the determination has been made by a competent authority that the outcome of a negotiation will be a treaty, and (2) discussions with a foreign government have begun on a text." *Id.* at 6. For the prohibition to apply, a former employee's personal involvement in the negotiations must have occurred after, and not before, the negotiations become "ongoing." *Id.*

The **OGE Summary** states that "[t]rade and treaty negotiations both cease to be ongoing when an agreement or treaty enters into force or when all parties to the negotiation cease discussion based on a mutual understanding that the agreement or treaty will not be consummated." *Id.* The **OGE Summary** does not address situations where such a cessation has occurred but the parties shortly thereafter change their positions and resume negotiations where they left off. Since the Act's restriction lasts for only one year in any event, it would seem prudent to assume that negotiations resumed within less than a year might well be treated as ongoing, rather than new, negotiations.

Assuming that a former government employee has participated personally and substantially in an ongoing trade or treaty negotiation (in the last year of government employment), he or she may not "knowingly represent, aid or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after his or her service or employment with the United States terminates," but the prohibition takes hold only if such representation is "on the basis of" information concerning the negotiations that he or she "knew or should have known" was designated by the appropriate department or agency as subject to a national security classification or otherwise exempt from disclosure under FOIA. Section 207(b)(1); **OGE Summary** at 7.

The **OGE Summary** also states that representation, aid or advice will have been given "on the basis of" restricted information if the "representation, aid or advice either involves a disclosure of covered information to any person, or could not have been made or rendered had the former employee not had actual knowledge of covered information." *Id*. The **OGE Summary** adds, however, that a former employee may utilize "information from an agency record which, at the time of his post employment activity, is no longer exempt from disclosure under the Freedom of Information Act." *Id.*.

The **OGE Summary** states that representation involves appearances before or communications with "any third party," including (but not limited to) "any employee of the executive, legislative or judicial branch of the Federal Government, including a Member of Congress." *Id*. Unlike the other prohibitions of section 207, this representation need not be intended to influence the taking of official action; it need only be "concerning" the treaty negotiations. A former government employee "aids or advises" another person "when he assists that person other than by communicating to or appearing before a third party." *Id*.

Because it is not enough simply to refrain from disclosing restricted information, it may be difficult to determine or demonstrate that a particular representation has not been in violation of the Act where the former employee had access to substantial amounts of information that was exempt from disclosure.

The **OGE Summary** points out as well that "even though a trade or treaty negotiation may not yet have become ongoing at the time of an employee's participation, the negotiation may nonetheless have had specific parties identified to it, thus triggering the lifetime restriction set forth in Section 207(a)(1)." This is consistent with the position taken by OGE in an informal advisory letter issued in 1987. See **OGE Informal Advisory Opinion 87 x 3 (March 4, 1987).**

1.11:680 Prohibition with Respect to Payment for Representational Services Before the Government (18 USC § 203).

Section 203(a) prohibits

> -- receipt of compensation for representational services before any department, agency, court, etc. of the United States,
>
> -- by anyone who at the time the services were performed, whether by that person or by another, was an officer, employee or judge of the executive, legislative or judicial branch or any agency of the United States,
>
> -- in relation to any "particular matter" in which the United States is a party, or has a direct and substantial interest.

In addition, section 203(a)(2) prohibits the knowing offer or payment of any such compensation for representational service rendered or to be rendered.
Section 203(b) sets out parallel prohibitions affecting employees of the District of Columbia government.

Section 203 overlaps substantially with section 205 (discussed under 1.11:690, below), and to some degree also with section 209 (1.11:699, below). Both section 203 and section 205 concern representational activities in matters involving the government, but the former applies to receipt or payment of compensation for such activities, and applies broadly to matters in which the government is a party or has a direct and substantial interest; while the latter applies to the representational activities themselves, and applies whether or not compensation is involved, but it applies, more narrowly, only to representational activities involving a claim against the government. The overlap between section 203 and section 209 lies in the fact that both prohibit receipt or payment of compensation to government personnel, the key difference being that under section 203 the prohibited compensation is for representational services to others and under section 209 it is for services provided to the government.

Section 203 has different mental state requirements for recipients and for payers of compensation for representational services. A payer is liable only if it "knowingly" gives, offers or promises compensation for representational services. The recipient, however, violates section 203 whether or not his or her receipt was "knowing." In explaining this discrepancy, the United States District Court for the District of Columbia observed,

> [T]he only logical explanation . . . for Congress' inclusion of the term "knowingly" in one subsection and its exclusion in the other is Congress' intent to treat government employees receiving payments from those

> interested in matters in which the United States is a party or has a direct or substantial interest more harshly than the donors of such payments.

United States v. Baird, 778 F. Supp. 534, 536-37 (DDC 1990), reversed on other grounds, 29 F. 3d 647 (DC Cir. 1994).

A violation of section 203 does not require any showing of evil intent. See **United States v. Alexandro, 675 F.2d 34, 43 (2nd Cir.), cert. denied, 459 U.S. 835 (1982)**; **United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied sub nom. Tate v. United States, 439 U.S. 870 (1978); OGE Informal Advisory Opinion 88 x 6 (March 10, 1988)**. But see **United States v. Johnson, 419 F.2d 56, 60 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970)** (court reads *scienter* requirement into predecessor statute to section 203). As the Court observed in **Evans**:

> The purpose of [Section 203] is to reach any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position "otherwise than as provided by law for the proper discharge of official duty." Even if corruption is not intended by either the donor or the donee, there is still a tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs. Th[is] statute[] . . . [is] a congressional effort to eliminate the temptation inherent in such a situation.

572 F.2d at 480. Indeed, the court further found that "it is not [even] necessary . . . that the official actually be capable of providing some official act as *quid pro quo* at the time." *Id*. at 479; see also **United States v. Freeman, 813 F.2d 303, 306 (10th Cir. 1987)** ("We do not limit our interpretation of [section 203] to require that the government employee perform an illegal service."). By similar reasoning, in **Stern v. General Electric Co., 924 F.2d 472 (2d Cir. 1991)**, the court held that section 203 would not be violated by a corporation's PAC making contributions to Members of Congress knowing that the contributions could be converted (legally) to the Members' personal use. "Criminal intent under section 203 turns not on what the contributor expects the recipient to do with the money, but rather on what the contributor expects to receive for that money." *Id.* at 478.

However, evil intent may be relevant in determining whether the violation amounts to a felony, on the one hand, or a misdemeanor, on the other, under section 216 of the Act, which prescribes the penalties attached to all provisions of the Act. (Section 216 is discussed under 1.11:600, above.)

The 1989 amendment to section 203 explicitly provides that the section applies only to "representational" services, codifying the consistent prior holdings of both the courts and the Office of Government Ethics. See *e.g.*, **United States v. Myers, 692 F.2d 823 (2nd Cir. 1982), cert. denied sub nom. Lederer v. United States, 461 U.S. 961 (1983); OGE Informal Advisory Opinions 89 x 7 (May 31, 1989) and 88 x 3 (March 2, 1888)**. There is, however, no requirement that these representational services relate to a proceeding that is actually pending at the time compensation is received, **Myers**, **692 F.2d at 853 n.26.**)

The term "representational services" clearly encompasses a wide array of activities commonly involved in the practice of law. As explained by the Office of Government Ethics, "[r]epresentational service is [seeking on behalf of another, a] discretionary action [from the Government]. It includes any of a broad spectrum of activities beyond formal representation in courtroom or in agency proceedings by an attorney." **OGE Informal Advisory Opinion 88 x 3 (March 2, 1988)** (brackets in original). It appears that rulemaking may be considered an "other particular matter," for section 203 purposes, as it is for purposes of section 207 (see 1:11:610, above), and thus a representational service within the prohibition of section 203, even though section 203, unlike section 207, was not modified with respect to the meaning of the term "particular matter" by the 1989 amendments.

"Such representations must involve communications made with the intent to influence and must concern an issue or controversy." **OGE Informal Advisory Opinion 89 x 7 (May 31, 1989)**. Thus, the "provision of purely factual information or the submission of documents not intended to influence are not representational acts," *id*.; see also **OGE Informal Advisory Opinions 81 x 21 (June 25, 1981)** and **85 x 3 (March 8, 1985)** (receipt of compensation for preparation and signing by Government employee of another's income tax return does not violate section 203).

A major change in the scope of section 203 made by the 1989 amendments was the addition of representational services before a *court* to the list of prohibited services. Prior to this amendment, representational services rendered before a court were barred only under section 205 (which substantially overlaps with section 203 but also covers unpaid services). See 1.11.690, below.

Section 203 does provide two exceptions that were added by the 1989 amendments. Both of these exceptions have particular relevance to lawyers, and the second is relevant to a law firm that has a "special Government employee" (such as an independent counsel) connected with the firm.

First, any government employee can provide paid or unpaid representational services for his immediate family (parents, spouse or children) or representational services as guardian, executor, administrator, trustee or other personal fiduciary, provided that the employee has not participated "personally or substantially" in the matter as a government employee and the matter is not the subject of his or her official responsibility. Section 203(d). This

exception is subject to approval by the Government official responsible for the appointment of the government employee. *Id*.

Second, a "special Government employee" can act as an agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States provided that the head of the department or government agency concerned with the grant or contract certifies in writing that the national interest so requires and publishes such certification in the Federal Register. Section 203(e).

Section 203 now also expressly allows a government employee to provide testimony under oath or make statements required to be made under penalty of perjury. This exception, which had been part of the predecessor statute to sections 203 and 205, had been inadvertently omitted from section 203 when the two sections were amended in 1962 to stand alone. **United States v. Wallach, 935 F.2d 445, 471 (2d Cir. 1991),** held that a conspiracy to violate section 203 could be found if a person anticipating appointment as a federal official accepted payment in return for agreement to lobby on an enterprise's behalf while holding federal office.

In **OGE Advisory Opinion 99 x 25 (December 22, 1999),** OGE adopted the view that section 203's prohibition on receipt of compensation for representational services is limited to compensation paid *in exchange for the provision of representational services to a third party*. It thus disowned its previous position that the prohibition extended to a government employee's receipt of compensation resulting from participation in an enterprise whose success or profitability depends on business or other dealings with the government.

OGE Advisory Opinion 99 x 20 (November 2, 1999) addressed the application of section 203 to prospective government employees who have an interest in a pending contingency fee case in which the government is a party or has a direct and substantial interest. Since such a case will normally involve continuing representational activity (by others) after the prospective employee has actually commenced government service, section 203 would prohibit subsequent receipt of the fee. In consequence, the prospective employee must dispose of the interest prior to entering a government service – by relinquishing it, exchanging it for an advance payment or fixed obligation, or assigning it irrevocably to another person.

Although section 203 is not limited to lawyers, it is of particular pertinence to them. In addition to the core prohibition, on a lawyer in government receiving compensation for representing another before the government, and on sharing the compensation received by others (such as law-firm partners) for such representations, section 203 has potential application to lawyers in two less obvious circumstances. One has to do with compensation of lawyers who join a firm after leaving government, and the other relating to compensation of "special Government employees" who concurrently work for a law firm.

<u>Lawyers Entering a Law Firm from Government</u>.

Because section 203 focuses on the date that representational services were rendered rather than the date compensation was received, paid or offered, lawyers leaving government service and the law firms to which they go must be aware of the restrictions of section 203 as they may affect the lawyer's compensation after joining the firm. As the Office of Legal Counsel of the Department of Justice has explained:

> This post-employment reach of section 203 especially affects situations in which a former government employee joins or rejoins a law partnership or similar firm. The literal language of [section 203] makes it unlawful for the former government employee to share in any fees received by the firm for services in a matter covered by the statute and rendered by the firm at any time during the period of his government employment -- even though the matter was never before his agency and did not come to his attention before he left the government, and even if during his government employment he had no part in, or even knowledge of, the service rendered by another.

Memorandum of the Department of Justice Office of the Legal Counsel, **General Restrictions Regarding Future Employment of Government Officers and Employees (Nov. 12, 1976), at 8** (hereinafter the **1976 OLC Memorandum**).

This restriction normally will not affect a firm's compensation to former government lawyers entering a firm as associates, since their fixed salary cannot be traced directly to any services before the government. See **1976 OLC Memorandum at 9** (section 203 "does not apply to a person who receives a fixed salary as an employee of the firm."). The firm must be careful, however, if it pays a bonus over and above the fixed salary to the associate, for the bonus must not be calculated on the basis of firm earnings that include compensation for representational services provided by the firm before the government. See **OGE Informal Advisory Opinion 84 x 13 (June 15, 1984)** (advising a law firm in which an "of counsel" lawyer had been appointed as an assistant independent counsel that a bonus paid to that lawyer over and above his fixed salary "may not be calculated on any amount that includes fees generated by the firm's representations of clients on matters 'pending in' the Department of Justice while he served as a special Government employee of the Department").

A firm must, however, take appropriate steps to ensure that former government lawyers entering the firm as partners do not receive such compensation. Partners ordinarily share in the profits of a law firm, but a partner joining a firm after government service must not share in any profit derived from representational services performed by the firm before the executive branch or courts during that partner's government service. See **OGE Informal Advisory Opinion 88 x 3 (March 2, 1988)** (government employee who is a partner in a law firm is "barred from receiving any partnership share, any bonuses, or any other form of payment derived from compensation for the representational services of others [before a government agency]"); **OGE Informal Advisory Opinion 90 x 3 (March 1, 1990)** (same, re former government employee joining law firm); **OGE Informal Advisory Opinion 90 x**

10 (May 9, 1990) (Section 203 would prevent a retired military officer serving as an officer of a corporation that acts as an agent for federal employees in pursuing private personal property loss and damage claims against the government from sharing in fees earned by the corporation in representing such persons during the time he was on active duty or employed by the government). Likewise, OGE has ruled that a government employee could not receive compensation by way of dividends instead of salary from a company that provides representational services on behalf of third parties, since such compensation is tied to the profitability of the firm which in turn is tied to the prohibited services. **OGE Informal Advisory Opinion 89 x 7 (May 31, 1989)**. Because section 203 imposes criminal liability upon the payer as well as the payee in such instances, such payment would expose to criminal sanction both the other partners of the firm who knowingly share the fee with the returned partner and a client who pays for such services knowing that the former government lawyer will share the fee. See **1976 OLC Memorandum at 9 n.11**.

There are two practical approaches that a law firm can take to avoid a violation of section 203 in these circumstances. One is to separate the fees received from representations before the government during the pertinent period from other fees that the partner is eligible to share, and have the partner in question share only in the latter fees. See **OGE Informal Advisory Opinion 84 x 3 (March 19, 1984)**: "In practical terms [the affected partner] and the other members of [the] firm must maintain a bookkeeping arrangement which segregates funds they receive for such representations from those in which [the affected partner is] eligible to share. They may not make up any resulting disparity so that [the affected partner does] not suffer any economic loss."

The other approach is to pay the incoming partner a fixed salary for such period as may be necessary to assure that no further fees for representational services before the government during the partner's government service remain to be received. See **OGE Informal Advisory Opinion 84 x 6 (May 1, 1984)** ("The payment of a salary, instead of the grant of a partnership interest, to a lawyer who has left the service of the Federal Government for practice as a principal in a law firm is a means of avoiding the specific prohibition of 18 U.S.C. § 203."). **OGE Informal Advisory Opinion 93 x 31 (October 26, 1993)** approved a proposed arrangement under which a law firm would compensate two partners who had recently left the government on the basis of estimated receipts from billings for services provided after their government service, rather than actual receivables, which might include fees for services rendered before they left government. The amounts based on the estimate would be paid regardless of how accurate the estimate proved to be. The **Opinion** observed that in subsequent years adjustment would have to be made for fees for services affected by section 203 only in the case of a "particularly dilatory client" or a fee in a "long-lived contingency fee case."

OGE Informal Advisory Opinion 99 x 24 (December 14, 1999), addressed an inquiry involving a variant of this situation, from a law firm that occasionally took on former government employees as “contract partners” for a certain period of time after they left government. Such contract partners had the same voting rights and other privileges as

“equity partners,” but were compensated at a fixed rate determined by a projection of what partners of similar experience were expected to receive for the calendar year, as reflected in the firm’s budget (established for other purposes) for that year. The firm’s practice was to revise the budget each year around September, on the basis of experience through July. In the particular year giving rise to the inquiry, the revised budget projected an 11.5 percent increase in partners’ compensation, and two former government employees taken on as contract partners after this adjustment were to be compensated at the resulting higher rate. The question posed was whether, in the interest of fairness, another lawyer from the same government agency, who had joined the firm in June, with agreed compensation at a lower level, could be compensated at the adjusted level. OGE’s slightly equivocal answer was that “we cannot say” that the higher compensation for that partner would not violate section 203.

"Special Government Employees" Simultaneously Employed in a Law Firm.

As explained under 1.11:600 above, a "special Government employee," as defined by section 202(a) of the Act, is an officer or employee of the executive or legislative branch of the United States government or any independent agency of the United States or the District of Columbia who is "retained, designated, appointed, or employed" to perform temporary duties on behalf of the govenrment, with the expectation of serving in a government position for 130 days or less during any period of a year; certain part-time United States Commissioners and magistrates; and, regardless of the number of days of appointment, independent counsel, and persons appointed by independent counsel.

Since it is often the case that a "special Government employee" does not work full-time for the Government, a lawyer might work at a law firm concurrently with his or her responsibilities as a special Government employee -- and, indeed, most independent counsel have done so. A firm that has a partner who accepts such a position and continues his or her relationship with the firm must consider how, in light of section 203, the partner can be compensated. (The issue affects only partners because, as explained above, associates in a firm, paid a salary and not sharing in the firm's profits, should not be impacted by section 203 because their salaries cannot be traced directly to any services before the government, let alone before any particular agency.) The restrictions covering "special Government employees" under section 203 are more lenient than those covering full-time government employees. Under section 203(c) a "special Government employee" is prohibited only from receiving compensation for representational services in particular matters involving a specific party or parties in which the employee has participated "personally and substantially" in his or her government work or which are pending before a Government department or agency in which the employee has served for more than sixty days in the preceding year. See **OGE Informal Advisory Opinion 84 x 4 (April 6, 1984)**(independent counsel and his lawyer staff can continue to be compensated by their law firms, so long as they don't share in compensation received by the firm for services before the Department of Justice after serving as independent counsel for more than sixty days). See also **United States v. Mitchell, 397 F. Supp. 166, 171 (DDC 1974), aff'd on other grounds sub nom. United States v. Haldeman, 559 F.2d 31 (DC Cir. 1976), cert.**

denied sub nom. Ehrlichman v. United States, 431 U.S. 933 (1977) (dismissing contention that special assistant to the Special Prosecutor violated section 203 in maintaining his connection with a law firm).

The firm, therefore, must ensure that partners who are "special Government employees" do not share profits derived from cases involving such representational services before the department or agency in which the partner is employed. See **OGE Informal Advisory Opinion 84 x 4 (April 6, 1984)** (advising an independent counsel that his firm "would have to take measures to ensure that any compensation [he] might continue to receive from the firm was not attributable to services the firm performed in relation to matters pending in the Justice Department"). See also **OGE Informal Advisory Opinion 84 x 13**, *supra.* Again, there are two ways of assuring that the lawyer who is serving simultaneously as a government employee and a law firm partner does not receive compensation forbidden by section 203: segregating the firm's profits from representations before the pertinent government agency into a separate profit account in which that partner does not share; and putting that partner on a fixed salary. Where the amounts involved are small, the first is likely to be the better alternative. Where the partner's "special Government employee" status is extensive in scope or duration, however, the firm would probably be better served by adopting the fixed salary method.

1.11:690 Prohibition on Representation of Others Before the Government (18 USC § 205)

Section 205(a) prohibits officers and employees of all three branches of the federal government from (1) acting as agent or attorney in prosecuting any claim against the United States, or receiving any compensation for assisting in the prosecution of any such claim; or (2) acting as agent or attorney for anyone before any "department, agency, court, court-martial, officer, or civil, military or naval commission" with respect to any "covered matter" in which the United States is a party or has a direct and substantial interest. The prohibitions apply only to such representational actions undertaken "other than in the proper discharge of . . . official duties." (It should be noted that the prohibition of section 205(a)(1) on receipt of compensation overlaps somewhat the prohibition of section 203, as explained at the beginning of the discussion of that provision, under 1.11:680, above.)

The prohibitions clearly contemplate representation of another; they do not apply to self-representation, **OGE Informal Advisory Opinion 96 x 11 (July 5, 1996)**, although they would apply to representation of a group of which the employee is a member, see **18 Op. Off. Legal Counsel No. 36 (1994)**, discussed below.

Subsection (b) of section 205 applies the same prohibitions as subsection (a), but with respect to prosecuting or receiving compensation for assisting in claims against the District of Columbia, and for acting as agent or attorney for anyone before any "department, agency, court, officer, or commission" with respect to a "covered matter" in which the District of Columbia government is a party or has a direct and substantial interest, but applies them only to officers or employees of the District of Columbia and of the Office of the United States Attorney for DC.

The term "covered matter" is defined in section 205(h) as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter" -- a definition identical to that of "particular matter" as used in the various prohibitions of section 207 except that "rulemaking" is not included in the listing of examples of a "matter." (See 1.11:610, above.) **18 Op. Off. Legal Counsel No. 36 (1994)** ruled that section 205 would preclude current federal employees from representing the National Association of Assistant United States Attorneys before the Department of Justice regarding compensation, workplace issues, and other issues that focus on the interests of assistant United States attorneys. Such issues, the **Opinion** stated, would be "covered matters" under section 205 even though "discussions of broad policy directed toward a large and diverse group" would be permissible, because assistant United States attorneys are a "discrete and identifiable class of persons or entities." *Id*. at 1. The **Opinion** relied, in this connection, on the regulation that OGE had issued defining the term "particular matter" as that term is used in section 208, as

> encompass[ing] only matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered . . . even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons. The term particular matter, however, does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.

Id. at 9 (Quoting **5 CFR § 2635.402(b)(3)**).

The term "particular matter" as used in section 205 was treated at length in the **Van Ee** case, described below. And the same term, in the context of section 208, is discussed more fully under the subtopic "Particular Matter," in1.11:695, below.

The elements of a violation of section 205 were summarized in **OGE Informal Advisory Opinion 96 x 6 (March 19, 1996)** as follows:

> First, the employee must be acting as an agent or attorney for anyone, other than himself. The services must be representational in that they must be designed to influence rather than to seek information or provide behind-the-scenes assistance. Next, the employee's representation must be made before [a] department, agency, court, or other specified entity. Finally, the representation must be made in relation to a particular matter in which the United States is a party or has a direct and substantital interest.

Section 205(c) provides that a "special Government employee" is subject to the prohibitions of subsections (a) and (b) only with respect to a "covered matter" involving a "specific party or parties" (1) in which he has participated personally and substantially as either a regular or a special Government employee; or (2) which is pending in the department or agency in which he is serving -- but this second prohibition does not apply to one who has served in the department or agency no more than 60 days in the preceding 365 days.

Section 205(d) provides that the prohibitions of subsections (a) and (b) do not apply to an officer or employee acting as agent or attorney, without compensation, for

> any person in connection with "disciplinary, loyalty, or other personnel administration proceedings,"
>
> with certain exceptions (specified in subsection (d)(2)) any "cooperative, voluntary, professional, recreational, or similar" nonprofit organization or group, a majority of whose members are current employees of the pertinent government, or their spouses or dependent children.

The exemption is contingent on the representation being "not inconsistent with the faithful performance of [the employee's] duties."

Section 205(e) provides an exemption for representation, with or without compensation, of a parent, spouse, child or "any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary." Excepted from the exemption, however, are matters in which the officer or employee has participated personally and substantially in an official capacity, or in matters "subject of his official responsibility," unless approved by the "official responsible for appointment to his position."

Section 205(f) provides an exemption from the prohibitions of subsections (a) and (b) for "special Government employees" acting as agent or attorney for another in the performance of work "under a grant by, or a contract with or for the benefit of," the United States if the head of the department or agency concerned with the grant or contract certifies in writing that "the national interest so requires," and publishes the certification in the **Federal Register.**

Section 205(g) provides that "[N]othing in [section 205] prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."

Section 205(i) (added in 1996, evidently in response to **18 Op. Off. Legal Counsel No. 36 (1994),** discussed above) provides that nothing in the section "prevents an employee from acting pursuant to [several specified sets of provisions of the United States Code dealing with labor-management relations or] any provision of any other Federal or District of Columbia law that authorizes labor-management relations between an agency or instrumentality of the United States or the District of Columbia and any labor organization that represents its employees."

A tangential aspect of the limitation of the prohibitions of subsections (a) and (b) to actions "other than in the discharge of . . . official duties" is illuminated by **OGE Informal Advisory Opinion 95 x 12 (November 15, 1995)**(discussed more fully under 1.11:610, above), pointing out that a representation exempt from section 205 on this ground would likely be subject to the post-government employment restriction of section 207(a)(1).

Section 205 is not interpreted by any regulation. However, OGE has pointed out that the regulations interpreting section 207 provide guidance as to the meaning of "direct and substantial interest [on the part of the United States]" that is applicable to section 205 as well. **OGE Informal Advisory Opinion 94 x 7 (February 7, 1994)**. That **Opinion** addressed the question whether section 205 would forbid the representation by a government lawyer of a private person in a lawsuit in a federal court against a private law school, asserting a claim under a federal statute forbidding discrimination against persons with disabilities by recipients of federal financial assistance. The federal government was not a named party in the case, but the **Opinion** pointed out that this did

not necessarily mean that the government did not have a "direct and substantial interest" in the case, so as to bring section 205 into play. The **Opinion** suggested that inquiry be made of the agency or agencies whose regulations or policies might be implicated in the case, to determine whether there was such a government interest in the matter. In addition, the regulations interpreting "particular matter," under section 208, have been held applicable to defining a "covered matter" under section 205, as explained in the discussion of **18 Op. Off. Legal Counsel No. 36 (1994)**, above.

16 Op. Off. Legal Counsel No. 59 (1992) addressed a proposal by the Chief Judge of the United States Court of Veterans Appeals (since redesignated the United States Court of Appeals for Veterans Claims), to recruit lawyers in the executive branch to serve, on a pro bono basis, as "master amici" in cases before that Court where the appellants were without representation. A "master amicus" would not formally undertake representation of an appellant in such a case, but rather would "advise the Court of any nonfrivolous issue capable of being raised by the appellant," and would brief any such issue. The **Opinion** held that such an arrangement would not avoid the proscription of section 205(a)(1) against acting as agent or attorney for prosecuting a claim against the United States.

Van Ee v. Environmental Protection Agency, 202 F.3d 296 (DC Cir. 2000), was a suit by an employee of the EPA who wished to continue to address other federal agencies on behalf of various environmental groups such as the Sierra Club and the Nevada Wildlife Foundation on matters of public concern unrelated to his work for the EPA, seeking a determination that such activities were not prohibited by 18 USC § 205 or related OGE regulations. The EPA had ruled that plaintiff's communications with federal agencies on behalf of any group in an attempt to influence federal policy would violate section 205, and that although he could properly make such communications purely on his own behalf, he could not do so in a manner that would "create the appearance" that he was doing so on behalf of another. Plaintiff contended that section 205 did not cover his conduct; that if it did, it was unconstitutional under the First Amendment; and that in any event he could not constitutionally be disciplined for merely creating an *appearance* of a violation of the statute. The District Court granted summary judgment to the governmental defendants, **55 F.Supp.2d 1 (DDC 1999)**, but the Court of Appeals, having determined that plaintiff's proposed activities did not involve a "covered matter" within the meaning of section 205(h) and that in consequence they did not violate section 205(a)(2), reversed and remanded with directions to grant declaratory relief to the plaintiff.

The issue on appeal in **van Ee** was broadly cast by the court as follows:

> [W]hether Congress intended § 205 to prohibit, on penalty of fine or imprisonment . . . a career federal employee from presenting the views of citizens' groups of which the employee is a member, without receiving compensation, in response to requests for public comment on proposed land-use plans issued by federal agencies other than the employing agency.

202 F.3d at 301. In resolving that issue, the court reviewed at length the history and purposes of section 205, as well as other decisional and interpretive authority, but ultimately focused on whether the proposed governmental actions to which plaintiff's comments would be directed would constitute a "particular matter" so as to be a "covered matter" under the definition of that term provided by section 205(h). The court concluded that Congress's "guiding principle" with respect to section 205 was that it should apply only to "matters in which the governmental decision at stake is focused on conferring a benefit, imposing a sanction, or otherwise having a discernible effect on the financial or similarly concrete interests of discrete and identifiable persons or entities." *Id.* at 302. Applying this principle in the interpretation of the term "particular matter" in the context of the case before it, the court observed that

> [W]hether an administrative proceeding is a "particular matter" under § 205 is determined by the nature and focus of the *governmental decision to be made or action to be taken as a result of the proceeding*. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties are the concerns animating § 205 implicated.

*Id.*at 308 (Emphasis supplied). The phrase here italicized in this passage proved to be the key to the decision, for the court went on to held that the EPA had wrongly focused, not on the nature of the contemplated governmental decision about which plaintiff would be commenting -- concerning, for example, governmental adoption of a plan for managing public lands in southern Nevada -- but rather on the content of plaintiff's comments, which might be directed to a portion of the plan affecting specific parcels of land. Even though some of the plaintiff's comments would have concerned proposed actions likely to have a discernible impact on the interests of identifiable parties, in other words, the focus of the decisions to be made would be of a much broader nature, and those decisions would not constitute "particular matters" for purposes of section 205.

The plaintiff in **Van Ee** had also contended that his communications would not come under the statutory prohibition because he would not be communicating as the "agent or attorney" of the groups on whose behalf he would be communicating, and the District Court had rejected this contention, **55 F. Supp. 2d at 7**, but the Court of Appeals did not find it necessary to reach either this issue or plaintiff's constitutional challenges.

In **O'Neil v. Department of Housing and Urban Development, 220 F.3d 1354 (Fed. Cir. 2000),** a case similar in factual context to **Van Ee,** the Court of Appeals for the Federal Circuit reached a similar result, albeit on a ground advanced by the plaintiff there but not reached by the Court of Appeals -- namely, a narrow reading to the word "agent" as used in section 205. In **O'Neil,** the petitioner had been discharged by HUD partly on the ground that she had violated section 205(a)(2) by her efforts to persuade various officials of that Department and the Department of the Air Force that military housing at an Air Force Base that was scheduled to be closed should be turned over to a

particular organization that would use the housing to provide shelter for homeless men. An administrative judge of the Merit Systems Protection Board had rejected petitioner's contention that, because she had no authority to act on behalf of the organization, she had not acted as its "agent," within the meaning of section 205(a)(2). The Court of Appeals, however, sustained petitioner's claim on this point (though it also upheld her discharge on other grounds), and held that the term "agent," as used in section 205, should be construed in accordance with the common law meaning of that term. In its discussion of this point, the Court contrasted the narrow phasing of section 205(a)(2) as it applies to acting on behalf of another with the broader language of section 203(a)(1) (prohibiting acceptance of compensation "for any representational services, as agent or attorney or otherwise"), and section 207(a)(1), which doesn't use the term "agent" at all but instead broadly prohibits communications "with intent to influence."

1.11:695 Prohibition with Respect to Acts Affecting a Personal Financial Interest (18 USC § 208)

Section 208(a) prohibits, with specified exceptions and exemptions, any officer or employee (including a "special Government employee") of the executive branch or of any independent agency of the United States, any Federal Reserve bank director, officer or employee, and any officer or employee of the District of Columbia from "participat[ing] personally and substantially" in that capacity in any "particular matter" in which, to his knowledge, he, his minor child or spouse, a general partner, an organization in which he serves as director, officer, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement covering prospective employment, has a financial interest. To establish a violation of section 208(a),

> [T]he Government must prove beyond a reasonable doubt that the defendant 1) was an officer or employee of the executive branch or of an independent agency, 2) participated personally and substantially in his official, governmental capacity in a matter, and 3) knew that he, his spouse, or another statutorily-listed person had a financial interest in that particular matter.

United States v. Nevers, 7 F.3d 59, 62 (5th Cir. 1993)(a case in which the defendant, while employed as a trade specialist for the International Trade Administration, attempted to persuade a client of that agency to sign an agreement with a company in which his wife had a financial interest).

A ready means of avoiding a violation is disqualification of the government employee (which simply means not participating in the particular matter, see **5 CFR § 2640.103(d)**); or, where prospective employment is involved, postponement of any negotiation until the matter is completed. Waivers are also available in some circumstances, as are some categorical exemptions – both of which are discussed under the subcaption Waivers and Exemptions, below.

The statutory provision is elaborated in **5 CFR Parts 2635** and **2640**. The first of these, titled *Standards of Ethical Conduct for Employees of the Executive Branch*, lays down rules of ethical conduct on several subjects quite distinct from that of section 208 (specifically, Gifts from Outside Sources, Gifts Between Employees, Misuse of Position, and Outside Activities), but it also specifically implements and in some respects adds administrative restrictions to the statutory ones in section 208, in three of its subparts, namely, **Subpart D --***Conflicting Financial Interests*; **Subpart E –** *Impartiality in Performing Official Duties*; and **Subpart F –** *Seeking Other Employment***.** The focus of the other regulation, **5 CFR Part 2640,** is indicated by its title, *Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208(Acts Affecting a Personal Financial Interest).*

17 Op. Off. Legal Counsel No. 3 (1993) held that a government employee/inventor who assigns his rights in an invention to the United States and accepts the government's payment of amounts tied to the resulting royalties, pursuant to the Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 1501-34, could continue to work on the invention without violating either section 208 or section 209. However, he could not, consistently with section 208, take official action with respect to an agreement for development of the invention entered into between the United States (which had retained the domestic patent rights) and a company with which the employee/inventor (who had retained foreign patent rights) had a contract for foreign commercial exploitation of the patent.

Two circumstances in which section 208(a) problems may arise that are likely to be of particular concern to lawyers and law firms – and that are separately addressed below -- are those where there are discussions about (or a subsisting arrangement for) future employment between a lawyer in government and a law firm with business before that lawyer's agency, and those where the spouse of a government employee is a lawyer who has business (or whose firm has business) before the agency where the employee works. In the first instance, the crux is that if the law firm with which the lawyer in government is negotiating (or has an "arrangement") about employment is involved in a "particular matter" before the lawyer's agency, then it has a "financial interest" in that matter which, under section 208, is a bar to the lawyer's participation in the matter. In the second situation, the crux is that the government employee whose spouse who is involved in a particular matter before the employee's agency has an imputed "financial interest" in that matter, which again bars the employee's participation in the matter.

<u>"Particular matter"</u>

The term "particular matter," as used in section 208(a), is not separately defined in the Act, but it appears at the end of a series of examples -- "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation [or] arrest" -- identical to those employed in the definition of "particular matter" in section 207(i) of the Act (which applies only to section 207), except for not including the term "rulemaking." However, **5 CFR § 2640.103 (a)(1)** states that "particular matter" as used in section 208 "includes only matters that involve deliberation, decision or action that is focused upon the interests of specific persons, *or a discrete and identifiable class of persons"* (emphasis added), and adds:

> The term may include matters which do not involve formal parties and may extend to legislation or policy making that is narrowly focused on the interests of a discrete and identifiable class of persons. It does not, however, cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons.

Id. Among the examples given to illustrate the foregoing are these two:

Example 3: A regulation published by the Department of Agriculture applicable only to companies that operate meat packing plants is a particular matter.

Example 4: A change by the Department of Labor in health and safety regulations applicable to all employers in the United States is not a particular matter. The change in the regulations is directed to the interests of a large and diverse group of persons.

Id. See also **5 CFR § 2635.402(b)(3)** (providing a substantively identical definition). As described below, under the subcaption Waivers and Exemptions, the regulations addressing exemptions under section 208(b), in **5 CFR Part 2640**, invoke a similar distinction (one not found in the statutory text), between a "particular matter involving specific parties" and a "particular matter of general applicability."

Similarly, the Office of Legal Counsel of the Department of Justice has interpreted section 208(a) to apply to "rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner." **2 Op. Off. Legal Counsel 151, 155 (1978)**. See also **OGE Informal Advisory Opinion 97 x 2 (March 5, 1997)**(observing that a rulemaking affecting all the members of a particular industry can have a direct and predictable effect on the financial interests of the industry's trade association, and so present a bar, for one involved in that rulemaking, to negotiating for post-government employment with the trade association). Thus, the term "particular matter" as used in section 208 is interpreted by authoritative sources to have essentially the same meaning as the identical term as used in section 207, despite the presence in the latter statutory provision, and the absence from the former, of the word "rulemaking."

"Personal and Substantial Participation"

The phrase "personal and substantial participation" is not defined in the statute but again is explained in the pertinent regulation, **5 CFR § 2640.103(a)(2)**. That regulation states that "[t]o participate 'personally' means to participate directly. It includes the direct and active supervision of the participation of a subordinate in the matter." *Id.* And "substantial" participation means that the employee's involvement is of significance to the matter, even though the participation was not determinative of the outcome of a particular matter. *Id.*

In determining whether an employee was "participating" in a particular matter, the courts have generally adopted a broad, common-sense approach. Thus, in interpreting the catch-all provision of the clause in section 208(a) detailing the types of participation covered ("decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise"), the Seventh Circuit held that "or otherwise" should be construed "in a realistic and relatively inclusive fashion." **United States v. Irons, 640 F.2d 872, 876 (7th Cir. 1981)**. The court held that the intention behind section 208 was "to proscribe rather broadly employee participation in business transactions involving conflicts of interest and

to reach activities at various stages of these transactions, including those activities specifically enumerated." *Id.* Thus, the court held that the acts of "causing delivery to be made of equipment" and "receiving payment of monies for such equipment" were covered under section 208 since they were acts that executed or completed a contract or matter. *Id.* at 874.

See also **OGE Informal Advisory Opinion 92 x 25 (December 10, 1992)**("[T]he concept of participation is not limited to formal actions or final events but may apply to preliminary activities or matters in a formative stage"). **OGE Informal Advisory Opinion 99 x 11 (April 19, 1999)** made clear that the substantiality of an employee's participation in a particular matter, for purposes of section 208, does not depend on the dollar amount involved in the matter in which the employee participates. It also pointed out that the term "substantial" has essentially the same meaning in section 208 as in section 207.

"Financial Interest"

The term "financial interest" is also liberally construed. A party has a financial interest "where there is a real possibility of gain or loss as a result of developments in or resolution of a matter." **United States v. Gorman, 807 F.2d 1299, 1303 (6th Cir. 1986), cert. denied, 484 U.S. 815 (1987)**. There is no *de minimis* exception to the "financial interest" requirement. See **OGE Informal Advisory Opinion 87 x 6 (April 1, 1987)**. "All that is required is that there be a real, as opposed to a speculative, possibility of benefit or detriment." **Gorman, 807 F.2d at 1303**. See generally, **Annotation, What Constitutes Acts Affecting Personal Financial Interests Within the Meaning of 18 U.S.C. § 208(a), Penalizing Participation by Government Employees in Matters in Which They Have a Personal Financial Interest, 59 A.L.R. Fed. 872 (1982).**

However, the two regulations interpreting section 208 apply something of a limiting construction to the term "financial interest," at least in the contexts there addressed – namely, disqualification and waiver. Both regulations effectively require that the financial interest be one on which the "matter" in question will have a "direct and predictable effect" – a phrase that does not appear in the statutory text (though it is based on a longstanding interpretation of the statute: see **2 Op. Off. Legal Counsel 151, 155 (1978)**). Thus, **5 CFR § 2635.402(b)(1)** provides:

> (i) A particular matter will have a direct effect on a financial interest if there is a close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter . . ..

(ii) A particular matter will have a predictable effect if there is a real, as opposed to a speculative possibility that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount . . . is immaterial.

An identical definition of the phrase "direct and predictable effect" is to be found in **5 CFR § 2640.103(a)(3).**

To violate section 208(a), a government employee must have *knowledge* of the pertinent financial interest in the particular matter in which he or she is participating. **Gorman, 807 F.2d at 1304**. Section 208(a) is, however, a strict liability statute: establishing a violation does not require proof of scienter or an intent to violate it. **United States v. Hedges, 912 F.2d 1397, 1400 (11th Cir. 1990**). "Actual corruption or actual loss suffered by the government are not elements of the crime," *id.* at 1402; see also **Gorman, 807 F.2d at 1304** ("Section 208 sets forth an objective standard of conduct which is directed not only at dishonor, but also at conduct which tempts dishonor").

It bears note that among the persons and entities that section 208(a) refers to as potentially having a financial interest in a particular matter that would be imputed to a government employee, is an *organization* in which the employee is "an officer, director, trustee, general partner or employee." This clearly encompasses nonprofit organizations, and the financial interest of such organizations is attributed to the government employee regardless of whether there is compensation for the services rendered by the employee to the organization. See **5 CFR § 2635.403(c)(2).**

In **In re Segal, 145 F. 3d 1348 (DC Cir. 1998)(per curiam)**, involving an application for reimbursement of attorney fees incurred by the target of an independent counsel investigation that did not result in indictment, the target had been chief executive officer of the Corporation for National and Community Service, which was established to manage the federal government's community service programs. He had established, and served as a director and officer of, a private, nongovernmental charitable organization that sought private donations to support the work of the governmental corporation, and, in his capacity as CEO of the governmental corporation, had engaged in fund raising for the benefit of the nongovernmental organization. Since that organization's financial interests were attributed to him, this was found to be a misdemeanor violation of section 208, but the independent counsel did not prosecute, finding that the target did not possess knowledge of the financial interest – which, according to the decision, is "not necessary for a technical violation of the law, but . . . is required by Department of Justice guidlelines before charges are brought." *Id.* at 1350.

OGE Informal Advisory Opinion 97 x 5 (March 25, 1997) observed that while there is no prohibition on spouses working in the same agency, one spouse could not hire the other or even recommend the other spouse for promotion without running afoul of section 208 (as well as the "anti-nepotism" statute, 5 USC § 3110).

Waivers and Exemptions

Ameliorating the broad reach of the prohibitions imposed by section 208(a), subsection (b) provides for a number of exceptions, both by individual waiver and by categorical exemption. Specifically,

> Subsection (b)(1) provides for individual waivers in circumstances where the official responsible for the appointment of the government employee or officer, after full disclosure, makes a written determination that the pertinent "interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee." The general requirements for issuance of such waivers are set out in **5 CFR § 2640.301(a)** , and **§ 2640.301(b)** offers a list of factors that may be considered in determining whether a "disqualifying financial interest is sufficiently substantial to be deemed likely to affect the integrity of the employee's services to the Government."
>
> Subsection (b)(2) of section 208 provides that OGE, by general rule or regulation, "applicable to all or a portion of all officers and employees covered by this section," may exempt a particular kind of financial interest as "being too remote or too inconsequential to affect the integrity of the services of the Government officers or employees." Pursuant to this provision, OGE has, in **Subpart B** of **5 CFR 2640,** issued regulations exempting certain mutual funds, unit investment trusts and employee benefit plans (**§ 2640.201**); certain interests in securities (**§ 2640.202**); and several miscellaneous circumstances (**§ 2640.203**). **OGE Advisory Opinion 00 x 8 (August 25, 2000)** discussed the differences between diversified mutual funds and sector mutual funds, and their treatment under **§ 2640.201(a) & (b)**, respectively. **OGE DAEOgram 99-015 (April 14, 1999)** discussed employee benefit plans, which are treated under **§ 2640.201(c)**. It described the differences between defined benefit plans and defined contribution plans, pointing out that normally only the former would present problems under section 208(a), since under such plans the employer sponsor is obligated to contribute to the plans, so that actions by a government employee that potentially affect the fortunes of the sponsor of a plan in which the employee has an interest might have an effect on the sponsor's ability or willingness to make the required contributions, and so affect the value of the employee's interest.
>
> Subsection (b)(3) provides for individual waivers in the case of a "special Government employee" serving on (or being considered for appointment to) an advisory committee within the meaning of the Federal Advisory Committee Act, where the appointing officer certifies in writing that the need for the individual's services outweighs the potential for a conflict of interest. This provision is implemented by **5 CFR § 2640.302.**
>
> Finally, subsection (b)(4) provides a blanket exemption for financial interests that would be affected by a particular matter where the interest results solely

from specified birthrights related to status as a native American Indian or Alaskan native. See, in this connection, **OGE Informal Advisory Opinion 00 x 3 (April 7, 2000)** (drawing a distinction between a shareholder interest by birthright in an Alaska Native Corporation, and an interest as a director of such a corporation).

As has been mentioned, **5 CFR Part 2640**, in addressing exemptions under section 208(b), makes a distinction, not found in the statutory text, between a "particular matter involving specific parties" and a "particular matter of general applicability." The first is defined by reference to the statutory phrase that precedes "particular matter" ("judicial or other proceeding, [etc.]"), and is asserted typically to involve "a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties." **§ 2640.102(l).** The second "means a particular matter that is focused on the interests of a discrete and identifiable class of persons, but does not involve specific parties." **§ 2640.102(m).** An employee is required to disqualify him- or herself from either sort of "particular matter" where a tainting "financial interest" is in the picture, unless the disqualifying interest has been exempted or the employee has obtained an individual waiver under section 208(b). **§ 2640.103(d).**

The different categories of "particular matter" have differential impact, however, in the determination of whether a particular financial interest qualifies for a categorical exemption under the regulations implementing section 208(b)(2), as "too remote or too inconsequential to affect the integrity of the services" of the government employee. See **§ 2640.201(c)(2)**(exempting employee participation in a particular matter of general applicability affecting a state or local government where the disqualifying financial interest in the matter arises because of participation in a pension plan established by that government), and **§ 2640.202(a) & (b)**(setting out different standards governing de minimis exemptions for matters involving specific parties and those of general applicability).

As has been noted, a violation of section 208(a) does not require a showing of scienter. Furthermore, a valid waiver may become void if the financial interests of the prospective employer or the official responsibilities of the employee change and such change was not considered by the grantor of the waiver. See **OGE Informal Advisory Opinion 88 x 13 (September 12, 1988)** (opining that Attorney General Meese's section 208(b)(1) waivers obtained with regard to telecommunications matters were defective where Mr. Meese had not provided full disclosure regarding his telecommunication industry holdings).

Additional Regulatory Restrictions

The provisions of **5 CFR 2635 Subpart E**, titled *Impartiality in Performing Official Duties*, extend the disqualification of government employees from participating in certain matters beyond the reach of section 208(a), to include circumstances where there may be "an appearance of loss of impartiality in the performance of . . . official duties." **5 CFR § 2635.501(a).** Thus, **§2635.502(a)** requires advance authorization from an employee's

agency before the employee may participate in a particular matter involving a specific party or parties when the employee either knows that the matter "is likely to have a direct and predictable effect on the financial interest of a member of his household," or else knows that "a person with whom he has a covered relationship is or represents a party to such matter," and "where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." A "covered relationship" is defined by **§ 2635.502(b)(1)** to mean a relationship with –

> (i) A person with whom the employee "has or seeks a business, contractual or other financial relationship that involves other than a routine consumer transaction" – a definition that excludes and extends well beyond "employment," the term used in section 208.
>
> (ii) A member of the employee's household, or a relative with whom the employee has a "close personal relationship" -- both of which go beyond the spouse and minor child referred to in section 208(a).
>
> (iii) A person "for whom the employee's spouse, parent or dependent child is, to the employee's knowledge, serving or seeking to serve as "officer, director . . . [or any of the positions forbidden to the employee by section 208(a)]."
>
> (iv) A person for whom the employee had acted as "officer, director . . . [etc.]" within the last year. Section 208(a), of course, applies only to concurrent, not past representations by the employee.
>
> (v) An organization, other than a political party, in which the employee is an "active participant." Section 208(a), in contrast, is limited to organizations in which the government employee is an "officer, director, . . . [etc.]"

5 CFR § 2635.502(d) provides that the employee's agency may determine that, even though the employee's participation would raise an appearance of impaired impartiality, the interest of the government in the employee's participation outweighs that concern, and that such participation should in consequence be authorized. **§ 2035.502(d)** also sets out various factors to be considered in such a determination. **OGE Informal Advisory Memorandum 99 x 8 (April 26, 1999)** elaborates on the provisions of **5 CFR § 2635.502** regarding the determination of when disqualification is required on the ground of appearance of impaired impartiality and the implementation thereof or alternatively, the employee's agency determines that despite such appearance, the employee should be authorized to participate in a particular matter.

One further regulatory disqualification relating to financial interests is imposed by **5 CFR § 2635.503**, again subject to agency waiver: a two-year bar from participating in any particular matter in which a former employer is a party or represents a party, if the employee received an "extraordinary payment" from that employer prior to entering

government service; the two years commencing to run with the date of receipt of the payment. "Extraordinary payment" is defined as any item worth $10,000 or more, paid (1) on the basis of a decision made after it was known to the former emplyer that the employee was being considered for or had accepted a government position, and (2) other than pursuant to an established compensation, partnership or benefits program.

It should be noted that unlike sections 203 and 209 (discussed under 1.11:680 above and 1.11:699 below, respectively), the prohibitions of section 208 do not apply to third parties, but only to the government employees who have the actual or imputed "financial interest." Thus, a law firm cannot be criminally charged under section 208 for recruiting a government lawyer for a position in the firm, even if the firm is directly involved in a matter before the government lawyer, but the lawyer in such circumstances is at jeopardy; and similarly, it is the government employee and not the employee's spouse or the spouse's law firm that is at risk where the lawyer or firm represent a client in a matter in which the employee participates.

Applicability to Law Firm Recruitment:

It bears note, with respect to the restriction on negotiating for post-government employment, that there is a parallel provision in Model Rule 1.11, though that provision is not included in the DC version of Rule 1.11. Thus, MR 1.11(c)(2) prohibits a lawyer serving as a public officer or employee (other than as a law clerk) from negotiating for private employment with any person who is involved as a party or lawyer for a party in a matter in which the government lawyer is participating personally and substantially.

A violation of section 208 in this context requires that (1) the defendant, who was at the time in question a government employee, negotiated or reached an arrangement concerning employment with a third party; (2) the third party had a financial interest in a matter in which the defendant participated personally and substantially; and (3) the defendant knew of the third party's interest. See **Gorman, 807 F.2d at 1303.** Clearly within the prohibition is the situation where a lawyer who entered the government from a law firm has a commitment to return to the firm after government service. **3 Op. Off. Legal Counsel 278 (1979)**(section 208 does not preclude a lawyer's returning to a former firm pursuant to a pre-departure agreement, but the lawyer must observe that provision's restrictions while in government); see also **OGE Informal Advisory Opinion 93 x 20 (August 27, 1993)**(holding that the fact that there is a binding contractual agreement – in this instance evidently a labor agreement not subject to renegotiation – is immaterial)**.** Less clearcut, and more hazardous, are circumstances where there is not such a subsisting arrangement, but only the prospect of one.

The regulations define "negotiations" broadly, as meaning

> [D]iscussion or communication with another person, or such person's agent or intermediary, mutually conducted with a view toward reaching an agreement

> regarding possible employment with that person. The term is not limited to discussions of specific terms and conditions of employment in a specific position.

5 CFR § 2635.603(b)(1)(i). Although **5 CFR Part 2635** in other respects goes beyond the statutory provision and simply establishes regulatory standards of conduct for executive branch employees, in the present instance it appears to offer a valid interpretation of the statutory term as well. Courts have uniformly held that the terms "negotiate" and "arrangement" are to be broadly construed and given their common, everyday meaning. See **United States v. Schaltenbrand, 930 F.2d 1554, 1558 (11th Cir. 1991)**; **Hedges, 912 F.2d at 1403**; **Gorman, 807 F.2d at 1303**; **United States v. Conlon, 628 F.2d 150, 154-55 (DC Cir. 1980)**. Thus, in **Schaltenbrand**, the court rejected the defendant's argument that a "negotiation" does not begin until a formal offer of employment has been made. While agreeing that "[p]reliminary or exploratory talks do not constitute negotiation," **930 F.2d at 1558** (quoting **Hedges, 912 F.2d at 1403 n.2**), the court held that where there is evidence of "active interest on both sides" concerning a "specific position," this requirement for a section 208(a) offense is met. As the court noted, "[t]he whole purpose of `negotiation´ is for each side to present its position to the other party, in the hopes that it can attract the other party to eventually submit to a binding agreement." *Id.* at 1559. The court held, therefore, that where the defendant had applied for a position with the potential employer, the potential employer had invited him to its offices, the two sides had discussed the qualifications needed for the specific position in detail, and the defendant had agreed to take action to remedy his failure to meet certain of these qualifications, there was "negotiation" under section 208. *Id.* See also **Hedges, 912 F.2d at 1403** ("That all of the terms of the agreement were not settled at that time, does not foreclose the fact that negotiations for employment were discussed.").

The regulations also define "employment" broadly, to include

> [A]ny form of non-Federal employment or business relationship involving the provision of personal services by the employee, whether to be undertaken at the same time as or subsequent to Federal employment. It includes but is not limited to personal services as an officer, director, employee, agent, attorney, consultant, contractor, general partner or trustee.

5 CFR § 2635.603(a).

Once it has been established that the parties were negotiating for future employment, the government must show that the prospective employer had a "financial interest" in a "particular matter" in which the government employee was "participat[ing]" "personally and substantially." In order to establish such a financial interest on the part of the recruiting law firm, it must ordinarily be the case that the law firm is representing a client in a matter in which the recruited lawyer is participating; it is not enough that a client of the law firm is a party to the matter, if it is not represented by the law firm in that matter. Thus, in **Air Line Pilots Ass'n, Int'l v. United States Dep't of Transp., 899 F.2d 1230 (DC Cir. 1990)**, the Court held that the then-Secretary of the Department of Transportation (DOT)

had not violated section 208 in negotiating for employment at a law firm despite the fact that the firm represented a client that was before DOT in another matter, in which the law firm was not representing that client. The Court held that it was "sheer speculation" to argue that the Secretary's employment negotiations could have been advanced by the outcome of the matter involving the firm's interest and cited with approval the following bright-line rule:

> [N]o participation by [the government employee] when a law firm that might employ him served as counsel in the case; but no bar to his [or her] participation when the firm did not so serve, though the matter involved a client represented in other matters by the firm.

Id. at 1232. In so ruling, the Court directly rejected the proposition that a government employee must be "disqualifi[ed] from any matter affecting a client of a prospective employer." *Id*. The Court noted that such a rule "would mean, effectively, that high government officials could not, before leaving their posts, negotiate with many, if any, of the District's large law firms." *Id.*

Another regulation, **5 CFR § 2635.604(d),** provides that an agency may allow an employee to take annual leave or leave without pay, or take other appropriate action while seeking employment, if the alternative would be disqualification of the employee from "matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired." **OGE Informal Advisory Opinion 95 x 7 (June 2, 1995)** says that the agency may *require* such a leave of absence.
A variant situation was addressed in **OGE Informal Advisory Opinion 96 x 19 (October 18, 1996)**, which asserted that a government employee may have a financial interest in the outcome of a matter if there is a concrete prospect of employment with an entity involved, and the opportunity depends on the outcome, even if there are no actual negotiations about the employment in question.

<u>Applicability to Spouses Where One Is in Government and the Other Is a Lawyer in the Private Sector</u>

The possible application of section 208 in this context arises when the lawyer spouse, or that spouse's law firm, represents a client in the particular matter. As the regulation states,

> An employee is prohibited by . . .. 18 U.S.C. § 208(a) from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.

5 CFR § 2635.402(a). The imputed interests include those of the employee's spouse,

§ 2635.402(b)(2)(i). The employee need not actually share in the spouse's financial interest in order for the prohibition to apply. As explained in **OGE Informal Advisory Opinion 96 x 10 (April 25, 1996)**, section 208 "establishes the status of marriage, not shared control and ownership of assets, as the prerequisite for imputing a spouse's financial interests to a Government employee [who] has knowledge of those interests." What is involved

> is not a rebuttable presumption that the Govenrment employee will benefit from his spouse's financial interests . . .. The issue is whether the Government employee will be participating in matters that could directly and predicably affect his *spouse's* financial interests.

Id. (Emphasis in original).

OGE Informal Advisory Opinion 95 x 1 (February 13, 1995) addressed circumstances where the husband of the head of a governmental agency was a partner in a law firm whose clients included major institutions some of which appeared before the agency. The husband had undertaken not to represent any clients before the agency during his wife's tenure, and she had disqualified herself from any matters in which his firm represented clients before the agency. The **Opinion** concluded that these arrangements were sufficient (though it did not explicitly hold that the former was required) for compliance with the applicable prohibition, and that the agency head should consider whether administrative ethics rules dealing with impartiality would preclude her participation. It also held that "where the clients are not being represented by [the firm] in a particular [agency] matter, the matter usually would not have a direct and predictable effect on the law firm's or [the spouse's] financial interests." *Id.* (Brackets in original.) It did allow that there might be "unusual cases" -- where, for example, agency action might literally put the law firm's client out of business – that would have an adverse effect upon the law firm's, and therefore the lawyer spouse's interest. To the same effect, see **Air Line Pilots Ass'n Int'l,** *supra.*

OGE Informal Advisory Opinion 00 x 4 (April 11, 2000) addressed the question whether a government employee would be barred from chairing an agency oversight group by reason of his wife's position as executive director for some nonprofit organizations with members that do business in an area with which the agency oversight group would be concerned. The **Opinion** first noted section 208 would not be implicated if the oversight group's deliberations were limited to consideration of broad policy options directed to the interests of a "large and diverse group of persons," for then no "particular matter" would be involved. It went on to say that even if a "particular matter" was involved, section 208 would not apply unless such matter would have a "direct and predictable effect" on his wife's "financial interest," meaning a "real as opposed to a speculative, possibility of financial benefit on detriment" -- as, for example, by affecting the ability or inclination of her employers to pay her salary.

1.11:699 Prohibition with Respect to Non-Governmental Compensation for Governmental Services (18 USC § 209)

Section 209(a) of the Act prohibits any officer or employee of the executive branch or of any independent agency of the United States, or of the District of Columbia, from receiving "any salary, or any contribution to or supplementation of salary," as compensation for his services as such, from any source other than the United States, "except as may be contributed out of the treasury of any State, county, or municipality." It also forbids any person or entity to pay, make any contribution to or in any way supplement the salary of any such officer or employee "under circumstances which would make its receipt a violation" of the subsection.

As has been noted under 1.11:680, above, section 209 overlaps section 203 to some degree, for both provisions prohibit payment to and receipt of compensation by government personnel, the critical difference being that under section 209 the prohibited compensation is for services rendered to the government and under section 203 it is for services to others. It may deserve mention that there is also some overlap with certain of the prohibitions in 18 USC § 201, which addresses bribery of public officials. See **United States v. Jackson, 850 F. Supp. 1481, 1495 (D. Kan. 1994)**(explaining that section 209 differs from sections 201(b)(1) and 201(c) in the element of requiring that the payment be made as compensation for services as a government employee).

"Special Government employees" (described under 1.11:600, above), and government employees serving without compensation, are excepted from the prohibition by section 209(c); see **Exchange National Bank of Chicago v. Abramson, 295 F. Supp. 87, 90 (D. Minn. 1969); OGE Informal Advisory Opinion 84 x 13 (June 15, 1984)** Also exempted are participants in a bona fide pension, retirement, group life, health or accident insurance, profitsharing, stock bonus, or other employee welfare or benefit plan, maintained by a former employer (section 209(b)); payment of relocation expenses incidental to certain executive exchange or fellowship programs (section 209(e)); and certain payments to injured employees made by a nonprofit organization qualified under § 501(c)(3) of the Internal Revenue Code (section 209(f)).

As the Supreme Court has observed, the prohibition in section 209(a) rests on three basic concerns:

> First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.

Crandon v. United States, 494 U.S. 152, 165 (1990) (quoting, with approval, **Association of the Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960)**). These three concerns are balanced against a weighty opposing consideration: "Such regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity." *Id*. at 166 (quoting President Kennedy).

A variety of circumstances can raise issues under section 209(a). Acceptance of money for a speech given in an official capacity would clearly violate section 209. See **OGE Informal Advisory Opinion 94 x 14 (July 15, 1994)**; see also **5 CFR § 2635.807(a)** (prohibiting receipt of compensation from any source other than the government for teaching, speaking or writing "that relates to the employee's official duties"). **OGE Informal Advisory Opinion 88 x 12 (July 27, 1988)** held that a research fellowship offered by a college to eligible recipients regardless of whether they were government employees, and specifically intended "not to diminish or replace the [recipient's] usual or expected compensation," would be forbidden to a government employee by section 209. **OGE Informal Advisory Opinion 92 x 6 (February 25, 1992)** asserted that section 209 would be violated if union officials who were also government employees, and who spent 100% of their duty time on union activities in accordance with an agreement between the agency and the union, were also compensated by the union for the time so spent.

Various kinds of profit-making activities engaged in "on the side" by government employees that exploit their positions as such have been held to violate section 209. Thus, in **United States v. Moore, 765 F. Supp. 1251 (E.D. Va. 1991)** the defendant was a civilian employee of the Navy, an engineer with expertise in circuit breaker electrical contacts and related components, who also had a 49% interest in a company that made such products and sold them to the Navy. He had not disclosed that interest to the Navy, and he had helped the company get several contracts for such products from the Navy. He had received $100,000 in dividends from the company. He pled guilty to a criminal information charging him with a violation of section 209(a) and then was sued by the government for recovery of the $100,000 that he had thus received, one count alleging a violation of section 209(a) and a second count a violation of section 208. The Court held that he was collaterally estopped by his plea to the criminal charge from denying that he had committed a breach of his fiduciary duty to the government, albeit not from contesting the amount owed by reason of the breach.

In **Jordan v. Axicon Systems, Inc., 351 F.Supp. 1134 (DDC 1972), aff'd, 489 F.2d 1272 (DC Cir. 1974)** a former government employee brought suit against a private employer seeking damages for breach of an employment agreement under which, while in government (as chief of the Tire Branch of the Department of Transportation's National Highway Traffic Safety Administration), he promoted computers to tire companies in connection with newly enacted tire safety legislation. The court held the contract to be unenforceable as contrary to Executive Order 11222 and in clear violation of sections 208 and 209 of the Act.

Not all receipt or payment of money to or for the benefit of a government employee is prohibited; the payment must be made in compensation for government service Thus, in **United States v. Muntain, 610 F.2d 964 (DC Cir. 1979),** an official in the Department of Housing and Urban Development was charged with violation of section 209 for having received $800 from a labor union as reimbursement for travel expenses of his wife and himself on a charter tour trip to Ireland organized by the union. The official was on leave at the time, and the Court concluded that "the payment to Muntain was for services having nothing to do with HUD business or with any responsibilities Muntain may have had to the Government as an employee of the United States." *Id.* at 970. **OGE Informal Advisory Opinion 93 x 21 (August 30, 1993)** held that contributions to a legal defense fund for an employee facing administrative disciplinary charges would not violate section 209 because they would not constitute compensation for services as an employee of the United States. The **Opinion** relied on **Crandon,** *supra,* in reading the statutory prohibition narrowly, and overruled the earlier **OGE Informal Advisory Opinion 85 x 19 (December 12, 1985)**, which had come to the opposite conclusion in the analysis of payments from a legal defense fund.

OGE Informal Advisory Opinion 92 x 7 (February 26, 1992) held that section 209 does not prohibit bestowal on or receipt by a government employee of an award (in this case a "Regents' Distinguished Alumnus Award" or an "Alumni Achievement Award") that consists solely of a certificate, with no associated monetary stipend. Even if there is a cash element, the **Opinion** asserts, the prohibition does not apply to an award for public service or other meritorious service that is bona fide, i.e., is not intended to compensate for government service.

17 Op. Off. Legal Counsel No. 3 (1993) held that a government employee/inventor who assigns his rights in an invention to the United States and accepts the government's payment of amounts tied to the resulting royalties, pursuant to the Federal Technology Transfer Act of 1986, 15 U.S.C. §§ 1501-34, may continue to work on the invention without violating section 209. (The **Opinion** also addressed section 208, and is discussed more fully under 1.11:695, above.)

An **OLC Opinion dated September 7, 2000** addressed the possible applicability of section 209 to another circumstance involving a government employee/inventor -- namely, where the employee has obtained patent rights to an invention made in the course of federal employment and licensed those rights to a private entity, receiving royalty payments in exchange. The **Opinion** concluded that section 209 ordinarily does not ban such royalty payments. In reaching this conclusion the **Opinion** first considered and rejected the argument that such payments could be treated as coming from the government (and so not from a "source other than the government of the United States," so as to come within section 209's prohibition), on the ground that the private entities paying the royalties acquired the pertinent patent rights only because the government declined to exercise its right to obtain title to the patent. The **Opinion** then considered whether the royalty payments in such circumstances would properly be considered *as compensation for services as an employee of the United States,* and

concluded that, at least in the usual case, they would not. The **Opinion** applied in this connection a list of factors to be taken into consideration in construing the phrase "as compensation for," where the existence of an intentional, direct link is unclear. It quoted those factors from an earlier **OLC Opinion dated October 28, 1997**:

> (1) whether there is a substantial relationship or pattern of dealings between the agency and the payor; (2) whether the employee is in a position to influence the government on behalf of the payor; (3) whether the expressed intent of the payor is to compensate for government service; (4) whether circumstances indicate that the payment was motivated by a desire other than to compensate the employee for her government service… (5) whether payments would also be made to non-government employees; and (6) whether payments would be distributed on a basis unrelated to government service.

OGE Informal Advisory Opinion 87 x 11 (Sept. 9, 1987) held that a "President's Discretionary Fund," established in honor of a university's former president now serving as a Commissioner of a government agency, and endowed by a corporation on whose board of directors he had served, does not violate section 209: "Even if money for the establishment of this honorary fund were to be viewed as compensation to the employee, it would not run afoul of [section 209] because . . . it is in recognition of the employee's past services . . . and is not related to his recent appointment to the Commission."

5 Op. Off. Legal Counsel 126 (1981) held that payment by a private foundation of legal fees incurred in connection with Senate confirmation hearings of a Cabinet member was not a violation of section 209, since the legal services provided served a legitimate governmental function, cognizable under the Presidential Transition Act.

Payments to Persons Entering Government Service

A number of the authorities applying section 209 address payments of various sorts made by private entities to employees who are departing for government employment. These are likely to be of particular interest to lawyers entering government service, and to law firms that they leave in order to do so: for example, the firm may have an interest in encouraging a young lawyer to spend some time in government; also, a withdrawing law firm partner will typically receive from the firm various sums that might raise questions under section 209.
In this connection, too, a central issue is whether the payment in question is intended o supplement the government employee's salary. Also of critical importance is the issue of when the payment or payments are made, in relation to the recipient's status as a government employee.

2 Op. Off. Legal Counsel 267 (1978) held that the employer of a White House Fellow could not, consistently with section 209, reimburse her for the cost of temporary living quarters in Washington while she and her husband maintained a home elsewhere. "The payment of a Government employee's living expenses due to his Government service is a

classic example of a supplementation of Government salary prohibited by section 209." *Id.* at 267-68. Also held to be impermissible were the employer's paying the White House Fellow's moving expenses to Washington and the accrual during the Fellow's leave of vacation time and sick leave. On the other hand, **5 Op. Off. Legal Counsel 150 (1981)** held that payment of moving expenses to a university faculty member going into the Department of Justice was not a violation of section 209 where the payment was made pursuant to the university's "Professional Development Program," akin to a sabbatical program, and was not designed or administered to favor federal employment over other forms of professional development leave. **6 Op. Off. Legal Counsel 224 (1982)** held that an employer could rent an employee's house during the employee's participation in the President's Executive Exchange Program, so long as it paid no more than the market price and actually used the house or at least excluded the employee from using it, but that section 209 would prohibit an arrangement under which the property would not be used at all, or the employee would continue to have use of the property, because this would mean that the employer was subsidizing the employee's government service.

Crandon, *supra,* the only Supreme Court decision construing section 209, interpreted it narrowly, to require that the payment be made while the recipient is in government, and not before (or, by implication) after government service. There, the Court addressed a challenge to a compensation plan under which The Boeing Company had provided lump sum severance packages for five employees who were leaving Boeing to enter government service. The payments had been made prior to the commencement of their government responsibilities, but had been in amounts that were "intended to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment." *Id*. at 154.
Each of the payments had been made unconditionally: "None of the employees promised to return to Boeing at a later date nor did Boeing make any commitment to rehire them." *Id*. at 156. Although section 209 is a criminal statute and at that time entailed no provision for enforcement by civil proceedings, this was a civil suit, in which the government asserted a "common law" claim, seeking as relief from Boeing the aggregate amount of the payments made and, with respect to the individual recipients of the payments, the imposition of a constructive trust upon the moneys received. (The provision for civil relief for violation of the several prohibitions of the Act, in section 216, was enacted shortly before the Court's decision in **Crandon**.) The District Court had dismissed the complaint, holding that section 209(a) did not apply because the payments were made before the recipients became government employees and that the payments were not intended to compensate them for government service. The Court of Appeals reversed, holding that employment status of the recipients at the time the payments were made was not an element of a violation of section 209, and that the purpose of supplementing their compensation as government employment brought the matter within the prohibition of that provision. **United States v. Boeing Co., Inc., 845 F.2d 476 (4th Cir. 1988)**. The Supreme Court reversed again, holding, in an opinion by Justice Stevens, that although section 209(a) was ambiguously worded, it was properly construed as prohibiting only payments made or received, respectively, at a time when the recipient was an employee of the government. **494 U.S. at 159.** The Court observed that

> At least two of the three policy justifications for the rule -- the concern that the private paymaster will have an economic hold over the employee and the concern about bitterness among fellow employees -- apply to ongoing payments but have little or no application to an unconditional preemployment severance payment.

Id. at 166. As to the third such consideration,

> Of course, the concern that the employee might tend to favor his former employer would be enhanced by a generous payment, but the absence of any ongoing relationship may mitigate that concern, particularly if other rules disqualify the employee from participating in any matter involving a former employer. Thus, although the policy justifications for § 209(a) are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements.

Id. Justice Scalia, in a concurring opinion joined by Justices O'Connor and Kennedy, agreed that the government had failed to prove a violation of section 209(a) but for quite different reasons. He disagreed with the majority's view that payments made before or after the term of federal employment are necessarily excluded from that provision's prohibition, but argued that the prohibition applies only to supplementation of *salary*, and not, despite much contrary authority in the form of opinions of the OLC and opinions and regulations promulgated by OGE (as well as some court decisions), to compensation of any other kind; that *salary* means *periodic* payments, and thus the prohibition does not apply to lump sum payments, whenever and for whatever purpose made, *id* at 168-184 (with the possible exception of payments whose amounts were computed "on the basis of so much per month or so much per year that each recipient promised to serve," *id*. at 183).

Crandon effectively overruled some prior authority that looked only to the nature of the payments made, and not to the time when they were made, in relation to the period of government service. See. e.g., **OGE Informal Advisory Opinion 89 x 8 (June 30, 1989)** (refusing to approve a severance package that would provide an employee leaving for a two year stint in the government with three lump sum payments made at six month intervals upon her return to the company; the fact that the payments were to be much more generous than the employer's usual hiring bonuses indicated that their real purpose was to supplement the employee's government salary). Insofar as prior authority examined the purpose and effect of payments made and received during government service, however, that authority remains valid. See, e.g., **OGE Informal Advisory Opinion 85 x 11 (Aug. 23, 1985),** disapproving a severance arrangement under which a prospective nominee to a Senate-confirmed position who was chairman of the board of a corporation and planned to return to that position would receive two payments "for past services" at a year's interval (and evidently during his government service): "[T]he inference can be drawn that availing oneself [of] the several available benefit plans of the company coupled with an intent to return creates, in effect, a leave of absence situation where the severance arrangement is

used simply to supplement Federal salary. A true severance payment would occur at the end of [the individual's] service to the corporation." *Id*.

An OGE opinion that does not address the point of timing of the payments but presumably remains authoritative with respect to the determination of whether the payments had a proper purpose is **OGE Informal Advisory Opinion 84 x 12 (June 14, 1984)** which approved a payment made by a law firm to a partner who withdrew to accept a presidential appointment. The firm's partnership agreement provided for a minimum payment for withdrawing partners, but also allowed for larger payments to partners who had made "extraordinary contributions" to the firm. In this instance, such a larger payment was involved. After evaluating the firm's practice in ten previous cases, OGE concluded that the payment in this instance was in line with firm's past practice after "carefully weighing the indicia of intent as represented by the prior personnel practices of [the] law firm; the nature, size and stated purpose of the payment; and the expressed nature of the services [the attorney] performed while in the employ of the law firm." *Id.*

Thus, the practical result of **Crandon**, so far as lawyers and law firms are concerned, appears to be that at least as section 209 now stands, a law firm can, consistently with that provision, make to a lawyer departing the firm for government a severance payment that is calculated to cushion the financial sacrifice entailed by government service, or promise a bonus similarly calculated upon the lawyer's return from government, *provided* that payment is actually made before the government service commences, (in the first case) or after it has been completed (in the second). (It might nonetheless be sensible to secure a confirming opinion from OGE before launching on such a course.) If, however, any portion of the severance payment is to be disbursed during the lawyer's government service, then it must be justified as an entitlement wholly unrelated to that government service.

1.11:700 DC Conflict of Interest Statutes and Regulations

As has been pointed out in the discussion of the federal conflict of interest statutes under 1.11:600, above, some – though not all – of those statutes impose on DC government employees, with respect to their dealings with agencies of the DC government, the same prohibitions as they impose on federal employees in their dealings with their governmental employer. These dual-application statutes are addressed under 1.11:710, immediately below. In addition, there are two sets of statutory provisions and related regulations applying solely to DC employees: these are treated under 1.11:720.

1.11:710 Federal Statutes Also Applicable to DC Government Employees

Only two of the federal post-employment statutory provisions, in 18 USC § 207, apply by their terms to DC as well as federal government employees – namely, subsections (a)(1) and (a)(2) [discussed under 1.11:601 and 1.11:620, respectively, above]. None of the other five prohibitory subsections of section 207 – that is, subsections (b) through (f) [discussed under 1.11:630 through 1.11:670, above] – has dual application. To be sure, some of the implementing subsections of section 207 also affect subsection (a) of that provision, and thus are involved in its application to DC employees. This is so of subsection (i)'s definitions of the terms "participated" and "particular matter" [discussed under 1.11:610, above]; and the exceptions with respect to official government duties, international organizations, scientific or technological information, and testimony, in subsections (j)(1), 3), (5) and (6) [also discussed under 1.11:600, above].

In contrast to the limited applicability of the federal *post-employment* prohibitions to DC government employees, all four of the federal statutory restrictions on conflicts on interest arising *during* government service – 18 USC §§ 203, 205, 208 and 209 [discussed under 1.11:680 through 1.11:699, above] – apply fully to DC government employees. The penalty provision applicable to all of the federal conflicts statutes, 18 USC § 216 [also discussed under 1.11:600, above], also governs those statutes when applied to DC government employees. As will be seen, the DC regulations impose additional, administrative penalties on some matters that are criminally punishable under the federal statutory provisions.

United States v. Smith, 267 F.3d 1154 (DC Cir. 2001), upheld the conviction under 18 U.S.C. § 208(a) of the defendant who, while chief of day programs in DC's Mental Retardation and Developmentally Disabled Administration, referred patients to a substandard treatment organization in return for various personal financial favors from the owner of that organization. **In re Sims, 844 A.2d 353 (DC 2004)** [discussed more fully under 8.4:300, below] was a disciplinary case in which the respondent had been convicted, on stipulated facts, of violating 18 U.S.C. § 208 when he abused his practice

as a hearing examiner in the Bureau of Traffic Adjudication in the DC government by fixing some 20 traffic tickets on cars belonging to himself or members of his family, in effect eliminating some $1,280 in fines and penalties.

As to interpretive authority, to the extent that the federal prohibitions with dual application have been implemented or interpreted by regulation, by judicial decision or by opinions of the Office of Government Ethics (OGE) or the Office of Legal Counsel in the Department of Justice (OLC), that authority is, *mutatis mutandis*, valid also with respect to the application of the prohibitions to employees of the DC government (and, as will be seen under 1.11:720, below, the pertinent DC regulations explicitly adopt by reference certain of the federal regulations). The discussion of that body of federal authority under the pertinent subdivisions of 1.11:600, above, need not be repeated here.

There are, however, several **OGE Informal Advisory Opinions** that explicitly address the application of certain of the federal statutory prohibitions to DC government employees. Two of these opinions concern the post-employment prohibitions of 18 USC § 207(a), and a third concerns 18 USC § 203's prohibitions relating to compensation for representational services; all three of these respond to inquiries about the applicability of the statutory prohibitions to members and staff of the Council of the District of Columbia (the District's legislative body). A fourth Opinion responds to a request for explanation of OGE's authority to exempt DC employees from the federal prohibitions.

The first of these, **OGE Informal Advisory Opinion 86 x 18 (December 9, 1986),** addressed the question whether the prohibitions of 18 USC § 207 applied to former employees of the DC Council. Although the inquirer contended that the DC Home Rule Act (District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774; codified at D.C. Code §§ 1.201-1.299.7) had changed the Council from an executive agency (appointed by the President) to a legislative body (elected by the DC citizenry), the **Opinion** held (and stated that OLC concurred) that there was nothing in the legislative history of 18 USC § 207 to support the proposition that it applied to less than *all* employees of the DC government, regardless of branch. As to the kinds of legislation passed by the Council to which the post-employment prohibitions of the two subsections might apply, the **Opinion** observed that the impact of the prohibitions would vary

> according to the type of legislative activity engaged in [by the former DC Council employee] while with the Government, and in many instances the impact may be limited because of the requirement of particular matters involving specific parties. Although special legislation affecting a selected class rather than the public generally might amount to a particular matter involving specific parties, most legislation would not so qualify.

Id.

OGE Informal Advisory Opinion 97 x 9 (May 21, 1997), after first observing that OGE does not provide advice to or about current or former employees of the DC

government except in "unusual circumstances," which were not here presented, proceeded nonetheless to respond to several questions posed by a former member of the DC Council. One question addressed was whether any of the post-employment prohibitions applicable to federal executive branch employees that were added to 18 USC § 207 by the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat.1716 (1989) – specifically, subsections (c), (d), (e), and (f) (see 1.11:630 through 1.11:660, above) – apply also to former DC employees. The answer was no.

Several questions addressed by **Opinion 97 x 9** were directed to the application of the two provisions of 18 USC § 207 that *do* apply to DC government employees – i.e., subsections (a)(1) and (a)(2). In this connection, although the inquirer hadn't explicitly raised the issue, the **Opinion** confirmed the view, previously expressed in **Opinion 86 x 18**, above, that the legislative branch of the DC government was not beyond the reach of those subsections, specifically holding in this instance that they applied to former *members* of the DC Council (whereas the earlier **Opinion** had addressed former *employees* of the Council). Another question posed was whether the prohibition of those two provisions applied to contacts by a former Council member with the current Council. **Opinion 97 x 9** ducked this question, saying that it should be addressed in the first instance by the DC government. Still another question was as to the effect of a recusal from a particular matter while the employee is in the government. The **Opinion** observed that recusal ordinarily avoids a post-government employment problem under subsection (a)(1) of 18 USC § 207, but not under subsection (a)(2). And yet another question related to a distinction, as respects the kinds of legislation to which the prohibitions would attach, between "legislation of general applicability" and "legislation involving a specific party." The **Opinion** responded by referring to the passage in **Opinion 86 x 18** that is quoted in the discussion of that **Opinion,** above.

A further inquiry addressed by **Opinion 97 x 9** concerned the significance of *compensation* in determining whether a particular post-government employment contact with a governmental agency is prohibited. Specifically, the inquirer, noting that those prohibitions don't apply to *self-representation*, asked if pro bono representation of an organization by an officer or member of the organization would be considered to be self-representation for this purpose. The answer was, in substance, that if a former employee was acting on behalf of an organization rather than on his or her own behalf, the prohibitions would apply. Finally, the inquirer sought and received assurance that the two post-employment prohibitions do not apply to the provision of "behind-the-scenes" advice to others regarding contacts with the DC government.

OGE Informal Advisory Opinion 93 x 22 (September 3, 1993) opined that 18 USC § 203 applies to members of the District of Columbia Council. In so holding, it rejected arguments (1) that the statute's legislative history suggests that the legislative intent was to exclude legislative and judicial personnel from its coverage, and (2) that the conflict of interest prohibitions in District of Columbia Campaign Finance Reform and Conflict of Interest Act, Pub. L. No. 93-376, 88 Stat. 447 (1974), that were codified at DC Code § 1-1461 (discussed under 1.11:720, below) were the only conflict of interest provisions that Congress intended to make applicable to Council members.

OGE Informal Advisory Opinion 00 x 5 (May 18, 2000) responded to a request for explanation of the authority of OGE to "exempt" employees of the District of Columbia from the federal conflict of interest provisions. After observing, as in **Opinion 97 x 9**, above, that OGE does not provide advice to, or concerning, DC employees absent unusual circumstances, **Opinion 00 x 5** went on to say that OGE has no authority "categorically" to exempt DC employees from otherwise applicable federal provisions, but that it does have narrow power of exemption with respect to certain financial interests held by employees covered by section 208, which include employees of the District of Columbia.

1.11:720 DC Statutes and Regulations

There are two sets of partially overlapping and intermeshing statutory provisions, and related regulations, addressing conflicts of interest on the part of employees of the DC government, reflecting the dual legislative authority over the District – an elected local legislature and the federal Congress -- that was established by the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L.No. 93-198, 87 Stat. 774 (1973). The statutory provisions are found in two chapters of Title I, *Administration,*of the DC Code, namely, Chapter 6, which bears the title *Merit Personnel System*, and Chapter 11, titled *Election Campaigns; Lobbying; Conflict of Interest*. Chapter 6 derives from legislation adopted by the local legislative body, the DC Council; Chapter 11 finds its principal source in federal legislation. Both sets of statutory and regulatory provisions include quite sweeping proscriptions regarding the conduct of employees, present and (in the case of Chapter 6) former, of the DC government, and make detailed provision for administrative enforcement, although the administrative agencies charged with that enforcement are different. In addition, both sets of provisions contemplate the issuance of advisory opinions on, *inter alia*, conflict of interest issues – but again, by different agencies. A final point of intersection/overlap relates to the population of employees covered by the two sets of provisions: the provisions of Chapter 6, and the regulations issued thereunder, apply to all DC government employees (and in some cases to former employees) save those of a few independent agencies, while the provisions of Chapter 11 and the regulations thereunder apply only to elected officials and incumbent employees of relatively senior status (including those of the independent agencies not reached by Chapter 6).

An additional element of complexity, not to say confusion, arises from the fact that the numbering system of the D.C. Code provisions, and in some instances the numbering of whole chapters of the Code, were changed with the 2001 Edition of the Code, but as of the time this discussion was last updated (September 2001), corresponding changes had not been made in cross references within the Code, or in references to the Code in implementing certain implementing regulations.

<u>Chapter 6</u>

Chapter 6 of Title I of the DC Code, *Merit System,* which derives from DC Law 2-139, DC Reg. 5740 (1979), establishes a "comprehensive merit system of personnel management for the government of the District of Columbia," §1-601.01(1), and its 36 subchapters cover the subject comprehensively indeed. Of particular pertinence to conflicts of interest are the three provisions of subchapter XIX, *Employee Conduct*. One of those provisions, § 1-618-02, titled *Conflicts of interest*, reads in its entirety as follows:

> No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.

This prohibition is implemented by the regulations in Chapter 18 of Title 6 of the **DC Municipal Regulations**, discussed below, but there is no reported judicial authority applying or interpreting it.

Another provision of the subchapter is § 1-618.01, titled *Standards of conduct,* which, in subsection (b), provides that "The Mayor shall issue rules and regulations governing the ethical conduct of all District employees." The regulations discussed below were issued pursuant to this authority.

The third pertinent provision of the statutory subchapter is § 1-618.03, titled *Ethics counselors; codification of advisory opinions*. It provides in subsection (a) that each agency head shall appoint an employee to serve as the ethics counselor for the agency, and that the Mayor shall appoint an ethics counselor for the District of Columbia. The Mayor has designated the DC Corporation Counsel as Ethics Counsel for the District of Columbia, and Corporation Counsel has redelegated the responsibility to a lawyer in the Corporation Counsel's office. Subsection (b) provides that such ethics counselors "shall issue advisory opinions concerning potential conflicts of interest which are presented by employees of the agency for resolution," the opinions to be issued within 15 days of receipt of an inquiry. Subsection (c) provides that the resulting opinions "shall be considered advisory opinions authorized under subsection (c) of § 1-1103.05, and shall be published in the District of Columbia Register." (The referenced statutory section is discussed under the subcaption Chapter 11, below.) As of the time this discussion was last updated (September2001), no advisory opinion had yet been published pursuant to subsection (c) of §1.618.03. Subsection (e) of § 1-618.03 provides that enforcement authority with respect to the provisions of Chapter 6, insofar as they apply to elected officials and senior-level employees otherwise subject to Chapter 11 (discussed under that subcaption, below) lies with the Board of Election and Ethics (rather than with the heads of agencies, as with all other employees who are subject to Chapter 6).

Chapter 6, unlike Chapter 11, contains no provision for criminal penalties or administratively-imposed fines. Enforcement of the standards of employee conduct set by § 1-618.02 and by the regulations issued under the authority of § 1-618.01(b) is by administrative action by the pertinent agency, subject to review by an Office of Employee Appeals whose operations are described in §§ 1-606.01 - 11. Additionally, § 1-615.05 provides for a sort of *qui tam* civil damage action, which may be brought by "any citizen," to

> recover funds which have been improperly paid by the District government while there exists any conflict of interest on the part of the employee or employees directly
> or indirectly responsible for such payment.

There are no reported decisions applying or interpreting § 1-615.05.

The regulations issued under the authority of § 1-618.01(b) that deal with conflicts of interest (among other isues of employee conduct) are contained in Chapter 18, *Employee*

Conduct, of the DC Personnel Regulations (which in turn are to be found inTitle 6, *Government Personnel*, of the **DC Municipal Regulations**). These regulations, which were promulgated in 1983 (and most recently amended, albeit not comprehensively revised, in May 2001), implement not only the conflict of interest provisions of the DC Code, but in addition the Federal statutory provisions that apply to DC as well as federal government employees (discussed in 1.11:710, immediately above).

Section 1802 of the regulations, elaborating on what the regulation designates as § 1-619.3(e) [now § 1-618.03(e)] of the Code, makes clear that the regulations generally apply to *all* DC employees, but the applicable enforcement authority depends on the seniority level of the employee affected: if the employee is at a sufficiently senior level to be subject to D.C. Code § 1-1106.01 (discussed under the subcaption Chapter 11 below), then enforcement authority lies in the Board of Elections and Ethics; otherwise, the enforcement authority is the head of the employee's agency.

Administrative "remedial actions," additional to "any penalty prescribed by law," are addressed by § 1801 of the regulation, which lists three types of administrative remedy: changes in assigned duties; "divestment by the employee of his or her conflicting interest"; and "disqualification for a particular assignment." (The regulation also refers here to "corrective or adverse action" pursuant to § 1-617.1(d) of the Code; but this provision was repealed in 1998.) A separate administrative process is provided by § 1815 of the regulations for enforcement of the pertinent post-employment prohibitions. The sole sanction that may result from the latter proceedings is a mayoral order barring the former employee, for up to five years, from representational contacts with the former employee's agency (§ 1815.23).

The subjects of ethics counselors and advisory opinions are addressed by §§ 1811 and 1812, respectively, of the regulations.

The principal substantive provisions of the *Employee Conduct* regulations pertinent here are those dealing with post-employment conflicts of interest, contained in § 1814 of those regulations. These elaborate on, and in two significant respects add to, the applicable post-employment prohibitions in 18 USC § 207. This is done in a fashion that is difficult to untangle – a result of the fact that the regulation has not yet (as of September 2001) been updated to reflect the changes in section 207 that were made, effective January 1, 1991, by the Ethics Reform Act of 1989. The prohibitions in section 207 that are in terms applicable to DC employees as well as federal ones are the permanent prohibition of subsection (a)(1) [see 1.11:610, above] and the two-year post-employment prohibition of subsection (a)(2) [see 1.11:620, above]. The regulations reiterate the substance of both of these prohibitions (in § 1814.4 and §§ 1814.6 through 1814.9, respectively), but in doing so refer to the provisions as they stood prior to the Ethics Reform Act's amendments. This is made clear by the fact that the regulations incorporate by reference the federal regulations interpreting section 207 prior to those amendments, which are now found in **5 CFR Part 2637** but which the DC regulation refers to by their pre-1990 designation of **5 CFR Part 737** (see §§ 1814.2 and 1814.3; see also the definition of "senior employee" in § 1814.1, making reference to 18 USC § 207(b)(ii), which was rescinded by the Ethics Reform Act). The

substance of what is now subsection (a)(1) of section 207 constituted, prior to the changes wrought by the Ethics Reform Act, the entirety of subsection (a); the substance of what is now subsection (a)(2) was subsection (b)(i) as it then stood.

The regulations also effectively add to the two prohibitions imposed by section 207 two others borrowed from that source: one that section 207 imposes only on former federal and not DC employees, and the other a prohibition that the statute no longer imposes on either group. As to the first of these, the regulations make applicable to former *senior* employees of the DC government (defined in § 1814.1) a prohibition roughly corresponding to the prohibition in subsection (c) of section 207 [discussed under 1.11:630, above], which imposes on former senior *federal* employees a one-year post-employment prohibition on representational contacts with their former agencies regarding any matter on which they are seeking official action, regardless of whether they had participated personally and substantially in or had official responsibility over the matter while in government (see §§ 1814.10 - 1814.14). This statutory prohibition carried the same lettering before the Ethics Reform Act, but was altered by that Act both in formulation and in some details of substance. The prohibition, however, did not in its prior form and still does not apply to former *DC* employees but only federal ones. As to the other prohibition borrowed from the federal statute, the regulation specifically refers (in the definition of "Senior Employee," in § 1814.1) to the prohibition of former subsection (b)(ii) of section 207, which imposed a two-year post-employment ban on former employees of both the federal and the DC governments *assisting* in representations by others, and restates (in § 1814.10), as a regulatory prohibition, the substance of that provision. That subsection of section 207, however, was eliminated by the Ethics Reform Act and is no longer in effect.

Other substantive prohibitions relating to conflicts of interest are found in the following sections of the *Employee Conduct* regulations:

-- Section 1803, titled *Responsibilities of Employees,* sets out various prohibitions, including one on receipt of compensation from a private source for services to the government (§ 1803.6) -- a prohibition that, as the regulation recognizes, is also imposed by 18 USC § 209 [discussed under 1.11:699, above].

-- Section 1804, *Outside Employment and Other Outside Activity,* imposes, *inter alia*, a restriction on maintaining a financial interest in or serving as an officer or director of an organization that is likely to be affected by government action taken or recommended by the employee (§ 1804.1(d)) – a kind of conflict addressed more centrally by 18 USC § 208 [discussed under 1.11:695, above]; and one on serving in a representative capacity for any outside entity in any matter before the District of Columbia (§ 1804.1(h)) – this time echoing 18 USC § 205 [discussed under 1.11:690].

-- Section 1805, *Financial Interest,* also addresses, albeit more broadly, conflicts of interest of the sort with which 18 USC § 208 is concerned: it prohibits knowing acquisition, by the employee or a member of his or her "immediate household," of property whose possession "could unduly influence or give the appearance of

unduly influencing" the employee's official conduct (§ 1805.1); and acquiring an interest in or operating a commercial enterprise that is "in any way related, directly or indirectly, to the employee's official duties" or to matters "over which the employee could wield any influence, official or otherwise" (§ 1805.2).

-- Section 1813, which is principally concerned with the subject stated by its title, *Reporting of Financial Interests*, also includes the following two substantive prohibitions:

> 1813.1. No employee of the District government shall engage in outside employment or private business activity or have any direct or indirect financial interest that conflicts or would appear to conflict with the fair, impartial, and objective performance of officially assigned duties and responsibilities.
>
> 1813.18. Notwithstanding the filing of the annual statement required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions of 18 U.S.C. § 208, or this chapter.

Chapter 11

Chapter 11 of Title I of the DC Code (formerly designated Chapter 14) derives from the District of Columbia Campaign Finance Reform and Conflict of Interest Act, Pub. L. No. 93-376, 88 Stat. 447 (1974). The Chapter bears the title *Election Campaigns; Lobbying; Conflict of Interest*, and is principally concerned with the first two of the three topics so referred to. A single section, § 1–1106.01, titled *Conflict of interest*, specifically addresses the third of those topics, setting out a number of prohibitions on the subject. As has been mentioned, the conflict of interest prohibitions in Chapter 11, unlike those in Chapter 6, above, do not apply to *all* DC government employees, but only to those in positions above a certain level of seniority. Specifically, all but two of the prohibitions of § 1-1106.01 apply to all "public officials" of the District of Columbia; the two exceptions apply to subsets of the same. "Public officials" are defined by § 1-1106.01(i)(1)(h-1)(2)(B)(i)(1) as persons required to file financial statements under § 1-1106.02. The latter provision, titled *Disclosure of financial interest*, requires annual filings of detailed financial statements by specified elected officials, namely the Mayor, DC's representatives in Congress, members of the Council and members of the School Board; persons serving as subordinate agency heads or serving in positions designated as within either the Legal or Excepted Service and paid at a rate of GS-13 or better or designated in § 1-609.08; and members of a wide array of administrative boards, which are listed *in extenso* in § 1-1106.02. (The substance – though not the timing – of the disclosure requirements of § 1-1106.02 has application to non-incumbent candidates for public office as well as incumbents, and thus such candidates are caught in the definition of "public officer" in § 1-1106.01, but all of the substantive prohibitions of that section clearly have application only to persons who are actually in office.)

The list of conflict of interest prohibitions in § 1-1106.01 commences with the following declaration of principle:

> (a) The Congress declares that elective and public office is a public trust , and any effort to realize personal gain through official conduct is a violation of that trust.

This is followed by a series of subsections setting out the following prohibitions applicable to all public officials:

> (b) No public official shall use his or her official position or office to obtain financial gain for himself or herself, any member of his or her household, or any business with which he or she or a member or his or her household is associated, other than that compensation provided by law for said public official.
>
> (c) No person shall offer or give to a public official or a member of a public official's household, and no public official shall solicit or receive anything of value, including a gift, favor, service, loan gratuity, discount, hospitality, political contribution, or promise of future employment, based on any understanding that such public official's official actions or judgment or vote would be influenced thereby, or where it could reasonably be inferred that the thing of value would influence the public official in the discharge of his or her duties, or as a reward, except for political contributions publicly reported . . . and transactions made in the ordinary course of business of the person offering or giving the thing of value.
>
> (d) No person shall offer or pay to a public official, and no public official shall solicit or receive any money, in addition to that lawfully received . . . in his or her official capacity, for advice or assistance given in the course of the public official's employment or relating to his or her employment.
>
> (e) No public official shall use or disclose confidential information given in the course of or by reason of his or her official position or activities in any way that could result in financial gain for himself or herself or for any other person.

The two prohibitions in § 1-1106.01 that are applicable only to elected officials are these:

> (f) No member or employee of the Council of the District of Columbia or Board of Education of the District of Columbia shall accept assignment to serve on a committee the jurisdiction of which consists of matters (other than of a de minimis nature) in which he or she or a member of his or her family or a business with which he or she is associated, has financial interest.
>
> (h) Neither the Mayor nor any member of the Council of the District of Columbia may represent another person before any regulatory agency or court of the District of Columbia while serving in such office.

Subsection (g) of § 1-1106.01 prescribes the actions to be taken when a public official "would be required" to take action affecting a personal or familial financial interest.

There are no reported court decisions applying or interpreting any of the prohibitory provisions of § 1-1106.01. **Dupont Circle Citizens Association v. District of Columbia Board of Zoning Adjustment, 364 A.2d 610, 613 (DC 1976)** does make glancing reference to what is now § 1-1106.01(g)). As noted under 1.11:700, above, **OGE Informal Opinion 93 x 22** rejected a contention that Congress had intended § 1-1106.01 to constitute the only conflict of interest prohibitions applicable to members of the DC Council (to the exclusion, in that instance, of 18 USC § 203).

Violations of the prohibitions of § 1-1106.01 (as well as other provisions of Chapter 11, and in addition those of Chapter 10, which also addresses the subject of elections, though not that of conflicts of interest) are subject to criminal penalties, provided by § 1-1107.01, of up to a $5,000 fine or 6 months imprisonment. Prosecutions are brought by the United States Attorney. Administrative enforcement authority is vested in the District of Columbia Board of Elections and Ethics, whose powers are prescribed by § 1-1103.05. Although the Board is authorized to refer violations to the United States Attorney, see §§ 1-1103.01(c) and 1-1103.02(c), it is also empowered by § 1-1103.05(b)(1) and (2) to assess, in administrative proceedings, civil penalties of up to $200 per day for violation of any provision of Chapter 11 or Chapter 10. It is also empowered by § 1-1103.05(b)(3) to prescribe a schedule of fines for such violations, which may be imposed "ministerially" by the Director of the Office of Campaign Finance, which fines are subject to a limit of $2,000 (per day) in the aggregate. When a civil penalty imposed by the Board is not paid, the Board is authorized by § 1-1103.05(b)(4) to seek enforcement by the Superior Court. The Board is also authorized, by § 1-1103.05(c), to issue, in response to inquiries from persons affected, "advisory opinions" about the applicability of any provision of Chapter 11 (or of Chapter 10).

The Director of Campaign Finance, referred to above in connection with the civil penalties that can be imposed ministerially, is appointed by the Mayor but operates as a sort of executive arm of the Board. The Director's duties are set out in § 1-1103.

The Board of Elections and Ethics has issued two sets of regulations that have relevance to the present discussion: one addressing *Conflict of Interest,* which comprises Chapter 33 of the **DC Municipal Regulations;** and the other addressing *Investigation and Hearings*, which is Chapter 37 of the same.

The regulations in Chapter 33 include, in § 3302, a substantial delegation by the Board to the Director of its advisory functions, authorizing the Office of Campaign Finance (OFC) to issue "interpretive opinions" in response to inquiries; review of these can be sought by the requester from the Board; and the Board's response becomes an "advisory opinion" which is published in the District of Columbia Register. No such "advisory opinions" have been issued in recent years. The "interpretive opinions" issued by the OFC are not published, but they may be viewed at the OFC's offices, and copies of particular opinions will be furnished upon request.

The prohibitory provisions of these regulations, found in § 3301, do little more than repeat, in somewhat simplified and watered-down form, the statutory prohibitions in § 1-1106.01, set out above. Thus, § 3301.1 of the regulation tracks § 1-1106.01(b) of the Code, but says "the public official shall avoid the use" rather than saying "No public official shall use" public office to obtain financial gain. Similarly, § 3301.2 tracks § 1-1106.01(c) on receipt of anything of value in exchange for official action; § 3301.3 tracks § 1-1106.01(d) on payment of receipt of money in return for advice or assistance given in the course of the public official's employment; § 3301.4(a) tracks § 1-1106.01(e) regarding use or disclosure of confidential information; and § 3301.4(b) tracks § 1-1106.01(f), regarding committee assignments.

The regulations in Chapter 37 prescribe in some detail the conduct of investigations. Section 3711 of those regulations sets out the schedule of fines that may be "ministerially" imposed by the Director pursuant to § 1-1103.05(b)(3) of the Code.

1.12 Rule 1.12 Third-Party Neutrals

1.12:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.12, DC Rule 1.11(a)
- Background References: ABA Model Rule 1.12, Other Jurisdictions
- Commentary:

1.12:101 Model Rule Comparison

Model Rule 1.12 imposes, in paragraph (a), a post-employment disqualification parallel to that imposed on former government lawyers by Model Rule 1.11(a), on lawyers who had previously served as a judge, arbitrator or "other adjudicative officer," or a law clerk to such a person, absent consent of all parties in the matter to which the disqualification applies. Paragraph (c) of the Rule, like Model Rule 1.11(b), imputes such a lawyer's disqualification to other lawyers associated with that lawyer in a firm, unless that lawyer is screened and appropriate notice is given to interested parties. In paragraph (b), Model Rule 1.12 also has a prohibition, parallel to that imposed by Model Rule 1.11(d)(2)(ii), on such a lawyer's negotiating for employment with a person who is involved as a party or as a lawyer for a party in a matter from which the lawyer would be disqualified. That paragraph also makes an exception from this prohibition for a law clerk to a judge or other adjudicative officer, provided that the latter was given notice beforehand. The recommendations of the Ethics 2000 Commission, adopted in 2002, did not alter the basic structure of Model Rule 1.12, but did expand its scope, to apply to mediators and other third party neutrals as well as judges and arbitrators, and the title of the Rule was amended to mention them as well.

DC Rule 1.12 was from inception, and remains, quite different from its Model Rule counterpart. It applied originally only to arbitrators, and more recently to other kinds of third-party neutrals, but not, like the Model Rule, to judges as well; under the DC Rules, the post-employment restrictions applicable to those who had previously acted in a "judicial or adjudicative capacity," as well as their law clerks, were dealt with in Rule 1.11 (as they had been in the predecessor DR 9-101(B) of the DC Code) (see 1.11:101, above). Until changed in 2006 as a result of recommendations by the Rules Review Committee, DC Rule 1.12 consisted entirely of just two brief paragraphs: paragraph (a) prohibited a lawyer who had served as an arbitrator from representing anyone in connection with a matter in which the lawyer had so served, absent consent; and paragraph (b) provided an exception to paragraph (a)'s prohibition where the arbitrator was selected as a partisan of a party in a multimember arbitration panel. The DC Rule had no provision for imputation of the arbitrator's disqualification (nor, necessarily, any provision for relief from imputation). Nor did it have a provision, comparable to paragraph (b) of the Model Rule, prohibiting negotiation for employment with a party or a lawyer for a party to the arbitration in which the lawyer served as arbitrator.

The DC Rules Review Committee recommended a number of changes to the DC Rule that would bring the Rule closer to the Model Rule -- prime among them, that the provisions dealing with disqualification of former judges and their law clerks be moved from DC Rule 1.11 to 1.12; but this was the only substantive recommendation of that Committee that the Court of Appeals declined to adopt. The Committee also recommended, and the Court accepted, a broadening of paragraph (a) to make it apply to a former mediator or other third-party neutral, as well as a former arbitrator, and a corresponding change in the caption to the Rule. The Committee also recommended, and the Court accepted, the addition of three paragraphs: a new paragraph (b), addressing negotiating for employment and identical to the Model Rule's paragraph (b) except that (as accepted by the Court) it does not refer to judges or other adjudicative officers or their law clerks; a new paragraph (c) identical to the Model Rule counterpart, providing for imputation of a disqualification to other lawyers in the disqualified lawyer's firm, absent screening and appropriate notice; and a new paragraph (d), which has no parallel in the Model Rule, providing a procedure for avoiding, on request of the client, disclosure of the fact and subject matter of a representation to the parties and the relevant tribunal, which would otherwise be effectuated by the written notices now required by subparagraph (b)(2) of the rule. The key features of this procedure are that those notices are still prepared, but filed with Bar Counsel rather than sent to the parties and the tribunal, and that if the fact and subject matter otherwise become publicly disclosed, the notices must then be submitted as required by subparagraph (b)(2). The provision that had previously been paragraph (c), making an exception to the prohibition of paragraph (a) for arbitrators selected as a partisan of a party in a multimember arbitration panel, was relabeled as paragraph (e).

1.12:102 Model Code Comparison

No disciplinary rule in the Model Code dealt specifically with arbitrators, although DR 9-101(A) applied to lawyers who had acted in a judicial capacity with respect to any matter. (The DC Code, as amended in 1982 [see 1.11:102 above], effectively folded that provision in with the general provision on post-government employment in DR 9-101(B).) EC 5-20 stated that an impartial arbitrator or mediator should not subsequently represent any of the parties involved with respect to the dispute, without any mention of consent.

1.12:200 Former Judge or Arbitrator Representing Client in Same Matter

- Primary DC References: DC Rule 1.11
- Background References: ABA Model Rule 1.12(a), Other Jurisdictions
- Commentary: ABABNA § 91:4501

Despite the 2006 changes in DC Rule 1.12, bringing it closer to the corresponding Model Rule [see 1.12:101, above], the DC Rule's prohibition on subsequent representation of a party to a previous adjudication still applies only to former arbitrators and other neutrals and not to former judges, who are still covered instead by DC Rule 1.11.

There appear to be no pertinent DC court decisions or ethics opinions relating to DC Rule 1.12.

1.12:300 Negotiating for Future Employment

- Primary DC References: DC Rule 1.12(b)
- Background References: ABA Model Rule 1.12(b), Other Jurisdictions
- Commentary: ABABNA § 91:4011; ALI-LGL § 125; Wolfram § 8.10.3

Prior to the changes made to DC Rule 1.12 in 2006 pursuant to recommendations of the DC Rules Review Committee [see 1.12:101, above], there was no provision in DC Rule 1.12 corresponding to paragraph (b) of the Model Rule, forbidding a lawyer serving as an arbitrator or other neutral from negotiating for future employment with a party to a pending proceeding; nor was there such a prohibition in either that Rule of DC Rule 1.11 applying such a prohibition to a judge. The 2006 amendments, however, inserted into DC Rule 1.12 a paragraph (b) identical to the corresponding paragraph of the Model Rule in its applying such a prohibition to arbitrators and other neutrals. That provision of the Model Rule applies also to judges and their clerks, and the DC Committee recommended that they be included also in the DC Rule, but this recommendation was not accepted by the Court. No such provision applying to judges or their law clerks is to be found in DC Rule 1.11 or elsewhere in the DC Rules.

1.12:400 Screening to Prevent Imputed Disqualification

- Primary DC References: DC Rule 1.11(c); DC Rule 1.12(c)
- Background References: ABA Model Rule 1.12(c), Other Jurisdictions
- Commentary: ABABNA § 91:4503; Wolfram § 7.6.4

Prior to the 2006 changes to DC Rule 1.12 [see 1.12:101, above], DC Rules had no provision corresponding to Model Rule 1.12(a), imputing, absent consent of all parties, the disqualification of a former arbitrator or other neutral pursuant to paragraph (a) of that Rule -- nor, necessarily, any provision similar to paragraph (c), setting out procedures for relief from such imputation. In 2006, however, DC Rule was brought into conformity with its Model Rule counterpart insofar as the treatment of former arbitrators and other neutrals were concerned. These changes did not, however, also extend to former judges, who remained subject to similar provisions, but in DC Rule 1.11 rather than 1.12.

1.12:500 Partisan Arbitrators Selected by Parties to Dispute

- Primary DC References: DC Rule 1.12(b)
- Background References: ABA Model Rule 1.12(d), Other Jurisdictions
- Commentary:

DC Rule 1.12, like its Model Rule counterpart, has always made an exception, from the prohibition on a lawyer representing any party to a matter in which the lawyer served as arbitrator (absent consent of all the parties thereto) for a lawyer who served as a partisan of a party in a multimember arbitration subsequently representing that party. That prohibition is in paragraph (a) of both the DC Rule and the Model Rule; the exception is now in paragraph (e) of the DC Rule and paragraph (d) of the Model Rule.

1.13 Rule 1.13 Organization as Client

1.13:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.13
- Background References: ABA Model Rule 1.13, Other Jurisdictions
- Commentary:

1.13:101 Model Rule Comparison

Substantial changes, described below, were made in Model Rule 1.13 in 2003 as a result of the report of the ABA Corporate Responsibility Task Force, which was prompted by the corporate scandals that had been proliferating in recent years. Prior to those changes the Model Rule and its DC counterpart were very similar, and in many respects identical in substance. Thus, paragraph (a) of DC Rule 1.13, the general statement that the lawyer for an organization represents the organization acting through its constituents, was then and remains today identical to paragraph (a) of the Model Rule.

Paragraph (b) of the DC Rule (now redesignated as (c)), addressing a lawyer's obligations when dealing with an organizational client's constituents, was identical to what was then paragraph (d)(now (f)) of MR 1.13, except that that paragraph of the DC Rule said a lawyer must explain to a constituent of the organization with whom the lawyer is dealing that he represents the organization when it is apparent that the organization's interests "may be" adverse to those of the constituent; the Model Rule's paragraph (b) required such an explanation when it was apparent that the interests "are" adverse. One further small difference between the two provisions was added to the Model Rule on a recommendation of the Ethics 2000 Commission -- the only change in the rule recommended by that Commission -- by the replacement in the Model Rule of the phrase "it is apparent" by "the lawyer knows or reasonably should know."

Paragraph (c)(now (d)) of the DC Rule, regarding representation of constituents of the organizational client as well as the organization, was and is still also identical to paragraph (e)(now (g)) of MR 1.13.

Prior to the 2003 amendments, the foregoing three provisions constituted the whole of DC Rule 1.13, but the Model Rule also contained two provisions that had no parallels in the DC Rule. One was the Model Rule's paragraph (b), suggesting various actions a lawyer might take on learning of actions taken, threatened or foregone by an organizational client's officers or employees that are likely to result in substantial injury to the organization, including "reporting up," which is to say referring the matter to higher organizational authority. The other provision in the Model Rule but not its DC counterpart was paragraph (c), making clear that if, despite the lawyer's efforts, the highest competent organizational authority insisted on action, or refused to refrain from action, that was clearly a violation of law and was likely to result in substantial injury to the organization, the lawyer could resign. The Jordan Committee had considered

following the Model Rules example with respect to these two provisions, but decided against doing so. The Board of Governors' petition forwarding the Jordan Committee report to the Court of Appeals explained the omission by observing that these paragraphs

> merely suggest measures which *may* be taken by a lawyer for an organization if the lawyer knows that a person associated with the organization is acting or intends to act in one of the specified improper ways. The Committee concluded that such advisory and precatory language is inappropriate for a black letter rule and that the substance of paragraphs (b) and (c) is adequately presented in the Comment to the Rule.

The portions of the Comment to which the Jordan Committee here referred were Comments [4] and [5] (now [3] and [4]) to the DC Rule, which were identical to the Model Rule's Comments [2] and [3]. The Jordan Committee also recommended omitting what was then Comment [6] (now [9]) to the Model Rule, explaining MR 1.13's applicability to government lawyers, and proposed a substitute Comment stating that 1.13 did not apply to government lawyers and explaining the reasons why. That proposed substitute Comment also noted that the Bar's Board of Governors planned to appoint a special committee to consider whether the DC Rules should include special rules, comparable to Rule 1.13 but specifically dealing with government lawyers. The committee thus appointed, the Sims Committee, did not recommend such a special rule for government lawyers, but instead recommended changes to six of the DC Rules, or their Comments, to deal specifically with government lawyers. With respect to DC Rule 1.13, the Sims Committee recommended, and the Court of Appeals agreed, that it should have a Comment [7] (now [6]), differently phrased than the Model Rules' Comment [6], stating that the agency that employs a government lawyer is the lawyer's client and that the application of Rule 1.13 to government lawyers must take into account differences between government agencies and other organizations.

The changes made in 2003 to Model Rule 1.13 included amendment of paragraph (b) to omit mention of less drastic measures a lawyer might take in the face of corporate misconduct, and to focus on reporting up the organizational ladder including, if necessary the highest authority, unless the lawyer reasonably believes it not necessary in the best interest of the organization. The DC Rules Review Committee recommended, and the Court of Appeals in 2006 approved, addition to the DC Rule of a new paragraph (b) almost identical to the revised paragraph (b) of the Model Rule. In addition to this change in Model Rule 1.13, the 2003 amendments added three new paragraphs, The first of these, paragraph (c), provided that a lawyer in appropriate circumstances might "report out" -- i.e., to report organizational misconduct to third parties, if the highest competent organizational authority "insists on or fails to address in a timely and appropriate manner" an action or refusal to act that is clearly a violation of law and the lawyer reasonably believes likely to result in substantial injury to the organization. A new paragraph (d) was also added, to exempt from such disclosures under paragraph (c) information learned by a lawyer in connection with an engagement

to investigate the client organization, or to defend the organization or an officer, employee or other constituent of the organization. And a new paragraph (e) was also added, to provide that a lawyer who reasonably believes that he or she has been discharged because of the lawyer's making the disclosures contemplated by paragraphs (b) and (c), to do what is necessary to see that the organization's highest authority is so informed. The DC Rules Review Committee did not recommend adding any of these three new provisions of the Model Rule to the DC Rule, and the Court of Appeals accepted this judgment. The Committee expressed the view that the amendment it had proposed to Rule 1.6 (in the new paragraph (d); see 1.6:101, above), allowing for disclosure of information otherwise protected by that Rule, to prevent the client from committing a crime or fraud using the lawyer's services, or to prevent or mitigate injury to financial interests or property resulting from such fraud or crime, provided sufficient latitude for a lawyer to blow the whistle on a client's misconduct when necessary, and to make any disclosure allowed or required by the Sarbanes-Oxley Act or SEC Rule 205. The Committee *did,* however, recommend that a reference to Rule 1.6(d) be added to what is now Comment [7] (formerly [8])..

1.13:102 Model Code Comparison

There was no counterpart to Rule 1.13 in the disciplinary rules of the Model Code. EC 5-18 was similar to Rule 1.13 in admonishing that "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity." In **Griva v. Davison, 637 A.2d 830, 837 (DC 1994)**, the questioned conduct occurred over a period that encompassed the reigns of both the Model Code and the Model Rules; the DC Court of Appeals reached substantially the same result under both DR 5-105, as informed by EC 5-18, and Rule 1.13.

1.13:200 Entity as Client

- Primary DC References: DC Rule 1.13(a)
- Background References: ABA Model Rule 1.13(a), Other Jurisdictions
- Commentary: ABABNA § 91:2001; ALI-LGL §§ 96, 97; Wolfram § 8.3

A common occasion for the application of Rule 1.13 is the representation of a closely held corporation. **DC Ethics Opinion 216 (1991)** ruled that the lawyer's client is the corporation and not one or more of its principals even in circumstances in which it takes a lawyerly mind singularly adept at reification to perceive what the corporation *is*. In **Opinion 216**, the corporation was owned in equal shares by two principals. It had sued a bank for wrongful termination of a banking relationship. The same bank had secured a judgment against one of the principals, who had defaulted on a loan, and in execution of the judgment became the owner of that principal's 50 percent interest in the corporation. The dispossessed principal had been the president of the corporation and claimed still to be president because it would take a majority vote to oust him and the other principal would not vote with the bank to do so. The lawyer for the corporation wanted to know whether he should follow the direction of the non-shareholder president of the corporation to pursue the suit against the shareholder bank. The Opinion said yes, at least until the dispute over control of the corporation was resolved. The Opinion acknowledged that the president might very well have his own, non-corporate, reasons for pursuing the suit but pointed to Comment [4], which tells the lawyer that, when the appropriate "constituent" makes decisions for the corporation, "the decisions must ordinarily be accepted by the lawyer even if their utility or prudence is doubtful."

DC Ethics Opinion 328 (2005) addresses issues that arise when a lawyer represents a constituent of an organization personally and not the organization. The **Opinion** states that a lawyer should make clear to the client at the outset of the representation that the lawyer's client is the constituent and not the organization. It also warns the lawyer to be sensitive to the false impression that might be created among non-client constituents, particularly when the lawyer represents a constituent that participates in the organization's management, and to make clear to them before being exposed to information that may constitute corporate confidences or secrets that the lawyer's interests may be separate from those of the entity.

1.13:210 Lawyer with Fiduciary Obligation to Third Person

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.13:220 Lawyer Serving as Officer or Director of an Organization

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.13:230 Diverse Kinds of Entities as Organizations

In **Griva v. Davison**, cited above in 1.13:102, the DC Court of Appeals held that a partnership is an organization within the meaning of Rule 1.13. However, by approving quotations from **ABA Formal Opinion 91-361**, the Court suggested — there is no explicit statement of the comparison — that a lawyer would properly be found to represent an individual partner (particularly in a small partnership) more readily than the same lawyer would be found to represent, say, an individual shareholder of a closely held corporation.

DC Ethics Opinion 305 (2001) addressed the ethical considerations arising from representation of a trade organization. Following the reasoning of **ABA Formal Opinion 92-305,** among other authorities, it held that representation of a trade association does not, without more, create an attorney-client relationship with individual members of the association; but also noted that the particular circumstances of a representation, such as where members of the association have disclosed confidential information to the lawyer in the belief that the lawyer was acting on their behalf, might result in such an attorney-client relationship. The **Opinion** also pointed out that representation of a trade association might bar the lawyer under Rule 1.7(2) through (4) from undertaking a representation adverse to a member of the association, if that representation was sufficiently related to the lawyer's representation of the association to present a risk either that the new client would not be represented with vigor or that unfair advantage would be taken of the adverse association member.

DC Ethics Opinion 159 (1985) ruled that, under the Model Code, the lawyer for a cooperative association did not, merely by virtue of his representation of the association, represent "each and every member" of the association even though the lawyer's fee was paid from members' dues. Subject to the usual conflict rules, expressed then in terms of adverse effect on professional judgment and differing interests, the lawyer could represent a member of the association in a dispute with another member, represent a member against a single director of the association, and represent the association against a member.

Under the substantive law of the District of Columbia the actual client of a lawyer described in lay (and probably most lawyers') terms as representing a decedent's estate is the personal representative. **Poe v. Noble, 525 A.2d 190, 193 (DC 1987)**; **Hopkins v. Akins, 637 A.2d 424, 428 (DC 1993)**. The Legal Ethics Committee in **DC Ethics Opinion 259 (1995)** considered itself bound by these decisions in ruling that a lawyer similarly represents the conservator of the estate of an incapacitated person and not the estate; thus the lawyer "for the estate" could not represent two conservators seeking to remove a third believed to have been profiting from the estate. However, under the DC Code a lawyer apparently may represent a trust as opposed to the trustees. **DC Ethics Opinion 230 (1992)**.

1.13:300 Preventing Injury to an Entity Client

- Primary DC References: DC Rule 1.13
- Background References: ABA Model Rule 1.13(b) & (c), Other Jurisdictions
- Commentary: ABABNA § 91:2001; ALI-LGL § 96; Wolfram § 13.7

In DC Ethics Opinion 216, cited in 1.13:200 above, the Legal Ethics Committee cautioned that, while the lawyer could and should continue to take directions from the dispossessed president of the close corporation up to a point, if the lawyer were convinced that the president's actions were clearly in violation of the president's own fiduciary duties to the corporation, "the lawyer may be forced to seek guidance from the courts as to who is in control of the corporation, there being no higher authority within the corporation to whom the lawyer can turn."

1.13:310 Resignation Versus Disclosure Outside the Organization

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.13:400 Fairness to Non-Client Constituents Within an Entity Client

- Primary DC References: DC Rule 1.13(b)
- Background References: ABA Model Rule 1.13(d), Other Jurisdictions
- Commentary: ABABNA § 91:2001; ALI-LGL § 103; Wolfram § 13.7.5

In DC Ethics Opinion 148 (1985), under the Model Code, the Legal Ethics Committee anticipated Rule 1.13(b) by ruling that DR 1-102(A)(4) (generally forbidding deceitful conduct) required a lawyer for a government agency to caution an employee whom the lawyer was advising in the course of official duty against making any disclosures to the lawyer in the belief that they would be confidential as against the agency.

DC Ethics Opinion 269 (1997) addresses the ethical considerations that arise when a lawyer is retained by a corporation to conduct an internal investigation and interviews corporate constituents. The **Opinion** emphasizes the provisions of Rule 1.13 that make clear that the lawyer's client is the corporation only, as well as those that obligate the lawyer to explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituent.

1.13:500 Joint Representation of Entity and Individual Constituents

- Primary DC References: DC Rule 1.13(c)
- Background References: ABA Model Rule 1.13(e), Other Jurisdictions
- Commentary: ABABNA § 91:2601; ALI-LGL § 131; Wolfram § 13.7

In Griva v. Davison, 637 A.2d at 837, the court held that a lawyer representing a partnership of three could not represent two of the partners in a dispute with the third.

DC Ethics Opinion 269 (1997) discusses issues that arise when a lawyer is asked to represent a constituent and an organization in the same matter.

1.13:510 Corporate Counsel's Role in Shareholder Derivative Actions

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.13:520 Representing Client with Fiduciary Duties

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.13:530 Representing Government Client

There has apparently been no elucidation or amplification by the DC Court of Appeals or the Legal Ethics Committee of the statement in Comment [7], quoted in 1.13:101 above, that the application of Rule 1.13 to government lawyers must take account of the differences between government agencies and other organizations. Under the Model Code, **DC Ethics Opinion 112 (1982)** says that lawyers for the federal Office of Personnel Management could not be members of a union described as "consistently in an adversarial relationship" with the agency if their interests as union members would affect their judgment as lawyers for the agency. And **DC Ethics Opinion 148 (1985)** ruled that, because the employing government agency, and not the employee to whom the lawyer regularly provided legal advice relating to the employee's official duty, was the lawyer's client, the lawyer could communicate to the agency the employee's disclosures to the lawyer and could be a witness against the employee in a disciplinary proceeding.

1.14 Rule 1.14 Client With Diminished Capacity

1.14:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.14
- Background References: ABA Model Rule 1.14
- Commentary:

1.14:101 Model Rule Comparison

The DC Rule as originally adopted was identical to the Model Rule except it did not include one of the Comments to that rule -- Comment [4], regarding the possible obligation of a lawyer representing a guardian, as distinct from a ward, to prevent or rectify the guardian's misconduct. The Jordan Committee considered the Comment language too vague and expressed concern that it would conflict with Rule 1.6 obligations to the guardian. The DC Rules Review Committee did not revisit this omission, which remains at the end of a revised Comment [4] in the Model Rule.

One other variance between the DC Rule and the Model Rule was the addition to the latter, in 1997, of two new Comments, following the last of the previous Comments, under the caption **Emergency Legal Assistance**; these are now numbered [9] and [10] in the Model Rule's Comments, and were added by the DC Rules Review Committee, in identical form and numbering, to the DC Rule.

The Ethics 2000 Commission recommended substantial changes to Model Rule 1.14, including a change in the caption of the Rule, to say **Clients With Diminished Capacity** instead of **Clients Under a Disability**; adding a new paragraph (c) to the Rule, addressing the relationship of the rule to Rule 1.6; and making substantial revisions in both of the other paragraphs of the black letter Rule and in addition all of the Comments. The DC Rules Review Committee recommended, and the Court of Appeals agreed, that all of the substantive changes in the Model Rule and virtually of its Comments be made also in the DC Rule and its Comments, so that the two Rules are again identical, with only a few minor differences in the Comments, including continued omission from the DC Comments of the substance of the original Comment [4] to the Model Rule (discussed in the first paragraph above).

1.14:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code.

1.14:200 Problems in Representing a Partially or Severely Disabled Client

- Primary DC References: DC Rule 1.14
- Background References: ABA Model Rule 1.14, Other Jurisdictions
- Commentary: ABABNA § 31:601; ALI-LGL § 24; Wolfram § 4.4

DC Ethics Opinion 252 (1994) considered Rule 1.14, *inter alia*, in discussing the authority and obligations of a lawyer who had been appointed as a guardian *ad litem* of a minor in a child abuse and neglect proceeding, with respect to potential tort claims of the child. The Opinion concluded that the lawyer does not have an obligation to pursue such claims on the child's behalf, but is obligated to notify the child or those responsible for the child's care of the potential claims, and when necessary to preserve the claim is also obligated to take reasonable steps to file required notices. The Opinion also stated that the lawyer guardian *ad litem* cannot enter into a retainer agreement in a tort action on the child's behalf or represent the child in such a case unless a disinterested third party represents the child's interests.

1.14:300 Maintaining Client-Lawyer Relationship with Disabled Client

- Primary DC References: DC Rule 1.14(a)
- Background References: ABA Model Rule 1.14(a), Other Jurisdictions
- Commentary: ABABNA § 31:601; ALI-LGL § 24; Wolfram § 4.4

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.14:400 Appointment of Guardian or Other Protective Action

- Primary DC References: DC Rule 1.14(b)
- Background References: ABA Model Rule 1.14(b), Other Jurisdictions
- Commentary: ABABNA § 31:601; ALI-LGL § 24; Wolfram § 4.4

See discussion of **DC Ethics Opinion 252** under 1.14:200 above.

1.15 Rule 1.15 Safekeeping Property

1.15:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.15, DC Rule 1.17
- Background References: ABA Model Rule 1.15 Other Jurisdictions
- Commentary:

1.15:101 Model Rule Comparison

Paragraph (a) of DC Rule 1.15 as originally adopted specified that funds of clients or third parties that the Rule requires be held separately from a lawyer's own funds must be deposited in an institution insured by the FDIC or (anachronistically) the FSLIC in the District of Columbia or the state in which the lawyer's or the law firm's office was located; but otherwise was the same as paragraph (a) of the Model Rule. In April 1992 paragraph (a) was supplemented by DC Rule 1.17, Trust Account Overdraft Notification, requiring that such funds be deposited only in institutions included on a list of "DC Bar Approved Depositories," which have agreed to notify Bar Counsel of overdrafts in such accounts. DC Rule 1.17 has been renumbered as Rule 1.19 pursuant to a recommendation of the DC Rule Review Committee, so as to make room for new Rules 1.17 and 1.18 corresponding to the similarly numbered Model Rules. DC Rule 1.19 has no Model Rule counterpart.

Paragraph (a) of DC Rule 1.15 and paragraph (b) of what was then DC Rule 1.17 were amended effective November 1, 1996, on recommendation of the Peters Committee, to deal with the problem that, as they previously stood, requiring that all funds of others held by a lawyer be deposited in an approved depository, they effectively prohibited legitimate, appropriate and, indeed occasionally *required* methods of investing such funds. The amendments established two exceptions to the requirement that funds be deposited in an approved depository: when the funds (1) are permitted to be held otherwise, by law or court order, or (2) are held by the lawyer under an escrow or similar arrangement in connection with a commercial transaction. The Peters Committee also suggested an exception where funds are held under a will, trust or other formal instrument that authorizes the lawyer to do differently; but the Court of Appeals omitted this, perhaps as already covered by the permitted-by-law exception.

Paragraph (b) of DC Rule 1.15 was identical to paragraph (b) of the Model Rule (now redesignated as paragraph (d) because of the insertion of new paragraphs (b) and (c)), except that it specified that any delivery of or accounting for property of others required to be held separately is subject to the confidentiality requirements of DC Rule 1.6.

Paragraph (c) of the DC Rule required that funds in dispute be deposited in a separate account meeting the requirements of paragraph (a), while paragraph (c) of the Model

Rule (now redesignated as paragraph (e)) said only that they "shall be kept separate by the lawyer;" otherwise, the two provisions were identical. That paragraph in both of the rules originally addressed only instances where both the lawyer and another person claimed interests in the disputed funds. Paragraph (c) of the DC Rule was, however, amended effective November 1, 1996, on a recommendation of the Peters Committee that had been suggested by Bar Counsel; the amendment extended it to cover situations where funds held by the lawyer are subject to claims of two or more persons other than the lawyer. A similar broadening of the scope of the provision was made in the corresponding paragraph of the Model Rule (along with its redesignation) pursuant to the Ethics 2000 Commission's recommendation, along with the addition of a final sentence, not found in the DC Rule, requiring the lawyer promptly to distribute all portions of the property held as to which the interests are not in dispute.

The first sentence of paragraph (d) of the DC Rule, as originally adopted and as in effect until January 1, 2000, said that advances of legal fees and costs become the lawyer's property upon receipt -- which exempts them from deposit in a trust account and allows them to be commingled with a lawyer's other funds. Effective on the date indicated, that sentence was amended to provide a presumption to just the opposite effect: specifically, that advances of unearned fees and unincurred costs may be treated as property of either the client or – with client consent – the lawyer, until earned or incurred; but with the default position (absent client consent) being that they are property of the client. This provision of the DC Rule did not, in either its original form or as changed in 2000, have any counterpart in the Model Rule; however, the Ethics 2000 Commission's included a new paragraph (c) in the Model Rule, providing that the lawyer must deposit fees and expenses paid in advance into a trust account and withdraw them only as earned or incurred.

The second sentence of paragraph (d) of the DC Rule, which was not changed in substance by the 2000 amendment, is to the effect that any unearned portion of the prepaid fees must be returned upon termination of the lawyer's services. This does not appear in Model Rule 1.15, but it is found in Rule 1.16(d), in both the DC Rules and the Model Rules.

Along with the foregoing changes in the black letter of DC Rule 1.5(d), there was added, effective January 1, 2000, a new Comment [2], explaining that provision; the Comments that follow it were renumbered. [The history of this paragraph of DC Rule 1.15, the possible problem it presents when variant rules of other jurisdictions may be involved, and the origin of the remedial amendments that came into effect on January 1, 2000, are more fully discussed under 1.15:210 below.]

Paragraph (e) of DC Rule 1.15, which has no counterpart in the Model Rule, makes provision for deposit of clients' funds in an IOLTA account [discussed under 1.15:110 below].

Paragraph (f) of DC Rule 1.15, which was added effective November 1, 1996, pursuant to a recommendation of the Peters Committee, provides that a small amount of the

lawyer's own funds can properly be placed in a trust account for the sole purpose of paying bank charges on that account — a provision that appeared in DR 9-102(A)(1) of the Model Code (and the corresponding DR 9-103(A)(1) of the DC Code) but had been omitted from the Model Rules. That omission was repaired by the Ethics 2000 Commission, which added a new paragraph (b) to the Model Rule that is the same in substance, though different in phrasing, from paragraph (f) of the DC Rule.

The Peters Committee also recommended, on a suggestion by Bar Counsel, that there be added to DC Rule 1.15 a prohibition against a lawyer's signing without authorization a client's name on a negotiable instrument or other document affecting a client's property rights. A new paragraph (f) and a new Comment [8] would have addressed this subject. The Court of Appeals rejected this recommendation, without explanation.

The Peters Committee also proposed a new Comment [9] for Rule 1.15 and a new Comment [1] for what was then Rule 1.17, to clarify that funds are required to be placed only in an institution that maintains federal insurance, not that they must be divided among accounts so that no single account exceeds the limits of applicable federal insurance. The Court of Appeals, however, rejected these suggestions, again without explanation..

1.15:102 Model Code Comparison

The DC Code provisions replaced by Rule 1.15 were found in DR 9-103, which with a single exception was identical to DR 9-102 in the Model Code, but which had been renumbered in April 1982, in connection with the substantial revision of the "revolving door" provisions in DR 9-101. References below will be to the DC Code rather than the Model Code provision.

Paragraph (a) of DC Rule 1.15, like its Model Rule counterpart, expands the requirements of DR 9-103(A) and DR 9-103(B)(2) and (3) regarding segregation, safekeeping and recording of client funds and property to include funds and property of a third person in the lawyer's possession; in addition it specifies the kinds of institutions in which funds must be deposited. It also adds, like the Model Rule, a five-year record-keeping requirement (previously imposed on all D.C. lawyers by Rule XI, Section 14 of the DC Court of Appeals Rules Governing the District of Columbia Bar).

Paragraph (b) of the DC Rule similarly extends to the funds and property of non-clients the obligations imposed by DR 9-103(B)(1) and (4) with respect to funds and property of clients; and, in addition, it makes any delivery of or accounting for it subject to the confidentiality duty imposed by Rule 1.6.

Paragraph (c) of DC Rule 1.15 similarly extends DR 9-103(A)(2) to cover funds and property of non-clients.

The first sentence of paragraph (d) of DC Rule 1.15 addresses a point — who owns fee advances — that was not clear under the Code. The second sentence, requiring return of the unearned portion of a fee advance, is similar to DR 2-110(A)(3).

Paragraph (e) of DC Rule 1.15, regarding the Interest on Lawyer Trust Account (IOLTA) Program, is substantially the same as DR 9-103(C) of the DC Code, which was added in 1985, and which had no counterpart in the Model Code.

Paragraph (f) of DC Rule 1.15, which was added effective November 1, 1996, restores a provision that, allowing a small amount of the lawyer's own funds to be placed in a trust account in order to pay bank charges on the account, appeared in the predecessor provision in both the DC Code and the Model Code but was dropped from both the Model Rule and the DC Rule as originally adopted.

1.15:110 DC IOLTA Plan

The DC Court of Appeals adopted an Interest on Lawyers Trust Accounts (IOLTA) Program in February 1985 on petition of the DC Bar. It is described in Appendix B to Rule X of the DC Court of Appeals Rules Governing the District of Columbia Bar. (Rule X promulgates the DC Rules of Professional Conduct, which are Appendix A thereto.) It is also reflected in DC Rule 1.15(e), which specifically provides (as did its predecessor, DR 9-103(C) of the DC Code) that clients' funds that are nominal in amount or to be held for a short period may be put in interest-bearing accounts for purposes of a court-approved IOLTA Plan.

The DC IOLTA Program is of the "opt-out" variety: lawyers and law firms may file a written Notice of Declaration, which excuses them from maintaining an IOLTA account, but absent such a filing, an IOLTA account is required. The interest or dividends on IOLTA accounts are required to be paid quarterly to the DC Bar Foundation, which in turn distributes grants to programs providing legal and related assistance to poor persons otherwise unable to obtain legal assistance.

1.15:120 DC Client Security Fund

Rule XII of the DC Court of Appeals Rules Governing the District of Columbia Bar provides for establishment of a Client Security Trust Fund, to "maintain the integrity and protect the good name of the legal profession by reimbursing, to the extent authorized by these rules and deemed proper and reasonable by the trustees, losses caused by dishonest conduct of members of the District of Columbia bar, acting either as lawyers or as fiduciaries (except to the extent to which they are bonded)." The Fund is managed by five trustees appointed by the Court upon nomination by the Board of Governors of the DC Bar, who are charged with considering claims for reimbursement of losses caused by the dishonest conduct of members of the DC Bar acting either as lawyers or as fiduciaries, and are given the power for this purpose to administer oaths and affirmations and subpoena documents and testimony. Appropriations to the Fund are made annually by the Board of Governors of the DC Bar in its discretion, out of revenues of the Bar: support of the Fund is one of the few uses to which the compulsory dues of members of the DC Bar may, following several membership referenda, be put. The Fund also recovers some amounts paid out in claims by pursuing its subrogation rights. The DC Bar's contributions, which average around $15,000 a year, are calculated to maintain the Fund at the level of $750,000.

1.15:200 Safeguarding and Safekeeping Property

- Primary DC References: DC Rule 1.15(a), DC Rule 1.17
- Background References: ABA Model Rule 1.15(a), Other Jurisdictions
- Commentary: ABABNA § 45:109; ALI-LGL §§ 44-46; Wolfram § 4.8

Rule 1.15(a)'s requirement that funds of clients or third persons be kept in separate accounts, and the related problems of commingling and misappropriation of funds, which are the most frequent occasions for application of Rule 1.15(a), are discussed under 1.15:300, below.

Maintenance of Records and Rendering Accounts: The requirement of DR 9-102(B)(3) that a lawyer maintain complete records of all funds, securities and other properties of the client and render appropriate accounts to the client regarding them, which is continued by DC Rule 1.15(a) and (b), was held in **In re Woodard, 636 A.2d 969 (DC 1994)**, to have been violated by the commingling of the funds of four clients. Failure to maintain complete records was also found in **In re Choroszej, 624 A.2d 434 (DC 1992)**, where the lawyer, who was found to have unintentionally committed misappropriation, also was unable to locate and produce financial records showing how he had handled settlement proceeds in a case. See also **In re Tinsley, 582 A.2d 1192 (DC 1990)**, where the lawyer was seriously remiss in his duties as a conservator, failing, among other things, to pay the ward's nursing home charges, to produce rental income from the ward's estate, to file timely accounts, to attend hearings regarding the conservatorship, and to respond to requests for information from auditors and the successor conservator, in violation of DR 9-102(B)(3) and several other rules; **In re Pels, 653 A.2d 388 (DC 1995), cert. denied, 117 S.Ct. 58 (1996)**, where there was found a "complete inability" to account for the flow of funds received on the client's behalf.

The requirements of Rule 1.15(a) regarding a lawyer's keeping of complete records of property of clients or thid persons in the lawyer's possession are einforced by Section 19(f) of DC App. Rule XI (Disciplinary Provisions), which reads as follows:

> (f) Required records. Every attorney subject to the disciplinary jurisdiction of this Court shall maintain complete records of the handling, maintenance, and disposition of all funds … belonging to another person … at any time in the attorney's possession, from the time of receipt to the time of final distribution, and shall preserve such records fo a period of five years after final distribution of such funds ….

In re Clower, 831 A.2d 1030 (DC 2003)(per curiam) involved the imposition of a public censure for violation of both of these provision, as well as DC Rule of Professional Conduct 1.15(b), requiring that a lawyer who receives funds or property in which a client or third party has an interest promptly notify that person of the receipt, and promptly deliver to that person funds or property to funds or property to which he

or she is entitled. The respondent here had received settlement funds for the client as to a portion of which a physical therapist had a claim under an authorization and assignment agreement for services rendered to the client, but although the respondent was aware of the therapist's claim, he neither notified the physical therapist of receipt of the settlement funds nor paid any part of the therapist's claim. By the time when, more than two years after receipt of the settlement funds, the claimant inquired about the matter, the respondent had disbursed all of settlement funds to others. Thus, the respondent had violated both the notice and the delivery requirements of Rule 1.15(b). The respondent's additional violation of the two provisions requiring the keeping of complete records of property or funds of another held by the lawyer turned on the fact that the records that the respondent had kept were not *complete,* as both of those provisions require. Respondent had disbursed funds from the settlement account not only to the client but to several persons who were not listed on a settlement and disbursement statement that the client had approved; and while respondent had kept records showing who received those disbursement, and was able to furnish a letter from the client stating that they had been made with her knowledge and approval, he had no contemporaneous written documentation of either client approval or the reasons for those disbursements.

Prompt Placement in Safekeeping. DR 9-102(B)(2)'s requirement that a lawyer put properties of the client in safekeeping as soon as practicable, which is not explicitly continued by DC Rule 1.15(a), was held to have been violated by a delay in depositing checks of the client in **In re Lenoir, 585 A.2d 771 (DC 1991)**, where the Court explained that "place of safekeeping" as used in the rule means, with respect to funds of the client, deposit in a bank account.

1.15:210 Status of Fee Advances [see also 1.5:420]

Pertinent here is paragraph (d) of DC Rule 1.15, which has no corresponding provision in the Model Rule. As descibed under 1.15:101, above, that provision as originally adopted and as in effect until January 1, 2000, stated that advances of fees and costs become the property of the lawyer upon receipt. This meant that a DC lawyer could not keep such advances with client funds but could put them in the lawyer's operating accounts. Effective on the date indicated, however, paragraph (d) has provided presumptively just the contrary – *i.e.*, that unearned fees and unincurred costs remain the property of the client (absent client agreement to the contrary).

The source of the original DC Rule 1.15(d) was **DC Ethics Opinion 113 (1982)**, which addressed several issues regarding fee advances, concluding, among other things, that although the lawyer is obligated to return to a client any portion of a fee advance not actually earned, such advances are nonetheless not "funds of a client" and so subject to the requirements of DR 9-103 (the DC Code predecessor of Rule 1.15) with respect to such funds.

DC Ethics Opinion 264 (1996) explicated the provision in its original form, and its application to special and general retainers. The **Opinion** stated that a retainer that is tied directly to the provision of legal services, rather than to ensuring the availability of the lawyer, is a "special retainer" which is earned upon provision of the services rather than upon receipt: thus, as DC Rule 1.15(d) explicitly provided, any unearned portion of the retainer must be returned to the client. In sum, a special retainer could not be nonrefundable (although the refund due on early termination of the engagement need not necessarily be strictly proportionate to the time spent). (In contrast, a "general retainer" is "paid solely for availability and a promise of exclusivity," is earned when received, and may be nonrefundable.) Nonetheless, the **Opinion** pointed out, DC Rule 1.15(d) stated that advances of legal fees and costs become the property of the lawyer upon receipt; in consequence, such advances could not be commingled with funds in a client trust account. The **Opinion** also pointed out that other jurisdictions may take the opposite approach and require that fee advances be placed in a trust account until earned; in consequence, "where several jurisdictions are involved in the representation, prudent lawyers may wish to adopt a conservative approach and segregate fee advances from both the law firm's assets and . . . assets of other clients which may be contained in a client trust account."

The revision of Rule 1.15(d) was proposed by the DC Bar's Rules of Professional Conduct Review Committee in January 1998, in order to bring the DC Rule into line with its counterparts in most other jurisdictions (and in particular the two neighboring jurisdictions, Maryland and Virginia). After exposure for comment, the Court of Appeals adopted the revision in June 1999.

1.15:220 Surrendering Possession of Property

Pertinent here is the requirement of paragraph (b) of Rule 1.15 (and, previously, DR 9-103(B)(4)) that a lawyer promptly pay or deliver to a client (or, under Rule 1.15(b), a third party), on demand, money or property to which the client or a third party is entitled. The applicability of that requirement to records relating to the representation is addressed in 1.15:230, below.

Rule 1.15(b)'s requirement that a lawyer promptly deliver to a third person any funds or other property that the third person is entitled to receive was held in **In re Ross, 658 A.2d 209 (DC 1995)** to have been violated by a lawyer failing promptly to pay a third party out of the proceeds of the settlement. The predecessor provision, DR 9-103(B)(4), was held in **In re Stone, 672 A.2d 1032 (DC 1995)** to be violated by a lawyer's failure to refund to a client on demand money the client had advanced to pay for a transcript, where the client had paid separately for the transcript. In **In re Delate, 579 A.2d 1177 (DC 1990)**, the Court made clear that "client," as used in DR 9-103(B)(4), means also a client's duly authorized representative.

Rule 1.15(b) requires not only prompt delivery upon demand of money or property of a client or third person held by a lawyer, but also prompt *notice* to the client or third person of the lawyer's receipt of the same; and this requirement has been separately enforced by disciplinary process, see **In re Shaw, 775 A.2d 1123 (DC 2001)** (failure to notify client's health insurer of receipt of funds on which the insurer had a lien).

In **In re Clower, 831 A.2d 1030 (DC 2003)(per curiam)**[which is more fully described under 1.15:200, above], the respondent had received settlement funds for the client as to a portion of which a physical therapist had a claim under an authorization and assignment agreement for services rendered to the client, but although the respondent was aware of the therapist's claim, he neither notified the physical therapist of receipt of the settlement funds nor paid any part of the therapist's claim. By the time when, more than two years after receipt of the settlement funds, the claimant inquired about the matter, the respondent had disbursed all of settlement funds to others. Thus, respondent had violated both the notice and the delivery requirements of Rule 1.15(b).

In **In re Kagan, 351 F.3d 1157 (DC Cir. 2003)**, the Court effectively adopted the report and recommendations of its Committee on Admissions and Grievances, with respect to a lawyer who, while representing the National Wildlife Foundation in a suit challenging a rulemaking by the Environmental Protection Agency (EPA), had received from EPA certain spreadsheets containing confidential business information (CBI) provided to EPA by companies in the industry effected by the rulemaking. The lawyer had sought discovery of CBI materials from EPA, and the Court had denied discovery; but the lawyer did not recognize that the spreadsheets had contained CBI and had been inadvertently produced to him by EPA until after he had read and absorbed their contents. Then, while taking care not to disclose the documents, the lawyer consulted an ethics expert who advised him, largely on the basis of **DC Ethics Opinions 318** and **256**, discussed immediately below, that he could properly make use of the CBI material

that had inadvertently been produced to him. The Court's Committee on Admissions and Grievances, after due inquiry, concluded that the lawyer's reliance on those **Opinions** was reasonable, and accordingly recommended that no disciplinary action be taken. The Court's decision that led to its referral of the matter to the Committee was **National Wildlife Federation v. Environmental Protection Agency, 286 F. 3d 554 (DC Cir. 2002)(en banc).**

In **In re Bettis, 855 A.2d 282 (DC 2004)**, the respondent, representing a client with respect to injuries received in an automobile accident, signed an "Assignment of Benefits" from an organization that had provided medical treatment for the injuries, and returned the executed form to that organization, but after accepting a settlement offer and receiving and depositing the agreed funds, failed to disburse any funds in payment for the medical services. The Board on Professional Responsibility held that this constituted a violation of DC Rule 1.15(b), but also noted that the violation was "certainly understandable against the backdrop; of a client who never mentioned that he had received services from [the organization]."

DC Ethics Opinion 318 (2002) addressed the obligations of a lawyer in an adversary proceeding who receives a privileged document of an opposing party, not from that party or its counsel but from some other person or entity, in circumstances suggesting that the document may have been stolen or taken without authorization from the opposing party. The **Opinion's** analysis rested largely on the earlier **Opinion 256** (described immediately below), dealing with the parallel situation where confidential documents of an opposing party are received from that party's counsel, rather than from a third person, and where they appear to have been produced inadvertently, rather than stolen. Following reasoning similar to that of that earlier **Opinion**, **Opinion 318** concluded that the recipient lawyer would violate Rules 1.15(b) and 8.4(c) by reviewing, retaining or using the document if (i) its privileged status is reasonably apparent, (ii) the lawyer knows the document came from someone not authorized to disclose it, and (iii) the lawyer does not have a reasonable basis to conclude that the opposing party had waived the privilege with regard to the document. (As to the last of these conditions, the **Opinion** pointed out that waiver of the privilege could not be inferred from the mere fact that the document was in the hands of a third person.) On the other hand, if these three conditions are not met, then the receiving lawyer's obligation of zealous representation, under Rule 1.3(a), may require the lawyer to use the document on behalf of the lawyer's client. The **Opinion** also pointed out that in such situations, counsel for the party whose confidences were disclosed may have violated Rules 1.1(a) and (b) and 1.6(a) and (b) for failing to exercise reasonable care in preventing the disclosure. **Opinion 318** specifically refrainedfrom addressing circumstance where the information in the improperly disclosed document, though confidential, is not privileged and therefore only a "secret" and not a "confidence," as those terms are defined in Rule 1.6(b), **Opinion 256**, in contrast, did not differentiate between the two categories of confidential information.

DC Ethics Opinion 256 (1995) addressed circumstances where a lawyer has inadvertently included documents containing client secrets or confidences in material

delivered to an adversary lawyer. It concluded that where the receiving lawyer knows of the inadvertent disclosure before examining the documents, DC Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer (and asserted that if the receiving lawyer reads or uses the material in such circumstances, that lawyer violates Rule 8.4(c)).

DC Ethics Opinion 242 (1993) discussed the obligations under DC Rule 1.15, *inter alia*, of a lawyer whose client provides documents that may be the property of the client's former employer. The Opinion concluded that the lawyer should, on the client's request, return the documents to the client if the client has a plausible claim to ownership of them; but as to documents about which the client has no such claim, the lawyer should return them to the employer — unless to do so would reveal confidences protected by Rule 1.6.

DC Ethics Opinion 209 (1990), interpreting DC DR 9-103(B)(4), held that a lawyer who represented more than one client on a closed matter may not give all of the files in the matter to one of the clients: the lawyer must preserve the files for the benefit of all the clients so long as destruction of the files would be detrimental to the interests of any of them. The opinion also stated that the lawyer may properly charge any client for making copies of the files for that client.

1.15:230 Documents Relating to Representation

Disputes, and disciplinary proceedings, frequently arise as a result of a lawyer's failure to return a client's files on demand, as required by Rule 1.15(b) and, formerly, by DR 9-103(B)(4). See **In re Stone**, *supra* (lawyer refused to return a file to a client who had discharged him, after several promises to do so); **In re Ryan, 670 A.2d 375 (DC 1996)** (intentional failure to return labor certifications and supporting documents to immigration clients on request); **In re Landesberg, 518 A.2d 96 (DC 1986)** (refusal to turn over client's file to successor counsel on request).

DC Ethics Opinion 206 (1989) addressed at length a lawyer's obligations with respect to "dead files" of clients. The Opinion identified three general categories of files and other property the lawyer may be in possession of after an engagement is completed — (1) valuable property of the client; (2) other property (principally originals of documents) of the client; and (3) attorney work product — and concluded that a lawyer has an obligation to preserve and "promptly deliver" to the client documents in the first two categories, absent agreement to the contrary, and that as to the third category, the lawyer must determine whether he has any statutory or legal obligation to preserve the documents, and otherwise must be guided by the avoidance of foreseeable prejudice to the client. As a general matter, the Opinion recommended that lawyers discuss with the client the disposition of files after the conclusion of an engagement, and contact former clients before disposing of files when this was not done.

In **DC Ethics Opinion 283 (1998)**, addressing an inquiry from a sole practitioner as to how he should dispose of files relating to representation of a former client, the Legal Ethics Committee refined somewhat the analysis in **Opinion 206**. As to property having intrinsic value or that directly affects valuable rights, such as securities, negotiable instruments and wills, the lawyer is bound by Rule 1.15(b) to deliver the property promptly to the client, and not destroy it. Other client property is subject not to Rule 1.15(b) but to Rule 1.16(d); as to it, as a general rule, and absent contrary understanding with the client, a five-year retention period is appropriate. The Opinion offers detailed guidance for determining what materials should be retained beyond such a period. As to non-client materials that do not "clearly or probably" belong to the client or a third party, these may be destroyed without consultation or notice. Finally, the Opinion addresses costs relating to storage or return of files, asserting that the former client can legitimately be charged not merely shipping or storage costs, but in addition for the lawyer's time involved in file review.

1.15:300 Holding Money as a Fiduciary for the Benefit of Clients or Third Parties

- Primary DC References: DC Rule 1.15(a), DC Rule 1.17
- Background References: ABA Model Rule 1.15(a), Other Jurisdictions
- Commentary: ABABNA § 45:501; ALI-LGL § 44; Wolfram § 4.8

Paragraph (a) of DC Rule 1.15 specifies a little more elaborately than its Model Rule counterpart the kinds of institutions in which trust funds must be deposited. It is supplemented by DC Rule 1.17 (Trust Account Overdraft Notification) — which has no Model Rule counterpart — requiring that such funds be deposited only in institutions included on a list of "DC Bar Approved Depositories," which have agreed to notify Bar Counsel of overdrafts in such accounts.

The purpose of the requirement that a client's or third person's funds be kept separate from the lawyer's funds, under DC Rule 1.15(a) and its predecessor DR 9-103(A), is not only to prevent the serious offense of misappropriation, but also to avoid the possibility of unintentional loss of client's funds due to circumstances beyond the control of the lawyer. **In re Hessler, 549 A.2d 700, 702 (DC 1988)**. Thus, it seeks to ensure that the lawyer's creditors are not able to attach client property that has been commingled with the lawyer's funds. *Id.*; **In re Velasquez, 507 A.2d 145 (DC 1986)**.

Misappropriation.

DC Rule 1.15(a), like its predecessor DR 9-103(A), effectively forbids both misappropriation and commingling. The DC Court of Appeals has defined misappropriation as "any unauthorized use of a client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." **In re Harrison, 461 A.2d 1034, 1036 (DC 1983)**. Misappropriation is essentially a *per se* violation, of which improper intent is not an element. *Id.*; **In re Choroszej,** *supra*, **624 A.2d at 436**; **In re Evans, 578 A.2d 1141, 1142 (DC 1990)**; **In re Reed, 679 A.2d 506 (DC 1996)**. Once the balance in a trust account falls below the amount that is held in trust, misappropriation has occurred. *Id*.

In the disciplinary framework, "In virtually all cases of misappropriation, disbarment will be the only remedy unless it appears that the misconduct resulted from nothing more than simple negligence." **In re Addams, 579 A.2d 190, 191 (DC 1990) (en banc)**; **In re Buckley, 535 A.2d 863 (DC 1987)** (disbarment, not two-year suspension, is the proper sanction for knowing misappropriation); **In re Pels**, *supra* (lawyer disbarred for reckless, though not intentional, misappropriation); **In re Ray, 675 A.2d 1381 (DC 1996)** (simple negligence in misappropriation warrants six-month suspension); **In re Reed, 679 A.2d 506 (DC 1996)** (same).

According to **In re Anderson, 778 A.2d 330, 339 (DC 2001)**,

> [T]he central issue in determining whether a misappropriation is reckless is *how* the attorney handles entrusted funds, whether in a way that suggests the unauthorized use was inadvertent or the result of simple negligence, or in a way that reveals either an intent to treat the funds as the attorney's own or a conscious indifference to the consequences of his behavior for the security of the funds.

In **In re Utley, 698 A.2d 1167 (DC 1997)**, the conservator of an estate had paid herself a fee and two annual commissions before obtaining required court approval, and had also mistakenly paid herself the same fee twice and then delayed repaying the fee for 21 months despite notification from an auditor and repeated requests from the court. On review of the report and recommendation of the Board on Professional Responsibility, the issues were whether the circumstances constituted misappropriation and whether any misappropriation resulted from more than simple negligence — issues that the court termed "questions of law concerning 'ultimate facts' and therefore subject to de novo review." *Id.* at *8. Finding that the circumstances did constitute misappropriation and amounted to more than simple negligence, the court, following **Addams**, supra, ordered disbarment. The court also adopted the Board's conclusion that the respondent's conduct had also violated Rule 1.15(b) and Rule 8.4(d) (conduct seriously interfering with the administration of justice).

The prohibition of DR 9-103(A) against misappropriation has been held to apply to a lawyer acting in a fiduciary capacity, even in the absence of an lawyer-client relationship (so that there were not, literally, *client* funds involved). **In re Burton, 472 A.2d 831, 835, cert. denied, 469 US 1071 (1984)** (court-appointed trustee); **In re Burka, 423 A.2d 181 (DC 1980)** (conservator of estate). Rule 1.15(a), it may be noted, speaks of property of a third party as well as of a client; but it speaks of such property being held "in connection with a representation."

<u>Commingling.</u>

Rule 1.15(a), like its predecessor DR 9-103(A), also prohibits commingling of funds of a lawyer with funds of a client or third party, and although this is a less grave offense than misappropriation, the Court of Appeals has taken an "increasing[ly] harsh view as to [its] seriousness." **In re Millstein, 667 A.2d 1355, 1356 (DC 1995)** (censure imposed for commingling funds); **In re Ross**, *supra* (30-day suspension for commingling funds and failure to pay settlement proceeds promptly to a third party); **In re Hessler**, *supra*, **549 A.2d at 703** (warning that "in future cases of even 'simple commingling,' a sanction greater than public censure may well be imposed"). The Court of Appeals has held, however, that the rule against commingling did not apply in a case where a lawyer was one of the sellers of property in a transaction in a jurisdiction where he was not admitted to practice (a fact of which the lawyer was aware), who deposited escrow funds in connection with the sale of the property in his personal account, paying interest to the purchaser. **In re Confidential, 664 A.2d 364 (DC 1995)**. The rule was there inapplicable, the court held, because the lawyer was not acting as a lawyer.

DC Ethics Opinion 251 (1994) ruled that a lawyer is required to hold settlement proceeds if the lawyer reasonably believes that a third party has a just claim to a portion of the funds that the client disputes. The undisputed funds should be promptly disbursed.

DC Ethics Opinion 36 (1977) addressed three questions relating to handling of a client's funds during real estate transactions, under DC DR 9-102 (subsequently renumbered DR 9-103). The Opinion concluded that commingling of funds of several clients in a single account is permissible, even though such funds may not be commingled with the funds of a lawyer or law firm; that it is not ethically impermissible to allow the balance in a common client account to exceed on occasion the FDIC insurance limit — that doing so would not necessarily constitute "neglect" within the meaning of DR 6-101(A)(3); and that it is not impermissible to place proceeds of a settlement in an interest-bearing account. (The Opinion treated as a matter of law, beyond the ethics committee's competence to address, the question of to whom, between the buyer and seller, any such interest belongs.)

1.15:400 Dispute Over Lawyer's Entitlement to Funds Held in Trust

- Primary DC References: DC Rule 1.15(c), DC Rule 1.17
- Background References: ABA Model Rule 1.15(c), Other Jurisdictions
- Commentary: ABABNA § 45:101; ALI-LGL §§ 44-45; Wolfram § 4.8

Although charges of misappropriation in the District of Columbia have mainly arisen under Rule 1.15 (a), there have been several reported cases involving "a dispute . . . between several persons claiming an interest" in property held by a lawyer, and so falling under Rule 1.15(c). In at least three of these cases the lawyer holding the funds and the client were the persons with claims on those funds. In **In re Haar, 667 A.2d 1350, 1353 (DC 1995)(Haar I)**, the Court stated that "the rule is unambiguous: an attorney may not withdraw a portion of . . . deposited funds when the attorney's right to receive that portion is "disputed" by the client. And in **In re Haar, 698 A.2d 412, 417-18 (DC 1997)(Haar II)**, the Court made clear that when the dispute concerns the lawyer's entitlement to funds that potentially belong to the client, a lawyer who withdraws the funds before the dispute is settled commits misappropriation. Thus, in **In re Midlen, 885 A.2d 1280 (DC 2005)**, a lawyer whose original retainer agreement with the client authorized him to deduct his fees from royalties that he received on behalf of the client, and who continued to deduct his fees in this manner after the client told him not to, but who wound up taking no more from the royalties than he was entitled to, was found nonetheless to have committed misappropriation. However, the Court, while recognizing that "When an attorney is found to have committed misappropriation, the discipline required is almost invariably disbarment if the attorney acted intentionally or recklessly in appropriating client funds," *id.* at 1288**,** went on to say that recklessness requires proof at a minimum that the attorney handled funds "in a way that reveals . . . conscious indifference to the consequences of his behavior for the security of the funds," *id*. (quoting **In re Anderson, 778 A.2d 330 at 339 (DC 2001)).** Given that the respondent's conduct in the particular circumstances of this case, as briefly decribed above, showed negligence but not the "heightened culpability" required for disbarment, the Court did not accept the Board's recommendation of disbarment, but adopted instead a suspension for eighteen months.

DC Ethics Opinion 127 (1983) addresses the withdrawal of attorney's fees from a trust account established to receive the proceeds of a settlement, concluding that DR 9-103(A) permits a lawyer to withdraw a portion of such a trust account in payment of his fee only when the fee is due and the right of the lawyer to receive the fee is not disputed by the client. It would violate DR 9-103(A) for the lawyer to make withdrawals from such an account to pay his own expenses before the lawyer's fee was due even if the amounts withdrawn were less than the undisputed amount of the agreed fee.

DC Ethics Opinion 293 (1999) offers guidance in the application of Rule 1.15 in circumstances where the lawyer holds funds that are claimed both by the client and by one or more third parties and the lawyer is unsure about the validity of the third party's claim or of his client's dispute of that claim. The **Opinion** points out that the lawyer's obligation in these circumstances differs from the obligation where there is a dispute between the lawyer and the client over ownership of the property, even though Rule 1.15(c) treats the two circumstances in identical terms. Where the dispute is between the lawyer and the client, the lawyer's duty of loyalty prevents the lawyer from withholding for her own use any of the disputed property until it is absolutely clear that the dispute is resolved. And as the court held in **In re Haar,** *supra*, 667 A.2d at 1353, "There is no requirement that the dispute be 'genuine,' 'services,' or 'bona fide.'" On the other hand, Comment [4] refers to third parties having *just* claims against the property held by the lawyer; and the **Opinion** interprets this as meaning that "unlike the claims of a client, which need not be even superficially justified in order to stop the lawyer from making distribution, the claims of the third party must rise to a higher level."

The **Opinion** goes on to express the view that

> the distinction between "just claims" that the lawyer must honor and other third party claims that the lawyer is not obliged to honor lies in the distinction between a specific claim that binds the lawyer and mere assertions of the client's general unsecured obligations.

The **Opinion** then lists the following examples of such a "just claim":

> (1) any final money judgment against the lawyer's client regardless of whether the judgment is related to the facts of the law suit; (2) a statutory lien that applies to the proceeds of the suit; and (3) a contractual agreement joined in by the lawyer and his client to pay certain client expenses in consideration of the supplier's agreement to forebear collection action during the pendency of the lawsuit.

The **Opinion** points out that the last of these cateegories, commonly known in this jurisdiction as an "Authorization and Assignment," is frequently used in contingent fee personal injury matters.

1.16 Rule 1.16 Declining or Terminating Representation

1.16:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 1.16
- Background References: ABA Model Rule 1.16, Other Jurisdictions
- Commentary:

1.16:101 Model Rule Comparison

Paragraph (a) of DC Rule 1.16, governing mandatory withdrawal, is identical to paragraph (a) of the Model Rule.

Paragraph (b), on permissive withdrawal, is largely the same, but with three substantive differences reflecting decisions of the Jordan Committee and one minor difference of form that was made to the Model Rule in 2002 on recommendation of the Ethics 2000 Commission. To address the latter variance first, the Model Rule's language allowing for withdrawal from a representation if the withdrawal can be accomplished without material adverse effect on the client was moved from the body of paragraph (b) to a new subparagraph (1), and all the previous subparagraphs renumbered accordingly. The DC Rules Review Committee did not recommend making the same change.

The first of the substantive differences between paragraph (b) in the two rules is that the DC Rule omits what is now the Model Rule's subparagraph (b)(4), allowing a lawyer to withdraw, without regard to its effect on the client, when the client "insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." The Jordan Committee was of the view that the terms "repugnant" and "imprudent" were "too vague to give any meaningful guidance to the legal community" and "would provide lawyers too much leeway to withdraw when it is personally convenient to do so." The Ethics 2000 Commission's recommendations resulted in a modification of subparagraph (b)(4) to substitute "taking action" for "pursuing an objective," and to replace "imprudent" as defining a client's action that would justify the lawyer's withdrawal with the modifying phrase "with which the lawyer has a fundamental disagreement." The DC Rules Review Committee considered but did not recommend adoption of a new subparagraph corresponding to the revised Model Rule provision.

Secondly, the Jordan Committee had similar objections to what is now subparagraph (b)(7) of the Model Rule, allowing withdrawal without regard to effect on the client when "other good cause for withdrawal exists," but the Court of Appeals restored a revised "other good cause" consideration in the corresponding paragraph of the DC Rule, subparagraph (b)(5), allowing a lawyer to withdraw if "the lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal."

The third substantive difference between paragraph (b) in the two rules results from the Jordan Committee's addition to subparagraph (b)(4) (corresponding to (b)(6) in the Model Rule), allowing withdrawal when the client's conduct renders representation unreasonably difficult a requirement that the conduct must also be "obdurate or vexatious."

Paragraph (c) of the DC Rule, requiring a lawyer to continue a representation despite good cause for withdrawal when ordered to do so by a tribunal, was initially identical to the corresponding paragraph of the Model Rule. The Ethics 2000 Commission's amendments added a first sentence to that paragraph, stating that a lawyer must comply with applicable law requiring notice to or permission of a tribunal in terminating a representation, an identical change was recommended by the DC Rules Review Committee, so the two provisions are now again identical.

Paragraph (d) of the DC Rule, regarding steps to be taken to protect a client's interests upon termination of representation, adds to the Model Rule a requirement that the steps be "timely." That paragraph also says retention of papers relating to the client is subject to DC Rule 1.8(i) rather than "other law" as in the Model Rule. The Model Rule provision was modified in 2002 to add, to the requirement that fees that had not yet been earned be returned to the client on withdrawal, a requirement that advance payments of expenses that had not yet been incurred also be returned. The same modification was added to the DC Rule in 2006.

The Comments to the two versions of Rule 1.16 are largely parallel and present only minor differences of substance or phraseology, except that the DC version has two Comments, now numbered [10] and [11], respectively addressing compliance with requirements of a tribunal, and return of a client's property or money, that are not found under the Model Rule.

1.16:102 Model Code Comparison

DC Rule 1.16, like the Model Rule, is substantially different from its Model Code counterpart, DR 2-110. In general, these differences reflect an intent to place greater restrictions than the Model Code upon a lawyer's ability to withdraw from representing a client.

DC Rule 1.16(a)(1)-(3) set forth the three circumstances in which a lawyer's withdrawal from representation is mandatory. The Model Code contained three analogous provisions in DR 2-110(B)(2)-(4). Although the language of these corresponding Code sections differed from the wording of the DC Rule, the underlying substance of the provisions is functionally indistinguishable, with the exception of DR 2-110(B)(2). That provision required withdrawal only in those cases in which a lawyer's representation would lead to a violation of a disciplinary rule, whereas DC Rule 1.16(a)(2) requires withdrawal when continued representation would result in a violation either of a rule of professional conduct or of any "other law." Another difference between the mandatory withdrawal requirements of the DC Rule and its Model Code counterpart is that DR 2-110(B)(1) included a provision not explicitly contained in the DC Rule, mandating withdrawal when the lawyer knows or it is obvious that the client's motive is to harass or maliciously injure another person.

The provisions of the DC Rule applying to permissive withdrawal differ more substantially from the Model Code provisions. DC Rule 1.16(b) starts with a general provision, not found in DR 2-110, that a lawyer may choose to withdraw from representing a client if doing so will not have a materially adverse effect upon the client's interests. DC Rule 1.16(b)(1)-(5) then sets forth five situations in which a lawyer has the discretion to withdraw from representing a client regardless of the effect of the withdrawal on the client. These, with some language variations, were largely reflected in DR 2-110(C)(1)-(6) of the Model Code, with two noteworthy exceptions. First, DC Rule 1.16(b)(2), which permits withdrawal if the lawyer discovers that the client has used — emphasis on past tense — his or her services to further a crime or fraud, does not have a corresponding provision in the Model Code. Second, the initial portion of DC Rule 1.16(b)(4), allowing for withdrawal if continued representation will be an unreasonable financial burden on the lawyer, does not have an equivalent in the Model Code. Although most of the substantive elements of the permissive withdrawal provisions of the DC Rule are reflected in the Model Code, the opposite is not true. That is, under the Model Code there were six circumstances in which a lawyer might voluntarily withdraw from a representation (regardless of the effect on the client) that are not explicitly included in the DC Rule: they are found in DR 2-110(C)(1)(a) (client insists on presenting an unsustainable claim or defense); DR 2-110(C)(1)(e) (client insists on conduct contrary to the lawyer's judgment and advice); DR 2-110(C)(2) (continued employment is likely to violate a disciplinary rule); DR 2-110(C)(3) (lawyer is unable to work with co-counsel); DR 2-110(C)(4) (mental or physical condition makes it difficult for the lawyer to be effective); and DR 2-110(C)(5) (client knowingly and freely assents).

Both DC Rule 1.16 and DR 2-110 have provisions recognizing the inherent power of courts to place limits on withdrawal from the representation of a client. Under DC Rule 1.16(c) a lawyer must continue his or her representation if ordered to do so by a court; DR 2-110(A)(1) states that, if a tribunal's rules require it, a lawyer must obtain permission from that tribunal before withdrawing from a representation.

Both DC Rule 1.16 and DR 2-110 contain substantially similar provisions — Rule 1.16(c) and DR 2-110(A)(2) and (3), respectively — governing a lawyer's responsibilities once withdrawal, whether mandatory or permissive, has occurred. The only noteworthy differences between the language of the DC Rule and the Code provision are that the former includes a requirement that the lawyer act in a "timely" manner in carrying out his or her responsibilities and places a limit, grounded in DC Rule 1.8(i), on a lawyer's ability to retain documents relating to the representation of a former client.

1.16:200 Mandatory Withdrawal

- Primary DC References: DC Rule 1.16(a)
- Background References: ABA Model Rule 1.16(a), Other Jurisdictions
- Commentary: ABABNA § 31:1001; ALI-LGL § 32; Wolfram § 9.54

1.16:210 Discharge by Client

Under DC Rule 1.16(a)(3), a lawyer must withdraw from representation when he or she is discharged by a client. See Comment [4], acknowledging a client's right to discharge a lawyer at any time with or without cause; see also **DC Ethics Opinion 173 (1986)** (withdrawal is mandatory under DR 2-110(B)(4) where a law firm has been discharged by the client).

1.16:220 Incapacity of Lawyer

If a lawyer is suffering from a physical or mental incapacity that materially impairs his or her ability to provide legal representation, that lawyer is required to withdraw under DC Rule 1.16(a)(2). The predecessor provision, DR 2-110(B)(3), imposed the same requirement. See **In re Larsen, 589 A.2d 400 (DC 1991)** (affirming a finding that a lawyer's mental condition was severe enough to warrant mandatory withdrawal pursuant to DR 2-110(B)(3)). See also **In re Robertson, 608 A.2d 756 (DC 1992)** (rejecting a lawyer's claim that his deteriorating physical condition accounted for his professional misconduct).

1.16:230 Withdrawal to Avoid Unlawful Conduct

Rule 1.16(a)(1) requires a lawyer to cease representation when to continue it would lead to a violation of a rule of professional conduct or other law. See Comment [2]; **DC Ethics Opinion 219 n.3 (1991)** (noting that withdrawal is required to avoid assisting an ongoing fraud). DR 2-110(B), the predecessor provision, was to the same effect. **In re Austern, 524 A.2d 680 (DC 1987)** (imposing sanctions upon a lawyer for, among other things, failing to withdraw upon becoming aware that a settlement-related escrow account was funded with worthless checks).

In **In re Ponds, 888 A.2d 234 (DC 2005),** the Court approved a thirty-day suspension of a lawyer who had been found by the Board on Professional Responsibility to have violated provisions of the Maryland Rules corresponding to DC Rule 1.7(b)(4) and, derivatively, Rule 1.16(a)(1). The respondent had been retained to represent the defendant on a charge of conspiracy to import and distribute cocaine, in the Federal District Court in Maryland. His client pled guilty, and the court after due inquiry accepted the plea, but before the sentencing hearing, the defendant wrote a letter to the respondent accusing him of having coercing him into the guilty plea but also asking respondent to assist him in withdrawing the guilty plea; and the defendant sent a copy of this letter to the judge, along with a request for a hearing on his request to withdraw the guilty plea. At the sentencing hearing, the judge first heard the defendant on his request to withdraw the guilty plea, and denied the request, and although the respondent did not participate in that exchange, he did represent the defendant in the sentencing hearing. This was found by the Board to have violated Rule 1.7 because the defendant's charge that he had coerced the guilty plea gave respondent a personal interest that conflicted with the interests of his client; and since the continued representation violated that Rule, Rule 1.16(a)(1) required his withdrawal.

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, above] was a violation of Rule 1.16:(a)(1)'s requirement that a lawyer withdraw from an engagement when continuing it will result in violation of the Rules of Professional Conduct. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients. The Rule violation that was held to bring the withdrawal obligation into play was the lawyers' negotiating the secret fee agreement while representing the clients.

DC Ethics Opinion 296 (2000) [which is more fully described under 1.7:330, above] addressed a situation where a law firm jointly represented an employer and its alien employee in seeking a visa for the employee, without any advance understanding as to whether client confidences with respect that the representation would be shared, and

where the firm's consequent inability to disclose fraudulent conduct by the employee to the employer required withdrawal from both representations, under Rule 1.16(a)(1).

1.16:300 Permissive Withdrawal

- Primary DC References: DC Rule 1.16(b)
- Background References: ABA Model Rule 1.16(b), Other Jurisdictions
- Commentary: ABABNA § 31:1101; ALI-LGL § 32; Wolfram § 9.5.3

1.16:310 Withdrawal to Undertake Adverse Representation

There appear to be no DC court decisions or ethics opinions applying DC Rule 1.16 on this subject. See, however, the discussion of the authorities under DC Rule 1.9, including the "hot potato" issue, under 1.9:300, above.

1.16:320 Circumstances Justifying Discretionary Withdrawal

In **Byrd v. District of Columbia, 271 F. Supp. 2d 174 (DDC 2003)**, the Court, on reconsideration of an initial ruling to the contrary, denied a lawyer's motion for leave to withdraw that rested on the assertion that the plaintiff he was representing hadn't paid his fees (evidently invoking Rule 1.16(b)(3)). The Court pointed out that since the lawyer's compensation arrangement provided for a contingency fee, his client hadn't yet failed to fulfill any financial obligation to him, and continued representation wouldn't impose any unreasonable or unanticipated burden on him.

A lawyer is allowed to withdraw pursuant to DC Rules 1.16(b)(3) and (b)(4) if the "client refuses to communicate with his attorney and makes no arrangements to pay the attorney for past services." **Crane v. Crane, 657 A.2d 312, 318 (DC 1995)**. Under DR 2-110(C)(1)(d) of the Model Code, which was similar in substance to DC Rule 1.16(b)(4), withdrawal has been permitted where the client had a history of leaving "telephone calls and letters unanswered, thus refusing to communicate with his attorney, and had made no arrangements to pay the attorney for past services." **Hancock v. Mutual of Omaha Ins. Co., 472 A.2d 867, 869 (DC 1984)**. See also **Esteves v. Esteves, 680 A.2d 398 (DC 1996),** and **Atlantic Petroleum Corp. v. Jackson Oil Co., 572 A.2d 469 (1990)**, addressing the circumstances in which a court should grant a motion to withdraw on the ground that "there has been a complete breakdown in the attorney-client relationship," **572 A.2d at 473**. See also **D.C Ethics Opinion 108 (1981)** (allowing withdrawal where a client moved without leaving a forwarding address or telephone number and the lawyer was unable, despite diligent efforts, to locate the client in order to proceed in a matter before the applicable statute of limitations expired); **DC Ethics Opinion 89 (1980)** (allowing a firm to withdraw based upon the client's "deliberate disregard" of its responsibility to pay for legal services rendered); **DC Ethics Opinion 85 (1980)** (allowing withdrawal based upon the dilatoriness of a client); **DC Ethics Opinion 21 (1976)** (recognizing that withdrawal may be appropriate where a client refuses to pay expenses needed to bring an important witness to court). But see **DC Ethics Opinion 139 (1984)**, ruling that in a criminal case where client contact was not essential in order for the lawyer effectively to proceed on behalf of the client, the lawyer could not withdraw for want of client cooperation.

DC Ethics Opinion 317 (2002) (discussed more fully under 1.7:240, above) looks at the permissive withdrawal provisions of Rule 1.16(b)(3), (4) and (5) in connection with the situation where a client who had given advance consent to a conflict of interest revokes that consent.

1.16:400 Order by Tribunal to Continue Representation

- Primary DC References: DC Rule 1.16(c)
- Background References: ABA Model Rule 1.16(c), Other Jurisdictions
- Commentary: ABABNA § 31:1106; ALI-LGL § 32; Wolfram § 9.5.1

All of the provisions governing mandatory and permissive withdrawal under DC Rule 1.16(a) and (b) are effectively limited by Rule 1.16(c), which recognizes the power of a tribunal to order a lawyer to continue representing a client even though withdrawal is required or permitted under paragraph (a) or (b). Even where this power of a tribunal has been exercised, however, Comment [11] notes that a lawyer retains the option, while continuing his or her representation, to challenge the jurisdictional authority for or merit of the tribunal's order preventing withdrawal.

DC Ethics Opinion 266 (1996) ruled that where the rules of a tribunal require a lawyer to seek leave of the tribunal before withdrawing from a representation, the Rules of Professional Conduct also require the lawyer to seek such approval: it is not sufficient for the withdrawing lawyer merely to inform the client of upcoming proceedings and advise the client to secure new counsel. The Opinion addressed an inquiry from a lawyer who had been representing a client in a proceeding before the Immigration and Naturalization Service, asking what his ethical obligations were when he received notice of a hearing after he no longer represented the client but before he had formally withdrawn as counsel. The inquirer noted that INS rules require a lawyer who seeks to withdraw from a case to obtain leave from the immigration judge and provide that unconditional leave to withdraw will be granted only if the lawyer provides the client's last known address to the immigration judge and shows that he attempted to advise the client, at the client's last known address, about the scheduled hearing. If the lawyer fails to provide that information, then the lawyer's withdrawal will be granted only on condition that the lawyer remain responsible for acceptance of service for the client. The Opinion assumed that the inquirer was reluctant to file a notice of withdrawal out of concern that the notice would trigger a hearing, which would not be in the interests of the client, but ruled that the obligation under Rule 1.16(d) to take "steps to the extent reasonably practicable to protect the client's interests" did not trump what the opinion treated as a requirement of Rule 1.16(c), and in addition Rule 3.4(c), that the lawyer, in withdrawing from the representation, first seek leave of the tribunal as required by its rules. The Opinion went on to say that, if a lawyer did not know the location of her client, there would be no harm to the client in so representing to the immigration judge; but that a more difficult issue would arise if a lawyer *did* know the client's whereabouts, since that information might well be a "secret" that the lawyer would be forbidden by Rule 1.6(b) to disclose. In those circumstances, the Opinion stated, the lawyer's obligation to protect the client's secret would govern; but the effect of this would not be to prevent the lawyer's withdrawal, but only to prevent an unconditional withdrawal, thus leaving the lawyer under a requirement to continue to accept service on her former client's behalf.

1.16:500 Mitigating Harm to Client Upon Withdrawal

- Primary DC References: DC Rule 1.16(d)
- Background References: ABA Model Rule 1.16(d), Other Jurisdictions
- Commentary: ABABNA § 31:1201; ALI-LGL § 32; Wolfram § 9.5.1

The most frequently addressed issue relating to a lawyer's duty to mitigate harm upon withdrawal concerns the propriety of the lawyer's asserting a lien on client files or attorney work-product documents. As a general rule, a lawyer has an affirmative duty under DC Rule 1.16(d) to return to the client all papers and property to which that client is entitled. See **In re Ryan, 670 A.2d 375, 380 (DC 1996)** ("a client's right to documents exists when the client has a plausible ownership interest in them and there is no competing claim to their ownership"); **DC Ethics Opinion 209 (1990)** (recommending that a lawyer contact all former clients before destroying files relating to a prior representation, even if there was no legal or contractual duty to keep such documents); **DC Ethics Opinion 168 (1986)** (interpreting DR 2-110(A)(2)'s requirement of avoiding prejudice to the client to mean that upon withdrawal a lawyer must provide to the client or the client's new counsel all material "likely to be useful to the client or the substitute counsel's representation of that client's interests"); **DC Ethics Opinion 333 (2005)** (holding that law firm was required to provide former client's successor with all materials in the client's files substantively related to the representation, including such opinion work product as lawyer notes and internal memoranda reflecting lawyers' thoughts, impressions and strategy ideas).

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, above] was a violation of Rule 1.16(d)'s requirement that a lawyer withdrawing from an engagement take steps to protect the client's interests. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients. The Rule 1.16(d) violation found in this case lay in the lawyers' promise to the defendant, in connection with the secret settlement agreement, not to disclose any information learned in the investigation of the matter, which would mean the clients' files could not be returned to them, and this would prevent the clients from pursuing their claims against the defendant.

In re Arneja, 790 A.2d 552 (DC 2002) involved, **inter alia**, a violation of Rule 1.16(d) by reason of a lawyer's foot-dragging in turning over the client's files to successor counsel despite repeated and urgent requests.

DC Ethics Opinion 270 (1997) addressed an inquiry by a lawyer who had been briefly employed by a sole practitioner to work on a particular matter. The client in that matter had recently insisted that the employing lawyer write an aggressive letter to a third party, despite the lawyer's advice that sending such a letter was imprudent, and the employing lawyer had responded by what he told the inquirer was his usual practice — namely, drafting a letter satisfying the client's demand and sending a copy to the client, but not sending the letter itself to the addressee. The inquirer, disturbed by this practice, quit the employment and asked the Legal Ethics Committee (1) whether, after leaving the employment, she had a duty to ensure that the client was informed of the employing lawyer's misrepresentations, and (2) whether, having left, she had a duty to report the lawyer's misconduct to disciplinary authorities. The Opinion answered both questions affirmatively. As to disclosure to the client, the Opinion pointed out that if the employment had continued, the inquirer would have had an obligation under DC Rules 1.4 and 5.2 to inform the client about the fictitious letter, and indeed to take action to see to it that no further fictitious letters were sent. Since the inquirer had left the employment, she no longer had a duty under DC Rule 1.4, but did have a duty, under DC Rule 1.16, upon her withdrawal to "take timely steps to the extent practicable to protect the client's interest," a duty that the Opinion said applied despite the fact that she was a subordinate and not the lawyer responsible for the representation. This obligation under DC Rule 1.16(d) had in this instance been discharged in what the Committee noted was the manner least disruptive to the existing lawyer-client relationship — namely, by telling the former employer that he should make disclosure to the client, which she had done. As to whether the inquirer had an obligation to report the employer's conduct to the disciplinary authorities under DC Rule 8.3, the Opinion held that she did, for "the conduct of the employing lawyer destroyed the heart of the lawyer-client relationship," and constituted dishonesty and deceit under DC Rule 8.4(c) and a violation of DC Rule 1.4.

Comment [12] to DC Rule 1.16, which was added effective November 1, 1996 [see 1.16:101 above], spells out a lawyer's obligation, when holding property or funds as to which a portion is in dispute, to distribute promptly any portion that is not in dispute.

Although DR 2-110(A)(2) of the DC Code, which was identical to its counterpart in the Model Code, on its face put no limits on a lawyer's right to assert a retaining lien upon a client's files or that lawyer's own work-product in order to ensure payment of an outstanding fee, opinions of the DC Bar Legal Ethics Committee took a dubious view of retaining liens. Thus, **DC Ethics Opinion 59 (undated)** stated that a lawyer could assert a lien on a client's file even if the file was "necessary" for new counsel, except when "(a) the client is financially unable to pay the fees; (b) the client gives other security for payment of the fees; or (c) the file is necessary to the defense of a serious criminal charge or the protection of the client's personal liberty." The Opinion also stated that "[t]he lawyer should assume the initiative . . . in seeking to avoid the need for actual invocation of the lien, and should ordinarily renounce the lien unless his legitimate financial interests clearly outweigh the adversely affected interests of his former client." Although the Opinion thus recognized that retaining liens were allowed under the Code provision, it expressed "serious doubts" as to whether they should

continue to be permitted. *Id*., n.13. See also **DC Ethics Opinion 90 (1980)** (reiterating the formulation of **Opinion 59**); **DC Ethics Opinion 100 (1981)** (where the lawyer and client have agreed on termination of the lawyer's services the lawyer may properly assert a retaining lien against money held in an escrow account but the lien does not give rise to a right of set-off: *i.e.*, the lawyer may not use the escrowed funds to satisfy his claim for fees); **DC Ethics Opinion 107 (1981)** (a lawyer retained by out-of-state counsel to participate as co-counsel in litigation who has a fee dispute with counsel but not with the client may not assert a retaining lien); **DC Ethics Opinion 119 (1983)** (describing the retaining lien as "an unattractive and potentially quite harmful tool"); **DC Ethics Opinion 191 (1988)** (asserting that "the ethical right to assert a lawyer's lien, and then withhold client papers, during a fee dispute is a narrow one and must be used sparingly"). See also **DC Ethics Opinion 195 (1988)**, which explained the difference between "retaining" or "general" liens (which allow the lawyer to withhold property of the client to compel payment of fees) and "charging" or "special" liens (which attach only to a cause of action or the proceeds thereof), and ruled that an agreement between a patent lawyer and his client assigning to the lawyer rights in a patent to secure payment of the lawyer's fee created neither kind of lien.

DC Rule 1.8(i)'s prohibition on a lawyer's imposing a lien on any part of a client's files except the lawyer's own work product, and then only in strictly limited circumstances [discussed in 1.8:1140, above], which has no parallel in the corresponding Model Rule, and which is reinforced by DC Rule 1.16(d)'s statement that "[t]he lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i)," reflects the hostility to retaining liens expressed in these ethics opinions. Thus, as stated in **DC Ethics Opinion 250 (1994)**,

> [I]t seems clear . . . that retaining liens on client files are now strongly disfavored in the District of Columbia, that the work product exception permitting such liens should be construed narrowly, and that a lawyer should assert a retaining lien on work product relating to a former client only where the exception is clearly applicable and where the lawyer's financial interests . . . "clearly outweigh the adversely affected interests of his former client" (quoting **Opinion 59**, *supra*).

See also **DC Ethics Opinion 230 (1992)** (a retaining lien that was properly asserted against client's files prior to January 1, 1991, when the DC Rules came into effect, became no longer permissible as of that date by reason of Rules 1.16(a) and 1.8(i)).

Accordingly, it seems clear that under the current rule a lawyer upon withdrawal should rarely be allowed to retain a lien on files as a means of ensuring the payment of an outstanding fee. [See also 1.15:230, above.]

DC Ethics Opinion 283 (1998), which is discussed more fully under 1.15:230 above, addresses a lawyer's obligation regarding disposition of files relating to representation of a former client.

1.16:600 Fees on Termination

- Primary DC References: DC Rule 1.16(d)
- Background References: ABA Model Rule 1.16(d), Other Jurisdictions
- Commentary: ABABNA § ; ALI-LGL § 40; Wolfram §

Upon withdrawal from a representation, a lawyer is required under Rule 1.16(d), among other things, to refund to the client any advanced fee that has not been earned. **In re Sumner, 665 A.2d 986 (DC 1995)**. See also **DC Ethics Opinion 37 (1977)** (addressing the issue of whether the lawyer or the client should bear the cost associated with "duplicative fees" that sometimes result from the withdrawal of a lawyer).

1.16:610 Termination of Lawyer's Authority [see 1.2:270]

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.17 Rule 1.17 Sale of Law Practice

1.17:100 Comparative Analysis of DC Rule

- Primary DC References:
- Background References: ABA Model Rule 1.17, Other Jurisdictions
- Commentary:

Prior to the DC Court of Appeals' adoption in 2006 of the changes recommended by the Rules Review Committee, the DC Rules did not include any counterpart to Model Rule 1.17, which had been adopted by the ABA in February 1990 and modified on the Ethics 2000 Commission's recommendation in 2002. There was a DC Rule 1.17 dealing with the quite different subject of trust account overdraft notification (which had and still has no counterpart in the Model Rules). That Rule, which is discussed in connection with DC Rule 1.15 at 1.15:101 above, was renumbered in 2006 as DC Rule 1.19, in order to make room for new Rules 1.17 and 1.18 corresponding to their Model Rules counterparts.

1.17:101 Model Rule Comparison

Model Rule 1.17 was not among the provisions included in the Model Rules as first adopted by the ABA. It was added in February 2000, and amended in various respects in 2002 pursuant to recommendations of the Ethics 2000 Commission. A corresponding Rule was not added to the DC Rules until 2006, but in December of the same year as Rule 1.17 was added to the Model Rules, the DC Bar's Legal Ethics Committee issued **DC Ethics Opinion 294 (2000)**, which opined that the sale of a law practice was permissible under conditions and restrictions similar but not identical to those set out in the Model Rule. Thus, although the DC of Appeals had not yet addressed the issue, members of the DC Bar were not without authoritative guidance on the matter. The DC Rules Review Committee nonetheless believed that for reasons of conformity and clarity, the authorization of the sale of a law practice should be reflected in a rule rather than solely in an ethics opinion, so the Committee proposed, and in 2006 the Court approved, a Rule 1.17 that was identical to the revised Model Rule in all but few respects.

The DC Rule, like the Model Rule, is structured as an introductory unnumbered paragraph stating that a lawyer or law firm may sell or purchase a law practice or area of practice, provided that specified conditions, enumerated in lettered paragraphs and numbered subparagraphs that follow.

Paragraph (a) of the Model Rule requires that the sale follow from the selling lawyer's ceasing to engage in the private practice either entirely or in an area of practice or a geographic area or jurisdiction, treating the last two variables (geographic area and jurisdiction) as alternatives for an adopting jurisdiction to choose between; in the DC Rule, the jurisdiction was the choice.

Paragraph (b) of the Model Rule requires that the sale be of an entire practice or an entire area of practice, and allows the sale in either case to be to one or more lawyers or law firms. The DC Rules Review Committee, however, believed that the rule should not allow the sale of an area of practice to be made to more than one purchaser, whether a sole practitioner or a law firm, and the DC Rule reflects this view. The Committee was concerned that allowing multiple purchasers of an area of practice would come too close to allowing the sale of individual clients or matters, with more lucrative clients or matters getting more favorable treatment than less profitable ones -- a danger that the Committee thought was more likely when only an area of practice rather than the entirety of a practice is involved.

Paragraph (c) of the Model Rule, regarding the written notice the seller of a law practice must give to each client, and the three numbered subparagraphs that follow it, are included verbatim in the DC Rule, except that in subparagraph (3), which requires the notice to clients to state that the clients' consent to transfer of their files will be presumed unless the client objects within ninety days of receipt of the notice, the DC Rule includes the phrase "to the purchasing lawyer or law firm," so as to make clear who the recipient of the transfer will be. That subparagraph, in presuming consent absent objection from the client, differs from (and overrules) **DC Ethics Opinion 294**, which opined that affirmative consent by the client was required.

The unnumbered paragraph that follows next in the Model Rule, addressing circumstances where the client can't be given notice, is copied identically in the DC Rule, but the DC Rule then adds a further unnumbered paragraph stating that once a client has consented to the transfer of the client's files, or fails to object within the 90 days provided in the written notice, the purchasing lawyer is responsible for the client's matter(s).

Finally, paragraph (d) in both versions of the Rule states that the fees charged clients shall not be increased by reason of the sale. **DC Ethics Opinion 294** had expressly permitted fee increases so long as they were reasonable, but the Rules Review Committee adopted the Model Rule's position instead, reasoning that sales should not be financed by increases in fees charged the clients affected.

The Comments following the DC Rule are largely identical to those of the Model Rule, but also reflect the several minor differences between the two rules.

1.17:102 Model Code Comparison

The Model Code contained one reference to sale of a law practice, in Ethical Consideration 4-6, which stated that "a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets," but there was no Disciplinary Rule addressing the subject.

1.17:200 Traditional Rule Against the Sale of a Law Practice

- Primary DC References:
- Background References: ABA Model Rule 1.17, Other Jurisdictions
- Commentary: ABABNA § 91:801; ALI-LGL § ; Wolfram § 16.2.1

There appear to be no pertinent DC court decisions regarding sale of a law practice, but there is on ethics opinion on the subject, **DC Ethics Opinion 294 (2000),** which was issued less than a year after the ABA had added the original Rule 1.17 to the Model Rules. That **Opinion** noted that although the Model Code of Professional Responsibility had no Disciplinary Rule addressing the subject, there were court decisions in other jurisdictions holding that sales of law practices were unethical, but also noted that the new Model Rule 1.17 took a contrary view, and that some 21 jurisdictions had adopted that rule or one similar to it. The **Opinion t**hen considered whether other provisions of the DC Rules applied to sales of law practices, and concluded that such transactions were ethically permissible, subject to conditions and restrictions similar though not identical to those in Model Rule 1.17.

As explained in the comparison of DC Rule 1.17 to its counterpart in the Model Rules under 1.17:101 above, the DC Rules Advisory Committee noted that there were several points regarding the permissible terms of sales of law practices on which the Model Rule differed from **Opinion 294** and as to which it viewed the Model Rule's position as the better one, and so incorporated that provision in its proposed DC Rule 1.17 which was adopted by the DC Court of Appeals.

1.17:300 Problems in Sale of Practice

- Primary DC References:
- Background References: ABA Model Rule 1.17, Other Jurisdictions
- Commentary: ABABNA § 91:801; ALI-LGL § ; Wolfram § 16.2.1

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

1.18 Rule 1.18 Duties to Prospective Client

1.18:100 Comparative Analysis of DC Rule

- Primary DC References:
- Background References: ABA Model Rule 1.18, Other Jurisdictions
- Commentary:

1.18:101 Model Rule Comparison

When Rule 1.18 was added to the Model Rules, in 2002, the DC Rules did not have a similar separate Rule, but the problem of possible disqualification of a law firm on the basis of confidential information that had been imparted to a lawyer in the firm by a prospective client who did not become a client was partially addressed by DC Rule 1.10(a) as it then stood. That provision made an exception to the general imputation of an individual lawyer's disqualification to all other lawyers in that lawyer's firm, for circumstances where the lawyer's disqualification resulted solely from such an interview with a prospective client, and Comments [7] though [9] to the Rule elaborated on this provision. Both that portion of DC Rule 1.10(a) and its related Comments had been added effective November 1, 1996 pursuant to a recommendation of the Peters Committee. **DC Ethics Opinion 279 (1998),** addressing the general subject of the availability of screening as a cure for imputed disqualification, noted that one of the situations in which screening might be usefully employed was the one addressed by DC Rule 1.10(a)'s exception to imputation. The **Opinion** recognized that where that exception applied, screening was not, strictly speaking, *necessary*, but observed that it might nonetheless be *useful* in assuring that the interviewing lawyer's disqualifying information was not imparted to other lawyers in the firm.

Although the DC Rules Review Committee recognized that, in light of the provision of DC Rule 1.10(a) described in the preceding paragraph, a new and separate rule on the subject was not necessary, it nonetheless concluded that it would be useful to have a rule that addressed the problem more comprehensively, and accordingly the Committee proposed, and the Court accepted, a DC Rule 1.18 that largely copies Model Rule 1.18, except in a few relatively minor respects, described below. Since the new Rule 1.18 rendered the provision dealing with the same subject in DC Rule 1.10(a) unnecessary, that provison and the related Comments were also eliminated. (See 1.10:101, above.)

Paragraph (a) of DC Rule 1.18, effectively a prospective client for purposes of that Rule, is identical to its Model Rule counterpart.

Paragraph (b), prohibiting a lawyer's revealing or using information learned in a conversation with a prospective client who did not become a client, uses identical wording with respect to this prohibition in the two versions of the Rule, but the Model Rule provides an exception for information that could have been revealed under Rule

1.9 if a lawyer-client relationship resulted from the initial interview, while the DC Rule makes exception when permitted by Rule 1.6.

Paragraph (c) in both versions of the Rule provides that a lawyer who has learned information from a prospective client may not thereafter represent a client with interests materially adverse to those of the prospective client in a substantially related matter, and imputes that prohibition to that lawyer's colleagues. However, the Model Rule applies the prohibition only if the lawyer has received information from the prospective client that "could be significantly harmful" to that person, which the DC Rule Review Committee deemed to be insufficiently protective of the prospective client's interests and difficult to apply. Therefore, paragraph (c) of the DC Rule more broadly, and practicably, ties the prohibition to the lawyer's having received a "confidence or secret" from the prospective client -- the two defined terms that that DC Rule 1.6 retains from its Code predecessor, DR 4-101. (See 1.6:102, above.)

Subparagraph (d)(1) in both versions of Rule 1.18 provides that when the interviewing lawyer has received information that would be disqualifying under paragraph (c), a representation adverse to the interviewed but declined prospective client is still permissible if both the affected existing client and the interviewed but declined one consent. Subparagraph (d)(2) in both versions makes a similar exception -- applicable here only to the imputation of the disqualification -- where the interviewing lawyer is timely screened; and here, the Model Rule but not the DC Rule also requires prompt written notice to the prospective client, and that the interviewing lawyer have taken reasonable measure in that initial interview to avoid exposure to more information than reasonably necessary to determine whether to take on the representation.

The Comments following DC Rule 1.18 are generally parallel to those following the Model Rule, but in some respects are more elaborate -- among other things, explaining differences between the two versions of the Rule.

1.18:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code.

1.18:200 Definition of "Prospective Client"

- Primary DC References: DC Rule 1.18
- Background References: ABA Model Rule 1.18, Other Jurisdictions
- Commentary:

Rule 1.18(a) defines a prospective client, in terms identical to those in the corresponding Model Rule, as a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.

1.18:300 Confidentiality of Communications with a Prospective Client

- Primary DC References: DC Rule 1.18
- Background References: ABA Model Rule 1.18, Other Jurisdictions
- Commentary:

DC Rule 1.18(b) imposes upon a lawyer who has had discussions with a prospective client an obligation not to use or reveal information learned in the discussions except as permitted by Rule 1.6. It differs from the Model Rule in that the parallel exception made by the latter is cast in terms of what would have been permitted under Rule 1.9 if the prospective client had become an actual client.

1.18:400 Conflicts of Interest Arising Out Of Communications with a Prospective Client

- Primary DC References:
- Background References: ABA Model Rule 1.18, Other Jurisdictions
- Commentary:

DC Rule 1.18(c) does not use the term "conflict of interest," but it prohibits a lawyer from undertaking a representation of a client with interests materially adverse to the interests of a prospective client in a matter that is the same or substantially related to the matter discussed with the prospective client if the lawyer received a confidence or secret from the prospective client. It differs from the Model Rule in making the prohibition turn on receipt of a confidence or secret from the prospective client; the latter Rule turns on the lawyer having received from the prospective client information that "could be significantly harmful" to the prospective client. Paragraph (d) of the DC Rule, again like the Model Rule but in slightly different terms, provides exceptions to the prohibition if both the affected client and the prospective client give informed consent, or the disqualified lawyer is timely screened from any participation in the matter.

1.19 Rule 1.19 Trust Account Overdraft Notification

1.19:100 Analysis of DC Rule

- Primary DC References: DC Rule 1.19
- Background References: Other Jurisdictions
- Commentary:

DC Rule 1.19, which has no parallel in the Model Rules, nor any predecessor in the Model Code, was originally designated as Rule 1.17. It was redesignated as Rule 1.19 in 2006 on the recommendation of the DC Rules Review Committee, in order to allow for insertion of a new Rule 1.17 dealing with sale of a law practice corresponding to the similarly designated Model Rule on that subject, as well as a new Rule 1.18 like new the Model Rule 1.18, dealing duties to prospective clients.

The Rule as originally numbered was added to the DC Rules in April 1992 on the recommendation of the DC Bar and the Board on Professional Responsibility. It imposes a requirement that, subject to specified exceptions, all trust funds in a lawyer's possession be deposited in an institution that is listed on a list that is maintained by the Board of "D.C. Bar Approved Depositories." In order to be so listed, a financial institution must file an undertaking with the Board on Professional Responsibility, agreeing promptly to report to the Office of Bar Counsel any instance in which an instrument that would properly be payable if sufficient funds were available has been presented and the account contained insufficient funds to pay it.

The Rule consists of seven paragraphs. Paragraph (a) imposes a general requirement that all trust funds, defined as funds required by the Rules to be segregated from the lawyer's own funds, be deposited in one or more specially designated accounts at a financial institution, and that the accounts be given a title that includes the words "Trust Account" or "Escrow Account," as well as the identity of the lawyer or law firm. As more fully discussed under 1.19:200, below, this paragraph is the only portion of the Rule whose disregard has been the subject of disciplinary proceedings.

Paragraph (b) of the Rule requires that the accounts be maintained only in institutions that are designated as "D.C. Bar Approved Depositories" on a list maintained by the Board on Professional Responsibility, unless the account is permitted to be held elsewhere or in a different manner by law or court order, or they're held under an escrow or similar agreement in connection withy a commercial transaction. The latter two exceptions to the coverage of the Rule were added in 1996 pursuant to a suggestion of the Peters Committee. (The Peters Committee had also suggested a third exception, for circumstances where the lawyer has authority to hold the fund elsewhere or in different manner by a will, trust or similar formal written instrument, but the Court of Appeals did not adopt that exception, nor explain why.) If a lawyer is a member of the DC Bar but practices law elsewhere, then the DC Br Approved Depositories are required only for trust funds received by the lawyer in the District of Columbia, or received by the lawyer from or for the benefit of persons located there, or arise from transactions negotiated or consummated there.

A separate unlettered paragraph under paragraph (b) provides that to be listed as an Approved Depository, a financial institution must file an undertaking with the Board, agreeing to report promptly to the Office of Bar Counsel any instance in which an instrument drawing on the lawyer's or law firm's specially designated account has been presented, the payment of which would create an overdraft. That paragraph also requires that Approved Depositories, wherever located, agree to respond promptly to subpoenas from the Office of Bar Counsel.

Paragraph (c) of the Rule specifies the information to be provided in the reports by Approved Depositories that are required by paragraph (b), and the timing thereof.

Paragraph (d) provides that the establishment of a specially designated account is conclusively presumed to constitute the lawyer or law firm's consent to the institution's providing to Bar Counsel all reports and information required by the Rule.

Paragraph (e) disclaims any responsibility on the part of the Court of Appeals, the Bar, the Board or the Office of Bar Counsel with respect to the soundness, business practices or other attributes of any Approved Depository.

Paragraph (f) states that nothing in the Rule precludes financial institution from charging a lawyer or law firm for the reasonable cost of producing reports and records required by the Rule.

Finally, paragraph (g) defines the terms "law firm" and "financial institution" as used in the Rule.

The Rule is accompanied by no Comments. Except for the revised numbering, it was left unchanged by the 2006 revisions.

1.19:101 Model Rule Comparison

There is not and has never been any provision in the Model Rules corresponding to DC Rule 1.19.

1.19:102 Model Code Comparison

There is no provision in the Model Code comparable to DC Rule 1.19.

1.19:200 Disciplinary Enforcement of Rule 1.19

The principal disciplinary significance of DC Rule 1.19 lies in its providing to Bar Counsel notice of threatened and actual overdrafts on trust funds, giving rise to disciplinary action for misappropriation under Rule 1.15(a); see, e.g., **In re Davenport, 794 .2D 602, 604 (DC 2002)**, where the court noted that Bar Counsel's investigation of the respondent's handling of trust funds was triggered by notice from the bank where the funds had been deposited pursuant to what was then Rule 1.17. A failure by a lawyer to comply with the fundamental requirement of paragraph (a) of the Rule, that all trust funds be deposited in specially designated accounts in a financial institution, however, is itself a disciplinary offense. There do not appear to have been any cases in which a lawyer was disciplined solely for a violation of Rule 1.19(a) (or, as it was previously designated, 1.17(a)), but there are a number of cases in which the lawyer was disciplined for commingling or misappropriation, under Rule 1.15(a) [see 1.15:300, above] or one of the other paragraphs of Rule 1.15, and in connection therewith, found to have violated this Rule as well. The connection between the two Rules is, indeed, often unavoidable: if a lawyer has put trust funds that are in the lawyer's possession into an operating account, then there has been a violation not only of the obligation under Rule 1.15(a) to keep the trust funds separate from other funds, but also the obligation under this Rule to put the trust funds into a separate account that meets the requirements of DC Rule 1.19.

Thus, in **In re Anderson, 778 A.2d 330 (DC 2001)**, the respondent had deposited funds received in a settlement of a personal injury case into a checking account that was the sole account he used in his practice, and had then disbursed the client's share of the settlement to the client but neglected to pay an outstanding claim of the doctors who had provided medical treatment to the client. He ultimately paid the doctors in full, but in the interim had allowed the balance in the account to fall below the level required to satisfy the doctors' claim. He was held to have committed commingling and misappropriation in violation of Rule 1.15(a), failed to notify and deliver funds to a third-party claimant in violation of Rule 1.15(b), and failed to designate a trust or escrow account in violation of then-Rule 1.17(a).

In **In re Bernstein, 774 A.2d 309 (DC 2001)**, where the principal disciplinary charges related to the charging of an excessive and unlawful fee [as more fully recounted under 1.5:730, above], the respondent had also deposited a settlement check in a business checking account in which he also maintained his own funds, and so was found to have violated both Rule 1.15(a) and then-Rule 1.17(a).

In **In re Bettis, 855 A.2d 282 (DC 2004)**, the respondent was found to have violated Rule 1.5(c) by failing to put a contingent fee agreement in writing, Rule 1.15(b) by failing to pay a claim for medical expenses out of the proceeds of a settlement, and then-Rule 1.17(a) by failing to designate the account into which the settlement proceeds were deposited as an escrow or trust account. This case may have provided an indication of the relative seriousness, for disciplinary punishment purposes, of a violation of then-Rule 1.17 and current Rule 1.19. The Court observed that even taken

together, the three violations, in the factual setting of this case, would not have called for a major disciplinary sanction, and the Court declined to accept the Board's recommendation of a thirty-day suspension with a fitness review before reinstatement as being too harsh since it would amount to a *de facto* suspension of a year-and-a-half or longer while the respondent's fitness was established. In place of this sanction, the Court imposed a public censure and a two-year period of probation during which the respondent's practice would be monitored.

Other cases in which a respondent was found to have violated then-Rule 1.17(a) as well as Rule 1.15(a) include In re Edwards, 870 .2D 90, 92-93 (DC 2005); In re Graham, 795 .2d 51 (DC 2002); In re Marshall, 762 A.2d 530, 531 (DC 2000); In re Johnson-Ford, 746 A.2d 308 (DC 2000); In re Diuguid, 689 A.2d 1223 (DC 2000).

II. COUNSELOR

2.1 Rule 2.1 Advisor

2.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 2.1
- Background References: ABA Model Rule 2.1, Other Jurisdictions
- Commentary:

2.1:101 Model Rule Comparison

The only changes recommended by the Ethics 2000 Commission with respect to Model Rule 2.1 were in Comment [5]: there, it added a sentence reminding lawyers that informing a client of various forms of dispute resolution may be required by Rule 1.4 when a different form of dispute resolution would be a reasonable alternative to litigation. It also proposed some other minor and non-substantive changes in the wording of the Comment for "clarification and style." The DC Rules Review Committee proposed, and the Court approved, the addition to Comment [5] of the DC Rule of a sentence to the same effect as the one added to the Model Rule's Comment, albeit more clearly phrased. It did not otherwise tinker with the wording of the Comment

2.1:102 Model Code Comparison

There is no direct counterpart to this Rule in the Model Code. Canon 5 asserted that a "lawyer should exercise independent professional judgment on behalf of a client;" the first sentence of Rule 2.1 makes this precept mandatory. DR 5-107(B), whose most direct descendant in the Rules is Rule 5.4(c), provided that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8, which is in effect the forerunner of the second sentence of Rule 2.1, stated that "[a]dvice of a lawyer to his client need not be confined to purely legal considerations . . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible . . . ."

2:1:200 Exercise of Independent Judgment

- Primary DC References: DC Rule 2.1
- Background References: ABA Model Rule 2.1, Other Jurisdictions
- Commentary: ABABNA § 31:701

Although Rule 2.1 is a separate, comprehensive statement of the obligation to use independent professional judgment, it is less likely to be invoked in court decisions, ethics committee opinions or disciplinary proceedings — and, indeed, there appear to have been none in DC — than the rules that address specific threats to such independence of judgment: DC Rules 1.7(b) and 1.8(f) if the lawyer's judgment may be jeopardized by allegiance to other clients; DC Rules 1.7(b), 1.8(b), (e) and (h) and 5.4 if the lawyer's judgment may be affected by allegiance to a third person; and DC Rules 1.8(a), (b), (c) and (g) where the lawyer's judgment may be affected by the lawyer's own interests.

2:1:300 Non-Legal Factors in Giving Advice

- Primary DC References: DC Rule 2.1
- Background References: ABA Model Rule 2.1, Other Jurisdictions
- Commentary: ABABNA § 31:701; ALI-LGL § 94; Wolfram § 4.3

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

2.2 Rule 2.2 Intermediary

2.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 2.2
- Background References: Former ABA Model Rule 2.2, Other Jurisdictions
- Commentary:

2.2:101 Model Rule Comparison

The Ethics 2000 Commission recommended deleting Model Rule 2.2 and moving any discussion of common representation to the Comments following Rule 1.7. The DC Rules Review Committee agreed with the Commission's view, and recommended that DC Rule 2.2, which was identical to the former Model Rule, should be rescinded because the relationship between Rules 1.7 and 2.2 was confusing and issues relating to intermediation could be satisfactorily addressed by Rule 1.7 and its Comments. Thus, the new/revised Comments [14] through [18] to DC Rule 1.7, under the caption Special Considerations in Common Representations, were derived from the commentary to former DC Rule 2.2. (See 1.7:101, above.)

2.2:102 Model Code Comparison

There was no direct counterpart to this Rule in the Model Code. DR 5-105(B) and (C) dealt in less detail with the general topic of multiple representation. EC 5-20 stated that a "lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such . . . relationships."

2.2:200 Relationship of Intermediation to Joint Representation

- Primary DC References: Former DC Rule 2.2
- Background References: Former ABA Model Rule 2.2, Other Jurisdictions
- Commentary: ABABNA § 51:1504; ALI-LGL § ; Wolfram §§ 8.7, 13.6

DC Ethics Opinion 296 (2000) [which is more fully discussed under 1.7:330, above] commented on the close similarity between a lawyer representing multiple clients under Rule 1.7, on the one hand, or acting as intermediary for the same parties with respect to the same matter under Rule 2.2, on the other. In both situations, a lawyer owes each of the parties on whose behalf he or she is acting obligations both to preserve client confidences under Rule 1.6 and to keep the clients informed, under Rule 1.4, and if both obligations cannot be met, the lawyer must withdraw. In the particular circumstances there addressed, a law firm jointly represented an employer and its alien employee in seeking a visa for the employee, without any advance understanding as to whether client confidences with respect to the representation would be shared, a problem arose because the employee client disclosed to the law firm that she had fabricated the credentials on which the visa had been based, and the law firm, unable to disclose this information to the employer client, had to withdraw from the representation.

DC Ethics Opinion 247 (1994) concerned a lawyer who had performed services for both seller and purchaser in a residential real estate transaction; the lawyer had been selected by the purchaser but had been the only lawyer involved in the transaction. The lawyer was subsequently asked to represent the purchaser in a potential lawsuit alleging blatant defects in the property. The issues addressed by the opinion were whether the lawyer was barred, absent consent of the seller, from undertaking the representation; and whether if so another lawyer associated with him as "of counsel" would also be disqualified. In addressing the first issue, the opinion noted that both Rule 2.2 and Rule 4.3 (on lawyers dealing with unrepresented persons) emphasize the importance of "making the lawyer's role, duties, and non-duties clear when those matters could be misunderstood by the multiple participants in a matter"; and, since it had not been made clear at the outset that the lawyer was representing only the purchaser in the real estate transaction, the lawyer was indeed disqualified from representing the purchaser in a dispute with the seller.

DC Ethics Opinion 217 (1991) addressed a firm's proposed representation of a group of three claimants, jointly, against other individual claimants or groups of claimants to a limited fund. The Opinion concluded that the proposed representation, insofar as it involved the shared interests of the represented group as against others, would not be barred by Rule 1.7; that Rule 1.7 would bar the firm from acting as advocate for any of the clients with respect to the allocation of any award among them; but that the firm could serve as an intermediary in determining the allocation among its clients, pursuant to Rule 2.2.

2.2:300 Preconditions to Becoming an Intermediary

- Primary DC References: Former DC Rule 2.2(a) & (b)
- Background References: Former ABA Model Rule 2.2(a), Other Jurisdictions
- Commentary: ABABNA § 51:1506; ALI-LGL § 153; Wolfram § 8.7, 13.6

DC Ethics Opinion 276 (1997) held that a lawyer acting as mediator pursuant to a court-sponsored alternative dispute resolution program is not governed by Rule 2.2, because the parties to the mediation are not clients of the lawyer. [**Opinion 276** is more fully discussed under 1.7:210, above.]

DC Ethics Opinion 243 (1993) responded to an inquiry from a lawyer who was also an ordained minister and had been doing domestic relations mediation work. The inquirer proposed to start a private law practice in which she would jointly represent divorcing spouses pursuant to Rule 2.2, in attempting to mediate the terms of the divorce, including terms of custody if there were children; and, if the mediation was successful, drafting and filing necessary agreements and representing both spouses in court. The opinion concluded that it was not permissible under Rule 2.2, and indeed forbidden by Rule 1.7(a), for the lawyer jointly to represent a divorcing husband and wife who seek assistance in reaching agreement as to the terms of their divorce. The opinion noted that the earlier **DC Ethics Opinion 143 (1984)**, applying DR 5-105 and DR 7-101 of the former DC Code, had concluded that as a general rule joint representation of a couple seeking a divorce was not ethically permissible; although in the circumstances there addressed, where the parties seeking joint representation were childless, had relatively equal employment status and educational background and had already agreed upon a division of property and all substantial settlement terms before retaining counsel, such a joint representation would be permissible. **Opinion 243** concluded that the earlier opinion continued to be sound, in allowing a joint representation in the particular circumstances there addressed; but that a joint representation where the terms of the divorce were not already agreed involved too sharp a conflict between the interests of the clients to lend itself to intermediation pursuant to Rule 2.2. The Opinion noted that nothing prevented a lawyer acting as mediator for spouses seeking a divorce so long as no client/lawyer relationship was established.

2.2:400 Communication During Intermediation

- Primary DC References: Former DC Rule 2.2(c)
- Background References: Former ABA Model Rule 2.2(b), Other Jurisdictions
- Commentary: ABABNA § 51:509; ALI-LGL § 153; Wolfram § 8.7, 13.6

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

2.2:500 Consequences of a Failed Intermediation

- Primary DC References: Former DC Rule 2.2(d)
- Background References: Former ABA Model Rule 2.2(c), Other Jurisdictions
- Commentary: ABABNA § ; ALI-LGL § 153; Wolfram § 8.7, 13.6

In **Green v. Newman, 385 A.2d 171 (DC 1978)**, the court held that it was improper to appoint a law student to represent a defendant as an advocate, where the law student had previously been involved as conciliator in the same case.

2.3 Rule 2.3 Evaluation for Use by Third Persons

2.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 2.3
- Background References: ABA Model Rule 2.3, Other Jurisdictions
- Commentary:

2.3:101 Model Rule Comparison

Prior to the changes made in Model Rule 2.3 in 2002 pursuant to recommendations of the Ethics 2000 Commission, DC Rule 2.3 was identical to the Model Rule except that it omitted Comment [2], addressing formal opinions provided to government agencies by government lawyers. That omission had been recommended by the Sims Committee, which had observed that "[a]s written, the [Comment] provides little guidance." The Ethics 2000 Commission proposed omitting that Comment for essentially the same reason, namely, that "neither its meaning nor its function is clear." The Commission also recommended the addition of a new paragraph (b) to the text of the Rule to make clear that the Rule contemplates two distinct circumstances where a lawyer may provide an evaluation for use by third person: when it is implicit in the lawyer's engagement; and, with the client's informed consent, when the evaluation is likely to affect the client's interests materially and adversely. The Commission also added a new Comment [5] elaborating on the new paragraph (b), and made some small language changes in the other two paragraphs of the Rule and in the remaining Comments. The DC Rules Review Committee recommended, and the Court agreed, that DC Rule 2.3 be similarly revised, so as to be once more identical to the Model Rule.

2.3:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code.

2.3:200 Undertaking an Evaluation for a Client

- Primary DC References: DC Rule 2.3
- Background References: ABA Model Rule 2.3, Other Jurisdictions
- Commentary: ABABNA § 71:701; ALI-LGL § 95; Wolfram § 13.4

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

2.3:300 Duty to Third Persons Who Rely on Lawyer's Opinion [see also 1.1:420]

- Primary DC References: DC Rule 2.3
- Background References: ABA Model Rule 2.3, Other Jurisdictions
- Commentary: ABABNA § 71:706; ALI-LGL § 95; Wolfram § 13.4.4

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

2.3:400 Confidentiality of an Evaluation

- Primary DC References: DC Rule 2.3
- Background References: ABA Model Rule 2.3, Other Jurisdictions
- Commentary: ABABNA § 71:704; ALI-LGL § 95; Wolfram § 13.4.3

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

2.4 Rule 2.4 Lawyer Serving as Third Party Neutral

2.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 2.4
- Background References: ABA Model Rule 2.4, Other Jurisdictions
- Commentary:

2.4:101 Model Rule Comparison

Model Rule 2.4 is another of the Rules added to the Model Rules in 2002 on the recommendation of the Ethics 2000 Commission. The DC Rules Review Committee recommended, and the Court agreed, that an identical Rule, with identical Comments, be added to the DC Rules. That Committee also noted that DC Rule 1.12 already addressed the ability of former arbitrators to represent clients in related matters, and that it had recommended that that Rule be expanded to cover third-party neutrals as well. It also noted that in **DC Ethics Opinion 276 (1997)**, the Legal Ethics Committee had discussed the ethical obligations of lawyer neutrals to conduct a conflicts check. And it observed that the DC Court of Appeals had not yet addressed the matters dealt with in the new Rule 2.4.

2.4:102 Model Code Comparison

There was no Disciplinary Rule in the Model Code comparable to Rule 2.4

2.4:200 Definition of “Third Party Neutral”

2.4:300 Duty to Inform Parties of Nature of Lawyer's Role

III. ADVOCATE

3.1 Rule 3.1 Meritorious Claims and Contentions

3.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.1
- Background References: ABA Model Rule 3.1, Other Jurisdictions
- Commentary: ABABNA § 61:704; ALI-LGL § 110; Wolfram § 11.2

3.1:101 Model Rule Comparison

DC Rule 3.1 follows Model Rule 3.1 in instructing a lawyer not to assert a claim that is frivolous, but with changes in that part of the Rule that deals with the case of the criminal defendant or other person threatened with a loss of liberty who has no non-frivolous defense. In such a case, the Model Rule says that a lawyer "may" put the government to its proof; the DC Rule says that the lawyer "shall" do so if the client elects to go to trial or to a contested fact-finding hearing. The Model Rule speaks of "a criminal proceeding, or . . . a proceeding that could result in incarceration"; the DC Rule speaks of "a criminal proceeding, or . . . a proceeding that could result in involuntary institutionalization." In describing what it means to put the government to its proof, the DC Rule says that the lawyer shall "nevertheless so defend the proceeding as to require that *the government carry its burden of proof*," the italicized phrase replacing the Model Rule's "every element of the case be established."

Model Rule 3.1 was amended in 2002 per recommendation of the Ethics 2000 Commission to make clear that a position taken in a proceeding, in order not to be frivolous, must have a basis in both law and fact; and this change was also made in the DC Rule in 2006 on recommendation of the Rules Review Committee.

Comment [2] to the DC Rule omitted from its third sentence language that was in its Model Rule counterpart as it stood prior to its amendment in 2002, stating that an action taken on a client's behalf is frivolous "if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person," but kept the description of a frivolous action as one for which no good faith argument can be made. Pursuant to a recommendation of the Ethics 2000 Commission, the same deletion was made in the Model Rule's Comment in 2002. Another change then made on recommendation of the Commission was the addition to Comment [2] to the Model Rule of a sentence stating that lawyers are required to inform themselves of the facts and the applicable law and determine that they can make good faith arguments in support of their clients' positions; and in 2006 a sentence to the same effect, though phrased slightly differently, was added, on recommendation of the Rules Review Committee, to the DC Rule's Comment [2].

The original Comment [3] to the DC Rule, for which the Model Rule had no counterpart, made clear that the language of obligation ("shall") in the DC version of the Rule was intended to impose a requirement and not just offer an option, and that the Rule covers civil commitment proceedings, which may not be encompassed by the Model Rule's "incarceration," as well as juvenile delinquency cases, which probably are. In 2002 a new Comment [3] was added to the Model Rule, stating that a lawyer's obligation under the Rule are subordinate to federal or state law that entitles a defendant in a criminal matter to assistance of counsel in presenting a claim that would otherwise be forbidden by the Rule; and in 2006 the Rules Review Committee added identical language to the DC Rule's Comment [3].

3.1:102 Model Code Comparison

Rule 3.1 is to the same general effect as DR 7-102(A)(1), which provided that a lawyer may not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;" but with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applied only when the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, DC Rule 3.1 makes an exception for a criminal case, or a case in which the involuntary institutionalization of the client may result (for example, certain juvenile proceedings); in such a case the lawyer shall put the prosecution to its proof whenever the client elects to contest the case, even if there is no nonfrivolous defense.

3.1:200 Non-Meritorious Assertions in Litigation

- Primary DC References: DC Rule 3.1
- Background References: ABA Model Rule 3.1, Other Jurisdictions
- Commentary: ABABNA § 61:101; ALI-LGL § 110; Wolfram § 11.2

In re Spikes, 881 A.2d 1118 (DC 2005) was a disciplinary proceeding in which respondent was held to have violated DC Rule 3.1, and Rule 8.4(d) as well, by filing a suit in the U.S. District Court against several lawyers in the Office of Corporation Counsel (now Attorney General) of the District of Columbia, charging them with conspiring to defame him and deprive him of civil rights. The District Court dismissed the suit for failure to state a claim, observing that the assertedly defamatory statements were privileged, and the civil rights and conspiracy claims were based on them. That decision was upheld on appeal by the DC Circuit in an unpublished opinion holding that "[t]he merits of the parties' positions are so clear as to warrant summary affirmance." *Id*. at 1121**.** The disciplinary proceeding in effect re-examined the respondent's claims in that suit under the more stringent standard of ethical permissibility. The statements by the defendants on which the respondent's District Court suit was based all related to what had appeared to be attempts by the respondent to bribe a witness to commit perjury in a suit against the District of Columbia in which the respondent was representing the plaintiff. One of the assertedly defamatory documents on which the respondent's District Court suit was based was in a letter one of the defendants had sent to Bar Counsel complaining of the respondent's conduct in that underlying case; in the subsequent disciplinary proceeding, the Board on Professional Responsibility held, and the Court agreed, that that letter was absolutely privileged by reason of DC Bar Rule XI §19(a), which provides, in relevant part, that "Complaints submitted to the Board or Bar Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained." *Id*. at 1122**.** A second assertedly defamatory document was a memorandum in support of a motion for a continuance in the underlying case, which made reference to the suspected misconduct by the respondent, and the third was a draft affidavit that had been submitted to the witness who was believed to be the target of the bribery; the Court of Appeals held that both of these were "cloaked with the absolute privilege that attaches to communications made within the judicial process." *Id*. at 1123**.** The fourth document complained of was a letter that had been sent to the U.S. Attorney referring to respondent's questionable conduct; as to this, the Court of Appeals observed that only a *qualified* privilege applies to reports made to law enforcement authorities for investigation, but held that the District Court's decision had effectively determined the issue of whether the privilege applied. The Court of Appeals accordingly concluded that all of the claims made in respondent's suit in the District Court suit were "frivolous," and so in violation of Rule 3.1. *Id*. at 1124**.** The Court also noted that this was the first case in which it had considered what constitutes a "frivolous" proceeding or issue warranting sanction under Rule 3.1, but concluded that its decision here was consonant with previous decisions interpreting that term for purposes of determining whether a pleading is "frivolous" and so subject to sanction

under Superior Court Civil Rule 11 or an appeal, petition or motion is similarly subject to sanction under D.C. App. Rule 38. *Id*. at 1125**.**

In Sturdza v. United Arab Emirates, 281 F.2d 1287 (DC Cir. 2002), the appellant, although represented by counsel, had made pro se filings asserting that those made on her behalf by her counsel failed to follow her directions and omitted critical information, and her counsel had responded with affidavits describing his efforts to consult with her on the appeal. The Court found that counsel had "carefully explained to [the appellant] why he thought the additional arguments she wished to make were without merit and why the material she wanted added to the Joint Appendix should not be included." *Id*. at 1294. The Court then observed that "This is precisely how appellate counsel should behave; indeed, we expect all lawyers practicing in this court to resist a client's desire to make 'poor legal arguments or unsubstantiated factual allegations'" [quoting a letter from counsel]; and then referred to DC Rule 3.1. *Id*.

In **In re Morrissey, 648 A.2d 185 (DC 1994)**, the Court approved reciprocal discipline in a matter where the respondent had been found to have violated, *inter alia*, DR 7-102(A) by numerous acts of misconduct in the course of a trial that the Virginia Disciplinary Board had described as "abuses of the legal process by every means available to him" and as "dishonest and in total disregard of even the most rudimentary sense of propriety in the Courts." *Id*. at 188.

In **In re J.J.Z., 630 A.2d 186 (DC 1993)**, the Court upheld, on the government's motion and over challenges by the children's guardian ad litem, the dismissal of neglect petitions that the government had filed. The court observed, *inter alia*, that Rule 3.1 and DR 7-102(A)(2) precluded an attorney from knowingly advancing a claim unsupportable by existing law, absent a good faith argument for its extension, modification, or renewal. *Id*. at 192-93.

There appear to be no DC ethics opinions interpreting or applying Rule 3.1, or casting light on its Code predecessors, DR 7-102(A)(1) and (2).

3.1:300 Judicial Sanctions for Abusive Litigation Practice (Especially Rule 11)

- Primary DC References: DC Rule 3.1
- Background References: ABA Model Rule 3.1, Other Jurisdictions
- Commentary: ABABNA § 61:151; ALI-LGL § 110; Wolfram § 11.2

The District of Columbia courts have rules of procedure providing remedies for abusive litigation tactics that correspond closely to, and are modeled on, the pertinent federal rules. Thus, Superior Court Civil Rule 11 (Signing of Pleadings, Motions and Other Papers; Representations to Court; Sanctions) is identical to Fed R Civ P 11 (and was identically amended in 1994). Additionally, Super Ct Civ R 37 (Failure to Make or Cooperate in Discovery), while it varies somewhat from Fed R Civ P 37, contains substantially the same provisions for sanctions for failure to respond to pretrial discovery, in paragraphs (a)(4), (b), (c), (d) and (g). Similarly, DC App R 38 (Damages for Delay) is modeled on Fed R App P 38. And the District of Columbia courts have been held to have the same sorts of "inherent powers" as the federal courts to impose sanctions on trial misconduct.

The DC Court of Appeals observed, in **Tupling v. Britton, 411 A.2d 349, 351 (DC 1980)**, that "[w]hile this court is not bound by the federal courts' interpretations of federal rules essentially identical or similar to our rules, those interpretations may be accepted as persuasive authority in interpreting our rules"; and, in fact, decisions of the District of Columbia courts frequently cite and follow decisions under the Federal Rules. In consequence there does not appear to have developed a separate body of DC jurisprudence regarding the pertinent rules of procedure, and so no effort is made here to provide a comprehensive treatment of DC decisions under those rules, but only discussion of a few representative decisions. The discussion immediately below will address, in order, cases applying Appeals Rule 38, Civil Rule 11 and Civil Rule 37. Decisions turning on inherent powers of the court are assembled under 3.1:500, below.

<u>Appeals Rule 38</u>

In **Tupling**, *supra*, the DC Court of Appeals addressed extensively that court's Rule 38, which was (and still is) identical in substance to Fed R App P 38 prior to the 1994 amendments. *[DC App R 38 provides, "If this court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Fed R App P 38 prior to the 1994 amendments started with the words "If a court of appeals," but otherwise was the same as the DC Rule. The 1994 amendment added, after "it may," the phrase "after a separately filed motion or notice from the court and reasonable opportunity to respond," a proviso that has not been added to the DC Rule.]* Involved in the case was a dispute between a custodian under the Uniform Gifts to Minors Act and the maternal grandmother of the minors in question, arising from a petition for an accounting filed by the latter, which resulted in a finding that the custodian had failed to fulfill certain responsibilities under the Act. The custodian filed

a timely appeal from the judgment entered on the basis of that finding, but his appeal was dismissed because of a continued failure to obey the rules of the Court of Appeals regarding the timely prosecution of appeals. The grandmother filed a motion seeking costs and damages under DC App R 38, and the court, having concluded that the custodian's appeal was frivolous and very likely interposed for delay, awarded costs but not the damages sought in the motion (apparently consisting of lawyers fees incurred below), which the court stated were not recoverable "because they are not attributable to the fact that the frivolous appeal was filed." *Id*. at 354. The court observed in this connection, however, that, "[i]f appellee had been represented by counsel, she would have been entitled to recover reasonable attorneys fees." In the course of an extensive review of decisional law interpreting both the DC Rule and its federal counterpart, the court observed, *inter alia*, that "[i]t is clear that the assessment of costs and damages against parties who file frivolous appeals is a well-established practice," and that "[a]warding appellees costs and damages against appellants who bring frivolous appeals has a two-fold purpose: (1) protecting appellate dockets from unmeritorious cases which delay the hearing of cases with merit, and (2) compensation for appellees for the unwarranted loss resulting from delay and added expense caused by frivolous appeals." *Id.* at 352. The court also stated that "damages an appellee may recover include, but are not limited to, additional interest on the judgment," *id*., and explained that "[a]warding appellees additional interest on their judgments would serve the dual purpose of compensating appellees for the unwarranted loss resulting from the delay caused by frivolous appeals, and deterring appellants who might consider filing such appeals to postpone the time when they have to satisfy the judgments against them." *Id*. at 353. The court left open "the question whether, under appropriate circumstances, counsel might be subject to disciplinary action for filing an obviously frivolous civil appeal." *Id*.

In **Parsons v. Mains, 580 A.2d 1329 (DC 1990) (per curiam)**, the court affirmed the trial court's dismissal for want of personal jurisdiction of a suit against a Virginia lawyer where jurisdiction was asserted on the basis that the lawyer had been counsel of record in two or three actions brought in District of Columbia courts over the course of ten years and so was claimed to have engaged in a "persistent course of conduct" within the meaning of the D.C. longarm statute, DC Code § 13-423(a)(4). The court observed in a footnote that although it could award reasonable attorneys fees on a finding that an appeal was frivolous, per DC App. R. 38, it concluded that "such a finding is inappropriate in this case given the few cases in which we have heretofore construed § 13-423(a)(4)." *Id*. at 1331 n.4.

In **Williams v. Ray, 563 A.2d 1077 (DC 1989)**, a case involving a challenge to the compensation that the trial court had awarded for services of a co-personal representative and counsel for an estate, the court denied a motion for sanctions pursuant to DC App R 38, noting that "at least one of the appellants' arguments has merit," and in consequence, "[b]ecause the appeal is not entirely frivolous, sanctions are not appropriate." *Id*. at 1081.

In **In re Solerwitz, 575 A.2d 287 (DC 1990)**, the court approved reciprocal discipline of a lawyer who had been disciplined by the United States Court of Appeals for the Federal Circuit for, inter alia, filing and maintaining petitions that were clearly frivolous. The Federal Circuit had imposed sanctions on the respondent pursuant to Rule 38 of the Federal Rules of Appellate Procedure, ordering him to pay damages to the government in the amount of $78,300; and had, in addition, suspended him from the Bar of the Federal Circuit for conduct "unbecoming a member of a Bar of the Court," pursuant to Rule 46(b) of the Federal Rules of Appellate Procedure. The Board on Professional Responsibility concluded, and the DC Court of Appeals concurred, that the conduct for which the respondent had been disciplined by the Federal Circuit also violated various provisions of the Code, including, with respect to the frivolous appeals, DR 7-102(A)(2).

Civil Rule 11

In **Roeder v. Islamic Republic of Iran, 195 F.Supp. 2d 140 (DDC 2002), aff'd 333 F.3d 228 (DC Cir. 2003)**, a class action on behalf of former hostages seeking to recover damages against the Iranian government, the District Court, after granting a motion to dismiss by the United States as intervenor, criticized class plaintiffs' counsel for violating both Civil Rule 11 and DC Rule of Professional Conduct 3.3(a)(3) for making frivolous legal arguments and failing to disclose adverse authority; although, remarkably, the Court did not impose any sanction. The Court termed "particularly problematic" the following:

> Plaintiffs' total failure to bring to this Court's attention the Algiers Accords and implementing regulations despite the FSIA's requirement that plaintiffs "established [their] claim or right to relief by evidence that is satisfactory to the Court." 28 U. S.C. § 1608(e).
>
> Plaintiffs' failure to address any of the two hundred years of cases regarding conflicts between legislation and previously-enacted treaties and international agreements until ordered to do so by the Court.
>
> Plaintiffs' request for a default judgment on liability prior to his Court hearing any evidence to support their claims, despite the clear statutory requirement in 28 U.S.C. § 1608(e).
>
> Plaintiffs' motion to strike the government's motion to intervene that raised a completely frivolous argument and did not contain any discussion of the requirements of Federal Rule of Civil Procedure 24.

Plaintiffs' argument that the Algiers Accords are the legally invalid result of coercion, raised very late in these proceedings, and clearly contradicted by Supreme Court precedent.

In **Esteves v. Esteves, 680 A.2d 398 (DC 1996)**, involving a dispute between former spouses, the trial court imposed sanctions on the former wife under both Rule 11, for

filing an amended complaint that was neither well grounded in fact nor warranted by existing law, and Rule 37(b)(2), for failure to give timely notice of the taking of a deposition, resulting in a two-month delay in the trial. As to the imposition of discovery sanctions, the court of appeals held that there was a sufficient basis for imposition of such sanctions, but remanded the case to the trial court for an explanation of why the sanctions had been imposed solely on the former wife, and not on her attorney or on both the client and the attorney. *Id*. at 407, 408. With respect to the Rule 11 sanctions, the court, applying the Rule as it stood prior to the 1994 amendments, observed that "[a] Rule 11 'decision on whether a paper is supported by law . . . is subject to *de novo* review because the issue is strictly one of law'; however, 'whether a violation of the factual inquiry or improper purpose prongs of Rule 11 has occurred is subject to review for abuse of discretion.'" *Id*. at 406 (citation omitted). In this case the trial court had "clearly focused on the outcome of the trial — the lack of credible evidence of fraud — rather than on the initial filing of the lawsuit. While the outcome of the trial may be relevant, in imposing Rule 11 sanctions on the ground that the amended complaint was not 'warranted by existing law,' a trial judge must inquire into the pre-filing analysis of existing law." *Id*. at 407 (citation omitted). Because this had not been done here, the court remanded for further findings on "all the relevant issues stated in Rule 11." *Id*. at 407.

In **Jabbour v. Bassatne, 673 A.2d 201 (DC 1996)**, the court upheld a substantial award of attorneys fees ($138,000) for violation of Rule 11 (in its post-1994 form) by the plaintiff for having filed suit for specific performance of an agreement involving valuation of certain property on the basis of an appraisal that he knew violated the agreement. Acknowledging the unusual character of a Rule 11 award against a party and not his attorneys, the court found it justified in this instance because the plaintiff had misrepresented to his attorney that he had complied with his obligations under the agreement.

In **Walker v. District of Columbia, 656 A.2d 722 (DC 1995)**, the court dealt with an appeal from the trial court's dismissal with prejudice of the plaintiff's personal injury claim against the District of Columbia and its order requiring plaintiff and her attorney to pay counsel's fees, pursuant to Rule 11. The Rule 11 counsel's fees sanction was directed to both plaintiff and her attorney for false and incomplete answers to certain interrogatories, and to the attorney alone for filing on plaintiff's behalf a claim for economic damages under a superseded provision of the DC Code. The Court of Appeals held that it could not consider claims of error affecting only the attorney because the attorney had not noted an appeal in her own name. It also held that the plaintiff had violated Rule 37 by submitting incomplete interrogatory responses; and that although these were not governed by Rule 37(b), which applies only to failures to obey an order requiring discovery, nonetheless Rule 37(d) allows any sanction provided by subparagraph (b) where a party "fails . . . to serve answers or objections to interrogatories." The court also found, however, that there was no Rule 11 violation associated with the filing of the complaint, and since the dismissal of the complaint had been based in part on the trial court's conclusion to the contrary, the court remanded for a decision whether the discovery violations alone were sufficient to warrant dismissal.

Washington Metropolitan Area Transit Authority v. O'Neill, 633 A.2d 834 (DC 1994), involved review of attorneys fees awards as sanctions under both Rule 11 and Rule 37. The Court upheld the award of such sanctions under Rule 11 for "costs associated with [plaintiff's] filing of an opposition to [defendant's] motion for summary judgment which was based on outdated information," *id*. at 842, and held that sanctions for gross negligence in not complying with discovery were justified by Rule 37, even though the trial court had not specifically cited that rule, *id.* In the latter connection, the court held that wilfulness is not required to support a sanction of attorneys fees under Rule 37; here the trial court had found gross negligence. *Id*. In **Block v. District of Columbia, 748 F. Supp 891 (DDC 1990)**, the court observed in a footnote that the defendant municipal agency's citation to a string of cases was "frivolous and may well be a violation of Fed. R. Civ. P. 11 and the Code of Professional Responsibility, DR 7-102(A)," because a Supreme Court decision handed down before the paper containing the citation was filed had "rendered those cases obsolete." *Id*. at 898 n.9.

Civil Rule 37

In **Cowen v. Youssef, 687 A.2d 594 (DC 1996)**, involving a landlord-tenant dispute, the court upheld the trial court's imposition of a sanction of $6,000 against the landlord's general partner for failure to comply fully with requests for production of documents during pretrial discovery, a failure that came to light only in the middle of trial. The court, after observing that trial courts have discretion to impose a variety of sanctions under Rule 37(b)(2) and (d) for noncompliance with pretrial discovery requests, added that "[w]hen reviewing the imposition of such sanctions, this court will reverse only if the trial court has abused its discretion by imposing a penalty too strict or unnecessary under the circumstances.'" *Id*. at 602 (citations omitted).

[See also **Esteves**, **Walker** and **O'Neill**, all treated under the preceding caption because they involve Rule 11 as well as Rule 37.]

In **Habib v. Thurston, 517 A.2d 1 (DC 1986)**, a landlord's action for possession, the court upheld the trial court's award of attorneys fees to the tenant pursuant to Super Ct Civ R 37(a)(4) on the ground that the landlord's failure to answer certain interrogatories was not substantially justified. (That rule was then, and still is, substantially identical to Fed R Civ P 37(a)(4) as it stood prior to the 1993 amendments.) The court also rejected the landlord's argument that the trial court erred in granting the tenant's motion without an evidentiary hearing, pointing out that the Rule's requirement of an opportunity for hearing "may be satisfied by allowing both parties to express their positions to the court in writing." *Id*. at 11.

In **Burt v. First American Bank, 490 A.2d 182 (DC 1985)**, the trial court's order granting summary judgment also awarded $200 to the prevailing party without, however, specifying whether that sum was intended as costs or as a sanction under Rule 37(a)(4). The court of appeals remanded, stating that "[w]hile we recognize that the trial court has broad discretion in imposing costs and attorney fees . . . the court must at least state for the record on what basis it makes its findings." *Id*. at 188.

In **Brady v. Fireman's Fund Insurance Cos., 484 A.2d 566 (DC 1984)**, the court held that although Super Ct Civ R 37(b)(2) and 37(d), like Rule 37(a)(4), empower a court to assess attorneys fees, the former, unlike the latter, do not explicitly provide opportunity for a hearing before the sanction can be imposed. Nonetheless, the court held, "[t]here can be no doubt that due process will generally require notice and an opportunity to be heard before a court may assess attorneys fees against counsel under Rule 37(b) or Rule 37(d)." *Id*. at 568.

In **Floyd v. Leftwich, 456 A.2d 1241, 1244 (DC 1983)**, the court, after stating the general proposition that an award of expenses and attorneys fees pursuant to Super Ct Civ R 37 is committed to the sound discretion of the trial court, and will be disturbed only on a showing of abuse of discretion, went on to find an abuse of discretion in the lower court's awarding expenses and fees that were unrelated to the failure to permit discovery upon which invocation of Rule 37 rested. The court also reversed the trial court's award of attorneys fees pursuant to Rule 37(b)(2) against a nonparty witness because as a nonparty he could be ordered to be sworn or to answer questions to a Rule 37(a) motion to compel discovery, or be held in contempt pursuant to Rule 37(b)(1), but was not subject to Rule 37(b)(2), which applies only to "the party failing to obey the order or the attorney advising him or both." *Id*. at 1245.

3.1:400 Civil Liability for Abusive Litigation Practice [see 1.1:520]

- Primary DC References: DC Rule 3.1
- Background References: ABA Model Rule 3.1, Other Jurisdictions
- Commentary: ABABNA § 61:106; ALI-LGL §§ 56, 110; Wolfram § 11.2

In Conservative Club of Washington v. Finkelstein, 738 F. Supp. 8 (DDC 1990), the court asserted that a violation of DR 7-102(A)(1) or (2) does not give rise to civil liability to a non-client, adding in a footnote that this did not mean that there might not be other relief available where DR 7-102 had been violated, and referring in this connection to a disciplinary complaint or a remedy under Rule 11 of the Federal Rules of Civil Procedure. *Id*. at 738-39 & n.2.

3.1:500 Complying with Law and Tribunal Rulings

- Primary DC References: DC Rule 3.1
- Background References: ABA Model Rule 3.1, Other Jurisdictions
- Commentary: ABABNA § 16:1201; ALI-LGL § 105; Wolfram §§ 12.1.3, 13.3.7

In Armenta v. Goodridge, 682 A.2d 221 (DC 1996) (per curiam), the court affirmed an order of the trial court imposing a sanction of $250 on defendants for failure of defense counsel and defendants to attend a mediation conference in violation of the Superior Court's General Mediation and Case Evaluation Order. The Court rejected the defendants' contention that the settlement of the case released them from a duty to pay the attorneys fees, holding that the point was governed by **Cooter & Gell v. Hartmarx Corp., 496 US 384 (1990)**.

In **Charles v. Charles, 505 A.2d 462 (DC 1986)**, the court upheld the trial court's assessment of attorneys fees against defendant's counsel personally for repeated failure to comply with court orders requiring him to respond to plaintiff's complaint. Relying on the analysis in **Roadway Express, Inc. v. Piper, 447 US 752 (1980)**, the Court concluded that District of Columbia trial courts, like federal courts, have "inherent power" to award attorneys fees as a sanction for such failures, provided there is a finding that counsel acted in bad faith.

In **Robinson v. Howard University, 455 A.2d 1363 (DC 1983)**, the plaintiff proposed, on the eve of trial, to expand the scope of testimony of an expert witness. On the second day of trial, the court ruled that the evidence would not be admissible; the plaintiff therefore requested a mistrial, and this was granted but conditioned upon plaintiff's paying costs. An order implementing this ruling directed plaintiffs to pay "per diem" costs of $250 to each defense counsel. The plaintiff appealed that order on the ground, *inter alia*, that the "per diem" costs awarded to appellee's attorneys were actually attorneys fees. The Court of Appeals, while expressing doubts as to whether the costs were in fact attorneys fees, observed that "implicit in the trial court's conditioning the mistrial upon payment of costs was a finding of a level of misconduct tantamount to the bad faith required for an award of attorneys fees," and added that "the trial court has 'unquestioned power' to do equity by awarding attorneys fees and 'against a party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order'" [citing **Hutto v. Finney, 437 US 678 (1978)**]. *Id*. at 1369-70.

In **S. Kann's Sons Corp. v. Hayes, 320 A.2d 593 (DC 1974)**, the court affirmed an order of the trial court assessing a sanction of $100 against the defendant's attorney for failure completely and accurately to answer pretrial interrogatories, a failure that was determined to have resulted in a loss of two hours of trial time. The court observed that the trial court had "wide discretion in such matters under the inherent power of the court to protect the integrity of its processes." *Id*. at 596.

3.2 Rule 3.2 Expediting Litigation

3.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.2
- Background References: ABA Model Rule 3.2, Other Jurisdictions
- Commentary:

3.2:101 Model Rule Comparison

DC Rule 3.2(b), with its requirement of reasonable efforts to expedite litigation, is identical to the entire Model Rule 3.2. Paragraph (a) of the DC Rule, forbidding delay in a proceeding "when a lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another," does not appear in the Model Rule.

Both versions of the Rule are attended by a single Comment, phrased identically until 2002. In that year, pursuant to a recommendation of the Ethics 2000 Commission, the second sentence of Model Rule's Comment was amended by deleting the introductory phrase, which stated that "[d]elay should not be indulged in merely for the convenience of the advocates," and replacing it with language softening that restraint to allow for a lawyer's properly seeking a postponement for personal reasons, but condemning a lawyer's "routinely fail[ing] to expedite litigation solely for the convenience of the advocates," and turning the remainder of the sentence into a separate sentence, with a new introductory phrase. The DC Rules Review Committee, in its review leading to the changes made in the DC Rule in 2006, saw no reason to make a change either the DC Rule or its Comment, and recommended none.

3.2:102 Model Code Comparison

Paragraph (a) of DC Rule 3.2 is substantially identical to DR 7-102(A)(1). Relatedly, DR 2-110(B)(1) required the lawyer to withdraw if the lawyer knew or it was obvious that the client was "having steps taken . . . merely for the purpose of harassing or maliciously injuring any person." Paragraph (b) of DC Rule 3.2 effectively turns into an affirmative, albeit very generally phrased, injunction the negatively phrased proposition in DR 7-101(A)(1) that a lawyer does not violate the duty to represent a client zealously "by being punctual in fulfilling all professional commitments."

3.2:200 Dilatory Tactics

- Primary DC References: DC Rule 3.2(a)
- Background References: ABA Model Rule 3.2, Other Jurisdictions
- Commentary: ABABNA § 61:202; ALI-LGL § 106; Wolfram § 11.2.5

There appear to be no DC ethics opinions casting light on Rule 3.2 or its Code antecedents.

3.2:300 Judicial Sanctions for Dilatory Tactics

- Primary DC References: DC Rule 3.2(a)
- Background References: ABA Model Rule 3.2, Other Jurisdictions
- Commentary: ABABNA § 61:202; ALI-LGL § 106; Wolfram § 11.2.5

The principal sanction for dilatory tactics applied by the DC courts is criminal contempt. See, e.g., **In re Roxborough, 663 A.2d 553 (1995)** (summary contempt and $150 fine for being late for two matters in Superior Court); **In re Thompson, 454 A.2d 1322 (DC 1982)** (choosing to attend a deposition rather than a status hearing); **In re Siracusa, 455 A.2d 663 (DC 1982)** (coming to court twenty minutes later than directed); **In re Gatehouse, 415 A.2d 1388 (DC 1980)** (failure to inform the court of schedule conflict); *but cf.* **In re Alexander, 466 A.2d 447, 448 n.2 (DC 1982)** (trial court referred lawyer to disciplinary process rather than charging him with criminal contempt, for failing twice to appear for a scheduled trial).

3.3 Rule 3.3 Candor Toward the Tribunal

3.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.3
- Background References: ABA Model Rule 3.3, Other Jurisdictions
- Commentary:

3.3:101 Model Rule Comparison

Prior to the 2002 amendments to Model Rule 3.3 pursuant to recommendations of the Ethics 2000 Commission, that Rule and DC Rule 3.3 differed in every paragraph and subparagraph save subparagraph (a)(1), prohibiting a lawyer from knowingly making a false statement of material fact or law to a tribunal. Those 2002 amendments, together with the 2006 amendments to the DC Rule recommended by the DC Rules Review Committee, have brought the two versions of the Rule 3.3 somewhat closer together, though the differences still outnumber the similarities.

Subparagraph (a)(1) of the Model Rule was changed in 2002 to eliminate the limitation of the prohibition on making a false statement of law or fact to material ones, and to add a requirement that the lawyer correct any such statement that had previously been made. These two changes were made in the DC Rule in 2006, but with an exception to the duty to correct a false statement if correction would require disclosure of information whose disclosure is prohibited by Rule 1.6.

Subparagraph (a)(2) of the Model Rule had required a lawyer to disclose a material fact to a tribunal when necessary to avoid assisting a criminal or fraudulent act by the client, but in 2002 this requirement was omitted, and the provision regarding disclosure of adverse authority, which had been subparagraph (a)(3), was renumbered as (a)(2). The DC Rule had never had a provision corresponding to the Model Rule's subparagraph (a)(2); but instead it had in subparagraph (a)(2) a prohibition on counseling or assisting a client to engage in criminal or fraudulent conduct, which was substantively identical to DC Rule 1.2(e) (and MR 1.2(d)). The Jordan Committee explained, in this connection, that it "felt that the ABA's imposition of an affirmative duty to expose a client's criminal or fraudulent act to a tribunal was too intrusive upon the lawyer's duty . . . to maintain client confidences and secrets;" but it did not explain why repetition of a provision already included in another rule was considered appropriate.

Subparagraph (a)(3) of the DC Rule, prohibiting a failure to disclose directly adverse legal authority, differs only slightly from its Model Rule counterpart, which was originally also subparagraph (a)(3) but is now (a)(2): the difference is that the DC version requires disclosure only of adverse authority that the lawyer knows to be "dispositive of a question at issue."

The first sentence of what was formerly subparagraph (a)(4) of Model Rule 3.3 and is now subparagraph (a)(3) forbids a lawyer, without exception, to offer evidence that the

lawyer knows to be false. The corresponding provision of the DC Rule, still designated subparagraph (a)(4), makes that prohibition subject to a paragraph (b) that has no counterpart in the Model Rule. That paragraph states that a lawyer who knows that a criminal defendant client intends to give false evidence must first attempt to dissuade the client and, failing that, must seek to withdraw unless this would seriously harm the client; but if neither persuasion nor withdrawal is feasible, the lawyer may put the client on the stand to testify in a narrative fashion, without examination and without arguing the probative value of the false testimony. (The Jordan Committee had proposed a provision that would have allowed the lawyer to "go forward with the examination of the client and closing argument in the ordinary manner," but the Court of Appeals rejected that and substituted the present provision.)

A second sentence in subparagraph (a)(3) of the Model Rule addresses the measures to be taken by a lawyer who comes to know that evidence the lawyer has offered is false; it originally spoke only of "reasonable remedial measures," but as amended in 2002 it specifically recognizes that such measures include disclosure to the tribunal "if necessary." Another sentence was also added to subparagraph (a)(3) of Model Rule 3.3 in 2002, stating that a lawyer may refuse to offer evidence, other than the defendant's testimony in a criminal matter, that the lawyer reasonably believes is false. That sentence had previously constituted a separate paragraph (c) of the Model Rule, which had no parallel in the DC Rule. However, an identical sentence was added to subparagraph (a)(4) of the DC Rule in 2006.

DC Rule 3.3 has in paragraph (d) a provision derived from DR 7-102(B), not included in the Model Rule, requiring a lawyer who learns that a fraud has been perpetrated upon the tribunal promptly to reveal the fraud to the tribunal — unless compliance would entail disclosure of information protected by Rule 1.6, in which case the lawyer must instead call upon the client to rectify the fraud.

Paragraph (b) of the Model Rule states that the duties set out in paragraph (a) continue to the end of the proceeding, and that they override the obligation of confidence imposed by Rule 1.6. In the DC Rule the corresponding provision is paragraph (c), which sets out only the first of these propositions; with regard to the second, the DC Rule takes the opposite position in paragraph (d): *i.e.*, Rule 1.6 trumps any disclosure requirement.

Model Rule 3.3(d) requires a lawyer in an *ex parte* proceeding to inform the tribunal of all material facts, whether or not the facts are adverse. DC Rule 3.3 has no counterpart provision. The Jordan Committee read the Model Rule provision as "requiring a lawyer to divulge a client's confidential information, when making an *ex parte* application for a temporary restraining order," and found this without precedent or justification.

Reflecting the many differences in the black letter text of the Rule, almost all of the comments to DC Rule 3.3 differ from those to the Model Rule..

3.3:102 Model Code Comparison

DC Rule 3.3(a)(1), prohibiting false statements of material facts or law to a tribunal, is substantially identical to DR 7-102(A)(5) of the Model Code, although DR 7-102(A)(5) was not, like Rule 3.3(a)(1), limited to false statements made to a *tribunal*. (Note that Rule 4.1(a), prohibiting false statements to a *third person*, also derives from DR 7-102(A)(5)).

Subparagraph (a)(2) of the DC Rule, on counseling or assisting a client to engage in criminal or fraudulent conduct, contains the same prohibition as did DR 7-102(A)(7) but adds the provisos that a lawyer may discuss the legal consequences of a course of conduct, and test the validity or application of a law.

Subparagraph (a)(3), requiring the disclosure of directly adverse authority, is substantially identical to DR 7-106(B)(1), except that subparagraph (a)(3) requires disclosure only of adverse authority that is dispositive of a question at issue. Subparagraph (a)(4) of the DC Rule is similar in substance to DR 7-102(A)(4), except that the latter prohibited a lawyer from knowingly using perjured testimony or false evidence without exception, while the DC Rule has an exception for circumstances described in paragraph (b), which has no counterpart in the Model Code.

Paragraph (c) of the DC Rule also has no counterpart in the Model Code.

Paragraph (d), directing a lawyer who learns that a fraud has been perpetrated on a tribunal to reveal the fraud unless the information is protected by Rule 1.6, is similar in substance to DR 7-106(B). (DR 7-102(B)(1) of the DC Code had been amended by referendum of the DC Bar in 1972 to limit the lawyer's obligation, when the client had committed the fraud, to calling upon the client to rectify it. The ABA made a somewhat similar change, limiting the lawyer's disclosure obligation to circumstances where no privileged communication is involved, in 1974.)

3.3:200 False Statements to a Tribunal

- Primary DC References: DC Rule 3.3(a)(1)
- Background References: ABA Model Rule 3.3(a)(1), Other Jurisdictions
- Commentary: ABABNA § 61:301; ALI-LGL § 120; Wolfram § 12.5

Comment [2] to the DC Rule emphasizes that, when a lawyer makes an assertion to a tribunal in an affidavit or in open court, the lawyer must know the assertion to be true or believe it to be true based upon reasonably diligent inquiry. See also **United States v. Williams, 952 F.2d 418, 421 (DC Cir. 1991), cert. denied, 506 US 850 (1992)** (administering a public reprimand of an assistant U.S. Attorney for five material misstatements of the record in a brief on appeal). Comment [2] also notes that in certain circumstances the failure to make a disclosure is the equivalent of an affirmative misrepresentation. However, awareness of *some* evidence contrary to an assertion does not prevent a lawyer from making the assertion. For example, in **Jackson v. Scott, 667 A.2d 1365, 1370 (DC 1995)**, the DC Court of Appeals held that a lawyer could deny his client's negligence notwithstanding evidence from the hospital's peer review process that the client committed malpractice. In **DC Ethics Opinion 213 (1990)**, a lawyer argued in connection with a post-trial ineffective assistance of counsel claim that a particular witness's testimony, if admitted, would have exculpated the defendant. This information later proved to be false, as the witness denied making the inculpatory statement. The Legal Ethics Committee concluded that the lawyer did not knowingly make a false statement in his argument because the "element of knowledge of any falsity at the time the statement may have been made [was] lacking."

In **In re Uchendu, 812 A.2d. 933 (DC 2002)**, the respondent lawyer was found to have signed his clients' names to probate documents that they were required personally to sign, sometimes with his initials following the name and sometimes not; and to have notarized some of the same documents. Despite the fact that respondent had had his clients' authorization to sign on their behalf, had not falsified any contents of the documents, had no intent to defraud, and had not prejudiced either the clients or the probate court's decision-making, he was held to have violated DC Rules 3.3(a)(1), 8.4(c) and 8.4(d), for which he was subjected to a 30-day suspension. The false signatures and notarizations fell under the prohibition of Rule 3.3(a)(1) because they were "false statements," and misleading.

DR 7-102(A)(5), which (unlike its successors Rules 3.3(a) and 4.1(a)) did not specify the audience to which the making of false statements of material fact was prohibited, was often applied to false statements made to a tribunal. Thus, in **In re Lenoir, 585 A.2d 771 (DC 1991)**, a lawyer was found to have violated DR 7-102(A)(5) (and DR 1-102(A)(4)) by placing another lawyer's name on a pleading without consent of the other lawyer. In **In re Reback, 513 A.2d 226 (DC 1986)**, two lawyers who failed to inform their client that her complaint had been dismissed and instead prepared a second complaint, forged the client's signature thereto and had the signature notarized, were suspended for six months for violating DR 7-102(A)(5), as well as several other

disciplinary rules. **In re Rosen, 481 A.2d 451 (D.C. 1984)**, involved several false statements in documents filed with a court. The first such statement, in a motion for continuance, was to the effect that the clients were out of the jurisdiction and unable to discuss pertinent matters, when the lawyer's own testimony made clear he had had numerous conferences with them during the pertinent period. The second, also in a continuance motion, was that his clients were financially unable to bring witnesses necessary to support their claim to Washington, D.C., and that they had difficulty obtaining necessary trial documents, when in fact respondent's unpreparedness was due to his own procrastination. The third false statement, responding to opposing counsel's argument that respondent had failed to comply with discovery rules and deadlines set in the pretrial order, was to the effect that he could not comply because his clients possessed all of the discovery documents and did not return to the jurisdiction until the day before trial — contradicted, like the first, by respondent's own testimony. The Court upheld the Board on Professional Responsibility's determination that all of the statements were baseless and constituted "knowing misrepresentations" in violation of DR 7-102(A)(5) as well as DR 1-102(A)(4) (which, like Rule 8.4(c), prohibited a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation"). In **In re Aircrash Disaster at Washington, D.C. on January 13, 1982, 559 F. Supp. 333 (DDC 1983)**, the court, in a footnote, "emphasize[d] its displeasure with counsel's misrepresentation," in the form of selective and misleading elision of a quotation from a decision by another district court, and noted that, if knowingly made (as the court suspected was the case), the misrepresentation would violate DR 7-102(A)(5). *Id.* at 355 n.35.

In **In re Cleaver-Bascombe, 892 A.2d 396 (DC 2006),** the Court approved a finding by the Board that the respondent, who had been appointed by the Superior Court under the Criminal Justice Act to represent the defendant in an extradition proceeding, had submitted a voucher claiming payment for her services which listed several items of time purportedly spent in that representation that had not in fact been spent at all. The Court also approved the Board's conclusion that the respondent had thereby violated DC Rule 3.3(a), as well as Rules 1.5(a), 8.4(c) and 8.4(d). In connection with the charged violation of Rule 3.3(a), the Hearing Committee had concluded that the vouchers had not been submitted to a "tribunal," the key operative term in that Rule, because the approval of such vouchers by the Financial Operations Division of the court was not a judicial function. The Board had disagreed with the Hearing Committee on this, and the Court concurred with the Board, pointing out that respondent, as an experienced CJA practitioner, knew that her voucher would be reviewed by the Superior Court judge who was presiding over the proceeding for which she was seeking compensation; and whether or not there were departments within the court that did not have authority to act in a judicial or quasi-judicial capacity, the judge surely did. With respect to the sanction to be imposed, however, the Court remanded the matter to the Board for a determination as to whether the submission of the false voucher had been the product of deliberate falsification, on the one hand, or on the other, record-keeping so shoddy that despite a lack of wrongful intent it was "legally equivalent to dishonesty."

In re Hermina, 907 A.2d 790 (DC 2006) applied reciprocal discipline to a lawyer who had been found by the Maryland Court of Appeals to have violated the Maryland Rule of Professional Conduct 3.3(a)(1) as well as Rules 3.4(c) and 8.4(a), (c) and (d) -- all of which Maryland Rules were either the same as or equivalent to correspondingly numbered DC Rules. (The respondent had also been found to have violated Maryland Rule 8.2, which like its Model Rule counterpart prohibited making false statements about the integrity of a judge, but which has no corresponding provision in the DC Rules, but the DC Court of Appeals found the other violations sufficient to support the same sanction of public censure as the Maryland authorities had imposed.) The violation of Rule 3.3(a)(1) had consisted of the respondent's deliberately misrepresenting to a judge that he had been precluded from conducting any discovery by virtue of a protective order that another judge had issued in the case. See also **In re Robbins, 911 A.2d 1227 (DC 2006),** where the respondent had been publicly censured in Arizona for violation of that state's Rule 3.3(a)(1) for stating to a court that settlement negotiations had begun when in fact they had not, though they did shortly thereafter. That Arizona Rule being the same as the corresponding DC Rule, the DC Court of Appeals same sanction approved reciprocal imposition of the same sanction.

DC Ethics Opinion 336 (2006) (discussed more fully under 3.3:600, below), which involved an inquiry by lawyer appointed to serve as the guardian of an incapacitated individual, stated that Rule 3.3(a)(1) applies to bar members even when they are not appearing before a tribunal in their capacity as a lawyer.

3.3:300 Disclosure to Avoid Assisting Client Crime or Fraud

- Primary DC References: DC Rule 3.3(a)(2)
- Background References: ABA Model Rule 3.3(b), Other Jurisdictions
- Commentary: ABABNA § 61:301; ALI-LGL § 120; Wolfram §

DC Rule 3.3 does not include a provision precisely parallel to MR 3.3(a)(2)'s prohibition of a lawyer's knowingly failing to disclose a material fact to a tribunal when necessary to avoid assisting a criminal or fraudulent act by a client. However, see discussion of DC Rule 3.3(d) under 3.3:600 below.

3.3:310 Prohibition on Counseling or Assisting Fraud on a Tribunal [see also 1.6:350]

In **In re Corrizzi, 803 A.2d 438 (DC 2002)**, the respondent was found to have committed a number of ethical delicts, of which the most serious involved counseling two clients, in separate cases, to commit perjury on their depositions. These two offenses, which themselves violated several different Rules, including DC Rules 3.3(a)(2), 3.4(b), 8.4(c) and 1.3(b)(2), were held sufficient to warrant disbarment. Rule 3.3(a)(2) prohibits (as do DC Rule 1.2(e) and Model Rule 1.2(d)) a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is criminal or fraudulent.

In **In re Sandground, 542 A.2d 1242, 1248 (DC 1988)**, the DC Court of Appeals explained that assisting a client to conceal funds during discovery in a divorce proceeding constituted assistance in a fraud and was a serious ethical transgression no matter what the lawyer's intentions were. **DC Ethics Opinion 153 (1985)**, discussing the DC Code of Professional Responsibility, explained that, when a lawyer cannot reveal a fraud because of Rule 1.6 and the client refuses to rectify the fraud, then to avoid participating in an ongoing fraud the lawyer must withdraw from the representation. But see **DC Ethics Opinion 9 (1975)** (a lawyer discovering his client's failure to maintain a condition of his release on bond cannot reveal the fraud on the tribunal and can continue to represent the client). Under **Opinion 153**, the lawyer can continue to represent the client in unconnected matters. A lawyer can also represent a client who the lawyer knows has committed a past fraud, if the lawyer did not represent that client when the fraud was committed.

3.3:400 Disclosing Adverse Legal Authority

- Primary DC References: DC Rule 3.3(a)(3)
- Background References: ABA Model Rule 3.3(a)(2), Other Jurisdictions
- Commentary: ABABNA § 4:303; ALI-LGL § 111; Wolfram § 12.8

In **Roeder v. Islamic Republic of Iran, 195 F.Supp. 2d 140 (DDC 2002), aff'd 333 F.3d 228 (DC Cir. 2003)**, a class action on behalf of former hostages seeking to recover damages against the Iranian government, the District Court, after granting a motion to dismiss by the United States as intervenor, criticized class plaintiffs' counsel for violating both Civil Rule 11 and DC Rule of Professional Conduct 3.3(a)(3) for making frivolous legal arguments and failing to disclose adverse authority; although, remarkably, the Court did not impose any sanction. The Court termed "particularly problematic" the following:

> Plaintiffs' total failure to bring to this Court's attention the Algiers Accords and implementing regulations despite the FSIA's requirement that plaintiffs "established [their] claim or right to relief by evidence that is satisfactory to the Court." 28 U. S.C. § 1608(e).
>
> Plaintiffs' failure to address any of the two hundred years of cases regarding conflicts between legislation and previously-enacted treaties and international agreements until ordered to do so by the Court.
>
> Plaintiffs' request for a default judgment on liability prior to his Court hearing any evidence to support their claims, despite the clear statutory requirement in 28 U.S.C. § 1608(e).
>
> Plaintiffs' motion to strike the government's motion to intervene that raised a completely frivolous argument and did not contain any discussion of the requirements of Federal Rule of Civil Procedure 24.

Plaintiffs' argument that the Algiers Accords are the legally invalid result of coercion, raised very late in these proceedings, and clearly contradicted by Supreme Court precedent.

3.3:500 Offering False Evidence

- Primary DC References: DC Rule 3.3(a)(4) & (b)
- Background References: ABA Model Rule 3.3(a)(4), Other Jurisdictions
- Commentary: ABABNA § 61:304; ALI-LGL §§ 115, 117, 120 ; Wolfram §§ 12.4.6, 12.5

DC Ethics Opinion 213 (1990) explains that a lawyer's knowledge that two witness statements conflict does not constitute "knowledge" that one such statement is false. Accordingly, use of one of the statements does not constitute knowing use of false evidence, and if a lawyer learns of the conflicting statements after the fact, the lawyer need not disclose the conflict to the tribunal. See also **Butler v. United States, 414 A.2d 844, 850-51 (DC 1980) (en banc)** (observing that the record did not support the inference that defense counsel *knew* the defendant was going to commit perjury solely because the defendant had made inconsistent statements to him about possession of a pistol).

DC Ethics Opinion 213 (1990) explains that a lawyer's knowledge that two witness statements conflict does not constitute "knowledge" that one such statement is false. See also **Butler v. United States, 414 A.2d 844, 850 (DC 1980) (en banc)**. Accordingly, use of one of the statements does not constitute use of false evidence, and if a lawyer learns of the conflicting statements after the fact, the lawyer need not disclose the conflict to the tribunal.

3.3:510 False Evidence in Civil Proceedings

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

3.3:520 False Evidence in Criminal Proceedings

DC Ethics Opinion 234 (1993) elaborates on the steps described in Rule 3.3(b) that a lawyer should take when a client who is a defendant in a criminal prosecution insists on presenting false testimony. As a preliminary matter, the lawyer must have a substantial level of knowledge that the testimony will be false, before the lawyer takes any remedial actions. Assuming such knowledge, the lawyer first must make a good-faith effort to dissuade the client from testifying falsely. If that effort fails, the client must seek leave of the tribunal to withdraw, unless withdrawal would seriously harm the client. As **Opinion 234** and Comment [8] to the Rule make clear, withdrawal is clearly the preferred option; however, because of the risk of seriously prejudicing the client, a lawyer need not move to withdraw on the eve of trial. Finally, if the client takes the stand, the lawyer must allow the client only to give narrative testimony and must not examine the client in a way to elicit testimony the lawyer knows to be false. Nor may the lawyer argue the probative value of the false testimony in closing. These provisions represent a compromise, which allows the lawyer to protect the attorney-client privilege while attempting to minimize the damage to the tribunal caused by perjured testimony. The ABA expressly rejected this approach when it promulgated the Model Rules.

3.3:530 Offering a Witness an Improper Inducement

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

3.3:540 Interviewing and Preparing Witnesses

DC Ethics Opinion 79 (1979) responded to a trio of questions regarding the ethical obligations of a lawyer who is asked to prepare a witness to testify: (1) to what extent may a lawyer suggest the actual language of a witness's testimony?; (2) to what extent may a lawyer suggest testimony that contains information not originally furnished by the witness?; and (3) to what extent may a lawyer prepare a witness for live examination, by questioning or otherwise? The Opinion held that a single principle, supported by DR 7-102(A)(4), (6) and (7), guided the answer to all three questions: "it is, simply, that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading." The Opinion added: "So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may — indeed, should — do whatever is feasible to prepare his or her witness for examination."

DC Ethics Opinion 79 (1979), discussing the DC Code of Professional Responsibility, emphasizes that a lawyer may not prepare, or assist in preparing, testimony the lawyer knows is false or misleading. However, so long as a lawyer does not violate this prohibition, a lawyer may suggest language and even the substance of a witness's testimony in preparing the witness.

3.3:600 Remedial Measures Necessary to Correct False Evidence

- Primary DC References: DC Rule 3.3(d)
- Background References: ABA Model Rule 3.3(a)(4), Other Jurisdictions
- Commentary: ABABNA § 61:401;*et seq.*,_ ALI-LGL §§ 66, 67, Wolfram §§ 12.5, 12.6, 13.3.6

3.3:610 Duty to Reveal Fraud to the Tribunal

DC Rule 3.3(d), like its predecessor DR 7-102(B)(1), requires a lawyer who learns that a fraud has been perpetrated on a tribunal promptly to so inform the tribunal unless to do so would disclose information protected by Rule 1.16 (under the Code, DR 4-101). In that case, the lawyer must "call upon the client to rectify the fraud."

DC Ethics Opinion 153 (1991), applying DR 7-102(B)(1), held that where a lawyer has advised a client to make disclosures to a tribunal and the client has refused to do so, the lawyer may not him- or herself make the disclosures. In such circumstances, however, the lawyer cannot continue to represent the client, either: see 3.3:300, above.

DC Ethics Opinion 219 (1991) explains that a lawyer may reveal such a fraud even if the disclosure is of information protected by Rule 1.6 *if* the law, or rules of the tribunal having the force and effect of law, require the fraud to be revealed and the client refuses to rectify the fraud. See also **DC Ethics Opinion 126 (1983)** (a lawyer is not obligated to disclose that his client has violated a court order unless the court orders him to do so); **DC Ethics Opinion 9 (1975)** (a lawyer discovering that his client has failed to maintain a condition of his release on bond cannot reveal the fraud on the tribunal but can continue to represent the client).

DC Ethics Opinion 336 (2006) addressed a lawyer's duty to disclose information to a tribunal when the lawyer is acting as guardian, but not as counsel, to an incapacitated individual. The **Opinion** responded to an inquiry from a lawyer who had been appointed to serve as the guardian of an incapacitated individual by the Probate Division of the DC Superior Court. The guardian had obtained benefits for the individual using a name and social security number that he later determined were false. The **Opinion** stated that the guardian's conduct was governed by Rules 3.3(a)(1), 3.3(d), and 8.4(c), even though he was not functioning as the individual's lawyer, and that those rules precluded him from continuing to use the false identity and required him to disclose the false identity.

The **Opinion** explained that the guardian's conduct before an agency that determines entitlement to benefits would be governed by Rule 3.3(a)(1). It observed that the guardian was required to provide periodic written reports on the individual's condition and held that he had an affirmative duty to "reveal the fraud to the tribunal" under Rule 3.3(d). It further observed that the guardian's failure to disclose the past use of false

information would likely be considered equivalent to an affirmative misrepresentation. Finally, the **Opinion** explained that virtually any conduct by the guardian that relied on or used the false information would violate Rule 8.4(c).

3.3:700 Discretion to Withhold Evidence Believed to Be False

- Primary DC References: DC Rule 3.3(b)
- Background References: ABA Model Rule 3.3(c), Other Jurisdictions
- Commentary: ABABNA § 61:304; ALI-LGL § 120 ; Wolfram § 12.5

Under **Witherspoon v. United States, 557 A.2d 587, 592 (DC 1989)**, when a conflict develops between a lawyer and a client because of the lawyer's refusal to present certain evidence, the court should conduct a hearing to determine whether the conflict precludes the lawyer's ability to provide effective representation. The concurring opinion of Judge Ferren in **Witherspoon, 557 A.2d at 594** provided a thorough discussion of the interaction between a lawyer's duty to abide by his client's wishes and his ethical obligations with respect to avoiding presentation of perjurious testimony under the Model Code. When a client, a defendant in a criminal prosecution, demands that the lawyer call witnesses who the lawyer suspects will lie on the stand, the lawyer is not obliged to withdraw from representation because the authority to call witnesses rests with the lawyer, not the client. Thus rather than withdraw, the lawyer simply must ignore the client's request in accordance with DR 7-102(A). *Id.* at 596. The ethical balance changes, however, if the client-defendant insists on testifying falsely. Judge Ferren said that, "absent serious harm to the client, a judge should not compel a lawyer, over the lawyer's objection, to associate further in a criminal case with a client-defendant who the lawyer knows intends to commit perjury at trial." *Id.* at 598.

3.3:800 Duty of Disclosure in Ex Parte Proceedings

DC Rule 3.3 has no provision corresponding to paragraph (d) of the Model Rule, which addresses the subject of required disclosures in ex parte proceedings. There appear to be no pertinent DC court decisions or ethics opinions on the subject.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

3.4 Rule 3.4 Fairness to Opposing Party and Counsel

3.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.4
- Background References: ABA Model Rule 3.4, Other Jurisdictions
- Commentary:

3.4:101 Model Rule Comparison

All of the black letter provisions of DC Rule 3.4 save paragraph (a) were identical to their Model Rule counterparts until 2006, when a new paragraph (g), described below, was added to the DC Rule. (No changes in the black letter text of Model Rule had been suggested by the Ethics 2000 Commission, and accordingly none were made in 2002.)

Although the two versions of paragraph (a) address the same general subject, they differ in several respects. First, while the Model Rule's prohibitions against obstructing another party's access to evidence and against altering, destroying or concealing evidence are both qualified by the adverb "unlawfully," the DC Rule omits that word from both prohibitions. However, Comment [4] to the DC Rule, which has no Model Rule counterpart, states that a "lawyer should ascertain that the lawyer's handling of documents or other physical objects does not violate any other law," and adds that "federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by . . . paragraph (a)."

A second difference in the two versions of paragraph (a) is that while both prohibit obstruction of another party's access to "evidence," the Model Rule's prohibition on altering, destroying or concealing applies to "any document or other material having evidentiary value," whereas the DC Rule refers, more narrowly, to "evidence" that the "lawyer reasonably should know . . . is or may be the subject of discovery or subpoena in any pending or imminent proceeding."

Another difference is that the Model Rule's paragraph (a) has a second sentence that prohibits a lawyer from counseling or assisting another person in doing what is forbidden by the first sentence, while the DC Rule covers both prohibitions in a single sentence.

Finally, paragraph (a) of the DC Rule has a second and a third sentence that address a lawyer's ethical obligations upon receipt of physical evidence from a client or any other person — a subject not covered by the text or comments of the Model Rule. These two additional sentences provide, respectively, that absent a legal prohibition, a lawyer may receive physical evidence of any kind from the client or a third party, and that if the evidence belongs to a person other than the client, the lawyer shall make a good faith

effort to return it to that person, subject to the duty of confidentiality imposed by Rule 1.6. These two sentences are the subject of lengthy explication in Comments [3] through [7] to the DC Rule, which have no counterparts in the Comments to the Model Rule.. The Jordan Committee also proposed a Comment [8] addressing a lawyer's conducting investigations to discover evidence; but the Court of Appeals did not adopt this proposed Comment.

The new paragraph (g) added to the DC Rule in 2006 prohibits a lawyer from peremptorily striking jurors for any reason prohibited by law -- a prohibition that had previously been in DC Rule 3.8, regarding special responsibilities of a prosecutor, as paragraph (h). The DC Rules Review Committee had recommended moving the prohibition to Rule 3.4 so as to make it applicable to all lawyers, not just prosecutors. In connection with this change in the prohibitions' scope, the provision's reference to striking a juror "on grounds of race, religion, national or ethnic background, or sex," was changed to "for any reason prohibited by law," a phrase defined by a new Comment [10] to the DC Rule as grounds for peremptorily striking a juror "that have been determined in binding decisions to be discriminatory in jury selection." The case law regarding peremptory strikes of jurors is extensively discussed under 3.8:900, below.

Special note should be taken of Comment [5] to the DC Rule, which recognizes a unique DC procedure under which a lawyer may turn over physical evidence to Bar Counsel, who then turns it over to appropriate authorities: a procedure that, as the Comment states, "is usually the best means of delivering evidence to the proper authorities without disclosing client confidences." This procedure is more fully discussed under 3.4:210, below.

Although paragraph (b) of DC Rule 3.4 is identical to its Model Rule counterpart, the Rule's prohibition on "offer[ing] an inducement to a witness that is prohibited by law" is elaborated by a Comment [8] that differs significantly from the corresponding Comment [3] to the Model Rule, with respect to compensation of both fact witnesses and expert witnesses. As to the fact witnesses, Comment [3] to the Model Rule states that "it is not improper to pay a witness's expenses," but that "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying." Comment [8] to the DC Rule, on the other hand, expressly states that "it is not improper . . . to compensate a witness for loss of time in preparing to testify, in attending, or in testifying." As to expert testimony, Comment [3] to the Model Rule states that the "common law rule in most jurisdictions is . . . that it is improper to pay an expert witness a contingent fee," but Comment [8] to the DC Rule expressly states that it is permissible to pay an expert witness a "fee . . . contingent on the outcome of the litigation," so long as the fee is not a percentage of the recovery.

With respect to paragraph (d) of the DC Rule, dealing with pretrial discovery, which as mentioned is also identical to its Model Rule counterpart, it should be noted that the Jordan Committee recommended deletion of that paragraph on the ground that

"disciplinary authorities should not be responsible for interpreting such [discovery] rules and principles," but the Court of Appeals did not adopt this recommendation.

3.4:102 Model Code Comparison

Paragraph (a) of DC Rule 3.4 includes prohibitions that were contained in DR 7-109(A), DR 7-109(B), and DR 7-106(C)(7) but is more comprehensive than these prior rules.

Paragraph (b) in conjunction with Comment [8] to the DC Rule (discussed under 3.4:101 above) represents a distinct change from DR 7-109(C), which prohibited "compensation to a witness contingent upon . . . the outcome of a case," and which, while allowing compensation of a witness for loss of time spent attending or testifying, did not include time spent in preparing to testify.

Paragraph (c) is substantially similar to DR 7-106(A).

Paragraph (d) had no counterpart in the Model Code.

Paragraph (e) is substantially identical to DR 7-106(C)(1), (3) and (4).

Paragraph (f) had no counterpart in the Model Code.

3.4:103 Overview

DC Rule 3.4, like its Model Rule counterpart, is one of several rules in the "Advocate" category that impose restrictions on a litigating lawyer's zeal in representing clients before courts or other tribunals. Such rules are intended to control, by professional discipline, a lawyer's litigation excesses. However, they overlap or supplement other forms of control applicable to the same type of lawyer excesses: *e.g.*, statutory criminal sanctions such as those for obstruction of justice or destruction of evidence; judicial sanctions through the power of courts to punish lawyers for contempt as well as to assess fines and to order payment of attorney's fees incurred by opposing parties; and judicial control by means of rulings on evidentiary or procedural matters likely to influence the outcome of the litigation in which such litigating excesses have occurred. In the District of Columbia, disciplinary proceedings to control lawyer excesses have been very sparse. Thus, as in many other jurisdictions, the most frequent form of control of litigating excesses probably consists of tribunal rulings on evidentiary or procedural matters in the course of litigation. See **Wolfram, Modern Legal Ethics 619-21 (1986)**.

3.4:200 Unlawful Destruction and Concealment of Evidence

- Primary DC References: DC Rule 3.4(a)
- Background References: ABA Model Rule 3.4(a), Other Jurisdictions
- Commentary: ABABNA § 61:702; ALI-LGL §§ 118, 119, Wolfram § 12.3

Paragraph (a) of DC Rule 3.4 sets forth a sweeping proscription of any destruction, alteration or concealment of evidence as well as any obstruction of another party's access to evidence, which, as discussed under 3.4:101 above, varies from the corresponding paragraph of the Model Rule in three significant respects. Comment [1], which is identical to its Model Rule counterpart, stresses that the purpose is to protect an advocacy system of litigation wherein evidence is to be marshalled competitively by the parties to the dispute operating on a level playing field.

As to the provisions of DC Rule 3.4(a) that are the same as those in the Model Rule, there are no court opinions setting forth a controlling interpretation of the DC Rule. Court decisions interpreting comparable provisions in the predecessor DC Code likewise provide little or no assistance. Hence, until such time as there are DC precedents, interpretations of Model Rule 3.4(a) in other jurisdictions may be significant for purposes of DC Rule 3.4(a).

Courts in other jurisdictions have interpreted Model Rule 3.4(a), as well as predecessor provisions in the Model Code, as prohibiting a lawyer from obstructing another party's access to evidence by improper means, such as inducing a potential witness to leave the geographic reach of the court's jurisdiction or otherwise to evade or ignore a subpoena or similar process. *E.g.*, **In re Geron, 486 N.E. 2d 514 (Ind 1985)** (lawyer instructed clients to depart from courthouse so as not to be able to testify); **Florida Bar v. Fischer, 549 So. 2d 1368 (Fla 1989)** (lawyer instructed secretary to inform a witness falsely that court session had been canceled). In most jurisdictions, however, a lawyer is permitted to inform a non-client witness of the privilege against self-incrimination, even though such advice may tend to obstruct opposing counsel's access to the witness. **McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), cert. denied, 415 US 951 (1974)**; see also **ABA Informal Opinion 575 (1962)**; **State v. Fosse, 424 N.W. 2d 725 (Wis Ct. App. 1988)** (contra). One court has held that a lawyer is guilty of obstruction of justice when the lawyer corruptly induces a client-witness to invoke the privilege against self-incrimination. **United States v. Cintolo, 818 F.2d 980, 990-92 (1st Cir. 1987)**.

The only DC ethics opinion discussing DC Rule 3.4(a) is **DC Ethics Opinion 242 (1993)**, which responded to an inquiry from a lawyer whose client had provided him with documents that might possibly be the property of the client's former employer. The Opinion concluded that if the client-employee so requested and had a plausible claim to ownership, the lawyer should return such documents to the client-employee; as

to all other documents, the lawyer should return them to the client's former employer unless this would reveal confidences of the client-employee protected by DC Rule 1.6, in which event the lawyer should retain the documents and not permit them to be used inconsistently with the lawyer's fiduciary duty to the owner, i.e. the client's former employer. This Opinion also discussed the relationship between DC Rules 1.15(a) and 3.4(a).

DC Ethics Opinion 119 (1983), responding to a lawyer's inquiry about the proposed destruction of the lawyer's copies of memoranda that had been sent to the client, was concerned with the precursor provisions of the Code. The memoranda in question had been prepared in a prior case that was later settled, but the same client was the defendant in another pending case raising one of the same issues as the settled case. The Opinion concluded that the lawyer's legal obligation was found in DR 1-102(A)(5), prohibiting "conduct that is prejudicial to the administration of justice" and that therefore the lawyer should "preserve the document, while vigorously presenting the [claimed] privileges as a defense to efforts to discover the document." The Opinion also addressed the question whether the inquiring lawyer had any legal obligation by virtue of the prior court ruling in the settled cases calling for production of the documents. The Opinion concluded that the obligation of a lawyer to comply with such a court order "does not extend beyond the proceeding in which the ruling was made."

3.4:210 Physical Evidence of Client Crime

Comment [5] to DC Rule 3.4 refers to a unique procedure that has been available in the District of Columbia for several years for dealing with physical evidence of a client's crime:

> In some cases, the Office of Bar Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences.

The Comment goes on to say that Bar Counsel may refuse to accept evidence, and that lawyers should therefore keep in mind the warnings set out in Comments [6] and [7] (described below), before accepting physical evidence from the client.

Comment [6] makes clear that if such evidence remains in a lawyer's possession and is then "subpoenaed or otherwise requested through the discovery process . . ., the lawyer will be obligated to deliver the evidence directly to the appropriate persons, unless there is a basis for objecting." Comment [7] states that, if the lawyer has received physical evidence from the client for purposes of examination or testing, the lawyer can later return the property to the client provided that it has not been subpoenaed, but points out that the lawyer may not be justified in returning to the client physical evidence whose possession by the client would be illegal such as certain weapons and drugs. Lawyers holding physical evidence that is contraband may therefore have a strong reason to turn such evidence over to the Office of Bar Counsel as provided in Comment [5].

In the absence of unusual circumstances, Bar Counsel generally accepts such contraband evidence and then promptly turns it over to an appropriate law enforcement agency without identifying the source of the evidence. It is understood that DC law enforcement authorities have concluded that it is better to have the contraband delivered to them by Bar Counsel, even without any disclosure of its source, than to allow it to remain with the lawyer or to be returned to the lawyer's client or other person. It is further understood that when disclosure no longer poses a threat to the individual who was the source of the contraband, Bar Counsel has sometimes arranged for the return of the contraband to its rightful owner.

Apparently the procedure for delivering contraband to Bar Counsel does not exist in any jurisdiction other than DC. Some jurisdictions have expressly rejected the procedure. See **Hitch v. Pima County Superior Ct., 708 P.2d 72, 78-79 (Ariz. 1985)** (DC procedure noted and rejected); *cf.* **Morrell v. State, 575 P.2d 1200, 1207-10 (Alaska 1978)** (without expressly referring to DC procedure, court endorsed limited disclosure to police based on reasoning inconsistent with DC rule).

3.4:300 Falsifying Evidence

- Primary DC References: DC Rule 3.4(b)
- Background References: ABA Model Rule 3.4(b), Other Jurisdictions
- Commentary: ABABNA § 61:705; ALI-LGL § 118, Wolfram § 12.3

The proscriptions in DC Rule 3.4(b) related to falsifying evidence or assisting a witness to testify falsely are straightforward and have not required extensive discussion in the cases. DC precedents have been concerned primarily with the proper severity of discipline for falsifying evidence. Although ABA disciplinary standards state that disbarment is generally an appropriate sanction for falsifying evidence, particularly if it may have a serious effect on a party or the case, **ABA Standards for Imposing Lawyer Sanctions § 6.11 (1986)**, sanctions imposed by the DC Court of Appeals have generally been less severe. For example, in **In re Reback, 513 A.2d 226 (DC 1986)**, the Court sitting en banc set aside a panel's order imposing suspension for a year and a day and ruled instead that suspension for six months would be appropriate. The falsification in **Reback** occurred when the two lawyers there disciplined, having discovered that the complaint filed to obtain a divorce for their client had been dismissed for lack of prosecution, prepared and filed a second complaint on which they forged their client's signature and then had the forged signature falsely notarized. Similarly, in **In re Thornton, 421 A.2d 1 (DC 1980)**, the court ordered suspension for a year and a day for the lawyer's submission of a "patently false" document stating that clients had been fully informed of a conflict of interest problem but had nonetheless agreed to the lawyer's representation of them.

In **In re Corrizzi, 803 A.2d 438 (DC 2002)**, the respondent was found to have committed a number of ethical delicts, of which the most serious involved counseling two clients, in separate cases, to commit perjury on their depositions. These two offenses, which themselves violated several different Rules, including DC Rule 3.4(b) as well as 3.3(a)(2), 8.4(c) and 1.3(b)(2), were held sufficient to warrant disbarment.

3.4:310 Prohibited Inducements

Comment [8] to DC Rule 3.4, which interprets paragraph (b) of the Rule as permitting fees to expert witnesses that are contingent on the outcome of a case, though not fees that are a percentage of the recovery, rejects the prohibition of DR 7-109(C), which, as **DC Ethics Opinion 20 (1976)** held, "clearly forbids" compensating an expert witness even in part on a contingent basis. Subsequent opinions provided a somewhat more permissive interpretation of DR 7-109(C): see **DC Ethics Opinion 55 (1978)** (permitting payment of a contingent fee to an intermediary "organization" that agreed to furnish an expert witness paid by the organization without regard to the outcome of the litigation); **DC Ethics Opinion 56 (1978)** (permitting client's assignment of a portion of the potential recovery in lieu of an obligation to pay an expert witness).

3.4:400 Knowing Disobedience to Rules of Tribunal

- Primary DC References: DC Rule 3.4(c)
- Background References: ABA Model Rule 3.4(c), Other Jurisdictions
- Commentary: ABABNA § 61:710; ALI-LGL § 105, Wolfram § 12.1

The provision of the Code that preceded Rule 3.4(c), DR 7-106(A), stated that a lawyer must not disregard either "a standing rule . . . or a ruling of a tribunal . . . in a proceeding," whereas Rule 3.4(c) refers only to "rules of a tribunal." This difference in terminology is not likely to cause the Rule to be more narrowly construed than the prior Code provision, given the absence of any comment elucidating Rule 3.4(c).

Disobedience of a court rule of another jurisdiction may be subject to disciplinary sanction under DC Rule 3.4(c) even if the rule violated has no counterpart in DC courts. See, *e.g.*, **In re McDonald, 775 A.2d 1085 (DC 2001)** (lawyer publicly censured for failing to file an affidavit certifying to completion of mandatory CLE courses in Delaware, despite lack of any comparable requirement in DC.).

In re Hermina, 907 A.2d 790 (DC 2006) applied reciprocal discipline to a lawyer who had been found by the Maryland Court of Appeals to have violated the Maryland Rule of Professional Conduct 3.4(c) as well as Rules 3.3(a)(1) and 8.4(a), (c) and (d) -- all of which Maryland Rules were either the same as or equivalent to correspondingly numbered DC Rules. The violations of Rule 3.4(c) had consisted of respondent's failing to respond to discovery in asserted retaliation for discovery failures on the part of his opponent, and knowingly failing to participate in a pre-trial conference.

DC Ethics Opinion 119 (1983), interpreting DR 7-106(A), concluded that the "obligation imposed by the rule does not extend beyond the proceeding in which the ruling was made" and that hence a court ruling requiring production of documents in a case that was concluded by a settlement did not oblige the lawyer to preserve the documents merely because parties in future cases might be likely to seek their production.

See also **DC Ethics Opinion 266 (1996)** [discussed under 1.16:400 above], holding that, where the rules of a tribunal require a lawyer to seek leave of the tribunal before withdrawing from a representation, the Rules of Professional Conduct also require the lawyer to seek such leave; it is not sufficient for the lawyer merely to inform the client of upcoming proceedings and advise the client to seek new counsel.

[See also 3.1:400 and 3.1:500, above (discussing decisions applying sanctions for misconduct in litigation).]

3.4:500 Fairness in Pretrial Practice

- Primary DC References: DC Rule 3.4(d)
- Background References: ABA Model Rule 3.4(d), Other Jurisdictions
- Commentary: ABABNA § 61:709; ALI-LGL § 106, Wolfram § 12.4

There are no reported disciplinary cases or opinions of the DC Bar's Legal Ethics Committee involving DC Rule 3.4(d). There are also no pertinent precedents under the Code because paragraph (d) had no counterpart in the Code.

See also 3.1:300, above (discussing decisions under Superior Court Civ. R. 37).

3.4:600 Improper Trial Tactics

- Primary DC References: DC Rule 3.4(e)
- Background References: ABA Model Rule 3.4(e), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 107, Wolfram § 12.1

DC Rule 3.4(e), like its identical Model Rule counterpart, proscribes two forms of "dirty tricks": alluding to matter that is irrelevant or that will not be supported by evidence and asserting personal knowledge of facts or personal opinion as to the law. DC precedents have strongly endorsed the second of these prohibitions, while recognizing that the distinction between a lawyer's permissible advocacy and prohibited testimony is not always a bright line. See **Powell v. United States, 455 A.2d 405, 409 (DC 1982)**, holding that a "prosecutor may not publicly cast his vote" in addressing the jury on a disputed material factual issue on which there has been conflicting testimony; **Dyson v. United States, 418 A.2d 127, 130 (DC 1980)**, where a new trial was granted because the prosecutor asserted, among other things, that the testimony of a defense witness was "a lie," and the error could not be said to be harmless.

The reported decisions applying DC Rule 3.4 do not include any disciplinary cases involving alleged violations of paragraph (e) or a predecessor, which suggests that this type of misconduct is typically controlled by the trial courts in which it occurs. A standard mode of control is the granting of a new trial because of a lawyer's misconduct at trial, such as a closing argument to the jury in which the lawyer makes statements proscribed by this Rule. *E.g.* **Powell v. United States**, *supra*; **Dyson v. United States**, *supra*; see also **Fineman v. Armstrong World Indus., Inc., 774 F. Supp. 266 (D.N.J. 1991), aff'd, 980 F.2d 171, 106-10 (3d Cir. 1992), cert. denied, 507 US 921 (1993)**.

3.4:700 Advising Witness Not to Speak to Opposing Parties

- Primary DC References: DC Rule 3.4(f)
- Background References: ABA Model Rule 3.4(f), Other Jurisdictions
- Commentary: AABABNAA § ; ALI-LGL § 118; Wolfram § 12.4.2

DC Rule 3.4(f), like its identical Model Rule counterpart, is a particularized application of the more general prohibition of Rule 3.4(a) against a lawyer's obstructing another party's access to evidence. It prohibits, with exceptions, a lawyer's asking a person other than a client to refrain from giving relevant information to another party. The exceptions are for a relative or employee or other agent of a client, when the lawyer reasonably believes that the interests of the persons thus affiliated with the lawyer's client will not be adversely affected. The permission given by Rule 3.4(f) is limited to asking the relative or employee not to volunteer information. It does not extend to obstruction of discovery or other legal process to obtain evidence. Thus, Comment [9] to the DC Rule and the identical Comment [4] to the Model Rule state that it is permissible under paragraph (f) for "a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client." Both Comments also make a cross-reference to Rule 4.2 which deals with communications between a lawyer and opposing parties and generally prohibits a lawyer from communicating with a party known to be represented by another lawyer in the same matter without the prior consent of opposing counsel. However, DC Rule 4.2 differs in some respects from its counterpart Model. [See 4.2:100, below.]

Outside of the exceptions, paragraph (f) specifically proscribes only a lawyer's "request" that a person refrain from voluntarily giving relevant information to another party. In the District of Columbia, however, pertinent precedent indicates that "advice" to refrain from voluntarily providing relevant information might be tantamount to "effectively denying . . . access to the witnesses" and so would likely be subject to the strictures of both paragraph (a) and paragraph (f). See **Gregory v. United States, 369 F.2d 185, 188 (DC Cir. 1966), cert. denied, 369 US 865 (1969)** (citing Canon 39 of the Canons of Professional Ethics).

There do not appear to be any reported decisions in disciplinary cases involving a charge of violation of DC Rule 3.4(f). Restrictions on a lawyer's right to confer with witnesses, such as the restrictions in paragraph (f), often turn on fine distinctions. It is generally recognized that a lawyer may inform a witness of the witness's own right not to cooperate voluntarily with opposing counsel as long as it is not the equivalent of instructing the witness to remain silent. See **United States ex rel. Frantino v. Hatrak, 408 F. Supp. 476, 481-82 (DNJ 1976)**. On the other hand, as noted above, a lawyer cannot advise a potential witness to refrain from talking to opposing counsel in circumstances that effectively deny access to the witness. **Gregory v. United States, 369 F.2d at 187-88**.

Sequestration orders during trial may impose prohibitions beyond those in paragraph (f), such as an order prohibiting witnesses from conferring with a lawyer during recess, including a party-witness's own lawyer as upheld in **Perry v. Leeke, 488 US 272 (1989)**. Compare **Geders v. United States, 425 US 80, 89 n.2, 91 (1976)** (holding that a sequestration order prohibiting a criminal defendant from consulting his counsel "about anything" during a 17-hour night recess violated the right to assistance of counsel under the Sixth Amendment, but distinguishing a limited order prohibiting a defendant from consulting his lawyer "during a brief routine recess during the trial day").

3.4:800 Standards of Civility

The DC Bar Board of Governors in July, 1996 adopted so-called "civility" standards entitled "Principles of General Applicability: Lawyers' Duties to Other Counsel, Parties and the Judiciary." The DC civility standards, which are wholly voluntary, are generally comparable to the voluntary civility standards adopted by the Seventh Circuit in December 1992, 143 FRD 441 (1992), but they do not have the official imprimatur of the DC Court of Appeals or any other court in the jurisdiction.

In **Steinbuch v. Cutler, 2006 WL 979311(DDC April 14, 2006)**, the court stated that "as this case proceeds" it would not "countenance the tone and tenor of some of counsel's current filings," and added that "[s]ince counsel have shown themselves as unable to abide by the Rules of this Court or refrain from engaging in unnecessarily litigious behavior, counsel for both parties are ordered to read the Local Civil Rules of this Court and Appendix B to those Rules -- the D.C. Bar Voluntary Standards for Civility in Professional Conduct -- and to abide by them in future." Similarly, in **Pigford v. Veneman, 225 FRD 54 (DDC 2005)**, the court struck as "scandalous" under Fed R. Civ. P. Rule 12(f) several filings made by one of the plaintiffs' counsel that were personal attacks on opposing counsel, and stated that "counsel is reminded that Local Civil Rule 83.8(b)(6)(v) of the Rules of this Court requires all counsel appearing in this forum to familiarize themselves with the D.C. Bar Voluntary Standards for Civility in Professional Conduct, which are included as Appendix D to those Rules." *Id*. at 58**.**

In **Pigford v. Veneman, 215 FRD 2 (DDC 2003)**, the Court granted a motion to strike a filing on the ground that it contained allegations that opposing counsel had demonstrated a "racist attitude" and asserting that his "dishonesty and [reckless] disregard for the truth [was] inspired by his contempt for 'lawyers of color'" – allegations that the Court found were without basis in fact or evidentiary support. While the Court's disposition of the motion rested on Fed. R. Civ. P Rules 11 and 12(f), its opinion also called attention to the fact that the District Court's Local Civil Rule 83.8(b)(6)(v) requires all counsel to familiarize themselves with the DC Bar's civility standards.

In **Alexander v. Federal Bureau of Investigation, 1999 U.S. Dist. LEXIS 16751 (DDC May 17, 1999),** a case in which discovery had been particularly contentious, the Court ordered that all counsel who expected to attend a particular deposition file with the Clerk of the Court in advance thereof a certificate that they had carefully read the D.C. Bar Voluntary Standards for Civility in Professional Conduct. The Court observed,

> Although a violation of these standards is not itself sanctionable, per se, the court believes these standards provide useful and appropriate guidance to lawyers when questions are raised about professional conduct.

The DC Bar's voluntary civility standards were also cited in **Blumenthal v. Drudge, 185 FRD 236 (1999)** [which is discussed more fully under 1.2:310, above].

Miranda v. Contreras, 754 A2d 277 (DC 2000), involved a motion to set aside a default judgment under Super. Ct. Civ. R..60(b)(6), on the basis of allegations that plaintiff's counsel had represented to defendant's counsel that he would consent to striking the default if settlement negotiations were unsuccessful, and that defendant's counsel in reliance had refrained from filing an answer or other response to the complaint. The Court of Appeals held that the allegations, if true, would constitute an 'extraordinary circumstance" warranting relief under the rule, and remanded for a hearing on the allegations. Referring in this connection to both Rule 8.4(c) and the DC Bar Voluntary Standards of Conduct, the Court observed,

> As colleagues at bar and officers of the court, and to ensure the efficient, accurate and just operation of judicial proceedings, counsel must be able reasonably to rely on representations made by fellow counsel in the context of litigation. Conversely, counsel should not be able to reap the windfall of his or her misrepresentation to fellow counsel.

Id at 280.

In **In re Bernstein, 774 A.2d 309 (DC 2001)** [which is more fully described under 1.5:730, above], the court disapproved a recommendation of the Board on Professional Responsibility that it be made a condition of reinstatement for a lawyer suspended as a result of a disciplinary proceeding, that the lawyer certify that he had read the D.C. Bar's "Voluntary Standards of Civility in Professional Conduct" a recommendation prompted by the lawyer's incivility in the course of the disciplinary proceedings. The court noted that the Standards of Civility are not mandatory but rather, voluntary and aspirational; and expressed doubt that familiarity with the Standards would have had any effect in this case. It also noted that in **In re Shearin, 764 A.2d 774 (DC 2000)**, the court had approved a recommendation that if the respondent there suspended sought reinstatement, the Board might *consider* whether she had familiarized herself with the Standards of Civility; but observed that this was "not the same as ordering an attorney to read the Standards and effectively telling him that, if he fails to do so, he will forfeit any hope of readmission to the profession," and concluded that "the invocation of the Standards of Civility in the **Shearin** footnote goes as far as we should ever go in tying voluntary and aspirational standards to the right to practice law." *Id.* at 319.

3.5 Rule 3.5 Impartiality and Decorum of the Tribunal

3.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.5
- Background References: ABA Model Rule 3.5, Other Jurisdictions
- Commentary:

3.5:101 Model Rule Comparison

DC Rule 3.5 and its Model Rule counterpart were identical until 2002, when substantial changes were made in the black letter text of the Model Rule and the Comments pursuant to the recommendations of the Ethics 2000 Commission. Specifically, a new paragraph (c) was added to the Rule, addressing communications with jurors after the discharge of the jury; and paragraph (b) was modified to limit the prohibition on ex parte contributions to those made during a proceeding, and to add an exception for those authorized by court order. In addition, three new Comments, [2], [3] and [5], were added.

The DC Rule was amended four years later pursuant to the recommendations of the Rules Review Committee to resume a close albeit not quite identical similarity to the amended Model Rule. The revised paragraph (c) of the DC Rule, unlike the Model Rule's counterpart, specifies that its prohibition on communications with jurors applies not only to ex parte communications but also extends to communications made jointly with opposing counsel, and subparagraph (c)(2), stating that the prohibition is applicable when a juror has made known a desire not to communicate, makes clear that the same applies to communications with an unwelcoming *prospective* juror. The amended DC Rule's Comments were enlarged by the addition of a new Comment [2] identical to the Model Rule's and a new Comment [3], explaining paragraph (c) of the black letter, that is also identical to the Model Rule's, except that it, like the DC Rule's paragraph (c), refers to communications together with opposing counsel as well as ex parte ones. The DC Rule's Comments also diverge from the Model Rules in not having a Comment corresponding to the Model Rule's Comment [5], stating that the duty recognized by paragraph (d) of the Rule to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. The Rules Review Committee did not offer any explanation of this omission.

3.5:102 Model Code Comparison

Paragraphs (a) and (b), although differently worded, incorporate the principles expressed in DR 7-108(A), DR 7-108(B) and DR 7-110(B). Paragraph (c) is similar to DR 7-106(C)(6), which prohibited undignified or discourteous conduct that is degrading to a tribunal.

3.5:200 Improperly Influencing a Judge, Juror, or Other Court Official

- Primary DC References: DC Rule 3.5(a)
- Background References: ABA Model Rule 3.5(a), Other Jurisdictions
- Commentary: ABABNA § 101:702, ALI-LGL §§ 113, 115, Wolfram §§ 11.3, 11.4

There appear to be no DC court decisions applying either DC Rule 3.5(a) or its Code predecessor DR 7-108(A).

3.5:210 Improperly Influencing a Judge

There appear to be no DC court decisions applying either DC Rule 3.5(a) or its Code predecessor DR 7-108(A).

3.5:220 Improperly Influencing a Juror

There appear to be no DC court decisions applying either DC Rule 3.5(a) or its Code predecessor DR 7-108(A).

3.5:300 Improper Ex Parte Communication

- Primary DC References: DC Rule 3.5(b)
- Background References: ABA Model Rule 3.5(b), Other Jurisdictions
- Commentary: ABABNA § 61:903; ALI-LGL §§ 112, 113, Wolfram § 11.3.3

There appear to be no DC court decisions or ethics opinions addressing DC Rule 3.5(b), but there are two ethics opinions dealing with its predecessor DR 7-110(B)(1). **DC Ethics Opinion 73 (1979)** responded to an inquiry whether it was permissible for a lawyer representing a party in connection with an investigation or proceeding before the DC Office of Human Rights or the federal Equal Employment Opportunity Commission to have ex parte communications with (a) an "investigator" for the agency, (b) a "conciliator" for the agency, or (c) a "hearing examiner" for the agency. The Opinion, after explaining the procedures of the two agencies, concluded that DR 7-110(B), while barring ex parte communications with a hearing examiner, did not bar such communications with a conciliator or, at least in the absence of agency regulations specifying otherwise, with investigators. **DC Ethics Opinion 5 (1975)** addressed an inquiry whether it would be unethical for a lawyer to write for publication in a legal journal an article discussing issues in a pending case. The Opinion found that the provision of the Code most relevant to the matter was the prohibition on ex parte communications with the court in an adversary proceeding in DR 7-110(B) (together with EC 7-35), but concluded that any possible problem under that provision would be avoided if the lawyer supplied adversary counsel with a copy of his article.

It is not clear whether DC Rule 3.5(b) would be interpreted as applying to communications with jurors *after* trial. Nor is it clear whether, if the Rule were so interpreted, it would be read as requiring explicit authorization "by law" for such communications or, on the contrary, as simply making it an ethical violation to have such a communication when it is forbidden "by law." *Cf.* **ABA, Annotated Model Rules of Conduct 342-43 (3d ed. 1996)** (collecting authorities regarding post-trial contacts with jurors).

Local Rule 115 of the US District Court for DC, entitled Communication with a Juror, provides in part as follows:

> **(b) After trial.** After a verdict is rendered or a mistrial is declared but before the jury is discharged, an attorney or party may request leave of court to speak with members of the jury after their discharge. Upon receiving such a request, the court shall inform the jury that no juror is required to speak to anyone but that a juror may do so if the juror wishes. If no request to speak with jurors is made before discharge of the jury, no party or attorney shall speak with a juror concerning the case except when permitted by the court for good cause shown in writing. The court may grant permission to speak with a juror upon such

> conditions as it deems appropriate, including but not limited to a requirement that the juror be examined only in the presence of the court.

The DC Superior Court has no comparable rule.

3.5:400 Intentional Disruption of a Tribunal

- Primary DC References: DC Rule 3.5(c)
- Background References: ABA Model Rule 3.5(c), Other Jurisdictions
- Commentary: ABABNA § 61:902; ALI-LGL § 105, Wolfram § 12.1.3

There appear to be no DC court decisions or ethics opinions addressing DC Rule 3.5(c), but there are several decisions applying its predecessor DR 7-106(C)(6). In **In re Haupt, 444 A.2d 317 (DC 1992)**, the Court adopted the recommendation of the Board on Professional Responsibility that the respondent be disbarred for numerous ethical lapses including a violation of DR 7-106(C)(6) which rested on the respondent having been found guilty of criminal contempt for failure to appear on behalf of a client in bankruptcy court, failure to provide answers to a questionnaire issued by the bankruptcy judge, and failure to repay a fee as ordered — all of which the Board found to constitute "discourteous conduct which is degrading to a tribunal." *Id*. at 326.

In **In re Evans, 533 A.2d 243 (DC 1987)**, the Court held that an attorney's disbarment in another jurisdiction for professional misconduct in the form of a letter accusing a magistrate of religious bias in violation of, *inter alia*, DR 7-106(C)(6), warranted reciprocal discipline of public censure rather than disbarment or suspension.

In **In re Morris, 495 A.2d 1162 (1985)**, the Court sustained reciprocal disbarment of a lawyer who had been found to have violated numerous provisions of the Maryland Code of Professional Responsibility, including DR 7-106(C)(6) on the basis of a misrepresentation to a court.

United States v. Meyer, 346 F. Supp. 973 (DDC 1972) involved contempt proceedings against a lawyer who had been appointed to represent defendants in the trial of the so-called "DC Nine," in which one of the charges was that the lawyer had "engaged in disrespectful and discourteous conduct which offended the dignity and decorum of [the] proceeding and which was degrading to [the] tribunal," in violation of DR 7-106(C)(6) of the Code. On remand for retrial before a different judge, see **United States v. Meyer, 462 F.2d 827 (1972)**, this charge was vacated for lack of the specificity required by Fed. R. Crim. P. 42.

3.6 Rule 3.6 Trial Publicity

3.6:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.6
- Background References: ABA Model Rule 3.6, Other Jurisdictions
- Commentary:

3.6:101 Model Rule Comparison

The DC Rule on trial publicity takes a different approach from the original Model Rule, the Model Rule as amended in 1994, and the rule in many other jurisdictions. Unlike MR 3.6, which specifically enumerates matters a lawyer can and cannot publicly discuss, DC Rule 3.6 establishes a general functional standard to determine whether an extrajudicial statement is permissible. The DC drafters viewed the Model Rule's detailed approach as needlessly broad and insufficiently sensitive to First Amendment concerns. The commentary to both Rules recognize, however, that as Comment [1] to the DC Rule observes, "[n]o body of rules can simultaneously satisfy all interests of fair trial and all those of free expression."

DC Rule 3.6 accordingly consists of a single paragraph, which originally required a lawyer to refrain from making statements that the lawyer knows, or reasonably should know, would create a "serious and imminent" threat to the impartiality of a judge or jury; in 2006, this was changed to substitute "material prejudice to the proceeding" for the reference to impartiality of the judge or jury. In adopting the "serious and imminent" standard, the drafters believed that the rule would proscribe hazards that are substantial and real rather than speculative. Unlike MR 3.6, which applies to all "adjudicative" proceedings, the DC Rule applies to cases actually tried before a judge or jury. The DC Rule, moreover, applies to lawyers litigating a case, whereas the Model Rule extends to lawyers investigating as well as those litigating a case, and to lawyers associated with them in a firm or a government agency. The DC Rule applies only to "a case being tried to a judge or jury," and so does not restrict comments made before commencement of a trial, while the Model Rule is not similarly limited with respect to the time at which it applies. *See, e.g.,* **Gentile v. State Bar of Nevada, 510 U.S. 1030 (1991),** where a lawyer was disciplined by the State Bar for violating a Nevada rule almost identical to Model Rule 3.6 as it then stood, by reason of his remarks at a press conference six months before the trial of the case to which the press conference related**.** (The Jordan Committee recommended that the Rule be limited to apply only to a case before a jury, but the Court of Appeals changed it to apply to a bench trial as well.) The DC Rule does not, like the Model Rule, include a "right of reply," see MR 3.6(c).

Reflecting the relative brevity of the black letter texts, the Comments to the DC Rule were sparse in comparison to those following the Model Rule.

Neither of the two versions of Rule 3.6 was substantially modified pursuant to the respective recommendations of the Ethics 2000 Commission in 2002 or those of the DC Rules Review Committee in 2006. Paragraph (a) of the Model Rule was amended in the earlier year to eliminate a reference to expectations of "a reasonable person," as to whether an extrajudicial statement would be disseminated by means of public communication, and make it subject to the same standard as the prospect of the statement having a prejudicial effect on the proceeding, turning on whether the lawyer knows or should know of the likelihood. A like change was made in the later year in the single paragraph that constitutes the black letter DC Rule, along with the substitution of "material prejudice to the proceeding" for "the impartiality of the judge or jury" as the serious and imminent harm that the Rule is intended to protect against.

Related provisions are found in Rule 3.8 (Special Responsibilities of a Prosecutor): see 3.8:100, below. Specifically, DC Rule 3.8(f), which is identical to (and indeed was the model for) MR 3.8(g), states that prosecutors shall not make comments that serve to increase the condemnation of the accused, unless they are necessary to inform the public of the nature and extent of the prosecutor's action *and* serve a legitimate law enforcement purpose. MR 3.8(e) also requires that prosecutors exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting the prosecutor from making an extrajudicial statement prohibited under MR 3.6; the DC Rule does not contain this provision.

3.6:102 Model Code Comparison

DC Rule 3.6 substantially departs from DR 7-107 of the Model Code, the predecessor Code provision to Rule 3.6. The Model Code, unlike DC Rule 3.6, provided a detailed list of matters that a lawyer could and could not discuss. The DC version of DR 7-107 substituted the text of Canon 20 of the Canons of Professional Ethics for Model Code paragraphs (G) and (H), addressing trial publicity in civil cases and administrative proceedings. Canon 20 generally condemned extrajudicial statements with respect to civil matters, and stated that they were permissible only in extreme circumstances and, even then, should not go beyond matters of public record. Those two paragraphs aside, the remaining provisions of the DC version and the Model Code version of DR 7-107, dealing with criminal and disciplinary cases, were identical. Paragraph (A) prohibited, with specified exceptions, extrajudicial statements about criminal investigations, and paragraph (B) did the same with respect to pending criminal cases. Paragraph (C) established a list of subjects that the lawyer *could* discuss, about pending cases; paragraphs (D) and (E) generally provided that a lawyer should not make any extrajudicial statement that was reasonably likely to interfere with a fair trial or the imposition of sentence; paragraph (F) applied the foregoing to professional disciplinary and juvenile proceedings, and paragraph (I) stated that the preceding prohibitions did not prevent a lawyer replying to charges of misconduct publicly made against the lawyer.

3.6:200 Improper Extrajudicial Statements

- Primary DC References: DC Rule 3.6
- Background References: ABA Model Rule 3.6(a), Other Jurisdictions
- Commentary: ABABNA § 61:1001; ALI-LGL § 109; Wolfram § 12.2

While DR 7-107(B) and Comment [5] to Model Rule 3.6 set forth a list of matters that a lawyer should not discuss, DC Rule 3.6 provides no such list. Comment [1] simply states that, "publicity should not be allowed to influence the fair administration of justice."

There appears to be only one reported decision relating to DC Rule 3.6, **In re Gansler, 889 A.2d 285 (DC 2005)**, which is discussed under 3.8:800, below.

DC Ethics Opinion 302 (2000) [which is discussed more fully under 7.1:200, below], addressing issues relating to a lawyer's use of internet web pages to solicit plaintiffs for a class action lawsuit, suggests that the lawyer should be sure that the solicitation does not present a threat to the impartiality of the judge or jury in the lawsuit referred to.

3.6:300 Permissible Statements

- Primary DC References: DC Rule 3.6
- Background References: ABA Model Rule 3.6(b), Other Jurisdictions
- Commentary: ABABNA § 69:1001, ALI-LGL § 109; Wolfram § 12.2

There appear to be no pertinent DC court decisions or ethics opinions interpreting Rule 3.6, though there are some ethics opinions on its Code predecessor. Unlike MR 3.6 and DR 7-107, Rule 3.6's predecessor Model Code provision, Rule 3.6's text and commentary do not list the topics that a lawyer can publicly discuss. DC Rule 3.6 settles for a general standard that is to be applied on a case-by-case basis. Comment [1] states that "litigants have a right to present their side of a dispute to the public."

DC Ethics Opinion 5 (1975) determined that DR 7-107 permitted a lawyer to publish a scholarly article that discussed issues in a client's case pending before an appellate court. The Legal Ethics Committee reasoned that restrictions on a lawyer's extrajudicial commentary about a case is directed more at attempts to sway a jury than to presentation of views on the law in a scholarly journal. **DC Ethics Opinion 8 (1975)** concluded that DR 7-107 did not prevent a law firm from providing a newspaper reporter with information pertaining to a client's statement of claim that was the subject of an arbitration proceeding. The Committee noted that the firm had been involved in an arbitration, rather than a trial, the newspaper reporter had sought out the law firm, and the information was a matter of public record.

3.6:400 Responding to Adverse Publicity

- Primary DC References: DC Rule 3.6
- Background References: ABA Model Rule 3.6(c), Other Jurisdictions
- Commentary: ABABNA § 61:1001; ALI-LGL § 109; Wolfram § 12.2

There appear to be no pertinent DC court decisions or ethics opinions on this subject. Although MR 3.6(c) permits a lawyer to make a statement that a reasonable lawyer would believe is required to protect a client from "the substantial undue prejudicial effect of recent publicity," DC Rule 3.6 contains no comparable provision.

3.7 Rule 3.7 Lawyer as Witness

3.7:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.7
- Background References: ABA Model Rule 3.7, Other Jurisdictions
- Commentary:

3.7:101 Model Rule Comparison

Paragraph (a) of DC Rule 3.7 is identical in substance to paragraph (a) of the Model Rule, but the wording of the introductory phrase of the latter was modified in 2002, to substitute "unless" for "except where" immediately before the three subparagraphs setting out the circumstances where paragraph (a)'s prohibition of a lawyer combining the roles of witness and advocate does not apply.

The first sentence of paragraph (b) of the DC Rule corresponds exactly in substance to paragraph (b) of the Model Rule, but it phrases the matter of attribution of the disqualification of the witness/advocate lawyer to the lawyer's associates in terms of what such an associated lawyer may *not* do *if* the witness/advocate would be disqualified under Rules 1.7 or 1.9, while the Model Rule's provision of what the associated lawyer *may* do *unless* the witness/advocate would be so disqualified.

Paragraph (b) of DC Rule 3.7 has a second sentence that has no parallel in the Model Rule, stating that the paragraph does not apply to a government lawyer acting as advocate for a government agency, thus allowing a government lawyer to act as advocate even though another government lawyer is likely to be called as a witness and will testify in a way that is counter to the government's position. This was added by the DC Court of Appeals; it was not in the DC Bar's submission.

There have always been a number of minor differences in the comments to the two versions of Rule 3.7. The recommendations of the Ethics 2000 Commission resulted in a number of changes in the comments to the Model Rule in addition to the slight change in paragraph (a) mentioned above, but the DC Rules Review Committee did not consider any of them worth emulating, so it recommended no changes, and the Court made none..

3.7:102 Model Code Comparison

Paragraph (a) of the Rule preserves the general substance of DR 5-101(B) and DR 5-102(A) and (B) as respects applicability to an individual lawyer of the prohibition of serving as both advocate and witness, albeit with a number of changes of both language and substantive detail. Thus, the Rule addresses situations where the lawyer is "likely to be a necessary witness," while DR 5-101(B) and DR 5-102(A) say "ought to be called as a witness," and DR 5-102(B) says "may be called as a witness." The latter two provisions distinguish between circumstances where the lawyer will be a witness for his client and for one not his client, respectively; the Rule drops this distinction. The Rule also omits the distinction, drawn in DR 5-101(B) and DR 5-102, between a lawyer's undertaking a representation that presents the advocate/witness problem and the possible need to withdraw when the problem arises *after* the representation is undertaken. Finally, paragraph (a) of the Rule collapses the four exceptions of DR 5-101(B) to three (combining (2) and (3)).

Paragraph (b) eliminates the automatic imputation of a lawyer's disqualification to the lawyer's firm imposed by DR 5-101(B) and DR 5-102(A) & (B), and limits imputation to cases in which the lawyer/witness's testimony would so conflict with the client's interests that he would be disqualified under Rule 1.7 or 1.9 from representing the client.

3.7:200 Prohibition of Advocate as Witness

- Primary DC References: DC Rule 3.7(a)
- Background References: ABA Model Rule 3.7(a), Other Jurisdictions
- Commentary: ABABNA § 61:501; ALI-LGL § 108, Wolfram § 7.5

In **U.S. ex rel. Miller v. Bill Harbert International Construction, Inc., 2007 WL 842081 (DDC March 19, 2007)**, the defendant in a suit under the False Claims Act sought to disqualify not only individual lawyers representing the relator and the government who would be witnesses in an aspect of the case, but also the entire law firm of the lawyers representing the relator, invoking DR 5-102 of the Model Code. The court pointed out, however, that DR 5-102 was no longer applicable, since it had been superseded by DC Rule 3.7, and that that Rule makes an exception for circumstances where disqualification of a lawyer "would work substantial hardship on the client." Id. at *4. The court also noted that Comment [4] to the Rule states that "the court must conduct a balance 'between the interests of the client and those of the opposing party,' " and went on to conclude that that balance in this case weighed heavily in favor of the plaintiffs. Id. The court did not mention an additional relevant difference between the two provisions -- that while DR 5-102 imputed an individual lawyer witness's disqualification to all of the lawyer's colleagues, Rule 3.7 imputes such disqualification only if the disqualified lawyer's testimony would violate Rule 1.7 or Rule 1.9.

In **Canfield v. Stone, 1993 US Dist LEXIS 15491 (DDC 1993)**, the court held that even if DC Rule 3.7(b) would prohibit a lawyer from acting as counsel at trial (an issue the court did not need in this instance to decide), it did not bar counsel from assisting in preparation of the case up to trial.

In **United States v. Ruffin, 1992 US Dist LEXIS 13152 (DDC 1992)**, the government had moved to disqualify criminal defense counsel on the ground that it was going to call him as a witness. The court conducted elaborate proceedings to make sure that the government could substantiate "beyond making a mere assertion" its claim that it was likely that the lawyer would be a witness at trial, *id.* at *6; and, finding that the government had "credible evidence to present to the jury that defendant's lawyer received cash to defend another member of the alleged conspiracy," *id.* at *10, the court determined that "there is a real possibility defense counsel would be a witness at trial," *id.*; and granted the motion to disqualify the lawyer in question.

In **Garcia v. Llerena, 599 A.2d 1138 (DC 1991)**, the court upheld a denial of a motion by which plaintiff sought to have defendant's counsel testify (and therefore to disqualify counsel), on the ground that the facts to which the testimony sought would have related were either otherwise established or else inadmissible.

In **S.S. v. D.M., 597 A.2d 870 (DC 1991)**, one of the issues raised by a mother appealing from a Superior Court order approving adoption of her son by the child's

great aunt was that the child's guardian *ad litem* had acted both as counsel and as a witness in the proceeding. The court discussed the several, not always distinct, roles of guardian *ad litem* and concluded that in this instance the guardian *ad litem* had indeed performed as both witness and advocate in the proceeding. However, because the appellant had not objected below, the court's review of the decision was on the basis of whether a miscarriage of justice had occurred as a result of the violation of Rule 3.7; and in light of the fact that the decision of the court below rested on independent grounds as well as the testimony of the guardian *ad litem*, the court held that that standard had not been met.

In **Lawson P.C. v. Nevada Power Co., 739 F. Supp. 23 (DDC 1990)**, the court denied a motion under DR 5-102(A) to disqualify the plaintiff, who was a lawyer practicing in the form of a PC, from representing that PC as the plaintiff in the case. The court started with the "well settled proposition that DR 5-102(A) does not bar a lawyer from appearing *pro se* and testifying in his or her own case," *id.* at 24 [citing, *inter alia,* **O'Neil v. Bergan**, discussed below], and went on to hold that the basic rule that business or commercial corporations do not have a right to appear *pro se* did not apply in the case of a lawyer who has chosen to practice in the form of an individual PC.

In **Rosen v. NLRB, 735 F.2d 564 (DC Cir 1984)**, Rosen and his law firm sought, in a collateral proceeding, to challenge the finding of an NLRB administrative law judge that Rosen had suborned perjury in a proceeding before the ALJ. The Court of Appeals upheld the District Court's dismissal of the complaint, on the ground, *inter alia*, that Rosen could, indeed *should*, have withdrawn as counsel and testified before the ALJ to deny the charge that he had suborned perjury, for this would have been for the client's benefit as well as his own, and would have outweighed the prejudice to the client of losing him and his firm as trial counsel. The court also pointed out that "DR 5-102(A), unlike other rules in the Code of Professional Responsibility, see, *e.g.*, DR 5-101(A), makes no provision for client waiver of its application." *Id.* at 574.

In **Groper v. Taff, 717 F.2d 1415 (DC Cir 1983) (per curiam)**, the court, on interlocutory appeal from an order disqualifying plaintiff's lawyer on the ground that the lawyer ought to be a witness in the case, held (1) that such motions to disqualify are committed to the sound discretion of the trial court; and (2) that the hardship to the client exception in DR 5-101(B)(4) was not applicable in this case, because it was a straightforward, simple case, and local counsel was competent to handle the case in the absence of the disqualified pro hac vice counsel.

O'Neil v. Bergan, 452 A.2d 337 (DC 1982), concerned a ruling of the trial court prohibiting the plaintiff from calling defense counsel as a witness and denying her motion to disqualify him. The court stated that "trial counsel may not be called as a witness by the opposing party and thus made subject to disqualification unless the opposing party shows a genuine need for the evidence," *id.* at 344, and noted that here counsel had submitted an affidavit to the effect that he had no personal knowledge of the matters on which his testimony was sought. The Court then went on to hold that DR 5-101(B) did not apply because counsel was also an individual defendant in the case

(along with the law firm of which he had until recently been a partner), and "DR 5-101(B) does not bar a lawyer from appearing *pro se* and testifying in his or her own case . . . . Nor does DR 5-101(B) bar an lawyer-witness who is entitled to self-representation from retaining another member of his or her firm as counsel." *Id.* [Citing **DC Ethics Opinion 44 (1978)**, discussed under 3.7:300 below.]

In **Williamsburg Wax Museum v. Historic Figures, Inc., 501 F. Supp. 326 (DDC 1980)**, the court asserted that "a party cannot disqualify its opponent's lawyers [pursuant to DR 5-102] simply by threatening to call them as witnesses to advice they may have given with respect to documents they prepared or reviewed." *Id.* at 331 n.19.

In **Biddle v. Chatel, 421 A.2d 3 (DC 1980)**, purchasers of property had sued a realtor for misrepresentations regarding their entitlement to access to an alley adjoining the property. They now sought to recover as damages attorney fees expended in the suit, and they appealed from the trial court's refusal to let the lawyer who had represented them testify about the value of the fee on the ground that the testimony was forbidden by DR 5-101. On this point, the Court of Appeals, while affirming on a threshold issue, observed that the lower court was in error, since the testimony in question, which would have related to the nature and value of legal services rendered in the case, was covered by DR 5-101(B)(3).

DC Ethics Opinion 228 (1992) says that a lawyer who is precluded from appearing at trial because the lawyer is likely to be a necessary witness is not precluded from assisting substitute counsel in pre-trial and trial preparation. The lawyer also may continue to represent the party involved in most pre-trial proceedings. Pointing out that Rule 3.7(a) by its terms extends only to prohibit advocacy at trial, the Opinion declined to join ABA **Informal Opinion 89-1529** in holding that a lawyer also may not argue a pretrial motion where the lawyer's testimony is disputed and material to a contested issue being decided before trial. The Opinion stated, however, that once it becomes apparent that a lawyer likely would be a necessary witness at trial, he must inform the client of the development and seek the client's consent to continuing the representation, and it details disclosures that should be made to the client in these circumstances.

DC Ethics Opinion 78 (1979), in the course of answering a number of questions about a government lawyer's participating in certain proceedings affecting clients he had represented while in private practice, observed in passing that affidavits of counsel exchanged and filed in litigation do not necessarily trigger the prohibition of DR 5-101(B).

3.7:300 An Affiliated Lawyer as Advocate (Imputed Disqualification)

- Primary DC References: DC Rule 3.7(b)
- Background References: ABA Model Rule 3.7(b), Other Jurisdictions
- Commentary: ABABNA § 61:510; ALI-LGL § 108, Wolfram § 7.5

All the seemingly relevant decisions and opinions are under the Code, which, as noted in 3.7:102 above, provided for automatic imputation to a law firm of a lawyer's disqualification from serving as advocate and witness. That is no longer the case under the Model Rules or the DC Rules. The relevance of the decisions and opinions is therefore questionable. In **Council for the Nat'l Register of Health Serv. Providers in Psychology v American Home Assurance Co., 632 F. Supp. 144 (DDC 1985)**, defendants had moved to disqualify plaintiff's counsel, pursuant to DR 5-102(A), on the ground that a partner of his "ought" to testify for the plaintiff. The plaintiff's executive officer had filed an affidavit saying that plaintiff preferred to forgo the testimony of that partner; but the defendant argued that plaintiff's decision was overridden by the DR's use of the verb "ought" and asserted that in any event defendant might call the partner as a witness. The court denied the motion to disqualify, holding that the plaintiff had a right to decide not to call a particular witness; it observed in addition that plaintiff had another witness on the subject that it could offer, and in any event defendant's calling the lawyer as a witness would not disqualify the firm. The court also held that disqualification would impose on the plaintiff undue hardship under DR 5-101(B)(4); and in addition asserted that because the testimony would be solely about the nature and value of legal services provided by the law firm, the exception in DR 5-101(B)(3) would also apply.

In **DC Ethics Opinion 148 (1985)**, a government agency had two separate offices of "in house" counsel, one (Office A) representing and providing legal advice to the agency regarding its daily operations and administration, and the other (Office B) representing and advising the commissioners regarding the application of the agency's substantive regulations. One of the issues treated in the Opinion was whether, if the lawyer in Office B were asked to be a witness in a proceeding involving a complaint by an employee against the agency, and the agency was represented in the proceeding by a lawyer in Office A, the imputed prohibition of DR 5-101(B) and DR 5-102(A) would apply. The Opinion states that that prohibition would not apply unless the two in-house counsel offices were "institutionally so intimate as to make them indistinct for practical purposes."

DC Ethics Opinion 132 (1983) addressed the question whether the prohibition of DR 5-101(B) and DR 5-102(A) would apply where a *former* colleague of the lawyer acting as advocate was to appear as a witness adverse to the lawyer's client. The Opinion concluded that the prohibition did not apply but noted that the personal relationship

between the two lawyers in such circumstances might be such that a lawyer acting as advocate would not be free of compromising influences and loyalties, and would therefore be barred from continuing the representation by DR 5-101(A).

DC Ethics Opinion 125 (1983) responded to an inquiry by a judge who was faced with a motion to disqualify a lawyer from representing two of the lawyer's partners in litigation relating to a construction contract. The Opinion recognized that the circumstances before it were different from those in **DC Ethics Opinion 44** (discussed below), in that here it was the partners individually, and not their law firm, who were parties to the case (and, respectively, counsel and prospective witnesses). The Opinion concluded, nonetheless, that despite the literal language of DR 5-101(B), the policies underlying that rule did not apply, and therefore neither should the rule's prohibition. Although the Opinion explicitly states that it should not be read to apply to circumstances other than those addressed in the Opinion (or in **Opinion 44**), the reasoning is such as to call into question the automatic imputation of an individual lawyer's disqualification as advocate/witness more generally — an imputation that, of course, is no longer automatic under Rule 3.7(b).

DC Ethics Opinion 44 (1978) concluded that DR 5-101(B) and DR 5-102(A) did not apply where a law firm was represented in litigation by a lawyer affiliated with the firm, and other lawyers in the firm would be witnesses at the trial.

See also **O'Neil v. Bergan** [discussed under 3.7:200 above].

3.8 Rule 3.8 Special Responsibilities of a Prosecutor

3.8:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.8
- Background References: ABA Model Rule 3.8, Other Jurisdictions
- Commentary:

3.8:101 Model Rule Comparison

DC Rule 3.8 is significantly different from MR 3.8, reflecting in part the fact that a special subcommittee of the Jordan Committee was appointed to consider and recommend rules specifically governing prosecutors. The end result is that none of the paragraphs of the DC Rule corresponds exactly to any paragraph of the Model Rule, and four of the paragraphs of the latter have no corresponding provision whatever in the DC Rule: paragraph (b), calling for a prosecutor to make reasonable efforts to ensure that the accused has had a reasonable opportunity to obtain counsel; paragraph (c), prohibiting a prosecutor from seeking to obtain from an unrepresented person a waiver of pretrial rights; paragraph (e), calling on prosecutors to exercise reasonable care to prevent others assisting or associated with the prosecutor from making extrajudicial statements that would violate Rule 3.6 — although Comment [2] to the DC Rule addresses this subject; and paragraph (f), regarding subpoenas to lawyers in grand jury or other criminal proceedings (although as to this last provision, the DC Bar Board of Governors recommended a similar provision, which was rejected by the Court of Appeals).

Paragraph (a) of DC Rule 3.8, prohibiting a prosecutor from invidiously discriminating in deciding to investigate or prosecute, has no parallel in the Model Rule.

Paragraph (b) of the DC Rule, prohibiting a prosecutor from filing or maintaining a charge that he or she knows is not supported by probable cause, is close to paragraph (a) of the Model Rule, which requires a prosecutor to "refrain from prosecuting" such a charge.

Paragraph (c) of the DC Rule, forbidding a prosecutor to take to trial a charge that the prosecutor knows is not supported by prima facie evidence of guilt, essentially elaborates the prohibition of paragraph (b), and so also relates to paragraph (a) of the Model Rule.

Paragraph (d) of the DC Rule, saying that a prosecutor may not intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense, has no parallel in the Model Rule.

Paragraph (e) of the DC Rule, regarding intentional failure to disclose evidence to the defense, is fairly close to paragraph (d) of the Model Rule. However, while the Model

Rule provision requires disclosure of information "known to" the prosecutor to negate or mitigate a defendant's guilt, the DC Rule substitutes "knows or reasonably should know." Additionally, the DC Court of Appeals modified the provision as recommended by the Jordan Committee and the DC Bar Board of Governors to make the prosecutor's obligations arise only upon request. Such a request is not a prerequisite to the prosecutor's obligation under the Model Rule.

Paragraph (f) of the DC Rule, prohibiting prosecutors' making extrajudicial statements that serve to heighten condemnation of the accused and serve no legitimate law enforcement purpose, is very close to — and indeed, was the model for -- a similar prohibition that was added to the Model Rule as paragraph (g) in 1994 in connection with the amendments to Model Rule 3.6 that were occasioned by the Supreme Court's decision in **Gentile v. State Bar of Nevada, 510 U.S. 1030 (1991).** That provision was redesignated as paragraph (f) of the Model Rule in 2002.

The DC Rule does not, however, include any provision requiring prosecutors to exercise reasonable care to prevent others from making improper extrajudicial comments, which would correspond to the Model Rule provision, originally a separate paragraph (e) but in 2002 added as a second clause to the redesignated paragraph (f). As stated below, the DC Rule does have a Comment pointing out that prosecutors have a responsibility for the conduct of others under Rule 5.3.

Up until 2006, DC Rule 3.8 had a final paragraph (h), prohibiting prosecutors from peremptorily striking jurors on the ground of race, religion, national or ethnic background, or sex, which had no parallel in the Model Rule. The single change made in 2006 to the black letter text of the DC Rule, on the recommendation of the Rules Review Committee, was to move that prohibition, in slightly different form, to DC Rule 3.4, where it became a prohibition applicable to all lawyers, and not just prosecutors. (See 3.4:101, above.)

The DC Rule originally omitted all but Comment [1] of the five Comments to the Model Rule but added new Comments [2] and [3], both elaborating on extrajudicial statements by prosecutors and, in the case of Comment [2], pointing out that prosecutors are also subject to all of the other Rules, and notably Rule 5.3, regarding responsibility for activities of nonlawyers. In 2002, a new Comment [6] was added to the Model Rule, elaborating on a prosecutor's responsibilities, under Rule 5.1 as well as 5.3, with respect to both lawyers and nonlawyers who work for or are associated with the prosecutor's office, as reflected in paragraph (f) of the Rule.

As of December 2006, there were no DC ethics opinions applying either DC Rule 3.8 or its Code antecedents, though there was some pertinent judicial precedent as discussed below.

3.8:102 Model Code Comparison

This Rule has just two antecedents in the Model Code. DR 7-103(A) provided that a prosecutor must not file charges that are not supported by probable cause, and DR 7-103(B) provided that a prosecutor must make timely disclosure of evidence tending to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. There are no DC ethics opinions or reported court decisions applying either of these provisions.

3.8:200 The Decision to Charge

- Primary DC References: DC Rule 3.8(a)-(c)
- Background References: ABA Model Rule 3.8(a), Other Jurisdictions
- Commentary: ABABNA § 61:601; ALI-LGL § 97, Wolfram § 13.10

Both the DC Rule and the Model Rule prohibit a prosecutor bringing or maintaining a charge not supported by probable cause. Probable cause, by its very nature, is a murky legal concept: thus, there are numerous reported cases in which prosecutors and defendants argue about whether there was probable cause to search or to arrest. There are, however, no reported cases in DC where a court has addressed whether a criminal charge or prosecution was supported by probable cause.

If probable cause exists, a prosecutor generally has extremely broad discretion in determining what charge to file, and whether or not to prosecute at all. **Bordenkircher v. Hayes, 434 US 357, 364 (1978)**. In other words, a prosecutor is under no ethical duty to prosecute all cases supported by probable cause. Applying this rule, the DC Court of Appeals held in **In re J.J.Z., 630 A.2d 186 (DC 1993), cert. denied, 114 S. Ct. 1651 (1994)**, that when the government seeks to dismiss a neglect petition before trial, the court must grant the motion, even if the guardian *ad litem* representing the putatively neglected child opposes it. Although neglect proceedings are civil, the court noted that the government's function was prosecutorial in nature, and thus, requiring the government to proceed with a charge it no longer believed supportable would violate its ethical duties under Rule 3.8. The prosecutor has broad discretion in this area, because courts have recognized that a decision of this type is "particularly ill-suited to judicial review." **Wayte v. United States, 470 US 598, 607 (1985)**. The discretion is not unfettered, however. A prosecutor may not base his or her decision to charge on an impermissible factor such as race or religion. **Bordenkircher, 434 US at 364**. Nor may a prosecutor deliberately treat someone differently in the decision to charge and/or prosecute based on the defendant's exercise of his or her constitutional rights. In **Fedorov v. United States, 600 A.2d 370 (DC 1991)**, the court held that the US Attorney's policy of not diverting protest cases into DC's pretrial diversion program for first-time offenders established a prima facie showing of selective prosecution. In **Dixon v. District of Columbia, 394 F.2d 966 (DC Cir 1968)**, the court held that it was impermissible to reinstate criminal traffic charges against a defendant in retaliation for the defendant's filing of police misconduct complaints. It should be noted, however, that none of these cases resulted in any reported disciplinary proceedings. (The same is true of the requirement of disclosure of information to a defendant. See 3.8:500, below.) Moreover, the defendant claiming selective prosecution must meet a heavy burden. In **Washington v. United States, 434 A.2d 394 (DC 1980) (en banc)**, the court held that a defendant facing trial for assault, who was reindicted and charged with assault with intent to kill, had not asserted a valid claim of vindictive prosecution. The court noted that prosecutors have the power to reevaluate the seriousness of an offense after an indictment has come down. Without a showing that the prosecutor had done so for a retaliatory or discriminatory motive, the defendant had not stated a claim for

vindictive prosecution. Absent motives of prejudice, political animus, or revenge, the prosecutor's office enjoys wide discretion in its decision to charge and maintain charges.

3.8:300 Efforts to Assure Accused's Right to Counsel

- Primary DC References:
- Background References: ABA Model Rule 3.8(b), Other Jurisdictions
- Commentary: ABABNA § 61:605; ALI-LGL § 97, Wolfram § 13.10

This provision of the Model Rule is not included in the DC Rule.

3.8:400 Seeking Waivers of Rights from Unrepresented Defendants

- Primary DC References:
- Background References: ABA Model Rule 3.8(c), Other Jurisdictions
- Commentary: ABABNA § 6:605, ALI-LGL § 97, Wolfram § 13.10

This provision of the Model Rule is not included in the DC Rule.

3.8:500 Disclosing Evidence Favorable to the Accused

- Primary DC References: DC Rule 3.8(e)
- Background References: ABA Model Rule 3.8(d), Other Jurisdictions
- Commentary: ABABNA § 61:606; ALI-LGL § 97, Wolfram § 13.10.5

Under **Brady v. Maryland, 373 US 83 (1963)**, a prosecutor has a duty to disclose to the defense all material in his or her possession that tends to exculpate the defendant. This is a constitutional obligation, so that a jurisdiction may require more of a prosecutor, but not less. Under DC Rule 3.8(e), a prosecutor is not required to disclose this evidence until it is requested by the defense; it is not a spontaneous obligation. There is no case in point, but this qualification is probably constitutional. DC courts have defined "exculpatory" broadly. For instance, in **Smith v. United States, 666 A.2d 1216 (DC 1995)**, the court held that failure to disclose prior inconsistent statements by a prosecution witness violated **Brady**. Under the Model Rule, and case authority following **Brady**, failure to disclose evidence is an ethical violation only if the individual prosecutor knows that the evidence tends to negate the accused's guilt. See, *e.g.*, **Giglio v. United States, 405 US 150 (1972)**, holding that where the prosecutor did not know that another prosecutor had promised a witness immunity in exchange for testimony, there was no ethical violation. Under the DC Rule, on the other hand, the touchstone is whether the prosecutor knows or reasonably *should* know. The importance of this distinction has not been tested. It should be noted that there is a distinction between whether the defendant's due process rights have been violated (which can happen innocently) and whether the prosecutor has violated the rules of ethics, which even under the DC rule require some scienter — reason to know. There are no reported DC cases in which a prosecutor has been disciplined for such a violation. The due process issue arises often in criminal appeals, but there are no DC cases that address this situation as an ethical violation. The remedy for a **Brady** violation is generally overturning the defendant's conviction, but it appears that the prosecutor responsible for violating **Brady** seldom undergoes disciplinary action for the misconduct. See, **Lynn Morton, "Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?" 7 Geo. J. of Legal Ethics 1083 (1994)**. Moreover, drastic remedies such as suppression of evidence or dismissal will be applied only in cases where the misconduct is so egregious that it violated the defendant's due process rights. **Smith v. Phillips, 455 US 209, 218 (1982)**. Where there has been no constitutional violation, there is generally no judicial response to this sort of prosecutorial misconduct. One commentator has suggested that this shows a reluctance on the part of the courts to pursue complaints that may be brought by resentful defendants. See **Wolfram, Modern Legal Ethics § 13.10.2, at 761 (1986)**. According to a 1987 law review article, as of that date, DC had no record of any formal complaints ever being filed with the Bar disciplinary authorities for **Brady** violations. **Richard Rosen, "Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger," 65 N.C. L. Rev. 693 (1987)**.

3.8:600 Monitoring Extrajudicial Statements by Law Enforcement Officials

- Primary DC References: DC Rule 3.8
- Background References: ABA Model Rule 3.8(e), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 97, Wolfram § 13.10

Paragraph (e) of the Model Rule, imposing on prosecutors the obligation to exercise reasonable care to prevent nonlawyer personnel assisting them from making statements prohibited to the lawyer by Rule 3.6, is not included in the DC Rule, but the point is covered by Comment [2] to the DC Rule. See also 3.8:800 below, about the prohibition on prosecutors themselves making extrajudicial statements.

3.8:700 Issuing a Subpoena to a Lawyer

- Primary DC References:
- Background References: ABA Model Rule 3.8(f), Other Jurisdictions
- Commentary: ABABNA § ; ALI-LGL § 97, Wolfram §

The DC Bar Board of Governors proposed adding a paragraph (j) to DC Rule 3.8, which would have been similar to paragraph (f) of the Model Rule, restricting prosecutors' issuance of subpoenas to defense lawyers, but the DC Court of Appeals declined to adopt it. Thus, the DC Rule has no provision regarding subpoenas to a lawyer.

3.8:800 Making Extrajudicial Statements

- Primary DC References: DC Rule 3.8(f)
- Background References: ABA Model Rule 3.8(g), Other Jurisdictions
- Commentary: ABABNA § 61:609, ALI-LGL § 109; Wolfram § 12.2.2

The only reported District of Columbia case involving DC Rule 3.8(f) is **In re Gansler, 889 A.2d 285 (DC 2005)**, a reciprocal disciplinary matter involving a Maryland State's Attorney who was also a member of the DC Bar and who had been reprimanded by the Maryland authorities for extrajudicial statements about the defendants in three criminal cases in Maryland which were found to have violated Maryland Rule 3.6(a). In one of those cases, at a press conference at which the police announced that the defendant would be charged with the murder of a female jogger, the respondent had stated that the suspect had confessed to the murder and furnished specific information about the surrounding circumstances, including "incredible details that only the murderer would have known." In the second case, also at a press conference at which the police announced the arrest of a suspect, in this case for murdering a priest, the respondent declared that the police had been "able to determine definitively that it had been [the suspect] who had committed the crime," and then expressed his opinion that "we have found the person who committed the crime," and that the case against him "will be a strong case." In the third and final case, after the Maryland Court of Appeals had reversed the conviction of a defendant for murder of a boy, the boy's mother and a nurse, the respondent had announced, in connection with a possible retrial, that he had decided to offer the defendant a plea bargain, and that the defendant would have six weeks to make a decision. The Maryland Court had found that on each of these three occasions the respondent had violated Maryland Rule 3.6(a), which in critical part prohibits a lawyer who "is participating or has participated in the investigation or litigation of a matter," from making an "extrajudicial statement that the lawyer knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." The DC Court of Appeals noted that although DC Rule 3.6 has a similar prohibition on extrajudicial statements, that prohibition applies only to situations where the lawyer is "engaged in a case being tried to a judge or jury," and all involved were agreed that because of this limitation, it did not apply here. Id. at 289 n. 3. However, the Board on Professional Responsibility concluded, and the Court agreed, that the respondent's conduct had violated DC Rule 3.8(f)'s prohibition on a prosecutor in a criminal case making [except where necessary for a legitimate law enforcement purpose] "extrajudicial statements which serve to heighten condemnation of the accused."

There are no other reported DC cases, under either DC Rule 3.8(f) or DC Rule 3.6, where prosecutors were disciplined for statements to the media. In **Gentile v. State Bar of Nevada, 501 US 1030 (1991)**, the Supreme Court, in addressing the application of Nevada's Rule 3.6 (which was identical to Model Rule 3.6 as it then stood) to a press conference by a defense lawyer, gave no indication that its decision would have been different had it been a prosecutor commenting on a pending criminal case. Of course, a

prosecutor still has every lawyer's duty of confidentiality, and this may affect what can be said publicly. Moreover, Comments [2] and [3] to DC Rule 3.8 emphasize ethical considerations in a prosecutor's making extrajudicial comments. Comment [2] clarifies that prosecutors, like all other lawyers, are subject to the strictures of Rule 5.3, which makes lawyers responsible for conduct of nonlawyers under their supervision that would violate the Rules of Professional Conduct if performed by a lawyer. Thus, it seems apparent that prosecutors may not direct nonlawyers under their supervision or control to make prejudicial extrajudicial statements. It is not clear, however, that this comment would apply to statements made by law enforcement officials not under the control of the prosecutor's office. Comment [3] makes clear that a prosecutor may announce the status of an investigation or a pending case. In addition, Comment [3] asserts that the prosecutor may respond publicly to extrajudicial allegations on the part of the defense.

3.8:900 Peremptory Strikes of Jurors

- Primary DC References: DC Rule 3.8(h)
- Background References: Other Jurisdictions
- Commentary:

Under the line of Supreme Court precedents that commenced with **Batson v. Kentucky, 476 US 79 (1986)**, peremptory strikes may not be used on the basis of race by either prosecutors or defense counsel, in either civil or criminal trials, see **Batson, 476 US at 89** (prosecutor's strikes in criminal trial); **Georgia v. McCollum, 505 US 42, 59 (1992)** (defense strikes in criminal trials); **Epps v. United States, 683 A.2d 749 (DC 1996)** (sustaining trial court ruling that defense counsel's striking white jurors was improper); **Edmonson v. Leesville Concrete Co., 500 US 614, 631 (1991)** (civil trials); **Safeway Stores, Inc. v. Buckmon, 652 A2d 597, 602 (DC 1994)** (same). Gender is also a constitutionally impermissible ground for striking jurors, **J.E.B. v. Alabama ex rel. T.B., 511 US 127 (1994)**, but age is not, **Baxter v. United States, 640 A2d 714 (DC 1994)**. DC Rule 3.8(h) extends the prohibition against peremptory strikes on grounds of race or gender insofar as it applies to prosecutors in criminal cases, to strikes based on religion and national or ethnic background. There is, however, no ethical prohibition regarding strikes on any ground by defense counsel in criminal cases, or by anyone in civil cases. There are no reported instances of a prosecutor's being disciplined for violating the DC Rule. Nor, looking in the other direction, have the additional impermissible grounds stated in Rule 3.8(h) been availed of to reverse a criminal conviction. A few criminal defendants in DC have been successful in having their convictions reversed on the ground of improper prosecutorial strikes. These were all cases of strikes based on race or sex; in such cases, the defendant has the burden of making a prima facie showing that the method of selecting and impaneling the jury "raise[s] the necessary inference of purposeful discrimination." **Little v. United States, 613 A.2d 880, 885 (DC 1992)**. The burden then shifts to the prosecutor to provide a race- or gender-neutral explanation for his or her challenges. However, **Batson** warned that this explanation need not be a reason that makes sense, but only a reason that does not deny equal protection. **476 US at 97-98**. The court will entertain a showing by the defendant that the reasons proffered by the prosecutor are pretexts, if the defendant can show different treatment of other jurors with the same characteristics. **Nelson v. United States, 649 A.2d 301, 311 (DC 1994)** (holding defendant had not made a prima facie showing of gender discrimination in eliminating male jurors in a statutory rape case absent showing that female jurors with the same characteristics offered as reasons for striking by the prosecutor were permitted to remain on the panel). The court must then determine whether the defendant has met his or her burden of establishing purposeful discrimination. *Id.* In the District of Columbia, this question, as it bears on strikes allegedly based on race, is more closely scrutinized if the crime itself is racially charged. Thus, in **Tursio v. United States, 634 A.2d 1205 (DC 1993)**, the defendant, a non-black Latino, was charged with the racially-motivated murder of a black man. The prosecution witnesses were black; the defense witnesses were white, and the case would turn on which set of witnesses the jury believed. In those circumstances, the court held

that the government had a heavier burden to overcome the defendant's prima facie case than it would have had in a case not so charged with racial division. *Id.* at 1210. However, in general, the court does not apply such close scrutiny. In part, in cases of racial strikes, this is due to the fact that the citizenry of the District of Columbia is preponderantly black. "Given the composition of the typical venire in the District of Columbia, it is not particularly surprising when all of the persons struck by the prosecutor are black." **Evans v. United States, 682 A.2d 644, 650 (DC 1996)** (citations omitted).

3.9 Rule 3.9 Advocate in Nonadjudicative Proceedings

3.9:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 3.9
- Background References: ABA Model Rule 3.9, Other Jurisdictions
- Commentary:

3.9:101 Model Rule Comparison

The only substantive differences between DC Rule 3.9 and its Model Rule counterpart lie in the other Rules that they each incorporate by reference. Each of them incorporates by reference Rule 3.4(a) through (c) and the entirety of Rule 3.5, but as has been shown (in 3.4:101 and 3.5:101 above) the DC Rule versions thus referred to differ from the Model Rule versions. The DC Rule also incorporates the entirety of DC Rule 3.3 while the Model Rule incorporates only paragraphs (a) through (c) of Model Rule 3.3, and not the other paragraph of that Rule, which is paragraph (d). But as has again been shown (in 3.3:101, above) the two versions of Rule 3.3 differ substantially, and one of those differences is that the DC version does not include any provision corresponding to paragraph (d) of Model Rule 3.3, which is the paragraph that is excluded from Model Rule 3.9's incorporation by reference.

That paragraph (d) of Model Rule 3.3 addresses a lawyer's obligations to a *tribunal* in an ex parte proceeding, and so is not appropriately included in a rule that, like Rule 3.9, is concerned with non-adjudicative proceedings. Prior to the 2002 amendments pursuant to the Ethics 2000 recommendations, however, despite Model Rule 3.9's recognition that a reference to ex parte proceedings before a tribunal didn't belong in a Rule dealing with non-adjudicative proceedings, that Rule by its terms applied to "a lawyer representing a client before a legislative or administrative *tribunal,"* while the DC Rule spoke of a lawyer representing a client before a "legislative or administrative *body."* The 2002 amendments to the Model Rules eliminated the anomalous use of the term "tribunal" by changing the pertinent language of Model Rule 3.9 to refer to a "legislative *body* or administrative *agency*." This change was evidently prompted by the fact that the 2002 amendments had added *tribunal* as a defined term in the new Rule 1.0, Terminology. The DC Rules already included such a defined term, and in 2006 DC Rules' definition of the term was conformed to the Model Rules' definition.

3.9:102 Model Code Comparison

This Rule had no direct counterpart in the Model Code. However, DR 7-106(B)(2) provided that "[i]n presenting a matter to a tribunal, a lawyer shall disclose . . . [u]nless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him." EC 7-15 stated that a lawyer "appearing before an administrative agency . . . has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 stated that "[w]hen a lawyer appears in connection with proposed legislation, he . . . should comply with applicable laws and legislative rules." And EC 8-5 stated that "[f]raudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a . . . legislative body . . . should never be participated in . . . by lawyers." The Model Code, like the DC Rules, defined the term "tribunal," albeit somewhat differently. The Model Code's Definition (6) reads: "'Tribunal' includes all courts and all other adjudicatory bodies."

3.9:200 Duties of Advocate in Nonadjudicative Proceedings

- Primary DC References: DC Rule 3.9
- Background References: ABA Model Rule 3.9, Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 104, Wolfram § 13.8

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

4.1 Rule 4.1 Truthfulness in Statements to Others

4.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 4.1
- Background References: ABA Model Rule 4.1, Other Jurisdictions
- Commentary:

4.1:101 Model Rule Comparison

The black letter text of DC Rule 4.1 is, and has always been, identical to Model Rule 4.1. The Ethics 2000 Commission recommended no changes to the text of the Model Rule, and neither did the DC Rules Review Committee with respect to the DC Rule.. However, there were from the time the DC Rule was first adopted some slight differences in two of the Comments to the Rule. The Ethics 2000 Commission recommended changes, adopted in 2002, in all three of the Comments to the Model Rule, and the DC Rules Review Committee recommended and the DC Court of Appeals adopted in 2006 the same changes in Comments [1] and [2] to the DC Rule, and slightly different changes in Comment [3] to the DC Rule.

The resulting differences in the Comments to the two versions of Rule 4.1 are as follows. The DC Rule's Comment [1] has a final sentence, not found in the corresponding Comment to the Model Rule, stating that "third person" as used in both paragraphs of the rule means a person or entity other than the lawyer's client. The DC Rule's Comment [2] emphasizes in each of the first two sentences that the rule prohibits only *material* false statements, and has a final sentence saying that there may be other situations besides those mentioned in the Comment where statements are not ordinarily taken as statements of material fact; the corresponding Comment to the Model Rule has neither of these features. Prior to the changes made in 2002 to the Model Rule and 2006 in the DC Rule, Comment [3] to Rule 4.1 was identical in the two versions. In the 2002 changes, however, the caption before the Comment to the Model Rule was modified to add <u>Crime or</u> before <u>Fraud by Client</u>; no such change has been made in the DC Rule's version. The Comment itself was also substantially modified in connection with the 2002 changes, to explain that a lawyer's duty under this paragraph (b) of the Rule is a "specific application" of the lawyer's duty under Rule 1.2(d); to explain the remedial measures lawyer may be required to take to avoid assisting client crime or fraud, including, where necessary, disclosure in "extreme" cases; and to make clear that disclosure is permitted only to the extent allowed by Rule 1.6. The 2006 amendments to the DC Rule included almost identical changes to Comment [3], differing from the Model Rule counterpart only in the language in which reference is made to information protected by Rule 1.6 (reflecting the differences in the two versions of that Rule), and in

the addition to the DC Rule's Comment of a sentence elaborating on the bearing of Rule 1.6 to this Rule..

4.1:102 Model Code Comparison

Paragraph (a) of DC Rule 4.1, like its Model Rule counterpart, is substantially similar to DR 7-102(A)(5), which stated that "[i]n his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact." The principal difference of substance between the two provisions is that Rule 4.1(a)'s prohibition is limited to false statements made to third persons (while Rule 3.3(a)(1) separately prohibits such statements to a tribunal), whereas DR 7-102(A)(5) does not limit the persons or entities to whom false statements are forbidden. Paragraph (b) of the Rule, also like its Model Rule counterpart, is somewhat similar to DR 7-102(A)(3), which provided that a lawyer shall not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal," but it is more narrowly limited to disclosures necessary to avoid assisting a crime or fraud by the client, and like paragraph (a) is limited to communications with third persons.

4.1:200 Truthfulness in Out-of-Court Statements

- Primary DC References: DC Rule 4.1
- Background References: ABA Model Rule 4.1, Other Jurisdictions
- Commentary: ABABNA § 71-201, ALI-LGL § 98, Wolfram § 13.5

The term "third person" in Rule 4.1(a) includes opposing counsel. In **In re Zeiger, 692 A.2d 1351 (DC 1997)**, the respondent, who had represented a client in a personal injury action arising from an automobile accident, admitted that he had altered his client's hospital records before producing them to counsel for the insurance company. The records indicated that the client was intoxicated at the time of the accident. Respondent argued that he deleted the references to his client's alcohol content following the accident and the references to his client's alcoholism and treatment because the information was "immaterial and extremely prejudicial." *Id*. at 1355. The Board on Professional Responsibility found, however, and the Court upheld the finding, that respondent had violated Rule 4.1(a), as well as Rules 3.4(a) (altering, destroying, or concealing evidence), and 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). Similarly, in **In re Pierson, 690 A.2d 941 (DC 1997)**, a lawyer who was disbarred for misappropriating client funds, in violation of Rule 1.15(a), was also found to have violated Rule 4.1(a) (along with Rule 8.4(c)) for falsely stating to opposing counsel that she had settlement money in her possession when in fact she had spent the money to pay her law firm's bills, and for later falsely stating that the settlement money was in her escrow account. As indicated by these two cases, misrepresentations found to violate Rule 4.1 are frequently also found to violate Rule 8.4(c)) (and this was also true of their predecessor provisions in the Code, DR 7-102(A)(5) and DR 1-102(A)(4)).

Despite Comment [1]'s assertion that the phrase "third person" means a person or entity other than the client, Rule 4.1(a) has been held applicable to misrepresentations made to an intermediary for the client. **In re Sumner, 665 A.2d 986 (D.C. 1995)** (finding violation of Rule 4.1(a) by reason of statements to the intermediary to the effect that the lawyer had ordered and received the transcripts of the client's trial, when in fact he had never ordered the transcripts).

There was no doubt that DR 7-102(A)(5) applied to misrepresentation to the lawyer's client. Thus, in **In re Reid, 540 A.2d 754 (DC 1988)**, the Court approved reciprocal discipline of a lawyer who had been suspended in Maryland for manifold misconduct which included misrepresenting to his client that the amount of a settlement received in a personal injury matter was $6,000 when in fact it was $9,000, in violation of DR 7-102(A)(5). But *cf.* **In re Schneider, 553 A.2d 201, 206 n.5 (DC 1989)** (observing that while the lawyer might have been charged with violating DR 7-102(A)(5) for altering travel reimbursement forms submitted to his firm, the "provisions of DR 7-102 are directed mainly at dealings with tribunals and third parties").

DC Ethics Opinion 203 (1989) addressed a lawyer's employing as an investigator a union representative who had referred a case to him. The Opinion warned that the arrangement, while not a per se violation of the disciplinary rules, presented ethical risks. Among other things, the Opinion pointed out that the investigator could not do anything that the lawyer could not ethically do, including knowingly making false statements of fact that would violate DR 7-102(A)(5).

DC Ethics Opinion 126 (1983) held that the fact that a client had failed to make required payments on a contribution order would be a client "secret" or "confidence" that a lawyer would ordinarily be forbidden to disclose, but that, when the lawyer must respond to a court's inquiry as to whether the client has complied with the contribution order, a failure to disclose such information would violate DR 7-102(A)(3) and (5).

4.1:300 Disclosures to Avoid Assisting Client Fraud [see also 1.6:370]

- Primary DC References: DC Rule 4.1(b)
- Background References: ABA Model Rule 4.1(b), Other Jurisdictions
- Commentary: ABABNA § 71-203, ALI-LGL § 66, Wolfram §§ 12.6, 13.3

Rule 4.1(b) makes clear that a lawyer's obligation to make disclosures in order to prevent criminal or fraudulent acts by a client is trumped by Rule 1.6's requirement that confidences and secrets be preserved. Where confidences or secrets are involved, therefore, Rule 4.1(b) requires disclosure only in circumstances where Rule 1.6 allows disclosure. Those circumstances are set out in DC Rule 1.6(c) and (d).

DC Ethics Opinion 219 (1991) addressed the interplay between a regulation of the U.S. Patent and Trademark Office and several ethical rules, including Rule 4.1(b). The regulation, 37 CFR § 10.85(b)(1), provided that a practitioner learning that a client in the course of the representation had perpetrated a fraud upon a person or tribunal must call upon the client to rectify it, and must himself or herself reveal the fraud if the client does not do so. This requirement of disclosure was inconsistent with both DC Rule 3.3(d) (Candor Toward the Tribunal) and Rule 4.1(b), both of which exempt, from the requirements of disclosure they otherwise impose, information protected by Rule 1.6. The Opinion held that in these circumstances the Patent Office regulation would prevail, since DC Rule 1.6(d)(2)(A) permits a lawyer to reveal client confidences and secrets when "required by law or court order" and, in the Legal Ethics Committee's view, "law" for this purpose includes federal regulations having the force and effect of law.

Decisions applying DR 7-102(A)(3) reached a similar result by reason of its requiring disclosure of information whose disclosure is "required by law," since that phrase has been interpreted as including a requirement by court order. Thus, in **In re Reiner, 561 A.2d 479 (DC 1989) (per curiam)**, the Court approved the imposition of reciprocal discipline on a lawyer whom the Virginia disciplinary authorities had found to have violated DR 7-102(A)(3) by failing to comply with an order requiring the lawyer to disclose, via certified letter to all of his clients, opposing counsel and judges before whom he had matters pending, the fact that he had been suspended for other violations. Similarly, **DC Ethics Opinion 124 (1983)** dealt with a lawyer's ethical responsibilities when in the course of a routine Internal Revenue Service audit of the lawyer's firm the names of the firm's clients were sought. Noting that the identity of the clients may be "confidences" or "secrets" protected by DR 4-101, the Legal Ethics Committee considered, *inter alia*, whether, absent client consent, the firm could furnish such client identities in response to an IRS summons and concluded that the firm would remain under an ethical obligation to resist disclosure until the firm "has exhausted available avenues of appeal." In a footnote, the Committee explained that if the IRS obtained a court order to enforce the summons, a lawyer's failure to disclose the information

pursuant to such an order would violate DR 7-102(A)(3). See also **DC Ethics Opinion 126 (1983)**, discussed under 4.1:200, above.

DC Ethics Opinion 153 (1985) addressed a lawyer's obligations when the lawyer learns that a client has committed a fraud upon a tribunal, within the meaning of DR 7-102(B), by reason of non-disclosure of material information to an administrative agency. The Opinion stated that the lawyer must withdraw if the client refuses to rectify the problem; otherwise, the lawyer would run the risk of violating not only DR 7-102(A)(7) (assisting a client in fraudulent conduct) and DR 7-102(A)(4) (engaging in conduct involving fraud) but also DR 7-102(A)(3).

DC Ethics Opinion 119 (1983) addressed, *inter alia*, the ethical propriety of a lawyer's destroying memoranda that were potentially pertinent to future litigation. The Legal Ethics Committee, noting that both federal and District of Columbia law forbids destruction of documents in certain circumstances, observed, not too helpfully, that DR 7-102(A)(3) required that "in deciding whether to destroy the memoranda, the lawyer should take reasonable steps to determine the legality of such destruction."

4.2 Rule 4.2 Communication with Person Represented by Counsel

4.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 4.2
- Background References: ABA Model Rule 4.2, Other Jurisdictions
- Commentary:

4.2:101 Model Rule Comparison

DC Rule 4.2 has always been quite different from the Model Rule, in both substance and form -- and most notably in the fact that whereas the black letter text of the Model Rule has always consisted of a single sentence, the DC Rule comprises four lettered paragraphs. Changes made in the Model Rule in 2002 as a result of the recommendations of the Ethics 2000 Commission and those made to the DC Rules in 2006 pursuant to recommendations of the Rules Review Committee have narrowed the disparity somewhat, but there remain a number of differences.

Even the captions of the two versions of the Rule differed until 2006, when the DC Rule's caption, "Communication Between Lawyers and Opposing Parties," was changed to conform to the Model Rule's "Communication with Person Represented by Counsel."

Paragraph (a) of the DC Rule is largely the same in substance as the single sentence comprising the Model Rule. Until the 2006 amendments, that paragraph, like the caption, referred to a "party" rather than a "person" represented by another lawyer, but this, too, was amended on the Rules Review Committee's recommendation to conform with the Model Rule. Another conforming change then made to paragraph (a) of the DC Rule was the insertion of the phrase "or a court order" after "authorized by law" -- a change that had been made in the Model Rule in 2002. After these changes, there remains just one notable difference between the DC Rule's paragraph (a) and the Model Rule: in the former but not the latter, the phrase "a lawyer shall not communicate" is followed by "or cause another to communicate" (a carryover from DR 7-104(A)(1) of the predecessor Code of Professional Responsibility). However, as was first pointed out in **ABA Formal Opinion 92-362**, Rule 4.2's restrictions on a lawyer's communications do not also apply to the lawyer's client, who has the right to communicate with an opposing party, and the lawyer may properly advise the client of this fact. Recognizing this, what is now the Model Rule's Comment [4], as amended in 2002, includes a statement that the Rule does not prohibit a lawyer from "advising a client concerning a communication that the client is legally entitled to make," and a similar assertion was added in 2006 to the DC Rule's renumbered Comment [2], along with the caveat that the client communication mustn't be "solely for the purpose of evading the restrictions imposed . . . by this Rule."

Paragraphs (b) and (c) of the DC Rule address the scope of Rule 4.2 with regard to communications with employees of a represented organization. Paragraph (b) provides that a lawyer may communicate with a "nonparty employee" of the opposing party without that party's consent, so long as the lawyer's identity and role are disclosed, and paragraph (c) defines a "party," for purposes of application of the Rule to organizational parties, as including a person who has authority to bind the party organization "as to the representation to which the communication relates." These provisions make the District of Columbia by far the most permissive jurisdiction with respect to contacts with employees of an adverse organizational party. The Model Rule addresses organizational parties only in what is now Comment [7] (formerly [4]), which, as amended in 2002, asserts that the Rule's prohibition extends to a "constituent" of a represented organization who "supervises, directs or regularly consults with the organization's lawyer" about the matter or whose act or omission is attributable to the organization. Although the 2002 amendment to the Model Rule's Comment narrowed the Rule's reach a bit by dropping the phrase "a person whose statement may constitute an admission on the part of the organization," it still gives the Model Rule a much broader sweep in barring contact with an opposing organization's personnel than is extended by the DC Rule.

Paragraph (d) of the DC Rule addresses its application to communications with employees of a governmental entity. It states that a lawyer may communicate with "government officials who have the authority to redress the grievances of the lawyer's client," so long as the lawyer discloses to the official who the lawyer is and that the lawyer is representing a client with a claim. This provision is elaborated by what are now Comments [10] and [11]. The Model Rule addresses this subject only in the first sentence of what is now Comment [5], asserting that "communications authorized by law" (which are excepted from the basic prohibition) may include "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."

As is discussed more fully under the subcaption <u>The Justice Department and Rule 4.2</u> in 4.2:220 below, the applicability of Rule 4.2 to investigative activities by or under the supervision of governmental lawyers was for a time a subject of considerable dispute between the Department of Justice and the American Bar Association. When the DC version of the Rules of Professional Conduct was adopted in 1990, however, its Rule 4.2 included a Comment [8] suggested by the then Deputy Attorney General that, unsurprisingly, supported the Department's position on the subject, stating that the Rule "is not intended to regulate the law enforcement activities of the United States or the District of Columbia" and went on to discuss the decisional law in the area at some length. The Peters Committee's review of the DC Rules resulted in a substantially condensed version of Comment [8], which, along with other changes recommended by the Peters Committee, became effective November 1, 1996. The amended Comment, later renumbered as [12], reads as follows:

> This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and

> permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

While the Peters Committee's proposals were being considered, the ABA had amended Model Rule 4.2 and its Comments, among other thing inserting a new Comment [2] that recognized, in a briefer and more concrete way than the DC Comment, that communications authorized by law included "constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings when applicable judicial precedent had approved such activities," but added that the Rule imposed ethical restrictions that went beyond those imposed by constitutional provisions. As revised in 2002, this Comment became part of Comment [5], the reference to judicial precedent was deleted, and additional emphasis was given to the assertion that when communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.

Among the changes made in 2006 to DC Rule 4.2's Comments was the addition to Comment [5] of an assertion that consent of an outside lawyer representing an organization in a matter is not required before communicating with in-house counsel of the organization -- a point not made in the Comments to the Model Rule. In addition, three new Comments to the DC Rule, inspired by changes to the Model Rule's Comments in 2002, were added in 2006. The new Comment [6] makes clear that consent of an organization's lawyer is not necessary for contacting a *former* constituent of the organization, although in making such a contact a lawyer may not seek information that is otherwise protected (derived from the new Comment [7] to the Model Rule); the new Comment [7] states that the Rule does not prohibit communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter (derived from an addition to what is now Comment [4] to the Model Rule); and the new Comment [8], making clear that the Rule makes no exception for circumstances where the communication is initiated or consented to by the other person (copying the Model Rule's new Comment [3]).

The changes made in 2002 to the Model Rule's Comments included one new Comment that the DC Rules Review Committee evidently did not deem worth copying: that is Comment [6], which states that a lawyer who is uncertain as to whether a communication with a represented person will violate the Rule may seek a court order; and that a lawyer may also seek a court order for authorization of an otherwise prohibited communication where necessary to avoid reasonably certain injury

4.2:102 Model Code Comparison

Paragraph (a) is substantially identical to DR 7-104(A)(1). Paragraphs (b), (c) and (d) had no counterparts in the Model Code.

4.2:200 Communication with a Represented Person

- Primary DC References: DC Rule 4.2
- Background References: ABA Model Rule 4.2, Other Jurisdictions
- Commentary: ABABNA § 71-303, ALI-LGL § 99-102, Wolfram § 11.6.2

Note: A major source of frustration arising from Rule 4.2's prohibitions is the situation where a lawyer who has made an offer of settlement to opposing counsel suspects that the offer has not been communicated to that lawyer's client. As discussed under 1.4:101, above, at one point the Legal Ethics Committee proposed to address this problem by amending DR 7-101(A)(1) to impose an explicit duty upon a lawyer who receives an offer of settlement or a proffered plea bargain to communicate it to the lawyer's client. Such a provision was instead incorporated in DC Rule 1.4, as Rule 1.4(c).

In **Cobell v. Norton, 212 FRD 14 (DDC 2002)**, **motion for reconsideration denied, 213 FRD 33 (DDC 2003)**, the Court held that counsel for the defendants in a class action had violated DC Rule 4.2 when they permitted the defendants to send a written notice to individual class members relating to claims made on behalf of the class. In that case there had been a class determination under Fed. R. Civ. P Rule 23(d); the notices sent to class members provided them accounts showing the amount of their possible claims, and told them that unless they challenged the accounts within sixty days they would be bound by them.

DC Ethics Opinion 274 (1997) addressed the applicability of Rule 4.2(a) to public meetings held by a government agency which might be attended both by persons having claims subject to disposition by the agency and by lawyers employed by the agency. The agency involved was the Pension Benefit Guaranty Corporation (PBGC), which administers, among other things, a pension plan termination insurance program, under which it is generally appointed as statutory trustee of a terminated underfunded pension plan. Following such an appointment, the agency's established practice is to send a notice to known plan participants inviting them to attend a meeting convened by the agency, for the purpose of providing general information about the insurance system, describing the general limitations of the statutory guaranty, and answering questions. The meetings are ordinarily conducted by nonlawyer employees of PBGC, but a PBGC staff attorney attends the meeting for the purpose of providing advice to the nonlawyer on the conduct of the meeting. The inquiry to which the Opinion responded concerned a demand, based on Rule 4.2(a), by a lawyer representing 300 beneficiary claimants of a particular failed plan, that PBGC not hold the meeting, but rather deal directly and exclusively with her with regard to the claims of her clients. The Opinion concluded that, for a number of reasons, Rule 4.2(a) was not applicable in these circumstances.

DC Ethics Opinion 263 (1996) addressed the scope of the term "matter" in Rule 4.2(a), concluding that a civil protection order and a contempt proceeding for violation of such an order are the same "matter" for purposes of the Rule, so that a lawyer could not

contact the person subject to the order about modification of its terms without consent of the lawyer representing him only in the contempt proceeding. [**Opinion 263** is more fully dealt with under 1.4:400, above.]

DC Ethics Opinion 321 (2003) [which is discussed more fully under 4.3:200, below], addressing the responsibility of a lawyer for the conduct of an investigator sent to interview a petitioner who was seeking a contempt order against the lawyer's client for violation of a Civil Protection Order (CPO), rejected an argument that if the contempt petitioner had been represented by counsel, Rule 4.2 would not apply because the petitioner was not a party to the contempt proceeding but only a witness. The **Opinion** rejected this argument on the ground that the underlying CPO proceeding and the contempt proceeding arising out of it were both parts of the same "matter" within the meaning of that Rule.

DC Ethics Opinion 258 (1995) concluded that a lawyer proceeding *pro se* is subject to Rule 4.2 just as if the lawyer were representing another person, despite the statement in Comment [1] that "parties to a matter may communicate directly with each other." However, the Opinion states, the Rule applies to a lawyer acting on his or her own behalf only "when a dispute has matured to the point where a person would ordinarily retain counsel" — a distinction that would exclude such things as a lawyer's negotiating with a business over a minor consumer dispute, complaining to a neighbor, or writing a letter of protest on an issue.

All the other precedent is under the Code. In **United States v. Adonis, 744 F Supp 336 (DDC 1990)**, the court found that there had been prosecutorial impropriety in violation of DR 7-104, when the prosecutor was present at parts of interviews of a criminal defendant with a psychiatrist and psychologist, and gave him instructions with respect to the interviews, without notifying the defendant's counsel or giving him an opportunity to be present. The Court held that this misconduct did not justify dismissal of the charges but could be given weight in sentencing.

Boykins v. United States, 366 A.2d 133 (DC 1976), held that DR 7-104 was not violated when FBI agents, questioning a person about a criminal offense of which another was a prime suspect, elicited a confession to a state offense that was not the subject of the investigation.

In **Mintwood v. Fonseca, 47 USLW 2019 (DC Super Ct 1978)**, the court held that agreements with represented tenants, negotiated by the lawyer for a landlord in blatant disregard of DR 7-104(A)(1), were void as obtained through undue influence.

DC Ethics Opinion 331 (2005) held that Rule 4.2 does not prelude a lawyer for one party from communicating with the opposing party's in-house counsel regarding a matter, even when the opposing party has also retained outside counsel on the same matter.

DC Ethics Opinion 215 (1990) concluded that a lawyer is not prohibited by DR 7-104(A)(1) from speaking to a person represented by counsel without consent of that

counsel, when the purpose of the conversation is to determine whether the person will retain the new lawyer and discharge the old one.

DC Ethics Opinion 178 (1987) responded to an inquiry from a lawyer who represented a target of a grand jury investigation and who wanted to interview a witness in the matter who was represented by counsel. That counsel had consented to the interview, but the inquiring lawyer proposed to record the interview secretly and had not so advised the witness's counsel. The Opinion concluded that the consent to the interview had not been informed consent, given that the witness's lawyer was not told of the intended surreptitious taping. The Opinion also concluded that the witness was a "party" within the meaning of the Rule, even though he was only to be a witness, and not a defendant.

DC Ethics Opinion 120 (1983) held that DR 7-104(A)(1) was violated by a lawyer's sending a represented party a copy of a letter to that party's counsel containing a settlement offer.

4.2:210 "Represented Person" (Contact with an Agent or Employee of a Represented Entity)

DC Ethics Opinion 287 (1999) addressed the question whether DC Rule 4.2 prohibits unconsented communications with a *former* employee of an organizational party opponent, and concluded that it does not. The **Opinion** warned, however, that the communicating lawyer in such circumstances must not solicit from such a former employee information that is or reasonably should be known to be "protected by an established evidentiary privilege." To solicit such information, the **Opinion** held, would be to violate Rule 4.4's prohibition on use of "methods of obtaining evidence that violate the legal right of [third parties]." (Moreover, as the **Opinion** pointed out in a footnote, the lawyer's use of such information may violate Rule 8.4(c).) The **Opinion** also asserted that the lawyer, before communicating with the former employee, must disclose his or her identity and the fact of the representation adverse to the former employer. Such disclosure is required by Rule 4.2(b) and Comment [3] with respect to otherwise permissible contacts with *current* employees of an opposing party; the same disclosure with respect to *former* employees is required by Rule 4.3.

In **United States v. Western Electric Co** [discussed in 4.2:220, below], the court observed that a former employee of an organizational party is not a "party" for purposes of Rule 4.2 or DR 7-104, "for he lacks the authority to bind the company."

DC Ethics Opinion 129 (1983) addressed the issue of the permissibility, under DR 7-104(A)(1), of contacts with low-level management employees of a represented corporate party. The opinion, following **ABA Informal Opinion 1410 (1978)**, concluded that the bar on communications with employees of a represented corporate party applies only to individuals who can "commit the corporation because of their authority as corporate officers or employees or for some other reason the law cloaks them with authority"; and that the "commitment" in question must refer to the litigation, not the subject matter of the litigation. Two members of the Committee dissented, taking the position that the Rule barred contact with employees of a corporate party at any level. The view of the Committee majority in this opinion was the source of paragraph (c) of DC Rule 4.2.

In **Pearce v. EF Hutton Group, Inc., 1987 US Dist LEXIS 13236 (DDC 1987)**, a U.S. Magistrate approved a protective order prohibiting counsel for the plaintiff from conducting *ex parte* interviews of employees of the corporate defendant. Plaintiffs urged the position taken by the majority in **DC Ethics Opinion 129** [discussed immediately above], to the effect that the Rule requires consent of opposing counsel only for contacts with employees of the organization who have authority to bind the organization with respect to the pending litigation — the view subsequently embodied in DC Rule 4.2(c) — but the Magistrate adopted instead the dissenting view in the Legal Ethics Committee, to the effect that the Rule barred communications with any employee who could bind the organization, by admissions or otherwise, as to matters that gave rise to the litigation.

4.2:220 Communications "Authorized by Law" — Law Enforcement Activities

Comment [8] to DC Rule 4.2 [discussed at 4.2:101 above] addresses the applicability of the Rule to law enforcement activities.

In **United States v. Lemonakis, 485 F.2d 941, 953-56 (DC Cir 1973), cert. denied, 415 US 989 (1974)**, the court held, in connection with a challenge to the use of conversations recorded by electronic surveillance, that neither the defendant's Sixth Amendment rights nor DR 7-104 had been violated even though the person investigated was known to be represented by counsel, since the matter was still in an investigative stage, and the informant wearing the "wire" was not acting as the "alter ego" of the U.S. Attorney's Office.

In **United States v. Sutton, 801 F.2d 1346 (DC Cir 1986)**, the court upheld the denial of the defendant's motion to suppress tapes of a conversation the defendant had had after the government was aware that he was represented by counsel, holding, following **Lemonakis**, that DR 7-104 did not apply since the taping had occurred at the investigatory stage, before the initiation of judicial proceedings.

In **United States v. Western Elec. Co., 1990-1 Trade Cas. (CCH) ¶68,939 (DDC 1990)**, the court declined to prohibit the US Department of Justice from engaging in communications with former employees of US West in connection with an investigation of that company's compliance with a court decree. The court observed that it was well established that "law enforcement authorities may engage in pre-indictment, pre-arrest or investigative contacts with suspects known to be represented by counsel," [citing **United States v. Lemonakis**, *inter alia*], and that accepting US West's position would effectively require its former employees who might be witnesses to accept representation by company counsel and thereby deprive them of counsel of their own choice.

<u>The Department of Justice and Rule 4.2</u>

The proper application of the policy expressed in Rule 4.2 (and its predecessor, DR 7-104(A)(1)) to law enforcement has been a major area of controversy in recent years. In June 1989, Attorney General Thornburgh issued a memorandum which stated that MR 4.2, if broadly applied, would interfere with legitimate law enforcement techniques and objectives. [The full text of this Memorandum is published as an attachment to **In re Doe, 801 F. Supp. 478, 489-93 (DNM 1992)**.] Thornburgh also announced that the Department would amend the Code of Federal Regulations to provide:

> An attorney employed by the Department, and any individual acting at the direction of that attorney, is authorized to contact or communicate with any individual in the course of an investigation or prosecution

> unless the contact or communication is prohibited by the Constitution, statute, Executive Order, or applicable federal regulations.

In February 1989, the ABA House of Delegates unanimously passed a resolution declaring it to be ABA policy that Department of Justice lawyers may not be given a blanket exemption from the requirements of Rule 4.2. More recently, while some cases have declined to apply Rule 4.2 or DR 7-104 to law enforcement activities, in a number of cases courts have sought to impose sanctions on government lawyers for making direct contacts with represented parties or prosecutors have sought to have portions of state ethics rules held invalid. In such cases, the Department of Justice has taken the position that the conduct of the lawyer was within the "authorized by law" exception to Rule 4.2 or that federal law took precedence over the state ethics rule by virtue of the Supremacy Clause. Both of these propositions have been contested by defense counsel, who have argued, among other things, that no express statute or regulation authorizes the questioned conduct and that the Supremacy Clause is inapplicable for that reason and for the further reason that the state ethics rules are also imposed as federal rules by most federal district courts.

Of particular interest in this connection is a decision that arose out of a criminal case in the DC Superior Court, **United States v. Smith, No. CR-F-9938-88**. In that case, an Assistant United States Attorney made contact directly and through a police detective with a defendant known to be represented by the Public Defender's Office. A judge of the Superior Court held that the federal prosecutor had violated DR 7-104 by having contacts with defendant Smith, and referred the matter to Bar Counsel. See **In re Doe, 801 F. Supp. at 480** (on removal from proceedings of the New Mexico Disciplinary Board in the **Smith** matter). Bar Counsel found that the District of Columbia had no disciplinary jurisdiction over the prosecutor, because the prosecutor was admitted only in New Mexico, and referred the matter to New Mexico authorities. However, in so doing, Bar Counsel:

> rejected entirely the suggestion that Disciplinary Rule 7-104(A)(1) does not apply to criminal proceedings, . . . that the rule does not apply to criminal prosecutors performing their duties . . . [and] that the Supremacy Clause of the United States Constitution creates a bar to the prosecution of an AUSA in a state disciplinary proceeding for a disciplinary violation.

Id. at 481 (quoting Bar Counsel's memorandum). Subsequently, disciplinary proceedings were started in New Mexico. An effort by the United States to enjoin these proceedings failed in both New Mexico, see **In re Doe**, *supra*, and in the District of Columbia, see **United States v. Ferrara, 847 F. Supp. 964 (DDC 1993), aff'd, 54 F.3d 825 (DC Cir 1995)**. The district courts in both **Doe** and **Ferrara** held that the Thornburgh Memorandum was not a federal law for Supremacy Clause purposes and did not shield the AUSA from disciplinary proceedings, though the Court of Appeals in **Ferrara** affirmed dismissal of the suit but on the ground of lack of personal

jurisdiction. The disciplinary proceedings in New Mexico resulted in public censure, which was affirmed by the New Mexico Supreme Court in **In re Howe, 1997 NM LEXIS 158 (1997).**

Hoping to end the ongoing dispute in the courts, the Department of Justice, on November 20, 1992, issued proposed regulations creating "a uniform, bright-line set of rules governing communications with represented persons." 57 Fed Reg 54,737, 54,740. A revised version of the regulations was published for comment on July 26, 1993, 58 Fed Reg 39,978-94, and the regulations were finally adopted on August 4, 1994, 59 Fed Reg 39,928, and now appear at 28 CFR Part 77 — Communications With Represented Persons. The regulations lay down detailed rules as to when and how a lawyer for the federal government may communicate with represented persons in both criminal and civil law enforcement proceedings. Communications authorized by the regulations are intended to constitute communications "authorized by law" within the meaning of MR 4.2 and DR 7-104(A)(1) of the Model Code. The regulations also assert that the Attorney General has exclusive authority over any asserted violation of the regulations.

See in this connection **ABA Formal Opinion 95-396 (1995)**, discussing MR 4.2 generally and, in parts III and X, more particularly the application of the Rule to law enforcement proceedings and the Department of Justice regulations.

4.2:230 Communications "Authorized by Law" — Other

As Comment [1] to the Model Rule suggests, communications "authorized by law" include communications with government officials that are protected by the constitutional right of petition. They also include the service of process by a lawyer on a corporation or other party even though the lawyer knows the party is represented by counsel. See **Hazard & Hodes, The Law of Lawyering § 42.109**.

4.2:240 Communication with a Represented Government Agency or Officer

DC Ethics Opinion 280 (1998), the only authority interpreting DC Rule 4.2(d) to date, held that under that provision a lawyer representing a client before a professional licensing board could properly contact individual board members to discuss both the board's action against the lawyer's client and board members' alleged dissatisfaction with the board's staff and internal operations as they affected the lawyer's client. The Opinion found the two kinds of communication in question to be covered by Comment [7]'s statement that Rule 4.2(d)

> is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducing themselves improperly with respect to aspects of the dispute.

The Opinion also explained the reasoning that led to the inclusion of paragraph (d) in DC Rule 4.2, in terms of the different considerations that apply where the government rather than a private party is the opposing party. Thus, the Opinion asserted that the core concern underlying Rule 4.2, that lawyers are positioned to exploit a layperson's lack of legal knowledge, is not fully applicable in the governmental context because "government officials generally are presumed to be sufficiently capable of resisting legal arguments that are not proper and genuinely persuasive." Moreover, government officials should have the experience and expertise to be competent to decide whether to engage in discussions with opposing counsel.

The Opinion said that the drafters also recognized that in litigation involving a governmental party decision-making authority may be shared by the government and counsel so that responsible government officials may not know of positions taken by counsel. In consequence, "[p]rohibiting direct communications with the governmental party . . . may hinder rather than advance the goal of client control of the proceedings."

Another difference between private and governmental parties mentioned by the Opinion is that, since the government represents the public, the public interest is not just that the government win a case but that the government advance the public interest; and permitting direct contact with government officials facilitates this result.

Finally, the Opinion noted that prohibitions on contacting governmental officials may infringe the First Amendment right of petition, citing in this connection **ABA Formal Opinion 97-408**.

DC Ethics Opinion 199 (1989) addressed a situation where government officials had asked a government lawyer to investigate allegations of impropriety within a particular agency. The lawyer made a written request for access to documents to the head of the agency, who had retained a lawyer to represent him personally. That lawyer insisted

that requests addressed to his client be sent to him rather than directly to the client. The opinion concluded that DR 7-104(A)(1) required that the lawyer's demand be complied with, despite the fact that the investigation could have been done by a layman rather than a lawyer, the fact that the request was in writing, the fact that the inquirer might have been able to get the records without the assistance of the agency head, and the fact that the agency head might have been required by applicable law to produce the governmental files.

DC Ethics Opinion 80 (1979) addressed the application of DR 7-104(A)(1) to communications with government officials. It concluded (1) that the Rule does apply to such communications; (2) that the government officials deemed to be the governmental parties are those who have the "power to commit or bind the government with respect to the subject matter"; and (3) that the Rule applies only where the government is a relatively formal "party" — in litigation, negotiation, licensing, etc. This opinion was an opinion of "broad scope," which had been published for comment in draft form. It was followed by the publication for comment of alternative drafts of revisions of DR 7-104(A), and the ultimate result of that process was paragraph (d) of DC Rule 4.2.

4.2:250 Communication with a Confidential Agent of Non-Client

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

4.3 Rule 4.3 Dealing with Unrepresented Person

4.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 4.3
- Background References: ABA Model Rule 4.3, Other Jurisdictions
- Commentary:

4.3:101 Model Rule Comparison

As originally adopted, DC Rule 4.3 was different in format from its Model Rule counterpart but quite close in substance. While the black letter text of the Model Rule was a single paragraph consisting of two sentences, the DC Rule consisted of an introductory phrase indicating the circumstances in which the Rule's prohibitions applied (i.e., where a lawyer representing a client is dealing with an unrepresented person) followed by two lettered paragraphs setting out the applicable prohibitions. Paragraph (a) prohibited such a lawyer from giving advice to the unrepresented person, other than the advice to have counsel, if that person's interests might be in conflict with those of the lawyer's client, carrying forward the substance of DR 7-104(A)(2). This prohibition was not originally in the text of the Model Rule, but appeared only in its Comment [1]. On the recommendation of the Ethics 2000 Commission, however, in 2002 the prohibition was taken out of the Comment and added to the Rule itself, as a third sentence.

Paragraph (b) of the DC Rule as originally adopted consisted of two sentences, setting out the two provisions that comprised the entirety of the Model Rule, i.e., a prohibition against stating or implying that the lawyer is disinterested; and a requirement that when the lawyer knows the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding.

The only change made in 2006 in the text of the DC Rule, on recommendation of the Rules Review Committee, was to its format: the introductory phrase is now labeled as paragraph (a) and is followed by subparagraphs (1) and (2), containing the prohibitions on giving advice to the unrepresented person and stating or implying that the lawyer is disinterested, respectively; and the remain substantive provision, regarding the obligation of correcting misunderstandings of the unrepresented person, has become paragraph (b) of the Rule.

As originally adopted, Model Rule 4.3 was accompanied by a single Comment, pointing out that an unrepresented person, if not otherwise advised, might assume that a lawyer is disinterested, and, as mentioned above, cautioning that a lawyer should not give advice to such a person, other than advice to get a lawyer. The DC Rule at that time had three Comments, the first of which was largely similar to the Model Rule's Comment. In connection with the 2002 changes to the Model Rules, the sentence in the Model Rule's Comment about a lawyer's giving advice to an unrepresented person was moved

to the text of the Rule and replaced by language pointing out that in order to avoid misunderstanding, a lawyer may need to identify the lawyer's client and explain that the client's interests are adverse to the unrepresented person. In addition, in 2002 a new Comment [2] was added, part of which was copied from Comment [2] to the DC Rule, pointing out that the Rule distinguished between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those where there was no such adverseness of interest. The other part of the new Comment [2] to the Model Rule pointed out that the Rule does not prohibit a lawyer's negotiating the terms of a transaction or settling a dispute with such a person, so long as certain requirements were satisfied. In connection with the 2006 changes to the DC Rules, the substance of this second part of the new Comment [2] to the Model Rule was copied as a new Comment [3] to the DC Rule, and what had been Comment [3] was renumbered as Comment [4]. That latter Comment, which had been added to the DC Rule by the Court of Appeals in connection with its original adoption of the DC Rules in 1990, asserts that the Rule is "not intended to restrict in any way law enforcement efforts by government lawyers that are consistent with constitutional requirements and applicable federal law." This is in effect a companion to Comment [8] to DC Rule 4.2 (discussed in 4.2:101 above).

4.3:102 Model Code Comparison

Paragraph (a) is substantially similar to DR 7-104(A)(2). Paragraph (b) has no direct counterpart in the Model Code.

4.3:200 Dealing with Unrepresented Person

- Primary DC References: DC Rule 4.3
- Background References: ABA Model Rule 4.3, Other Jurisdictions
- Commentary: ABABNA § 71-501, ALI-LGL § 103, Wolfram § 11.6.3

DC Ethics Opinion 321 (2003) addressed the ethical obligations of a lawyer with respect to the conduct of an investigator sent by the lawyer to interview a person not represented by counsel, in the context where the person to be interviewed was seeking a contempt order against the lawyer's client, for violation of a Civil Protection Order (CPO). The **Opinion** recognized that the lawyer's responsibility for the investigator's actions rested on Rules 5.3 and 8.4(a), but that the Rule laying out the standards to be observed was Rule 4.3. The **Opinion** made clear that although only paragraph (a) of Rule 4.3 refers to a lawyer dealing with an unrepresented person whose interests are or may be adverse to those of the lawyer's client, paragraph (b) of the Rule is also fully applicable, so that the lawyer – and therefore the investigator acting under the direction of the lawyer – must not only refrain from giving advice (other than advice to secure counsel) to the interviewed person, as provided by paragraph (a), but also refrain from stating or implying that the [interviewer] is disinterested, and make reasonable efforts to correct any misunderstanding that the [interviewer] reasonably should know that the interviewed person entertains as to the [interviewer's] role in the matter, per paragraph (b). In this connection, the **Opinion** rejected the suggestion that "it can generally be inferred that unrepresented petitioners in domestic violence cases who decide to speak to a respondent's investigator understand the investigator's role," but nonetheless made clear that the [interviewer] must be alert to a possible misunderstanding by such a petitioner, and must be careful not to make representations that may be misunderstood. The **Opinion** also rejected the suggestion that Rule 4.3 imposes an affirmative obligation to advise unrepresented persons of their right to independent legal advice before signing any substantive legal documents, including releases; although the [interviewer] "must take great care" to ensure that unrepresented persons understand that the presentation of documents for them to sign does not amount to offering advice to sign them.

Finally, the **Opinion** addressed an argument that even if the petitioner in the particular hypothetical case under discussion had been represented by counsel, Rule 4.2 would not apply because the interviewed petitioner was not a party to the contempt proceeding, but only a witness. The **Opinion** rejected this argument on the ground that the underlying CPO proceeding and the contempt proceeding arising out of it were both parts of the same "matter" within the meaning of Rule 4.2.

DC Ethics Opinion 302 (2000) [which is discussed more fully under 7.1:200, below], addressing issues relating to a lawyer's use of internet-based web pages to solicit plaintiffs for a class action lawsuit, suggests that Rule 4.3 might be violated if the lawyer failed to disclose the lawyer's financial interest in the lawsuit.

DC Ethics Opinion 287 (1999) [which is more fully discussed under 4.2:210, above] held that Rule 4.2 does not prohibit communication with a *former* employee of an organizational adversary known to be represented by counsel, but that the adversity of interest between the lawyer's client and the former employee of the person sought to be communicated with underscores the importance of the disclosures required of the lawyer by Rule 4.3.

DC Ethics Opinion 247 (1994) concluded that, when a lawyer performed some services for both seller and purchaser in a residential real estate transaction, did not advise the seller that he represented only the purchaser, and did not specify his relationship to the seller, the lawyer could not represent the purchaser against the seller in a subsequent dispute about the sale. The Opinion points, among other things, to Rule 4.3 (as well as Rule 2.2) as emphasizing the importance of making the lawyer's role, duties and nonduties clear, when those matters could be misunderstood by multiple participants in a matter.

DC Ethics Opinion 240 (1993) responds to an inquiry by the DC Corporation Counsel, whose office provides representation both for individual petitioners and for the government in actions against non-supporting spouses under the Child Support Enforcement Program. Among other things, the Opinion emphasizes that there are circumstances where the individual affected by a matter may think that she is being represented by the lawyer from the Corporation Counsel's office, when in fact the client is not that individual but rather the Department of Human Services: in such circumstances, the Opinion states, Rule 4.3 requires that the lawyer not give advice if the person's interests might conflict with the interests of the lawyer's governmental client and must make clear that he or she represents the government and not the individual.

DC Ethics Opinion 159 (1985) addresses issues relating to the representation by a lawyer of a cooperative association and individual members thereof. In respect of one such issue, the Opinion states that, if the lawyer represents the association, the lawyer may not represent an individual member making a claim against the board of the association, or, by reason of DR 7-104(A)(2), give any advice to such a member other than advice to seek counsel.

DC Ethics Opinion 148 (1985) discusses various issues relating to the obligations of a lawyer representing a government agency. It asserts, among other things, that the lawyer's client is the agency and not its employees as individuals, and unless the government lawyer actually represents a government employee, the lawyer cannot, by reason of DR 7-104(A)(2), give the employee legal advice (except the advice to obtain counsel) and, as pointed out under 1.13:400 above, is ethically obligated to advise the employee that the lawyer does not represent the employee.

DC Ethics Opinion 129 (1983), which principally addresses the applicability of the anti-contact provision of DR 7-104(A)(1) to contacts with employees of a represented organizational party [and is therefore discussed at greater length under 4.2:210 above],

also notes that in contacting employees of such an organization, the lawyer must take care not to violate DR 7-104(A)(2).

DC Ethics Opinion 326 (2004) held that a lawyer approached by an unrepresented person seeking representation in a matter that is or would be adverse to a party with whom the lawyer has an on-going lawyer-client relationship may recommend competent counsel.

4.4 Rule 4.4 Respect for Rights of Third Persons

4.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 4.4
- Background References: ABA Model Rule 4.4, Other Jurisdictions
- Commentary:

4.4:101 Model Rule Comparison

As originally adopted, DC Rule 4.4 was identical to Model Rule 4.4, in both its black letter text and the wording of its single brief Comment. In 2002, as a result of the recommendations of the Ethics 2000 Commission, both the text and the commentary of the Model Rule were revised to address the responsibilities of a lawyer who receives documents that have been inadvertently sent by an opposing party or lawyer; and in 2006, per the recommendations of the DC Rules Review Committee, changes were made in the DC Rule's text and commentary to address the same circumstances. The changes made in the two versions of Rule 4.4 were not, however, identical.

The differences in the changes that were made in the two versions of the Rule reflected in part the fact that both the ABA Standing Committee on Ethics and Professional Responsibility and the DC Bar's Legal Ethics Committee had issued opinions that addressed the problem of inadvertently sent documents, but had reached somewhat different conclusions as to what the obligations of a lawyer receiving documents should be. **ABA Formal Opinion 92-368** had concluded that when in such circumstances the receiving lawyer is aware of the fact that the documents were sent in error, the lawyer is obligated to refrain from examining the documents and must notify the sender of their receipt and abide the latter's instructions as to how the documents should be dealt with. Three years later, **DC Ethics Opinion 256 (1995)** came to the more realistic conclusion that if the receiving lawyer is aware before reading a document that it was sent inadvertently, the lawyer should refrain from reading it and notify the sender; but that if the receiving lawyer reads the document before realizing that it was mistakenly sent, the lawyer is under no obligation to return the document or to refrain from using it, though the lawyer must notify the sender that the document has been received.

The Ethics 2000 Commission, recognizing that **Formal Opinion 92-368** had been much criticized, did not recommend changing the Model Rule to reflect that Opinion's conclusions but instead proposed that the Rule require only that when the receiving lawyer knows or reasonably should know that the documents were inadvertently sent, the lawyer should notify the sending lawyer, and leave that lawyer with the responsibility of doing whatever can be done to protect the interests of that lawyer's client. Specifically, it recommended that a new single-sentence paragraph (b) to that effect be added to the Rule (and that the single sentence that had previously constituted the entirety of the Rule be redesignated as paragraph (a)); and this change was made in 2002. The DC Rules Review Committee similarly recommended, and the DC Court of

Appeals in 2006 approved, the addition to the DC Rule of a brief new paragraph (b), imposing an obligation on the receiving lawyer only if that lawyer knows before reading a document that it was inadvertently sent, but the obligation is not only to notify the sending lawyer of the document's receipt but in addition to abide by that lawyer's instructions regarding the return or destruction of the document. The Committee also recommended the insertion of *knowingly* into the second clause of paragraph (a), referring to the use of methods of obtaining evidence that violate the rights of third persons.

The foregoing changes in the black letter text of the two versions of Rule 4.4 were accompanied in each case by two new Comments elaborating on the new paragraph (b). In addition, the Ethics 2000 Commission recommended that the second sentence of the original single Comment, identifying some of the rights of third persons protected by the Rule, be amended to add mention of unwarranted intrusions into privileged relationships such as the lawyer-client relationship; and the Rules Review Committee recommended that the same change be made in Comment [1] to the DC Rule.

ABA Formal Opinion 92-368, by now disowned by the revised Model Rule 4.4, was formally repealed on October 1,2005 by **ABA Formal Opinion 05-437.**.

4.4:102 Model Code Comparison

The Model Code contained a number of provisions dealing with a lawyer's obligations towards various categories of third persons: DR 7-102(A)(1) provided that a lawyer must not "take . . . action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another"; DR 7-106(C)(2) provided that a lawyer must not "[a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person"; DR 7-108(D) provided that, "[a]fter discharge of the jury . . . the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror"; and DR 7-108(E) provided that a lawyer "shall not conduct . . . a vexatious or harassing investigation of either a venireman or a juror." Rule 4.4 puts the common theme of these scattered provisions into a single Rule applicable to all third parties, irrespective of their specific status.

4.4:200 Disregard of Rights or Interests of Third Persons

- Primary DC References: DC Rule 4.4
- Background References: ABA Model Rule 4.4, Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL §§ 103, 106, Wolfram § 12.4.4

In **Shepherd v. American Broadcasting Cos., Inc., 151 FRD 194 (DDC 1993)**, the court imposed upon the defendant the sanction of default on the basis of a number of instances of what the court found to be misconduct, including a violation of Rule 4.4 by reason of a lawyer for the defendant having "harassed" a witness who had previously made clear that she did not want to talk to counsel, by confronting her in the company of her colleagues and asking her to talk to him. *Id*. at 204-06. The DC Circuit reversed and remanded, **62 F.3d 1469 (DC Cir 1995)**. The Court of Appeals observed that, "[w]hile it is not the district court's role to enforce the rules of professional conduct . . ., we think Rule 4.4 provides a sound standard to guide a district court's use of its inherent power to sanction an attorney for harassment," but held that Rule 4.4 does not depend on the third person's perception of the lawyer's conduct, but rather on whether, from the attorney's perspective, "the attorney has 'no substantial purpose' other than to embarrass, delay or burden a third person"; and that here the district court had found that the lawyer had a substantial purpose in approaching the witness, namely that he "needed information." *Id*. at 1483.

DC Ethics Opinion 287 (1999) [which is more fully discussed under 4.2:210, above] pointed out that a lawyer communicating, permissibly (so far as Rule 4.2 is concerned), with a former employee of an opposing organizational party, would nonetheless violate Rule 4.4 in seeking to elicit information "known to be protected by an established evidentiary privilege."

In **DC Ethics Opinion 285 (1998)**, the Legal Ethics Committee addressed four different circumstances involving law firms employing, or using as consultants, nonlawyers who are former government employees. The *first* such circumstance was one where the nonlawyer had worked directly with government lawyers on a matter in which the law firm is now involved; in the *second*, the nonlawyer had no direct contact with government lawyers but had been exposed to confidential government information; in the *third*, the government is not a party to a case in which the firm is engaged but may still be harmed by the abuse of confidential government information in the nonlawyer's possession; and in the *fourth,* the nonlawyer had simply participated in government policymaking. The Committee noted that the Rules of Professional Conduct do not apply directly to nonlawyers, but that certain Rules (notably Rules 5.3 and 8.4(a)) impose on lawyers responsibility for conduct of nonlawyers associated with them. The Committee then held that in the first scenario, where the nonlawyer had worked with government lawyers on a case in which the firm is engaged, screening of the nonlawyer is necessary -- and adequate -- to avoid imputed disqualification of the employer law firm, citing, *inter alia*, **DC Ethics Opinion 227 (1992)**. As to the second scenario, where the nonlawyer had had no contact with government lawyers but nonetheless

possessed confidential government information, the Committee concluded that, there being no imputed professional obligation to preserve confidences or secrets, there would be no need to screen the former employee. As to the fourth scenario, where the former government employee had participated in government policymaking, the Committee observed that Rule 1.11 does not operate to disqualify former government *lawyers* by reason of participation in "[t]he making of rules of general applicability and the establishment of general policy," Rule 1.11, Comment [3], and concluded in consequence that such participation should not disqualify *nonlawyers*, either. Finally, the Committee pointed out, with reference to the last three scenarios, that a law firm's inducing a former government employee to violate obligations of confidence that derived from a source other than providing assistance to government lawyers could involve a violation of Rule 4.4.

DC Ethics Opinion 31 (1977) held that, if a lawyer who was a congressional committee staff person required a witness who was a target of a pending grand jury investigation to appear at televised hearings to be questioned when the committee had been notified in advance that the witness would exercise his constitutional privilege not to answer any questions, this would violate DR 7-106(C)(2)'s provision that "[i]n appearing in his professional capacity before a tribunal, a lawyer shall not . . . [a]sk any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness."

4.4:210 Cross-Examining a Truthful Witness; Fostering Falsity

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

4.4:220 Threatening Prosecution [see 8.4:900]

In **In re Waller, 524 A.2d 748, 754 (DC 1987)**, the report of the Board on Professional Responsibility, approved by the court, noted that the respondent's prior record included an informal admonition for violations of, *inter alia*, DR 7-102(A)(1), for "threatening legal action for the purpose of harassment." [See also 8.4:900, below.]

V. LAW FIRMS AND ASSOCIATIONS

5.1 Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

5.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.1
- Background References: ABA Model Rule 5.1, Other Jurisdictions
- Commentary:

5.1:101 Model Rule Comparison

As originally adopted, the black letter texts of DC Rule 5.1 and of its Model Rule counterpart were identical except for subparagraph (c)(2), where the DC Rule varied from the Model Rule in one significant respect: that provision of the Model Rule made a lawyer responsible for another lawyer's violation of the rules of professional conduct if the lawyer is a partner in a firm in which the other lawyer practices or has direct supervisory authority over the other lawyer, and *knows* of the misconduct in time to take remedial or preventive action, while the DC Rule, holding supervisory lawyers to a higher standard than the Model Rule, added *or should have known*.

Most of the Comments to the two versions of the Rule were also identical, but the two Comments to the Model Rule that elaborated on paragraph (c) of the Rule (numbers [3] and [4]) were replaced by three Comments in the DC version (now renumbered as [4]-[6]), in which the Jordan Committee endeavored to spell out as precisely as possible the circumstances under which subparagraph (c)(2) of the Rule would be applicable.

A number of small changes were made to the Model Rule and its Comments in 2002 -- and in addition, to its caption -- on the recommendation of the Ethics 2000 Commission, mainly to clarify that the obligations imposed by the Rule applied not only to law firm partners but also to supervisory lawyers in corporate legal departments, government agencies, and legal services organizations. The DC Rules Review Committee recommended that comparable changes be made in the DC Rule and its Comments and caption, and these were approved by the DC Court of Appeals in 2006.

The caption of both versions of the Rule was changed in these revisions from *Responsibilities of a Partner or Supervisory Lawyer* to speak more broadly of *Responsibilities of Partners, Managers and Supervisory Lawyers.* Paragraph (a) of the text of both versions of the Rule was revised to supplement the introductory phrase *A partner in a law firm* by adding *and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm*; and the DC Rule also added *or a government agency.* Similarly, the Model Rule's subparagraph (c)(2) was expanded by the addition, after its initial phrase *the lawyer is a partner,* the phrase

or has comparable managerial authority; and the DC version also added *or government agency* after *law firm.* Related, largely minor changes were made to most of the Comments to both versions of the Rule, and both had two new (and identical) Comments added: a new Comment [2] to highlight the additional ethical obligations of lawyers with managerial responsibilities with respect to the organization's policies and procedures for assuring compliance with ethical requirements; and a new final Comment to each Rule (numbered [8] for the Model Rule and [9] for the DC Rule) to emphasize that the duties imposed by the Rule on managing and supervisory lawyers do not modify the personal obligations of the subordinate lawyers under Rule 5.2.

5.1:102 Model Code Comparison

Rule 5.1 had no counterpart in the Model Code. The most nearly pertinent provision, DR 1-103(A), predecessor to Rule 8.3, provided that a lawyer "possessing unprivileged knowledge of a violation of DR 1-102 [predecessor of Rule 8.4] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

5.1:200 Duty of Partners to Monitor Compliance with Professional Rules

- Primary DC References: DC Rule 5.1(a)
- Background References: ABA Model Rule 5.1(a), Other Jurisdictions
- Commentary: ABABNA § 91-203, ALI-LGL § 4, Wolfram § 16.2

Rule 5.1(a) requires that partners and lawyers with comparable managerial authority in a firm make "reasonable efforts" to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct. Comment [2] observes that the duty of partners, as well as of supervisory associate lawyers, to ensure compliance with the rules of professional conduct will vary according to a law firm's structure and practice. Comment [2] notes with approval firms that designate a senior partner or a special committee for junior lawyers to consult when potential ethical problems arise. The comment also states that "reasonable efforts" will be interpreted to encompass continuing legal education courses that the firm's lawyers are required to take. While partners have a duty under Rule 5.1(a) to monitor general compliance with professional rules of conduct among members of the firm, the mere fact of partnership is not sufficient, without more, to impute a junior lawyer's misconduct to a partner under Rule 5.1(c). See Comment [4].

In re Cohen, 847 A.2d 1162 (DC 2004), which is more fully discussed under 5.1:400, below, was mainly concerned with a violation of DC Rule 5.1(c)(2) by a supervising partner who had failed to detect or take remedial action about violations by an associate he was supervising that had violated two other Rules. However, the respondent there was also found to have violated Rule 5.1(a)'s requirement of reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that lawyers in the firm conformed to the rules of professional conduct, observing in this connection that "Respondent conceded . . . that there was no system in place to impart rudimentary ethics training to lawyers in the firm, particularly the less experienced ones. Equally troubling was the lack of a review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney." *Id*. at 1166.

D.C. Ethics Opinion 278 (1998) addressed the question whether a member of the D.C. Bar could practice law in a partnership or other professional association with a lawyer licensed to practice in a foreign jurisdiction but not any U.S. jurisdiction. The Opinion's answer was affirmative, so long as the partnership or association would not compromise the D.C. lawyer's ability to uphold ethical standards The Opinion pointed in particular to the possible pertinence of Rule 5.1(a) to the question whether the foreign lawyer would adhere to ethical standards such as the need to maintain client confidentiality and avoid conflicts of interest, and to the importance of avoiding assisting another in the unauthorized practice of law, under Rule 5.5(b). The Opinion also noted the possible pertinence of Rule 7.5(b) (Firm Names and Letterheads) and 7.5(d) (Implying Practice in a Partnership).

The only other decisional authority making reference to DC Rule 5.1(b) appears to be **DC Ethics Opinion 256 (1995)**, which briefly refers to that provision and Rule 5.3(b), along with Rule 1.6(e), in the context of a supervising lawyer's responsibility to see to it that subordinate lawyers or non-lawyers engaged in document production do not mistakenly make disclosures of information subject to confidentiality requirements.

5.1:300 Monitoring Duty of Supervising Lawyer

- Primary DC References: DC Rule 5.1(b)
- Background References: ABA Model Rule 5.1(b), Other Jurisdictions
- Commentary: ABABNA § 91-203, ALI-LGL § 4, Wolfram § 16.2

Rule 5.1(b) requires that a lawyer with direct supervisory authority over another lawyer make "reasonable efforts" to ensure that the junior lawyer conforms to the rules of professional conduct. According to Comment [2], the reasonableness of a supervisory lawyer's efforts depends on the nature of the firm and its practice. Comment [3] states that whether a lawyer has supervisory authority over another lawyer is a question of fact. Direct supervisory authority requires "an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation." A lawyer who is designated a "supervisor" in organizational terms without actually being involved in directing the efforts of other lawyers is not a supervisory lawyer for purposes of the rule.

The only DC court decision touching on this subject appears to be **Wallace v. Skadden, 715 A. 2d 873 (DC 1998)**, where the Court addressed, inter alia, a claim by a lawyer that she had been wrongfully discharged by a law firm for reporting to her superiors various acts of malfeasance and unethical conduct by other lawyers in the firm. Asserting that she was ethically required by Rules 5.1 and 5.2 to report such misconduct, she asserted that her claim for wrongful discharge was governed by **Adams v. George W. Cochran & Co., 597 A. 2d 28 (DC 1991)**, which held that "a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee's refusal to violate the law." *Id.* at 34. The Court disposed of this claim by pointing out that Rule 5.1 sets out responsibilities of a supervisory lawyer, and so had no applicability to the plaintiff, and that while Rule 5.1 focuses on the responsibilities of subordinate lawyer, it imposes no obligation to report the misconduct of others.

DC Ethics Opinion 304 (2001) [which is discussed more fully under 5.4:400, below] addresses Rule 5.1 in the context of a law firm contracting out its human resources functions to a separate, unrelated company.

5.1:400 Failing to Rectify the Misconduct of a Subordinate Lawyer

- Primary DC References: DC Rule 5.1(c)
- Background References: ABA Model Rule 5.1(c), Other Jurisdictions
- Commentary: ABABNA § 91-203, ALI-LGL §§ 4, 5, Wolfram § 16.2

Rule 5.1(c)(2) states that a partner or a supervisory lawyer will be responsible for another lawyer's violation of the rules of professional misconduct if the partner or supervisory lawyer knows *or* reasonably should know of the misconduct at a time when its consequences can be mitigated *but fails to take remedial action*. Comment [5] explains that appropriate remedial action depends on (1) the immediacy of the involvement and (2) the seriousness of the misconduct. A supervisory lawyer is required to intervene to prevent avoidable consequences of misconduct after the lawyer learns of the misconduct. Rule 5.1(c)(2) requires, for example, a supervisory lawyer to correct the misapprehension of an opposing party when it is caused by a junior lawyer's misrepresentation during a negotiation. See Comment [5].

In re Cohen, 847 A.2d 1162 (DC 2004) involved a partner in a small firm who was held to have violated DC Rule 5.1(c)(2) in failing to be aware of and prevent or correct conduct that violated Rules 3.3(a) and 8.4(c) on the part of an associate in the firm who was handling a client matter under the partner's supervision. The acts of the associate that violated the latter two rules consisted of the erroneous filing with the Patent and Trademark Office of a document withdrawing a previously filed trademark application, and in that filing falsely and dishonestly representing to the PTO that the client had expressly abandoned the application. The respondent challenged the charge that he violated Rule 5.1(c)(2) on the ground that he had not been aware of the incorrect filing. The Court, however, pointed out that although Model Rule 5.1(c)(2) makes a lawyer who exercises managerial authority over another lawyer responsible for the supervised lawyer's conduct only if the managing lawyer *knows* of the conduct at a time when its consequences can be avoided or mitigated, the DC Rule imposes that responsibility if the lawyer either knows or *reasonably should know* of the conduct, and held that that provision of the Rule applied in the circumstances of this case. As the Court explained, "We believe a lawyer of reasonable prudence and competence would have made the inquiry necessary to determine the status of the application proceeding." *Id*. at 1167. Although Bar Counsel had charged the respondent with himself violating, in effect vicariously, the rules that the supervised lawyer had violated, the Hearing Committee had recognized, and the Board and the Court agreed, that only the supervised lawyer had violated those Rules, not the respondent as supervising lawyer. Although the Court's decision was principally concerned with the charge under Rule 5.1(c)(2), the Board had also held that the respondent had violated DC Rule 5.1(a)'s requirement that a partner in a law firm make reasonable efforts to see that the firm has in effect measures providing reasonable assurance that all firm lawyer conform to the rules, and the Court observed in this connection that "[r]espondent conceded . . . that there was no system in place to impart rudimentary ethics training to lawyers in the firm, particularly

the less experienced ones. Equally troubling was the lack of a review mechanism which allowed an associate's work to be reviewed and guided by a supervisory attorney." *Id*. at 1166.

5.1:500 Vicarious Liability of Partners

- Primary DC References: DC Rule 5.1
- Background References: ABA Model Rule 5.1, Other Jurisdictions
- Commentary: ABABNA § 91-203, ALI-LGL § 58, Wolfram §

Under Rule 5.1(c), a partner or supervisory lawyer is vicariously liable for the misconduct of a junior lawyer if the partner orders the misconduct, ratifies the misconduct, or knows or reasonably should have known of the misconduct at a time when the consequences could have been avoided but failed to take remedial action. An objective standard based on an evaluation of all the facts is used to determine whether a partner, or a supervisory lawyer, should reasonably have known of a junior lawyer's misconduct. See Comment [4]. A lawyer's position and responsibility within the firm, the type and frequency of his or her contacts with the junior lawyer, and the nature of the misconduct at issue are used to determine whether the lawyer should have known of the junior lawyer's misconduct.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

5.2 Rule 5.2 Responsibilities of a Subordinate Lawyer

5.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.2
- Background References: ABA Model Rule 5.2, Other Jurisdictions
- Commentary:

5.2:101 Model Rule Comparison

DC Rule 5.2 is identical to MR 5.2. Both MR 5.2(a) and DC Rule 5.2(a) state that a lawyer is bound by the rules of professional conduct even if he or she acts at the direction of a supervisory lawyer. MR 5.2(b) and DC Rule 5.2(b) both provide further that a subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable* resolution of an *arguable* question of professional duty. Neither the Ethics 2000 Commission nor the DC Rules Review Committee saw any reason to change either the text or the commentary to this Rule, and none were made in the respective 2002 and 2006 revisions.

5.2:102 Model Code Comparison

Rule 5.2 had no counterpart in the Model Code.

5.2:200 Independent Responsibility of a Subordinate Lawyer

- Primary DC References: DC Rule 5.2(a)
- Background References: ABA Model Rule 5.2(a), Other Jurisdictions
- Commentary: ABABNA § 91-204, ALI-LGL § 5, Wolfram § 16.2

Rule 5.2(a), sometimes known as the "Nuremburg Rule," prevents a junior lawyer from relying on the fact that he or she was acting at the direction of another lawyer to avoid sanctions under the disciplinary code. Comment [1] states, however, that the fact that a lawyer acted at another lawyer's direction "may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the disciplinary rules." If, for example, a junior lawyer files a frivolous pleading on the instructions of a supervisor, the junior lawyer would not be guilty of professional misconduct unless he or she knew the pleading was frivolous. See Comment [1].

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

See, however, the discussion of **Wallace v. Skadden**, under 5.1:300, above.

5.2:300 Reliance on a Supervisor's Resolution of Arguable Ethical Issues

- Primary DC References: DC Rule 5.2(b)
- Background References: ABA Model Rule 5.2(b), Other Jurisdictions
- Commentary: ABABNA § 91-207, ALI-LGL § 5, Wolfram § 16.2

Rule 5.2(b) states that a junior lawyer does not violate the rules of professional conduct by acting in accordance with a supervisor's instructions if those instructions provide a "reasonable resolution of an arguable question of professional duty." Rule 5.2(b) therefore provides a defense for a junior lawyer carrying out the instructions of his or her supervisor where the conduct required by the disciplinary rules is uncertain and the supervisor's proposed course of action is reasonable in light of that uncertainty. Comment [2] to Rule 5.2 explains that the rule allows for a consistent course of action in instances where the disciplinary rules do not provide clear guidance to lawyers. Under Rule 5.2(b), the supervisory lawyer has the authority to guide the conduct of a junior lawyer where there is some degree of doubt as to the proper course of conduct required under the rules. Comment [2] also says, however, that if the rule leaves no doubt as to the proper course of conduct, both the supervisory lawyer and the junior lawyer are equally responsible for complying with the rules of professional conduct.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

5.3 Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

5.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.3
- Background References: ABA Model Rule 5.3, Other Jurisdictions
- Commentary:

5.3:101 Model Rule Comparison

The black letter text of DC Rule 5.3 as first adopted was identical to Model Rule 5.3, except that DC Rule 5.3(c)(1) substituted "requests" for "orders" in describing the nature of the directions a lawyer must have given to a nonlawyer employee in order for the lawyer to be responsible for the ensuing conduct, and DC Rule 5.3(c)(2) omitted "or reasonably should know," leaving only "knows," and thereby required that the lawyer actually know of a nonlawyer employee's misconduct before he or she becomes responsible for it.

Changes made in the Model Rule in 2002 and in the DC Rule in 2006, pursuant to the respective recommendations of the Ethics 2000 Commission and the DC Rules Review Committee widened the differences slightly.

Paragraph (a) of the Model Rule, requiring that a partner in a law firm make "reasonable efforts" to ensure that the firm has in effect measures giving reasonable assurance that the behavior of nonlawyer personnel will be compatible with the professional obligations of the lawyer, was modified in 2002 to apply to lawyers other than partners who, individually or together with others, possess comparable managerial authority in a law firm; identical language was added in 2006 to the DC Rule, together with additional language making clear that the provision also applied to lawyers with managerial authority in a government agency.

Paragraph (b) of the DC Rule, addressing a supervising lawyer's responsibility for nolawyer assistants' conduct, is and always has been identical to its Model Rule counterpart.

A purely editorial change was made in 2006 in subparagraph (c)(1) of the DC Rule by the omission of the unnecessary article "the" before "knowledge," but no such change had been made in the Model Rule.

Subparagraph (c)(2) of the Model Rule was amended in 2002 in a fashion similar to the change then made in paragraph (a), to extend the scope of the provision to lawyers who exercise managerial authority comparable to that of partners, but unlike the addition made to paragraph (a), this added phrase did not include a reference to the authority being held individually or together with others. Subparagraph (c)(2) of the DC Rule was

changed in 2006 by addition of the same broader reference to lawyers exercising comparable authority that had been added to paragraph (a) of both versions of the Rule; and in addition, language making clear that it applied to supervisors in a government agency as well as those in a law firm.

As originally adopted, Model Rule 5.3 had a single Comment, elaborating on lawyers' responsibilities with respect to the conduct of nonlawyer assistants, and the DC Rule had an identical Comment, but in addition had a Comment [2], discussing the responsibility of prosecutors and other government lawyers for governmental investigators acting under their direction even though not formally reporting to them. That Comment also notes that what are now Comments [4]-[6] to DC Rule 5.1 apply to DC Rule 5.3 as well. The 2002 amendments to the Model Rule added a Comment [2] that simply explains the differences between the obligations imposed by the three paragraphs of the Rule. No such Comment has been added to the DC Rule..

5.3:102 Model Code Comparison

There was no direct counterpart to Rule 5.3 in the Model Code. DR 4-101(D), carried forward in DC Rule 1.6(e), provided that a lawyer should exercise reasonable care to prevent employees, associates and others from disclosing client confidences or secrets. DR 7-107(J) provided that "[a] lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

5.3:200 Duty to Establish Safeguards

- Primary DC References: DC Rule 5.3(a)
- Background References: ABA Model Rule 5.3(a), Other Jurisdictions
- Commentary: ABABNA § 91-205, ALI-LGL §§ 4, 5, Wolfram § 16.3

Rule 5.3(a) requires that a partner in a firm establish "measures" giving reasonable assurance that the conduct of nonlawyer personnel in the firm is compatible with the professional obligations of the lawyer. Comment [1] to Rule 5.3 states that a lawyer should give nonlegal assistants "appropriate instructions and supervision" about the ethical aspects of their employment, "particularly regarding the obligation not to disclose information relating to representation of the client." The comment also notes that lawyers should account for the fact that nonlawyers lack legal training and are not subject to rules of professional discipline.

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

5.3:300 Duty to Control Nonlawyer Assistants

- Primary DC References: DC Rule 5.3(b)
- Background References: ABA Model Rule 5.3(b), Other Jurisdictions
- Commentary: ABABNA § 21-8601, ALI-LGL §§ 4, 5, Wolfram § 16.3

Rule 5.3(b) requires lawyers with direct supervisory authority over nonlawyer personnel to make "reasonable efforts" to ensure that the conduct of nonlawyer personnel is compatible with the professional obligations of the lawyer.

In **In re Cater, 887 A.2d 1 (DC 2005)**, there were four consolidated proceedings against the same lawyer, in one of which the respondent was charged with violating DC Rules 5.3(b) and 1.1(b) by failing to act competently and failing adequately to supervise a nonlawyer assistant, in connection with a former secretary's embezzlement of $47,000 from the estates of two incapacitated adults for whom the respondent had been the court-appointed guardian and conservator. (In the three other proceedings, the respondent had been charged with violating DC Rules 8.1(b) and 8.4(d) by reason of her repeated failures to respond to inquiries from Bar Counsel; these are more fully discussed under 8.1.500, below.) With respect to the Rule 5.3(b) proceeding, the evidence showed that over a nine-month period, the respondent's secretary had forged respondent's signature on thirty-four checks totaling $42,000 from the account of one of the clients, and two checks totaling a little over $5,000 from the other client's account -- facts that the respondent did not discover until she examined the accounts a year after he secretary had disappeared without notice. The respondent had delegated to the secretary entire responsibility for handling the two accounts, and had done nothing to check or supervise her handling of them. The Hearing Committee had concluded that the respondent had not violated these two rules because she had offered an explanation that the Committee found persuasive, and a divided Board had concurred, albeit with four members dissenting. The Court, however, agreed with the minority on the Board, and quoted the commentary in the Annotated Model Rules of Professional Conduct to the following effect:

> Courts view holding money in trust for clients as a nondelegable fiduciary responsibility that is not excused by ignorance, inattention, incompetence or dishonesty. Although lawyers may employ nonlawyers to assist in fulfilling this fiduciary duty, lawyers must provide adequate training and supervision to ensure that ethical and legal obligations to account for clients' monies are being met.

Id. at 13. Having concluded that respondent had violated Rule 5.3(b), the court stated that it followed *a fortiori* that she had also failed to provide competent representation and thereby violated Rule 1.1(a), since the same evidence supported both charges.

DC Ethics Opinion 321 (2003) [which is discussed more fully under 4.3:200, above] addressed the ethical obligations of a lawyer with respect to the conduct of an investigator sent by the lawyer to interview a person not represented by counsel, in a

context where the person to be interviewed was seeking a contempt order against the lawyer's client, for violation of a Civil Protection Order (CPO). The **Opinion** recognized that although the applicable ethical restrictions governing the interview were to be found in Rule 4.3, the lawyer's official responsibility for the investigator's conduct rested on Rules 5.3 and 8.4(a).

DC Ethics Opinion 298 (2000) [which is discussed more fully under 1.5:240, above] held that a lawyer using a collection agency to recover unpaid client fees has an obligation under Rule 5.3 to see to it that the agency preserves appropriately the confidentiality of client information imparted to it for purposes of its collection activities.

DC Ethics Opinion 304 (2001) [which is discussed more fully under 5.4:400, below] addresses Rule 5.1 in the context of a law firm contracting out its human resources functions to a separate, unrelated company.

DC Ethics Opinion 282 (1998) (more fully discussed under 1.6:320, above) addresses the problem presented by the conflict between a lawyer's duty under DC Rules 1.6(e) and 5.3 to see that non-lawyer collaborators preserve client confidences and secrets, and the statutory duty imposed on a social worker collaborator to report suspected child abuse or neglect.

The only other decisional authority applying DC Rule 5.3(b) appears to be **DC Ethics Opinion 227 (1992)** [discussed under 1.10:200 above]. The Opinion required screening of a paralegal who at the firm where she had previously been employed had worked on a matter that created a conflict with a client of the firm that now employed her. The opinion identified steps that the inquiring law firm could take to satisfy its obligation under Rule 5.3(b): (a) instruct the paralegal in writing not to discuss the case with any firm personnel, and give reciprocal instructions to those personnel; (b) "sticker" pertinent files with the same instructions; and (c) investigate whether the paralegal has brought with her any sensitive files or information.

See also **DC Ethics Opinion 285 (1998)**, discussed under 4.4:200, above (relying on **Opinion 227)**.

The only other ethics opinion referring to Rule 5.3(b) is **DC Ethics Opinion 256 (1995)**, which is briefly mentioned under 5.1:300 above.

5.3:400 Responsibility for Misconduct of Nonlawyer Assistants

- Primary DC References: DC Rule 5.3(c)
- Background References: ABA Model Rule 5.3(c), Other Jurisdictions
- Commentary: ABABNA § 91-205, ALI-LGL §§ 4, 5, Wolfram § 16.3

Rule 5.3(c) provides that a lawyer is responsible for the conduct of nonlawyer personnel that would violate the rules of professional conduct if engaged in by the lawyer where the lawyer (1) requests or knowingly ratifies the conduct or (2) knows of the conduct at a time when its consequences can be avoided but fails to take reasonable remedial action. Comment [2] states that the rule applies to prosecutors and other government lawyers who effectively direct the conduct of police or other governmental investigative personnel, even though the lawyers technically might not have any formal authority over the actions of such personnel. Under Rule 5.3, the relationship between prosecutors and other governmental lawyers with police or investigative personnel is subject to the same restrictions that apply to the relationship between private lawyers and their retained investigators. Comment [2] also indicates that Comments [3], [4], and [5] to Rule 5.1 apply to Rule 5.3 as well. [See 5.1:101, above]. Accordingly, whether a lawyer has supervisory authority over nonlegal personnel is a question of fact; the rule applies only to lawyers who have *actual* supervisory authority. Additionally, the remedial action required by the rule depends on the immediacy of the involvement and the seriousness of the nonlawyer personnel's misconduct.

Rule 5.3(c)(2) was found to be violated (along with Rule 1.15 and Rules 8.4(b), (c) and (d)) in a case involving commingling and misappropriation of trust funds, where improper checks were drawn by the respondent's wife and office manager at respondent's direction. **In re Moore, 704 A. 2d 1187 (DC 1997)**.

5.4 Rule 5.4 Professional Independence of a Lawyer [Restrictions on Form of Practice]

5.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.4
- Background References: ABA Model Rule 5.4, Other Jurisdictions
- Commentary:

5.4:101 Model Rule Comparison

DC Rule 5.4(a)(1), (2) and (3) as originally adopted copied the original version of Model Rule 5.4(a) without change. In 1990, however, Model Rule 5.4(a)(2) was substantially rewritten, to change its focus from a lawyer's completing the unfinished business of a deceased lawyer to the lawyer's purchasing a practice of a deceased, disabled or disappeared lawyer, a subject also addressed by the new Model Rule 1.17 on the sale of a law practice. DC Rule 5.4(a)(2) remained unchanged until 2006, when it was revised on the recommendation of the DC Rule Review Committee by the *addition* of the new language of Model Rule 5.4(a)(2) rather than its *substitution* for the previous language of that subparagraph. Subparagraph (a)(3) remains identical and unchanged in both versions of Rule 5.4. A new subparagraph (a)(4) was added to the Model Rule on the recommendation of the Ethics 2000 Commission, recognizing the permissibility of a lawyer sharing court-awarded fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter, as first announced in **ABA Formal Opinion 93-374**. The Commission's report expressed agreement with the reasoning of **Formal Opinion 93-374,** but thought it useful to have its conclusion incorporated in the text of Rule 5.4, since some state ethics committees, while agreeing with the policy underlying the **Opinion**, had nonetheless found that their state's version of Rule 5.4 did not allow such fee sharing. In 2006 a new subparagraph (a)(5) similar to the Model Rule's 5.4(a)(4) was added to the DC Rule, but this provision applies to fees received in settlement as well as court-ordered ones, and adds a requirement that the organization qualify under Section 501(c)(3) of the Internal Revenue Code,

Paragraph (c) of Rule 5.4, prohibiting a lawyer from permitting a person who recommends, employs or pays a lawyer to provide services to a third person to direct or regulate the lawyer's judgment, has always been identical in both the Model Rule and the DC Rule.

The major substantive difference between the DC and the Model Rule versions of Rule 5.4 is in the way they treat lawyers practicing law in partnership with nonlawyers, a matter mainly addressed in paragraph (b) of both versions. Paragraph (b) of the Model Rule prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consists of the practice of law, and paragraph (d) of the Model Rule (for which there is no corresponding provision in the DC Rule), extends the prohibition to professional corporations or other associations authorized to practice law

in which nonlawyers have an ownership or management role. On the other hand, paragraph (b) of the DC Rule has from the beginning permitted a lawyer to practice in a partnership or other organization where a nonlawyer has a financial interest or managerial role, so long as the nonlawyer performs professional services that assist the organization in performing legal services, and the following four additional requirements set out in subparagraphs (1) - (4) are also met: (1) the sole purpose of the organization must be to provide legal services to clients; (2) all the nonlawyer owners or managers must agree to abide by the Rules of Professional Conduct; (3) the lawyer owners or managers must undertake to be responsible for the nonlawyers as if they were lawyers under Rule 5.1; and (4) the foregoing three conditions must be set forth in writing. Supplementing these provisions of paragraph (b) of the DC Rule, subparagraph (a)(4) of that Rule (which has no counterpart in the Model Rule) permits a lawyer to share legal fees in a partnership or other organization that meets the requirements of paragraph (b).

The DC Rules' version of Rule 5.4(b) is based on the Model Rule 5.4 that was proposed by the ABA Commission on Evaluation of Professional Standards (the "Kutak Commission"), the body that wrote the Model Rules that were proposed to the ABA House of Delegates in 1983. The House of Delegates, however, rejected this proposal and chose instead to preserve the prior Model Code's categorical prohibition in DR 3-103(A) on a lawyer practicing law in a partnership with a nonlawyer. The Jordan Committee, however, preferred the Kutak Commission's approach, and the Board of Governors and the Court of Appeals accepted its recommendation. For a discussion of the background of the DC rule, see **Susan Gilbert and Larry Lempert, The Nonlawyer Partner: Moderate Proposals Deserve a Chance, 2 Geo. J. Legal Ethics 383, 392-400 (1988)**. See also **DC Ethics Opinion 93 (1980)** (holding that a law firm could ethically offer services of other professionals — in this case psychologists, social workers and family counselors — who were employees of the firm).

In the late 1990's, an ABA Commission on Multidisciplinary Practice was appointed to study the issue of lawyers practicing law in partnerships and comparable organizations in which members of other professions were partners, and its final report to the House of Delegates, considered at the ABA's annual meeting in 2000, recommended revision of the ethical rules to allow multidisciplinary practice under somewhat less restrictive conditions than those of the Kutak Commission's proposal or the provisions of DC Rule 5.4, but its proposals were rejected by the House of Delegates. Thereafter, a number of jurisdictions, including the District of Columbia, established their own committees to consider the proposals of the ABA Commission, most of which recommended rejection of those proposals. The District of Columbia's committee was an exception; it recommended, and the DC Bar's Board of Governors concurred, that DC Rules 5.4 be amended to allow multidisciplinary practice, but on December 21, 2004, the DC Court of Appeals concluded that adoption of the recommendation was not warranted at that time, although the Court remained open to reconsideration at some future time.

5.4:102 Model Code Comparison

DC Rule 5.4(a)(1), (2) and (3) are substantially identical to DR 3-102(A). Paragraph (b) is a significant change from the Model Code, particularly DR 3-103(A) which prohibited a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consisted of the practice of law. DC Rule 5.4(c) is substantially identical to DR 5-107(B).

5.4:200 Sharing Fees with a Nonlawyer

- Primary DC References: DC Rule 5.4(a)
- Background References: ABA Model Rule 5.4(a), Other Jurisdictions
- Commentary: ABABNA § 41-801, ALI-LGL § 60, Wolfram § 16.4

DC Rule 5.4(a) is based on a concern for the independence of a lawyer's professional judgment. "[F]ee splitting between lawyer and layman . . . poses the possibility of control by the layperson, interested in his own profit, rather than the client's fate." **ABA Formal Opinion 95-392** (Sharing Legal Fees with a For-Profit Corporate Employer).

Major issues concerning the prohibition against a lawyer's sharing a fee with a nonlawyer have arisen in, broadly, two situations. The first is the case of a salaried lawyer for a corporation who receives a fee for performing legal services for others. In **DC Ethics Opinion 135 (1984)** the Legal Ethics Committee concluded that it was permissible for a lawyer employed by a consultant corporation to perform services for the corporation's clients, but that any fees so generated could be used only to compensate the lawyer and any lay staff working under the lawyer's supervision in performing the services; the fees could not be used to compensate or profit other nonlawyer employees or owners of the corporation. The opinion was rendered under the Model Code, but the result would presumably be the same under DC Rule 5.4. DC Rule 5.4(a)(4) permits the sharing of fees in a partnership or other organization that has nonlawyer principals, but the first condition of the permissibility of such an arrangement is that the partnership or other organization "has as its sole purpose providing legal services to clients." DC Rule 5.4(b)(1). To the same effect as Opinion 135 but on more complicated facts is **DC Ethics Opinion 182 (1987)**; see also **DC Ethics Opinion 94 (undated)**.

The other situation presenting major issues regarding fee-sharing is the receipt or proposed receipt by a salaried lawyer of an award of attorneys fees in litigation, the amount thereof determined not by the particular lawyer's salary but by the (almost always higher) market value of lawyers' services generally. In **National Treasury Employees Union v. Department of the Treasury, 656 F.2d 848 (DC Cir 1981)**, salaried lawyer employees of a union represented a union member in successful litigation pursuant to the union's prepaid legal services plan. The successful litigant was entitled to attorneys' fees. Any awarded fee, it was acknowledged, would go into the union's general treasury. The United States Court of Appeals affirmed the district court's order limiting the fees in these circumstances to the expenses incurred by the union — the relevant proportion of the lawyer's salaries and out-of-pocket expenses.

In **Jordan v. Department of Justice, 691 F.2d 514, 516 n.14 (DC Cir 1982)**, the litigant entitled to an award of attorneys' fees was represented by lawyers employed by a law school-sponsored public interest representation institute. In these circumstances the court allowed a market-value fee award on the assumption that, if the institute

shared in any "fee award beyond recoupment of its own expenses, it will maintain a fund exclusively for litigation, into which its share will be deposited." In **DC Ethics Opinion 176 (1986)**, the Legal Ethics Committee found it "unclear" but unnecessary to decide whether a market-value fee award for the work of salaried union lawyers would violate DR 3-102 and 3-101(A) even if not deposited in a separate litigation fund. The Committee found it "clear" that, if the fee were so deposited, there was no ethical prohibition of a market-value fee award even if the union were thereby to receive some indirect benefit.

Somewhat more broadly, **ABA Formal Opinion 93-374 (Sharing of Court-Awarded Fees with Sponsoring Pro Bono Organizations)** concluded that Model Rule 5.4(a) does not prohibit a lawyer agreeing to share court-awarded fees with a non-profit organization that sponsors litigation.

There have been rulings on other aspects of sharing fees with nonlawyers.

DC Ethics Opinion 322 (2004) addressed an inquiry from a small law firm engaged in a series of class actions against defendants who were all members of a particular industry. The law firm had hired a nonlawyer employee who had worked as a consultant in the relevant industry, to assist the firm in those class actions, and proposed to compensate the employee by a small salary which would be supplemented by a share of fee recovered in the class actions – that share to be proportional to time spent by the consultant on all the class actions, multiplied by a stated hourly rate, in relation to a corresponding calculation of the value of lawyer's time spent. The questions posed were whether such an arrangement by the law firm was permissible under DC Rule 5.4, and if not, whether some other arrangement would be.

The **Opinion** considered previous DC Ethics Opinions 307 (2001), 298 (2000) and 233 (1993), as well as a number of ethics committee opinions from other jurisdictions, and observed that

> Although blurred somewhat by the past opinions of this Committee, there emerges a prohibition on splitting fees with a nonlawyer employee on a contingent basis *arising out of a case or category of cases*, at least unless the client approves in advance (an impracticality here).

(Emphasis added.) Although the **Opinion** saw little logic in the indicated distinction between bonuses contingent on fees from a particular case or category of cases and bonuses based on the entirety of a law firm's profit, it nonetheless accepted the distinction and so held that the inquiring law firm's proposal would violate DC Rule 5.4(a).

The **Opinion** went on, however, to consider the exception, unique among America jurisdictions, that is contemplated by DC Rule 5.4(a)(4), namely, an organization meeting the requirements of DC Rule 5.4(b), which allows lawyers to practice law in an organization in which a nonlawyer has a financial interest or exercises managerial authority, provided that four specified conditions are met. The **Opinion** concluded that

the inquiring firm could set up a joint venture with the nonlawyer employee which would engage solely in the pursuit of the sort of class actions relevant to the nonlawyer's qualifications, and so long as it met the requirements of DC Rule 5.4(b), could permissibly share the resulting profits with the nonlawyer. It also pointed out, however, that since no other jurisdiction has a provision comparable to DC Rule 5.4(b), the arrangement would only be viable for class actions pending in the District of Columbia.

DC Ethics Opinion 302 (2000) [which is discussed more fully under 7.1:200, below] observed that when a web site sponsoring client requests for bids for legal services offers assistance to law firms in responding to such requests, the law firm's accepting such assistance would not offend Rule 5.4(a)'s prohibition on allowing a non-lawyer to direct or regulate the lawyer's professional judgment.

DC Ethics Opinion 253 (1994) addressed the "considerable tension" between DC Rule 5.4(a), which prohibits a lawyer from sharing legal fees with nonlawyers, and DC Rule 7.1(b)(5), which permits the payment of referral fees to intermediaries when specified conditions are met. Finding DC Rule 7.1(b)(5) to be a narrow exception to Rule 5.4, the Committee concluded that only those lawyers who disclose the requisite information under DC Rule 7.1(b)(5) can avoid Rule 5.4(a)'s ban against sharing legal fees with nonlawyers. **Opinion 253** was largely overruled by **DC Ethics Opinion 286 (1999)**, holding that a referral fee contingent on the paying lawyer's receipt of fees from the case involves the sharing of a lawyer's fee, and so is subject to DC Rule 5.4(a) -- and Rule 1.5(e) -- rather than DC Rule 7.1(b)(5). See 7.2:400, below. The DC Bar Ethics Committee subsequently came to a contrary conclusion, however, in an opinion dealing with a governmentally-sponsored referral service that charged a contingent fee. See **DC Ethics Opinion 307 (2001)** [which is described more fully under 7.2:400, below].

DC Ethics Opinion 329 (2005) also addressed the tension between DC Rule 5.4(a) and DC Rule 7.1(b)(5) in the context of a proposal by a non-profit organization to pay a lawyer a $10,000 annual retainer to handle small workers' compensation claims on behalf of day laborers; allow the attorney to take a 10 percent contingency fee from client awards; and require the attorney to pay the non-profit the first $10,000 the lawyer receives in contingent fees each year to permit the non-profit to recoup its retainer costs. In concluding that the proposed arrangement complied with the DC Rules, the Opinion relied heavily on **DC Ethics Opinion 307 (2001)**, which had opined that a lawyer may "participate in a federal government referral service that negotiates contracts to provide legal services to federal agencies where that program requires the lawyer to submit one percent of the legal fees received through the service to the government office in order to fund the program." The Opinion also distinguished **DC Ethics Opinion 286 (1999)**, explaining that the fee agreement it was addressing was different from the precluded in **Opinion 286** because the lawyer's payment to the non-profit allowed the non-profit to recoup its out-of-pocket costs for the retainer and would not be tied to the amount of fees collected in connection with the lawyer's representation of a particular client.

DC Ethics Opinion 233 (1993) concluded that a firm's payment of a "success fee" to a nonlawyer consultant under a client's agreement with the consultant does not constitute an impermissible "sharing" of fees between a lawyer and nonlawyer even if the funds flow through the law firm to the consultant.

All other DC authority arose under the Model Code.

DC Ethics Opinion 182 (1987) stated that DR 3-102(A) prohibited a law firm from borrowing a lawyer from a lay organization and paying that organization a fee for the borrowed lawyer's time that included an element of profit. The law firm need not disclose to the clients that the lawyer had been borrowed or that reimbursement has been provided to the lender but must bill its own clients for the borrowed lawyer's services at reasonable rates.

DC Ethics Opinion 176 (1986) emphasized that DR 3-102(A) imposed no ethical restrictions on placing market value fees in a separate legal assistance fund even if the umbrella organization received some indirect benefit from the arrangement.

DC Ethics Opinion 160 (1985) found that it would violate DR 3-102(A) for a lawyer to divide legal fees with a suspended lawyer for services rendered after the other lawyer was suspended.

DC Ethics Opinion 155 (1985) concluded that a prepaid legal services plan under which clients would pay a set monthly amount to receive legal services on a reduced fee basis and the parent organization would receive 10 percent of the monthly fee to cover administrative expenses did not violate DR 3-102(A). The Opinion emphasized, however, that the percentage paid the parent corporation must bear a reasonable relationship to the nonlegal costs incurred.

DC Ethics Opinion 94 (1980) concluded that a general counsel of a national trade association could accept fees for services rendered to a related educational association provided the fees accrue to the benefit of the trade association. Emphasizing that the association was not in the business of practicing law, the Legal Ethics Committee found that the arrangement did not raise a concern about the exercise of control by nonlawyers over lawyers in the practice of law. [See 5.4:400]

DC Ethics Opinion 93 (1980) concluded it was ethically proper for a lawyer, law firm or professional corporation, while engaging in the practice of law, also to offer and furnish services of other professionals, such as psychologists, social workers and family counselors, as long as the nonlawyers did not share in any fees paid for legal services. The nonlawyers could receive fees for any nonlegal services they performed.

DC Ethics Opinion 39 (1977) ruled that money paid by a law firm to a referral service for use of the temporary services of a lawyer registered with the service was not the unauthorized sharing of "legal fees" prohibited under DR 3-102(A). Defining "legal fees" as the fee a lawyer or law firm charges a client being served, the Legal Ethics Committee found that a salary paid by a law firm to a referral service or a referred

lawyer who does some or all of the work does not constitute legal fees. Similarly, the portion of a fixed salary paid by a referral service to the lawyer registered with the service for the lawyer's temporary work at a law firm was not prohibited by DR 3-102(A) so long as "the mode of payment to the referred lawyer" did not become a means by which the referral agency exercises any control over the manner in which the referred lawyer's professional services are rendered."

DC Ethics Opinion 10 (1975) addressed whether there was an ethical prohibition against a lawyer's joining with a nonlawyer in the performance of a contract requiring not only legal skills but the skills of other professions or disciplines as well. The Committee found no ethical problem under DR 3-102(A) so long as a portion of the fees received pertained only to nonlegal portions of the work performed.

5.4:300 Forming a Partnership with Nonlawyers

- Primary DC References: DC Rule 5.4(b)
- Background References: ABA Model Rule 5.4(b), Other Jurisdictions
- Commentary: ABABNA § 41-801, ALI-LGL § 60, Wolfram §§ 16.4, 16.5

Alone among American jurisdictions, DC allows lawyers to have nonlawyer partners — subject, however, to fairly stringent conditions that few firms have thought it worth satisfying. DC Rule 5.4(a)(4) makes an exception to the prohibition on sharing fees with nonlawyers for organizations meeting the requirements of DC Rule 5.4(b), and that provision states that a lawyer may practice law in a partnership or other organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients. Numbered subparagraphs follow stating the conditions of this permission: (1) the sole purpose of the organization must be the provision of legal services, (2) all nonlawyer partners must undertake to abide by the Rules of Professional Conduct, (3) the lawyer partners must be responsible for the nonlawyers as if they were lawyers, per Rule 5.1, and (4) all of these requirements must be put in writing.

DC Ethics Opinion 244 (1993) permits the name of a nonlawyer partner to be included in the name of a law firm but requires that firm stationery, cards and professional listings make clear that the nonlawyer partner is not a lawyer.

5.4:400 Third Party Interference with a Lawyer's Professional Judgment

- Primary DC References: DC Rule 5.4(c)
- Background References: ABA Model Rule 5.4(c), Other Jurisdictions
- Commentary: ABABNA § 51-901, ALI-LGL § 60, Wolfram § 8.8

Among the problems Rule 5.4 seeks to prevent is the interference by laypersons with a lawyer's practice. "The involvement of nonlawyers, such as corporate employers, in the legal process is of concern because the lawyer's independent professional judgment can be impaired by the involvement and control of nonlawyers who, by definition, are not subject to the same ethical mandates . . . of the professional code of conduct." **ABA Formal Opinion 95-392 (Sharing Legal Fees with a For-Profit Corporate Employer)**.

DC Ethics Opinion 289 (1999) addressed an inquiry regarding the conduct of "cause" litigation involving the representation of third persons, by a non-profit membership organization run by non-lawyers. The organization, whose activities included legislative lobbying and public education efforts on behalf of a particular population group, also sought to advance its public policy purposes through litigation intended to establish useful precedents, or to challenge undesirable ones. Such litigation had previously been conducted by staff lawyers representing the organization itself, as a party or *amicus curiae*, but was being expanded to include the representation of third persons in suitable "cause" cases. For this purpose, a special unit had been set up, within (but not separate from) a charitable foundation affiliated with the organization. Among the relevant features of the arrangement were that

-- The personnel of that unit were all either lawyers or legal support personnel.

-- While the lawyer in charge of the unit would report to the foundation's non-lawyer management, non-lawyers could have no role in the conduct of cases involving third person representation.

-- Non-lawyers outside the unit would, however, participate in the selection of cases undertaken, so as to assure that the cases would be consistent with the organization's policy goals, the representation of other clients, and the organization's relationship with other entities.

-- The unit had a charter and litigation guidelines, written procedures, and a standard retainer agreement, providing *inter alia* that client confidences and secrets would be appropriately protected, and that no one other than a staff lawyer of the unit or a lawyer in the organization's office of general counsel could interfere in the management or conduct of third person litigation. (As will be seen, the **Opinion** concluded that the exception for lawyers in the general counsel's office in the latter provision presented an ethical problem.)

-- A standard retainer agreement provided that if in a particular case it became to the client's advantage to take a legal position in conflict with the organization's policies, the client would have the last word; but in such a case, the unit's lawyers would be free to seek leave to withdraw (there being, in every case, other cooperating counsel also involved in the representation).

-- The clients would not be responsible for payment of any fee for lawyers' services, but where court-awarded fees were available such fees would be sought, and if recovered, split between the unit and cooperating counsel in proportion to lawyer time spent. Fees obtained by unit lawyers would be placed in a separate account, to be used solely in support of other "cause" litigation.

-- The standard retainer agreement obligated the client to cooperate in obtaining an award of attorneys fees where available, and in publicizing the case. It also required -- and here the **Opinion** found two more sticking points -- that the client agree not to accept a settlement offer conditioned on either (a) a waiver of the right to pursue attorney's fees, or (b) keeping the fact or the terms of the settlement confidential.

The **Opinion** concluded that the structure and operation of these representations of third persons, although in other respects evidently unexceptionable, presented ethical problems of three kinds. *First*, participation by lawyers in the organization's general counsel's office, in the day-to-day *conduct* of third person litigation (as distinct from the decision whether to undertake the representation) was deemed to present a possible violation of the prohibitions of DC Rules 5.4(c) and 1.8(e)(2) on lay interference in a lawyer's professional judgment because, although lawyers in the general counsel's office were indeed lawyers, they would be acting as agents of a lay entity, and not as counsel for the third person client. On the same reasoning, client confidences and secrets protected by Rule 1.6 could not be shared with such lawyers. (The **Opinion** also suggested, in a footnote, that such participation by lawyers in the general counsel's office might violate Rule 5.5.)

Second, the **Opinion** held that the provision of the standard retainer agreement by which the client agreed not to accept a settlement offer that was conditioned on keeping the fact and/or terms of the settlement confidential impermissibly interfered with the client's right, under Rule 1.2, to accept or reject a settlement. Recognizing that Rule 1.2(c) allows a lawyer and client to agree to limit the objectives of a representation, the **Opinion** nonetheless expressed doubt that it would be possible in this situation for a client to offer informed consent in advance to this condition. The **Opinion** also found this provision to offend the prohibitions on lay interference in Rules 1.8(e)(2) and 5.4(c), and to risk improper disclosure of client confidences and secrets, in violation of Rules 1.6 and 1.8(e)(3). (In this connection, the **Opinion** again referred, in a footnote, to a possible violation of Rule 5.5.)

Finally, the **Opinion** held that the retainer agreement's standard advance commitment by the client not to accept an offer of settlement conditioned on waiver of the right to pursue court-awarded fees also violated Rule 1.2(a). Recognizing that relevant authority on the point from other jurisdictions is divided, the **Opinion** nonetheless concluded that "a client's right to accept or reject a settlement is absolute," and, without extensive analysis, found Rules 1.7, 1.8(e)(2) and 5.4(c) implicated as well.

DC Ethics Opinion 304 (2001) addressed the ethical implications of a law firm's contracting out its human resources functions to a separate, unrelated company, concluding that such contracting out is permissible even under arrangements where the law firm's employees, including its lawyers, are considered for certain purposes employees of the other company, so long as the arrangement does not prevent or inhibit any lawyer from conforming to the applicable Rules of Professional conduct and does not attempt to insulate any lawyer from liability her own malpractice. The **Opinion** responded to an inquiry that contemplated that a firm of two lawyers (one of whom was the owner, the other an employee) with sixteen non-lawyer employees, would contract with a management company to employ all eighteen and be responsible for payroll services, employee benefits, withholding and similar tax payments, compliance with employment laws, personnel recordkeeping, unemployment compensation, workers' compensation, and the like. The law firm (or rather its single owner) would retain full management and supervisory authority over all employees, and would have custody and control of all client files and accounting information (other than employment related information). The management company might provide similar services to other companies, including law firms, and become the employer or co-employer of their employees, but there would be no contact between the firms by reason of their using the same employee management company. The **Opinion** observed that in recent years an increasing number of businesses have engaged unrelated companies to perform one or more human resources functions, and pointed out several advantages of such arrangements. It also noted that there are several forms of such arrangements, one being a "professional employer organization," or PEC; and other an administrative service organization, or ASO. Whatever the form of the arrangement, the **Opinion** held--or, for that matter, whatever the nature of an individual lawyers' employment arrangement--the arrangement must not impair the responsibilities of a lawyer to exercise independent professional judgment, per Rules 5.4, 2.1 and 1.8(e)(2); to maintain confidentiality of information gained in the representation, per Rule 1.6 and 1.8(e)(3); to act zealously on behalf of the client, per Rule 1.3(a); to avoid conflicts, per Rule 1.7, and to supervise adequately the conduct of other lawyers, per Rules 5.1 and 5.3.

The **Opinion** focused principally upon the latter two rules, and the importance of supervisory authority with respect to all activities constituting or assisting in the practice of law, resting solely with the firm's lawyers. It noted in this connection that the supervisory responsibilities imposed by Rules 5.1 and 5.3 are not limited to circumstances where the supervised lawyers or non-lawyers are actually in the employ of the supervising lawyer. It also observed that the management company may not exercise authority over hiring, firing, promotion, compensation or work assignments of

lawyers and legal assistants, or even of clerical or secretarial employees except as unrelated to the provision of legal services. The **Opinion** further made clear that the management company's compensation must not be a function of fees earned by the firm, which would violate Rule 5.4(a). It also observed that because there would be no sharing of employees among the firms serviced by the management company, there should be no problems about confidentiality or conflicts. And it said that since the management company would not be holding the lawyers out to clients, exercising control over the selection of lawyers or supervising their practice of law, there would be no problem of unauthorized practice of law.

The **Opinion** warned that a lawyer could not use the device of an employee management company to limit her liability for malpractice without violating Rule 1.8(g)(1). It also noted that some PEO's adhere to standards of a trade organization known as Employer Services Assurance Corporation (ESAC), which require that a PEO share with its client organization, and in some instances exercise exclusively the power to hire and fire, that it have at least a shared right to direct and control the work of the employees, and that ESAC have access to client firm work sites and records. The **Opinion** concluded that a lawyer owner who permitted such an arrangement would violate the Rules of Professional Conduct.

DC Ethics Opinion 314 (2002) addressed the permissibility, under Rule 5.4(c), of a nonlawyer employee of a union supervising a lawyer who represents the union or a member of the union. It concluded that where the lawyer is representing the union as an entity, supervision of the lawyer's work by a nonlawyer union employee is no more inconsistent with Rule 5.4(c)'s prohibition on allowing "a person who recommends, employs or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment" in rendering such services than it is to have a nonlawyer officer of a corporation direct the services of in-house counsel for the corporation. In each case, the organization involved is a client (and of necessity a nonlawyer), which has a client's entitlement, within the limits imposed by Rule 1.2, to direct the services of a lawyer who is representing it. The fact that it is an organization means, as recognized by Rule 1.13, that it must act through some individual, and that individual may also be a nonlawyer. On the other hand, where the union lawyer is representing only a member of a union, on a matter not arising out of the collective bargaining process (for example, through a legal services program under which a lawyer paid by the minor drafts a will, handles a divorce or litigates a personal injury suit), then Rule 5.4(c) has full force and the representation may not be supervised by a union employee. Finally, in between these two extremes are situations where substantive labor law will govern the question of who the client is. Thus, it is generally recognized that where a union represents one of its members in connection with a grievance under a collective bargaining agreement, the grievance belongs to the union, not its member, so that "an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance." **Gwin v. Nat'l Marine Engineers Beneficial Ass'n, 966 F.Supp. 4, 7 (DDC 1997), aff'd, 159 F.3d 636 (DC Cir. 1998).** The **Opinion** pointed out that if in such circumstances the union member involved is <u>not</u> a client, the lawyer will be

obliged, per Rules 1.13 and 4.3, to make that clear to the employee. Finally, the **Opinion** observed that there may well be circumstances where the lawyer represents both a union and a member of the union, in which case there would be the same potential for conflicts under Rule 1.7 as in any other dual representation.

DC Rule 5.4(c) is substantially similar to its predecessor DR 5-107(B); accordingly, the jurisprudence under the DC version of DR 5-107(B) remains pertinent.

DC Ethics Opinion 201 (1989) concluded that a "Hotline" project operated by a non-profit public interest legal service project through which clients could retain lawyers at reduced fees did not violate DR 5-107(B) where the project had agreed not to interfere with or control the performance of any lawyer.

DC Ethics Opinion 176 (1986) concluded that a lawyer's independent professional judgment would not be compromised in violation of DR 5-107(B) when a federal employee labor union employed a salaried lawyer to provide legal services for its members, "since the clients and the union that recommends counsel to them normally have the same goals."

DC Ethics Opinion 173 (1986) concluded that under DR 5-107(B) a lawyer hired and paid by an insurance company to represent an insured could not allow his relationship with the insurance company to affect his representation of the insured.

DC Ethics Opinion 155 (1985) concluded that a prepaid legal services plan under which member organizations were billed a monthly fee for legal services rendered by a law firm working for the parent organization did not violate DR 5-107(B) where the plan protected the law firm's obligation of independent professional judgment on behalf of each individual member organization for which it did legal work. Specifically, the Committee emphasized that the member organizations were (1) charged a monthly amount based on the number of hours each organization needed and (2) billed directly by the law firm.

DC Ethics Opinion 135 (1984) concluded that a lawyer employed by a consultant corporation whose officers and directors were nonlawyers could perform legal work for the corporation's clients if, among other things [see 5.4:200, above], the nonlawyers involved in the corporation did not exercise any control or influence over the lawyer's professional judgment in performing legal services.

DC Ethics Opinion 93 (1980) concluded that DR 5-107(B), prohibiting a lawyer from allowing a person who recommends, employs or pays him to "direct or regulate his professional judgment," was concerned with lay control of a lawyer's activities. Accordingly, when the direction of control was reversed, so that a lawyer had control over a nonlawyer's activities, DR 5-107(B) did not apply.

5.4:500 Nonlawyer Ownership in or Control of Profit-Making Legal Service Organizations

- Primary DC References: DC Rule 5.4(b)
- Background References: ABA Model Rule 5.4(d), Other Jurisdictions
- Commentary: ABABNA § 91-413, ALI-LGL § 60, Wolfram § 16.4, 16.5

DC Rule 5.4(b) permits a lawyer to practice in an "organization" in which a nonlawyer has financial or managerial control in limited circumstances. The rule therefore permits nonlawyer ownership in or control of a profit making legal service organization provided such organization is in the business of practicing law and the other conditions outlined in DC Rule 5.4(b) are satisfied. [See 5.4:300, above].

5.4:510 Group Legal Services

DC Rule 5.4 does not mention group legal services. However, DC Rule 6.3, permitting a lawyer to serve as "director, officer or member of a legal services organization" and its Comment [1], stating that "lawyers should be encouraged to support and participate in legal service organizations," indicate that such groups are permissible. DC Rule 5.4 does not proscribe group legal services plans so long as the plan and its administrators do not attempt to direct a lawyer's professional judgment. [See 5.4:400, above]

5.4:520 Nonprofit Organizations Delivering Legal Services

DC Rule 5.4(b), permitting a lawyer to practice in an organization in which a nonlawyer has a financial interest or managerial control under specified conditions, draws no distinction based on whether the organization is for profit or nonprofit. [See 5.4:300, above.]

5.5 Rule 5.5 Unauthorized Practice of Law

5.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.5
- Background References: ABA Model Rule 5.5, Other Jurisdictions
- Commentary:

5.5:101 Model Rule Comparison

As originally adopted, DC Rule 5.5 was identical to the Model Rule, and so consisted of an introductory phrase "A lawyer shall not," followed by two lettered paragraphs, respectively addressing (a) the practice of law in a jurisdiction where doing so violates the regulation of the legal profession, and (b) assisting a nonmember of the bar in an activity that constitutes the unauthorized practice of law. The black letter text of the DC remains in its original form, but in 2002 the Model Rule was substantially revised to incorporate the numerous changes that had been recommended by the ABA Commission on Multijurisdictional Practice. (The ABA Ethics 2000 Commission had also considered various amendments to Rule 5.5, but eventually deferred to the other Commission, which had studied the issues more comprehensively.)

Recognizing that the ABA had a commission studying the subject of multijurisdictional practice, the DC Bar Board of Governors in November 2001 appointed a Special Committee on Multijurisdictional Practice to study and make recommendations on the same general subject. That Committee focused its attention principally on Rule 49 of the DC Court of Appeals Rules, dealing with unauthorized practice of law, rather than on Rule 5.5 of the DC Rules of Professional Conduct, because Rule 49, which had been substantially revised in 1988 after a comprehensive study by the Schaller Committee, plays a more important role in the regulation of unauthorized practice in DC than Rule 5.5. The DC Bar's Special Committee issued its report in February 2004, and the DC Bar Board of Governors approved the report two months later. The Special Committee's Report recommended several changes to Rule 49 whose effect would bring the DC regulatory regime governing the unauthorized practice largely into conformity with that contemplated by the revised Model Rule 5.5, but as of this writing (January 2007), the DC Court of Appeals had not yet acted on the proposed changes to Rule 49.

The DC Rules Review Committee, taking account of the recommendations of the Special Committee on Multijurisdictional Practice, recommended no changes to DC Rule 5.5 save the addition of a new Comment [1] making reference to DC Court of Appeals Rule 49, so as to "assist DC Bar members seeking guidance on unauthorized practice rules." The provisions of Rule 49 and the decisional law thereunder are described in 5.5:210, below.

5.5:102 Model Code Comparison

Paragraph (a) is substantially identical to DR 3-101(B) of the Model Code, which provided that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

Paragraph (b) is substantially similar to DR 3-101(A) of the Model Code, which provided that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."

5.5:200 The Prohibition on Unauthorized Practice

- Primary DC References: DC Rule 5.5(a)
- Background References: ABA Model Rule 5.5(a), Other Jurisdictions
- Commentary: ABABNA § 21-8001, Wolfram § 15.1

DC Ethics Opinion 224 (1991) discusses the application of Rule 5.5 to a prepaid legal services program in which a third party markets legal services to potential subscribers and pays a law firm a fee for providing legal advice to subscribers. This was found not to violate Rule 5.5 under the arrangement described in the inquiry.

5.5:210 The Limited Role of Rule 5.5

DC Rule 5.5, like the other disciplinary rules, is addressed to lawyers. "Lawyer" is not a defined term. But it apparently denotes, at the core, an enrolled active member of the District of Columbia Bar. Rule 49 of the Rules of the District of Columbia Court of Appeals, the District's substantive unauthorized practice rule (discussed under 5.5:211, below) prohibits the practice of law by anyone not "enrolled as an active member of the Bar." Thus, an enrolled active member of the Bar, however unprofessional or unethical his conduct, cannot be engaged in the unauthorized practice of the law in the District. The term "lawyer" as used in the disciplinary rules also includes an inactive member of the Bar and a member whose license has been suspended or revoked. See **DC Ethics Opinion 271 (1997)** (inactive member of DC Bar treated as subject to DC disciplinary rules); **In re Kennedy, 542 A.2d 1225 (DC 1988)** (suspended member of the Bar violated predecessor to Rule 5.5 by practicing while under suspension); **In re Burton, 614 A.2d 46 (DC 1992)** (Bar Counsel allowed to proceed against disbarred DC lawyer for unauthorized practice). DC Rule 8.5, in stating that "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the conduct occurs" (a proposition that Comment [1] says "restates long-standing law"), implies unmistakably what has always been assumed: that the disciplinary authority of the Court of Appeals as exercised in the disciplinary rules extends no farther. The rules apply only to lawyers who if not now active members of the DC Bar were once "admitted to practice in this jurisdiction." Thus, the lawyer admitted to practice only in another jurisdiction who practices law in the District of Columbia is subject to action under Rule 49 but not to action under Rule 5.5; similarly as to the law-trained person not licensed to practice anywhere (who might loosely refer to himself as a lawyer) who undertakes to practice in the District.

DC Rule 5.5, then, has a limited role:

> 1. It makes subject to discipline in the District the active enrolled lawyer admitted to practice in the District who practices elsewhere in violation of another jurisdiction's unauthorized practice statute or rule.

2. It makes subject to discipline in the District the inactive lawyer admitted to practice in the District and the active enrolled District lawyer whose license to practice has been suspended or revoked if such lawyer practices either in the District in violation of Rule 49 or elsewhere in violation of another jurisdiction's unauthorized practice statute or rule.

3. By paragraph (b), it makes subject to discipline in the District any District lawyer who assists another to do something that constitutes the unauthorized practice of law in the District or elsewhere.

5.5:211 The Provisions of DC App. Rule 49

The real prohibition of unauthorized practice of law in the District of Columbia is in Rule 49 of the Rules of the District of Columbia Court of Appeals. That Rule was revised substantially (albeit more in form than in substance), effective February 1, 1998, with the Court of Appeals' adoption, in December 1997, of the recommendations of the DC Bar Committee on the Examination of Rule 49 (known for its chairman, James P. Schaller, Esq., as the Schaller Committee). The revised Rule 49 is now organized as a general prohibition followed by definitions, exceptions, provisions regarding the Committee on Unauthorized Practice of Law, and provisions governing enforcement proceedings before the Court of Appeals. Adopted along with the revised Rule was a quite detailed and informative Commentary, addressing each of the provisions of the revised Rule. The Committee on Unauthorized Practice of Law is authorized by Rule 49(d)(3)(G) to issue opinions "as to what constitutes the practice of law," and the Committee has exercised this authority with vigor, as indicated by the summaries of its opinions to be found below. [Opinions of the Committee, which are cited herein as **DC UPL Opinion ____,** are retrievable at http://www.dcappeals.gov.]

The general prohibition of unauthorized practice is set out in section (a) of the Rule, which provides that

> No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules.

Section (b) of the Rule provides definitions of certain terms. The key term "practice of law" is defined in subsection (b)(2) as:

> the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
>
> > (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;
> >
> > (B) Preparing or expressing legal opinions;
> >
> > (C) Appearing or acting as an attorney in any tribunal;

> (D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;
>
> (E) Providing advice or counsel as to how any of the activities described in sub-paragraph (A) through (D) might be done, or whether they were done, in accordance with applicable law;
>
> (F) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

The Commentary to Rule 49(b)(2)(F) provides a safe harbor for referral services:

> The conduct described in section (b)(2)(F) concerning the furnishing of attorneys is not intended to include legitimate or official referral services, such as those offered by the District of Columbia Bar, bar associations, labor organization, non-fee *pro bono* organizations, and other court-authorized organizations.

The Commentary also notes that

> The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.

Section (b) of the Rule, in addition to defining "practice of law," provides an all-inclusive definition of the term "Person," as well as definitions of the phrases "In the District of Columbia," and "Hold out as authorized or competent to practice law in the District of Columbia".

DC ULP Opinion 14-05 (Dec. 10, 2004) concluded that lawyers authorized to practice law in foreign jurisdictions but not in the District of Columbia may practice law in the District when their presence is of only incidental or occasional duration. The **Opinion** observed that Rule 49(b)(3)'s definition of "in the District of Columbia," which allows out-of-town lawyers to practice law in the District on an incidental basis, does not distinguish between lawyers authorized to practice law in foreign jurisdictions and lawyers authorized to practice law in other U.S. jurisdictions.

A significant issue regarding the applicability of Rule 49(b) to "cause" organizations, such as the NAACP Legal Defense and Education Fund and the American Civil Liberties Union, is addressed by **DC UPL Opinion 4-98 (Sep. 14, 1998)**. That **Opinion** responded to an inquiry that pointed out that the definition of "person," in Rule 49(b)(1), includes a comprehensive array of organizations, and Rule 49(b)(2)'s definition of the "practice of law" includes the "[f]urnishing [of] an attorney" to render

the various kinds of services specifically mentioned (see Rule 49(b)(2)(F), quoted above). The inquiry pointed out that a literal reading of these provisions would have the consequence that such cause organizations – and, for that matter, law firms as well – since they are "persons" subject to the UPL prohibition, but cannot themselves be members of the DC Bar, could be viewed as necessarily engaged in the unauthorized practice of law. The inquirer suggested that "cause" organizations should, like the "referral services" specifically excepted by the Commentary to 49(b)(2)(F) (quoted above), not be treated as coming within the prohibition because they do not hold themselves out as having a client relationship of trust or reliance. The **Opinion** rejected this reasoning, holding instead that "cause" organizations, like law firms, do indeed have -- and hold themselves out as having -- "client relationships of trust and reliance," but that, nonetheless,

> [A]n organization that engages in referring persons seeking legal services to attorneys within itself or to attorneys volunteering through the organization does not act in violation of Rule 49 where there is a member of the District of Columbia Bar within the organization who is responsible for the referral judgment.

Elaborating on the central premise on which **Opinion 4-98** rested, **DC UPL Opinion 6-99 (June 30, 1999)** addressed the applicability of the unauthorized practice prohibitions to the activities of commercial firms that locate and offer lawyers to law firms, corporate law departments and other legal service organizations, for temporary projects. The Opinion held that such commercial firms do not engage in the practice of law even though they are "furnishing an attorney or attorneys" to do so, and so nominally within the terms of Rule 49(b)(2)(F), quoted above, so long as –

> 1. An attorney in the legal service organization that has an attorney-client relationship with the prospective client will select the temporary attorney.
>
> 2. The lawyer providing services on a temporary basis will be directed or supervised by a lawyer in the legal services organization that represents the client; and
>
> 3. The commercial firm does not otherwise engage in the practice of law within the meaning of Rule 49(b)(2)(A-E), or attempt to direct or to supervise the practice of law by the attorneys it places.

By way of explanation, the Committee emphasized that--

> it considers essential to this opinion the predicate that professional legal judgments concerning retention of individual lawyers on a temporary basis are made by competent and authorized attorneys within a legal service organization that has an attorney-client relationship with the client whose legal needs give rise to the need for temporary attorneys.

Section (c) of Rule 49 lists a number of exceptions to the general prohibition against unlicensed practice, all subject to the proviso that "the person is not otherwise engaged in the practice of law or holding out as authorized or competent to practice law in the District of Columbia."

Subsection (1) covers U.S. government employees.

Subsection (2) covers practice before a U.S. special court, department or agency, where the governmental entity has a rule permitting and regulating such practice and the practitioner gives prominent notice in all business documents that the practice is "limited to matters and proceedings before federal courts and agencies." (As to such notice, see the discussion of **DC UPL Opinion 5-98**, below.)

In re Banks, 805 A.2d 990 (DC 2002), made clear that Rule 49(c)(2) does not constitute an affirmative grant of authority to practice before a federal agency; it merely provides that if such an agency has a rule permitting such practice, that practice by a person not admitted to the DC Bar does not in itself constitute the unauthorized practice of law. **Banks** also made clear that even if one is permissibly practicing before a governmental agency, he is not thereby entitled to hold himself out as qualified to practice law in the District of Columbia.

Subsection (3) allows practice before a U.S. court.

DC UPL Opinion 17-06 (July 21, 2006) states that lawyers qualify for the exception in Rule 49(c)(3) only if they make clear in business documents that they are not admitted in D.C. and their practice is limited to matters within the scope of the exception. The **Opinion** explains that the exception and disclosure requirements are comparable to the exception and disclosure requirements in Rule 49(c)(2).

Subsection (4), regarding lawyer employees of the District of Columbia, allows such a lawyer who is a member in good standing of another bar to provide services to his employer agency (without becoming a member of the DC Bar), but only for the first 360 days of employment.

DC UPL Opinion 13-04 (March 25, 2004) states that the 360-day exception does not permit D.C. government employees to practice law for a longer period even if they have a pending application to the D.C. Bar. The **Opinion** explained that the Rule contains no exception and makes no provision for waiver or extension. It also stated that the Committee may decide not to take enforcement action in extraordinary circumstances but that the Committee's decision would not bind other entities.

Subsection (5) provides for practice before agencies of the District of Columbia on terms parallel to those governing practitioners before federal government agencies under subsection (2), described above, including appropriate public notice of the limitations of practice. (As to such notice, see the discussion of **DC UPL Opinion 5-98**, below.)

> Subsection (6) covers in-house counsel, allowing for the provision of "legal advice only to one's regular employer, where the employer does not reasonably expect that it is receiving advice from a person authorized to practice law in the District of Columbia."
>
> Subsection (7) provides for *pro hac vice* appearances in DC courts by members of other bars not admitted to the DC Bar, allowing no more than five such appearances a year, requiring a $100 fee for each application, and limiting such appearances to persons not having an office in the District of Columbia.

The pro hac vice admission process is fully described in **DC UPL Opinion 2-98 (March 2, 1998)**, and forms of application for admission *pro hac vice* are attached to the **Opinion**. **DC UPL Opinion 9-01 (February 27, 2001)** addresses a dissonance between this subsection (7) and certain other exceptions to the prohibition of unauthorized practice provided in other subsections of Rule 49(c). Subsection (7) sets out a form of sworn statement to be executed by each applicant for admission *pro hac vice*, which includes the statement "I do not practice or hold out to practice law in the District of Columbia." The problem this presents is that lawyers properly practicing in DC under other subsections of section (c) cannot truthfully make the prescribed statement, since they *are* (legitimately) practicing law in DC in the limited ways provided by such subsections. The **Opinion** solves this problem by concluding that an applicant for admission *pro hac vice* can make changes in the language of the prescribed sworn statement that are necessary to make the statement accurate and complete: for example, instead of saying "I do not practice or hold out to practice law in the District of Columbia," they may say "I practice law in the District of Columbia pursuant to Rule 49(c)(8)."

> Subsection (8) (a wholly new provision added by the February 1, 1998, revision) provides that a member of another bar who has timely filed an application for admission to the DC Bar (within 90 days of commencing practice) may for a period of 360 days practice in the District of Columbia under the direct supervision of a member of the DC Bar, provided that the latter takes responsibility for the quality of the work and gives notice to the public of the member's supervision and the practitioner's bar status.

The Rule does not specify how the notice is to be given, but **DC UPL Opinion 1-98 (Feb. 2, 1998)**, issued immediately after the new Rule 49 went into effect, specifies that the following legend must be included on "all business documents signed or expressly presented by" the supervised lawyer, including letters, business cards, promotional materials, and filings or formal submissions:

> Admitted only in [the other jurisdiction]; supervision by [name of DC Bar member], a member of the DC Bar.

(As to this notice, see also **DC UPL Opinion 5-98**, discussed below.)

Rule 49 provides that a lawyer practicing under the exception in subsection (8) must be admitted *pro hac vice* to the extent the lawyer provides legal services in the courts of the District. However, **DC UPL Opinion 18-06 (Oct. 20, 2006)** states that lawyers practicing under the (c)(8) exception who are representing a party *pro bono* may follow a simplified certification process (set forth in (c)(9)) rather than file an application and motion to appear *pro hac vice* (unless a judge requires an application in a particular case), that they are not required to pay the *pro hac vice* application fee, and that the case does not count against the limit in Rule 49(c)(7)(i) of five *pro hac vice* cases per calendar year.

An important passage in the Commentary to Rule 49(c)(8) asserts the following:

> Neither this section, nor other sections of the Rule are intended to prohibit lawyers admitted and in good standing to the bars of other jurisdictions from providing professional services to their clients in the District of Columbia, where the principal offices of those lawyers are located elsewhere and their presence in the district is occasional and incidental to a practice located elsewhere.

DC UPL Opinion 10-01 (February 27, 2001) addressed the requirement of subsection (8) that an application for admission to the Bar must be submitted within 90 days of commencement of practice in DC, as applied to an applicant who has previously been engaged in practice under an exception provided by another subsection of section (c). The **Opinion** concluded that the period of practice under such other exception is not to be counted in determining whether an application for admission was filed within 90 days of commencing practice under section (c)(8).

> Subsection (9) of Rule 49(c) allows for the provision of *pro bono publico* services (A) by inactive members of the DC Bar employed by or affiliated with a legal services or referral program; (B) by employees of the Public Defender Service or non-profit organizations providing legal services for indigent clients provided they are members in good standing of another Bar and have timely applied for admission to the DC Bar — the allowance being good only for 360 days; and (C) by an officer or employee of the United States and a member in good standing of another Bar, who is assigned a referral by an organization providing legal services without fee.

DC UPL Opinion 3-98 (Mar. 3, 1998), after observing that "[t]he purpose of the exception set forth in 49(c)(9) is to provide the broadest access to *pro bono* legal services, while serving the purposes of Rule 49 to protect the public from unlicensed legal practitioners," specified that entitlement to practice requires only completion of a certificate that the applicant satisfies the requirements of 49(c)(9); neither an application nor a motion *pro hac vice* in litigation is required. A form of certificate, adequate for the purpose, is attached to the **Opinion**.

DC UPL Opinion 12-02 (September 16, 2002) offers guidance, in response to several requests, as to the meaning of the requirement in Rule 49(c)(8), Rule 49(c)(9)(B) and

Rule 49(c)(9)(C), that unadmitted lawyers practicing law pursuant to those provisions be supervised by a member of the D.C. Bar, and in particular, whether the supervision requirement means that the supervising lawyer must be present whenever the supervised lawyer appears in court. The **Opinion** stated that the same standard governs the supervision requirement of Rule 49 as applies under DC Rules of Professional Conduct. Specifically, DC Rule 5.1(b) provides that

> A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

This provision, the **Opinion** observed, requires the supervising lawyer to make reasonable efforts to ensure conformity with, among other Rules, Rule 1.1 requiring competent representation and Rule 1.3 requiring zealous and diligent representation within the bounds of the law. Whether this standard requires the supervising lawyer to attend with the supervised lawyer various events in litigation depends on the circumstances, including the experience and skill of the supervised lawyer, the nature of the case and the type of proceeding.

> Subsection (10) of Rule 49(c) provides an exception for programs specifically authorized by DC courts.
>
> Subsection (11) of Rule 49(c) allows authorized officers, directors or employees of corporations or partnerships to appear on behalf and in defense of such organizations in small claims actions or in settlement of landlord-tenant matters; but the organization must be represented by a lawyer if it files a cross-claim or counterclaim, or if the matter is certified to the Civil Action Branch of the Superior Court.

DC UPL Opinion 5-98 (Dec. 23, 1998) addresses in some detail the notices of limitation of practice required under subsections (2), (5) and (8) of Rule 49(c), recognizing differences in the necessary detail of such notices given practical differences between directory listings, marketing materials, letterhead, business cards and telephone lists. (The **Opinion** does not address lobby listings.)

DC UPL Opinion 11-02 (June 10, 2002) elaborates on the changes in Rule 49(c)(2), (c)(5), (c)(8), (c)(9) and (c)(10) made by the Court in April 2002, all relating to the notices required to be given by lawyers not licensed in DC but practicing there pursuant to one or more of the special exceptions provided by the referenced portions of Rule 49. To some extent, **Opinion 11-02** supersedes **Opinion 5-98**, described immediately above.

Section (d) of Rule 49, which sets forth the mandate, powers, and procedures of the Committee on Unauthorized Practice of Law, includes in subsection (3)(G) a new provision granting the Committee specific authority to issue opinions as to what constitutes the unauthorized practice of law, to be published "in the same manner as opinions rendered under the Rules of Professional Conduct." That provision also states

that conduct of a person "undertaken in good faith, in conformity with, and in reliance on" such an opinion "shall constitute a *prima facie* showing of compliance with Rule 49."

Section (e) of the Rule, addressing enforcement proceedings before the Court of Appeals, provides, in subsection (2), that violations of Rule 49 are punishable as contempt or subject to injunctive relief, or both, and in addition states that the Court has power to grant remedial compensation to persons harmed by violations of the Rule. (The Schaller Committee considered recommending the addition of criminal sanctions for the unauthorized practice of law, but concluded that this was not necessary.)

DC UPL Opinion 16-05 (June 17, 2005) addressed several issues regarding the use of "contract" lawyers – *i.e.*, lawyers other than partners or regular employees of a firm or other entity. The **Opinion** stated that Rule 49 makes no exception for contract lawyers, and thus a contract lawyer who practices law in the District on a regular basis must be a member of the D.C. Bar. It also discussed whether Rule 49 applies when a contract lawyer is hired to do "paralegal work." It explained that Rule 49 does not prevent a firm from hiring a person who is admitted to the practice of law in another jurisdiction as a paralegal, but if the person is being held out or billed out as a lawyer, or is being supervised as a subordinate attorney, the person and the person's employer must comply with Rule 49. The **Opinion** also warned that a contract lawyer whose presence in the District as a contract lawyer is not occasional or incidental within the meaning of rule 49(b)(3) is subject to Rule 49, even if each assignment, considered in isolation, might constitute only incidental or occasional presence in the District.

5.5:212 The Scope of the Prohibition on Unauthorized Practice

There are several cases dealing with what is the practice of law under the prior Rule 49. In **In re Banks, 561 A.2d 158 (DC 1987)**, the Court concluded that a law school graduate who had never been a member of the DC Bar or any other Bar had violated Rule 49(b) by engaging in a continuous course of conduct designed to foster the impression that he was a qualified member of the DC Bar. Instances of conduct that the Court found objectionable were: (1) representing himself to the public as a "lawyer"; (2) representing to the public that he was a former "administrative law judge," in describing his former positions as a hearing examiner for the DC Office of Human Rights and the DC Rental Accommodations Office; and (3) using terms and titles such as "administrative trial advocate," "in-house counsel," "member of the World Council (or Association) of Lawyers," and "member of the National District Attorneys Association" in his advertisements, resumes, business cards and stationery. *Id.* at 164-66. The Court found that these representations and titles misled the public by creating the impression in a reasonable mind that the respondent was qualified to practice law in the District, notwithstanding a disclosure statement he gave to his clients that stated that his firm was not licensed to practice law. *Id.* at 166-67.

Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120 (DC 1988), involved a lawyer who was not a member of the DC Bar but who had represented parties in proceedings before the DC Rental Accommodations Office. The Court affirmed the trial court's holding that these activities did *not* constitute the unauthorized practice of law, because Rule 49 does not address representation before administrative agencies and because the Rental Office's regulations authorized lay representation of parties in its proceedings. However, the Court cautioned that it was not finally deciding the larger issue of whether the definition of "practice of law" includes or excludes lay representation before agencies, in light of the review of Rule 49 then currently underway. Notably, the revised Rule 49(b)(2) defines this sort of activity as presumptively the "practice of law." Subsection (c)(5) of the revised Rule, however, provides an exception to this general rule and allows lay representation before DC agencies if (a) the representation is confined to appearances in proceedings before that agency, (b) the representation is authorized by statute or agency rule; and (c) the practitioner expressly and prominently gives notice of the limitations of his practice.

The Court in **re Amalgamated Development Co., 375 A.2d 494 (DC 1977)**, found a non-lawyer who was not registered with the Patent Office as a patent agent to be engaged in the unauthorized practice of law where he advised investors as to patentability, prepared patent applications, advised clients of what action to take after rejection of an application, and prepared and filed amendments to applications. The fact that the non-lawyer did not sign any correspondence with the Patent Office and expressly disclaimed that he and his organization were patent lawyers did not "remove these efforts from the realm of the practice of law," according to the Court. *Id.* at 499.

The Court in **J.H. Marshall & Associates, Inc. v. Burleson, 313 A.2d 587 (DC 1973)**, held that a collection agency was engaged in the unauthorized practice of law where it conducted its debt collection business in the following manner: the agency publicly solicited accounts, charged a contingent fee, prepared statements of claims that it filed in the Civil Division of Superior Court or in the Small Claims Branch, made payment of court costs, and then notified its retained lawyers so that they could appear on the designated return date. It remitted to the original creditor two-thirds of the amount collected in the litigation and retained one-third of that amount, out of which it paid its retained lawyer. The Court found the result of this arrangement was that "the credit agency, . . . retaining a contingent fee and advancing costs, sells the services of a lawyer, whom it controls and directs, thereby destroying the privity between attorney and client." *Id.* at 597. Moreover, the Court was not reassured by the lawyer's role in the business, stating that "the fact that an agent of the unauthorized practitioner, who is himself authorized to practice law, actually performs some legal services does not remove the taint from the entire scheme. It is axiomatic that one cannot do through an employee or agent that which he cannot do himself." *Id.* The Court enjoined the collection agency from engaging in a long list of activities it considered constituted the practice of law:

> [1] advising creditors when to bring suit; [2] soliciting or receiving assignments of claims or debts for collection under which payment, to the assignor or creditor, is dependent on collection from the debtor and which contemplates or authorizes the enforcement of collection by suit, brought in the name of either party, by an attorney at law; [3] employing a lawyer on behalf of the creditor or an assignor without specific written authority to do so; [4] interposing itself between the creditor and the lawyer handling legal action on the claim; [5] instituting or maintaining legal actions for others; and [6] appropriating to its own use as attorney fees sums adjudged against debtors on assigned claims except when such judgment is its bona fide property.

Id. at 600.

The Court in **Shamey v. Hickey, 433 A.2d 1111 (DC 1981)**, again found unauthorized practice of law where Hickey, the appellee, purportedly purchased from a home improvement company that he "operated" or "r[a]n" its claim against a customer, appellant Shamey. Hickey then filed a *pro se* suit in Small Claims Court to collect on the assigned claim. The Court found that he was engaged in the unauthorized practice of law because Hickey, "though purporting to be appearing for himself, was in reality representing the interests of the corporate party to the subject contract." *Id.* at 1112.

Jack Faucett Associates, Inc. v. American Telephone & Telegraph Co., 1985 WL 25746 (DDC Oct. 18, 1985), involved two companies that offered their services to class members in a class action suit in exchange for 50 percent of the amount the class members would receive under a proposed settlement agreement. The Court found that the companies were engaged in the unauthorized practice of law, specifically objecting

to the following activities: (1) soliciting the class members with offers to perform such services as preparing, completing and filing claim forms with the court on behalf of class members; (2) advising the class members as to whether or not they were eligible to participate in the settlement; and (3) participating on behalf of the class members in court proceedings.

In **In re Burton, 614 A.2d 46 (DC 1992)**, the Court affirmed the trial court's finding that a disbarred lawyer was engaging in the unauthorized practice of law within the meaning of Rule 49 where the lawyer had not only taken responsibility for the *administrative* aspects of his client's discrimination claim but had also drafted a complaint for filing in federal district court, prepared her for a deposition, prepared a memorandum opposing summary judgment, counseled her on her court appearances, advised her on courses of action after the trial court's decision, held himself out as authorized to perform these services, and accepted checks tendered as attorney's fees. Further, the Court held that it was proper for Bar Counsel to petition the court for contempt proceedings in this case, despite the fact that Rule 49(d) expressly commits the decision whether to initiate contempt proceedings for violating the Rule to the Committee on Unauthorized Practice of Law. The Court distinguished between the situation of a disbarred attorney practicing law and other forms of unauthorized practice and concluded that Rule 49 did not require that the former type of unauthorized practice be channeled through the investigative and hearing procedures of the Committee on Unauthorized Practice.

Inquiries to the Legal Ethics Committee from or concerning lawyers worried that they would be violating 5.5(b) or its predecessor by assisting another in engaging in the unauthorized practice of law have resulted in opinions of that Committee marking the boundaries of law practice in the District.

DC Ethics Opinion 225 (1992) found that it would *not* violate Rule 5.5 for a law firm to participate in a prepaid legal services program under which a third party company would market the program to potential subscribers and pay the law firm a fee for providing advice to these subscribers. As no employees of the marketing company would be providing legal services under the program and the company's role would be limited to the establishment, marketing and administration of the program, the Opinion concluded that the marketing company's activities could not be considered the practice of law.

DC Ethics Opinion 182 (1987) involved an inquiry into the permissible financial arrangements between a law firm and a consulting firm where some of the lawyers employed by the consulting firm were also partners in the law firm. Specifically, the inquiring firms asked whether the lawyer-employees needed to be removed from the consulting firm's payroll when performing legal work for clients unrelated to the consulting firm, as partners of the law firm, or could stay on the consulting firm's payroll and be "rented" to the law firm for a fee. The Legal Ethics Committee concluded that the consulting firm could "rent" the lawyer-employees to the law firm to the extent that the fee paid to the consulting firm represented only a reimbursement of

the cost of "lending" the lawyer-employee and no part of the fee represented profit from the lawyers' practice of law. The Committee stated that a consulting firm that received any profit from its lawyer-employees' practice of law on behalf of unrelated clients would be engaged in the unauthorized "business" of practicing law. See also, in this connection, **ABA Formal Opinion 95-392 (Sharing Legal Fees With a For-Profit Corporate Employer).**

DC Ethics Opinion 94 (1980) involved a situation very similar to that in **DC Ethics Opinion 182**. The inquirer in this instance was the general counsel of a national trade association that wanted to provide legal services to a "related" educational association for a fee. The Legal Ethics Committee approved the arrangement as consistent with DR 3-101, citing **ABA Informal Opinion 973 (1967)** as support. **ABA Informal Opinion 973** found a similar arrangement permissible as long as the lawyer's employer did not employ him "for the basic purpose" of supplying his legal services to other corporations and the lawyer would be retained directly by the related corporation with a *pro rata* reduction in salary based upon the portion of his time spent servicing the related corporation.

DC Ethics Opinion 55 (1978), discussed in more detail in 5.5:500, below, found that a lay organization that arranged for medical expert testimony for lawyers and sometimes charged a contingent fee for this service was not engaged in the practice of law.

DC Ethics Opinion 52 (1978) stated that a non-lawyer campaign consultant is generally free to impart his knowledge of federal campaign laws to his customers without engaging in the unauthorized practice of law, but cautioned that only lawyers could advise the consultant's customers on matters concerning their individual legal problems under the campaign laws where those problems were difficult or complex.

DC Ethics Opinion 39 (1977) involved an inquiry by a non-lawyer as to whether he could establish a referral service for lawyers willing to accept temporary assignments from other lawyers and law firms. The Opinion found this service permissible under DR 3-101(A), as the service did not provide legal services to the general public and, under the terms of their agreement, lawyers registered with the service were not its employees, but rather the principals for whom the service was the agent.

5.5:213 Sanctions for Engaging in Unauthorized Practice

As discussed above, Rule 49 of the District of Columbia Court of Appeals Rules provides for injunctions against unauthorized practice and contempt penalties for unauthorized practice in the District. In addition, if the unauthorized practice is engaged in by a D.C. lawyer who is subject to Rule 5.5, that lawyer may, like any D.C. lawyer, be censured, suspended from practice or expelled from the Bar by the Court of Appeals. DC Code § 11-2502 (1981). Further, a non-lawyer practicing law may be found to have committed unlawful trade practices in violation of the **Consumer Protection Procedures Act, DC Code § 28-3904 (1991)**, in addition to violating Rule 49. Thus, the Court in **Banks v. District of Columbia Department of Consumer and Regulatory Affairs, 634 A.2d 433 (DC 1993)**, held that the Department of Consumer and Regulatory Affairs (DCRA) had the authority to proceed against a non-lawyer engaged in the unauthorized practice of law and sustained the DCRA's ruling that the non-lawyer had engaged in three deceptive trade practices in violation of DC Code § 28-3904(a), (b), and (d) by reason of his unauthorized practice of law.

Another potential penalty for a non-lawyer engaged in the unauthorized practice of law is the denial of admission to the DC Bar. The Court in **In re Demos, 579 A.2d 668 (DC 1990)**, denied an application for admission to the DC Bar, in part because of the applicant's earlier engaging in the unauthorized practice of law. While working as a law clerk, the applicant had participated in a deposition as the sole representative of his law firm present, asked questions of the person being deposed and failed to inform opposing counsel of his non-lawyer status.

It should be noted, however, that Court of Appeals Rule 49 does provide for the *limited* practice of law in the District of Columbia by eligible law students, subject to several requirements and restrictions. DC Superior Court Rule of Civil Procedure 101(e) and DC Superior Court Rule of Criminal Procedure 44-I(f) also govern the limited practice of law by law students in the District of Columbia.

In **Landise v. Mauro, 725 A.2d 445 (DC 1998),** the Court held that a lawyer who was a member of the bar of another jurisdiction but not admitted in the District of Columbia, and who had practiced law with a DC lawyer pursuant to an oral partnership agreement, was not barred from recovering amounts due her as a partner by the fact that she had engaged in the unauthorized practice of law in the District of Columbia.

5.5:214 Unauthorized Practice by Lawyers

Agapito v. District of Columbia, 477 F.Supp.2d 103 (DDC March 7, 2007) concerned claims for attorney's fees for five lawyers who had successfully represented special needs children in administrative proceedings before hearing officers of the DC Public Schools (DCPS) under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 4000 et seq. All five lawyers came from the same out-of town firm, and were apparently admitted to the bar of the jurisdiction where that firm had its offices, but only one of the five was a member of the DC Bar, and one other was found to be entitled to practice in the District of Columbia under the terms of Rule 49(c)(8), which allows an attorney licensed elsewhere with a pending application for admission to the DC Bar to practice under the supervision of a DC-licensed lawyer for a limited period of time. The principal issue before the court was whether the other three lawyers, having been engage in the unauthorized practice of law in their representations before the DCPS, were nonetheless entitled to receive the attorneys' fees authorized by IDEA. As to this, the court, having determined that there was no statutory provision specifically authorizing specified categories of persons other than lawyers authorized to practice before the DCPS, so as to come under the exception provided by Rule 49(c)(2), described above under **where?**, held that these lawyers were not entitled to statutory attorneys fees for what had been the unauthorized practice of law.

The respondent in **In re Coleman, 919 A.2D 1135 (DC 2007)** was a lawyer who, three years after admission to the Pennsylvania Bar, was transferred by that Bar to inactive status for failure both to file a registration statement and to pay annual bar dues; and then a year later again moved to inactive status for failure to complete the necessary CLE courses. While in that inactive status, he entered into an arrangement to serve as local counsel in Pennsylvania for a New Jersey lawyer to whom he represented himself as a member of the Pennsylvania Bar, and signed and filed pleadings in that capacity in Pennsylvania courts. These activities drew the attention of the Pennsylvania disciplinary authorities, and resulted in a determination that he had violated Pennsylvania's Rule 5.5(a) as well as Rules 1.16(a), 7.1(a), 7.5(a), 7.5(b) ad 8.4(c) and (d), for which he was suspended from the Pennsylvania Bar for two years. The respondent had also been a member of the DC Bar, and when this discipline was reported to the DC disciplinary authorities, an identical suspension was imposed on him.

See also **In re Devaney, 870 A.2d 53 (DC 2005)**, where, as more fully discussed under 1.8:400, above, a lawyer who was disbarred for violating DC Rule 1.8(b) by preparing codicils to a client's will that amended the will to give members the of the lawyer's family substantial gifts was also held to have violated Rule 5.5(a) because he had not been admitted to practice in the state where he and his client resided and the codicils were prepared.

The Court in **In re Kennedy, 542 A.2d 1225 (DC 1988)**, held that a lawyer suspended from active practice for nonpayment of Bar membership dues violated DR 3-101(B) by continuing to practice law.

In **In re Stanton, 532 A.2d 95 (DC 1987)**, the Court held that a suspended lawyer's petition for reinstatement to the Bar should be denied because he engaged in the unauthorized practice of law while he was under suspension. The suspended lawyer had identified himself as a lawyer and used his DC Bar number in proceedings before the DC Rental Housing Commission.

In re Willcher, 404 A.2d 185 (DC 1979), also involved a lawyer who had practiced law while suspended, in apparent violation of DR 3-101(B), the Code predecessor of Rule 5.5(a). The Court concluded that there was insufficient proof of a DR 3-101(B) violation by the lawyer, however, because it not shown that he knew he had been suspended at the time he was practicing law.

5.5:300 Admission and Residency Requirements for Out-of-State Lawyers

See the treatment of Rule 8.1, below, for discussion of bar admission in the District of Columbia. 8.1:210 and 220 discuss bar admission in the District of Columbia generally; and 8.1:230 discusses the requirements for admission on motion that apply to lawyers who are members of the bar of another jurisdiction.

As for residency requirements, DC Bar Rule II, Section 1 states that "[r]esidence in the District of Columbia shall *not* be a condition of eligibility to membership." (Emphasis added.)

5.5:310 Pro Hac Vice Admission [see also 8.1:240]

See 8.1:240, below, for general information about admission *pro hac vice* in the District of Columbia.

The DC Court of Appeals has held that overuse of the *pro hac vice* admission exception may constitute the unauthorized practice of law, even where the lawyer has been in apparent technical compliance with its requirements. **Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120 (DC 1988)**, involved a lawyer who was a member of the Wisconsin and Pennsylvania bars but had offices located in the District. The lawyer had appeared only in the courts and before the agencies of the District and had never practiced anywhere other than in the District. While, as a technical matter, the lawyer had always complied with the provisions of the Court's rule governing *pro hac vice* admission by providing the correct paperwork for each appearance and never exceeding the maximum number of five permissible appearances per year, the Court found the lawyer had violated the "spirit" of the exception and was effectively engaged in the unauthorized practice of law. The Court emphasized that *pro hac vice* admission was "intended for special cases or unusual circumstances," and is "not a device to circumvent bar membership requirements or rules against unauthorized practice." *Id.* at 1124.

5.5:320 Special Legal Consultants (Foreign Lawyers)

DC Court of Appeals Rule 46(c)(4) provides for the licensing of certain foreign lawyers for limited practice of law in the District of Columbia, using the title Special Legal Consultant. To qualify for such licensing an applicant must have been admitted to practice in a foreign country and have engaged in the practice of law and been in good standing in that country for five of the previous eight years. Rule 46(c)(4)(A). The practice permitted to such Special Legal Consultants is effectively confined to advice about foreign law, since it may not include advice about the law of DC, the United States or any state or territory (except in reliance on advice of a member of the Bar). Rule 46(c)(4)(D)(5). Special Legal Consultants also may not appear for another in court (unless admitted *pro hac vice);* prepare any instrument affecting title to real estate in the United States; prepare a will or trust affecting disposition of property located in the United States and owned in whole or part by a resident or an instrument relating to administration of an estate in the United States; or prepare any instrument relating to marital relations, rights or duties of a US resident or the custody or care of the children of such a resident. Rule 46(c)(4)(D) (1)-(4). In addition, Special Legal Consultants may not hold themselves out as members of the Bar of the DC Court of Appeals, Rule 46(c)(4)(D)(6), or use any title other than "Special Legal Consultant," his or her foreign title and/or the name of his or her foreign firm, in each case together with the name of the country of admission to practice. Rule 46(c)(4)(D)(7).

DC UPL Opinion 8-00 (July 28, 2000) responded to several inquiries concerning the relationship of Rule 46(c)(4) to Rule 49, dealing with the unauthorized practice of law. The **Opinion** made clear that Rule 49 does not prohibit practice of law in the District of Columbia by a foreign lawyer licensed as a Special Legal Consultant under Rule 46(c)(4), so long as the practice is within the limitations imposed by that rule (described above). A foreign lawyer who is not eligible for license as a Special Legal Consultant, however, is in the same position as a lawyer admitted to practice in another U.S. jurisdiction but not eligible for admission to the DC Bar. Such a lawyer may only do legal work in DC as a law clerk under the supervision of a member of the DC Bar, and the supervising member must make sure there is no holding out of the supervised lawyers as a member of the DC Bar. The **Opinion** also held that Rule 49 does not permit a foreign lawyer to engage in the practice of law while his or her application for license is pending, since the special provisions in Rule 49(c)(8) for a 360-day grace period for applicants seeking admission on the basis of membership in another Bar applies only to applicants for admission to the DC Bar, and Special Legal Consultants do not attain the status of members of that Bar.

5.5:400 Performing Legal Services in Another Jurisdiction

DC Ethics Opinion 105 (1981) involved inquiries by lawyers licensed in the District concerning the propriety of multijurisdictional newspaper advertisements and letters of solicitation. The Opinion found that advertising alone does not constitute the practice of law and therefore "the provisions of DR 3-101(B) of the D.C. Code would not be violated even were the advertisements to constitute a violation of another jurisdiction's requirements."

DC Ethics Opinion 134 (1984) also was in response to an inquiry concerning advertising. The opinion found that a law firm would *not* violate DR 3-101(B) of the DC Code by sending a newsletter to recipients in various states, citing **DC Ethics Opinion 105** for the proposition that advertising alone does not constitute the practice of law. However, the opinion qualified this by stating that DR 3-101(B) required that the newsletter conform to the requirements of the recipient jurisdiction if it was sent to a jurisdiction where members of the firm practiced law or were members of the bar. (The Legal Ethics Committee's almost offhand remark to this effect appears to be a misreading of DR 3-101(B). Like Rule 5.5(b), it forbade practicing law in violation of another jurisdiction's unauthorized practice statute or rule; it did not make subject to discipline in the District of Columbia a lawyer who had violated any disciplinary rule of another jurisdiction or district where the lawyer practiced law or was admitted.)

DC Ethics Opinion 167 (1986) involved an inquiry by a member of the DC and California bars who wanted to advertise his immigration law services in London and Hong Kong. Again, the Opinion cited **DC Ethics Opinion 105** for the proposition that advertising alone does not constitute the practice of law under DC's ethics rules and concluded that as long as the lawyer merely advertised in those foreign jurisdictions and did not practice law there, he would not violate DR 3-101(B). However, the opinion cautioned that the overseas jurisdictions might reach a different conclusion on the issue of whether advertising constitutes the "practice of law."

The DC Court of Appeals has imposed sanctions on DC bar members who engaged in unauthorized practice in another jurisdiction in violation of Rule 5.5 or its predecessor, DR 3-101. See, *e.g.*, **In re Spiegelman, 694 A.2d 59 (DC 1997)** (imposing a one-year suspension for engaging in unauthorized practice in Maryland on several occasions, as well as for other disciplinary rule violations occurring in Maryland); **In re Ray, 675 A.2d 1381 (DC 1996)** (imposing a six-month suspension for engaging in unauthorized practice in Maryland, as well as other disciplinary rule violations arising out of the same transaction); **In re Kennedy, 605 A.2d 600 (DC 1992)** (imposing a nine-month suspension for engaging in unauthorized practice in Maryland); **In re Washington, 489 A.2d 452 (DC 1985)** (imposing a three-month suspension for engaging in unauthorized practice in Maryland, as well as other disciplinary rule violations).

5.5:500 Assisting in the Unauthorized Practice of Law

- Primary DC References: DC Rule 5.5(b)
- Background References: ABA Model Rule 5.5(b), Other Jurisdictions
- Commentary: ABABNA § 21-8201, Wolfram § 15.1

DC Ethics Opinion 289 (1999) [discussed more fully under 5.400, above], addressing various issues potentially presented by a nonprofit organization's program of "cause" litigation involving the representation or third persons, found certain aspects of the program to raise problems of lay interference with the lawyers conducting the litigation, in violation of Rule 1.8(e)(2) as well as Rule 5.4(c), and suggested, in footnotes, that such problems might implicate Rule 5.5 as well.

DC Ethics Opinion 278 (1998), addressing the question whether a member of the DC Bar could practice law in a partnership or other professional association with a lawyer licensed to practice in a foreign jurisdiction but not in any U.S. jurisdiction, referred to the possible application of Rule 5.5 in such circumstances. [The Opinion is discussed somewhat more fully under 5.1:200, above.]

DC Ethics Opinion 225 (1992) [discussed in more detail under 5.5:210, above] found that a law firm would not assist the unauthorized practice of law by participating in a prepaid legal services program that was to be administered and marketed to potential subscribers by a lay company. This is the only opinion under Rule 5.5(b).

DC Ethics Opinion 182 (1987) [also discussed in more detail under 5.5:210, above] concluded that a lawyer employed by a consulting firm would be aiding in the unauthorized practice of law in violation of DR 3-101(A) if the lawyer allowed the firm to receive any part of the profits from his practice of law on behalf of clients unrelated to the firm. However, the Opinion stated that the lawyer would not be aiding in the unauthorized practice of law if the consulting firm received compensation that merely represented a reimbursement of the cost to the firm of allowing its lawyer-employee to work on matters unrelated to the firm.

DC Ethics Opinion 176 (1986) addressed the ethical propriety of a salaried attorney employed by a federal employee labor union accepting an attorney's fee award calculated at the prevailing market rate when the amount awarded would be deposited in a separate fund to be used solely by the union's lawyers to finance legal assistance. The Opinion found that this arrangement would *not* violate DR 3-101(A) of the DC Code.

Case authority is to the same effect. See, *e.g.*, **American Fed'n of Gov't Employees, AFL-CIO, Local 3882 v. Federal Labor Relations Auth., 944 F.2d 922 (DC Cir. 1991)** (concluding that it does *not* constitute the unauthorized practice of law for union attorneys to be awarded market-rate attorneys' fees under the Back Pay Act in connection with the union's successful representation of an aggrieved employee,

provided the fees are placed in a legal representation fund, separate from the union's general treasury, to be used solely in connection with legal matters); **Jordan v. United States Dep't of Justice, 691 F.2d 514 (DC Cir. 1982)** (awarding attorneys' fees to attorney employed on legal staff of law school public interest organization for services rendered in successful Freedom of Information Act case, on the assumption that the organization would deposit any fees beyond recoupment of its expenses into a fund maintained exclusively for litigation).

DC Ethics Opinion 172 (1986) advised lawyers involved in joint ventures with non-lawyers to structure these ventures carefully in order to insure that no legal work is performed by the joint enterprise, so that the lawyers can be sure they are not assisting non-lawyers in the unauthorized practice of law in violation of DR 3-101(A).

DC Ethics Opinion 160 (1985) concluded that a lawyer would violate DR 3-101(A) if he continued to practice as an associate in a law firm where the partners of the firm had been suspended or if he sought the approval or advice of a suspended lawyer regarding decisions made for firm clients. The Opinion found that these activities would be aiding a non-lawyer in the unauthorized practice of law: it considered a suspended lawyer to be a "non-lawyer" within the meaning of the DR 3-101(A), and a firm's holding itself out as a law firm authorized to practice law and exercising the responsibility to approve decisions on legal matters undertaken on behalf of a client to constitute the "practice of law." Thus, for the lawyer to participate in these activities would be aiding a non-lawyer in the unauthorized practice of law in violation of DR 3-101(A).

DC Ethics Opinion 135 (1984) addressed the question whether a lawyer employed by a corporation whose directors and officers were non-lawyers can perform legal work for the corporation's clients without violating DR 3-101(A). The Opinion concluded that this was allowed under the disciplinary rule, but only if: (1) the fees generated by the work went only to compensate the lawyer and those under his supervision and were not used to compensate or profit a non-lawyer in the corporation; and (2) the non-lawyers in the corporation did not exercise any control or influence over the exercise of the lawyer's professional judgment in performing legal services for the corporation's clients.

DC Ethics Opinion 93 (1980) concluded that it did not violate DR 3-101(A) for a lawyer or law firm to offer and furnish the services of other professionals, such as psychologists, social workers and family counselors, while engaging in the practice of law, as long as the lawyer or firm ensured that non-lawyers did not control the activities of lawyers in the practice of law, share in fees generated from such practice, or engage in unethical activities connected with the practice of law. This Opinion, and the unique DC Rule that was its ultimate progeny, are discussed under 5.4:101, above.

DC Ethics Opinion 55 (1978) concluded that an attorney representing claimants in personal injury actions might employ a lay organization to arrange for medical expert testimony on their behalf, even where that lay organization charged a contingent fee for its services, without violating DR 3-101(A)'s prohibition on aiding a non-lawyer in the

unauthorized practice of law. The Opinion found that the services rendered by the lay organization in finding appropriate medical expert witnesses, paying them for their testimony, and assuming a portion of the injured party's financial risk of prosecuting the lawsuit did not constitute the practice of law.

DC Ethics Opinion 39 (1977), discussed in more detail under 5.5:203 above, found that lawyers could participate in a temporary attorney referral service without violating DR 3-101(A)'s prohibition against assisting in the unauthorized practice of law.

DC Ethics Opinion 10 (1975) discussed whether a lawyer could bid on a government contract that required both legal and non-legal work. The Opinion found this would not violate DR 3-101 as long as the services to be provided by non-lawyers were non-legal services. Specifically, the Opinion stated that, "where identifiable aspects of such projects fall within a lawyer's professional ken, so as to constitute the practice of law, the lawyer's professional responsibility for those aspects of the work should not be shared in specific respects with laymen."

The Court in **In re Smith, 5 B.R. 92 (Bankr. DC 1980), aff'd in part and rev'd in part sub nom. In re Devers, 12 B.R. 140 (DDC 1981)**, found a lawyer had violated DR 3-101 by assisting a "debt adjusting" corporation in the unauthorized practice of law. The Court stated that "[i]t is . . . clear that the activities of a debt-adjusting business constitute the unauthorized practice of law in this and many jurisdictions." *Id.* at 104. Thus, the lawyer's active involvement as general counsel, officer and director of the corporation plainly amounted to assistance in the unauthorized practice of law in violation of DR 3-101.

5.6 Rule 5.6 Restrictions on Right to Practice

5.6:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 5.6
- Background References: ABA Model Rule 5.6, Other Jurisdictions
- Commentary:

5.6:101 Model Rule Comparison

DC Rule 5.6 as first adopted was identical to Model Rule 5.6, except that in paragraph (b), addressing restrictions imposed on a lawyer's practice in connection with the settlement of a controversy, where the Model Rule refers to a "controversy between private parties," the DC Rule omitted the word "private," making clear that the rule applies to settlements involving a governmental party the government as well as private parties. In 1995, **ABA Formal Opinion 95-394** addressed the question whether the Model Rule applied to settlements with governmental parties despite the reference to "private" parties, and concluded that it did, thus rendering the term "private" inoperative surplusage. In 2002, the Model Rule was amended, pursuant to a recommendation of the Ethics 2000 Commission, to eliminate this surplusage by substituting for the phrase "settlement between private parties" in paragraph (b), the phrase "settlement of a client controversy."

The Model Rule was also changed in 2002 to broaden the categories of agreement covered by the prohibition in paragraph (a) to include, in addition to partnership and employment agreements, shareholders, operating, and "other similar types of" agreements. In 2006, paragraph (a) of the DC Rule was amended identically. The 2006 changes to the DC Rule included several changes to its Comments. A sentence was added to Comment [1], asserting that whether provisions limiting benefits are retirement provisions, excepted by the Rule, will depend on a number of factors, citing **Neuman v. Akman, 715 A.2d 127 (1998)** (discussed under 5.6:200, below). A new Comment [2] was also added, asserting that restrictions other than those concerning retirement benefits, that impose a substantial financial penalty on a lawyer who competes after leaving a firm, might violate paragraph (a) of the Rule. And a new Comment [4] was added, asserting that the Rule doesn't prohibit restrictions that may be included in the terms of a sale of a law practice under the new Rule 1.17.

5.6:102 Model Code Comparison

DC Rule 5.6 is substantially similar to its Model Code counterpart, DR 2-108. However, DC Rule 5.6(b) goes further than DR 2-108(B) by prohibiting the offer, as well as the acceptance, of a settlement agreement that restricts the lawyer's right to practice law. In the past, lawyers could make such offers without liability in the hope that opposing counsel would accept them either out of ignorance or in disregard of the Disciplinary Rule.

5.6:200 Restrictions on Lawyers Leaving a Firm

- Primary DC References: DC Rule 5.6(a)
- Background References: ABA Model Rule 5.6(a), Other Jurisdictions
- Commentary: ABABNA § 51-1201, ALI-LGL § , Wolfram §

The imposition of a financial penalty on a departing lawyer is an unreasonable restriction in violation of DC Rule 5.6(a) unless it results from "an agreement concerning benefits upon retirement" (which are discussed in the final paragraph of this section). Prohibited agreements include those that require the departing lawyer to forfeit earned, deferred compensation that the lawyer would receive if he or she were not leaving to compete with the firm for its business. See **DC Ethics Opinion 241 (1993)** (concluding that an agreement imposing a delay of up to five years in paying out funds of a departed partner's capital account where the departed partner continues to practice in the same location is a violation of Rule 5.6(a)). Also prohibited are agreements forcing the departing lawyer to pay a percentage of fees earned from clients who leave the former firm to become clients of the departing lawyer. See **DC Ethics Opinion 65 (1979)** (finding that an employment contract requiring a departing lawyer to pay a percentage of post-withdrawal fees for any work performed for a client of the former firm violated DR 2-108(A)); **DC Ethics Opinion 181 (1987)** (condemning, under DR 2-108(A), a restriction that prevented a withdrawing attorney from taking any action that would interfere with the business of the firm in any possible way).

Some financial disincentives are permitted under the rules. In **DC Ethics Opinion 221 (1991)**, the Legal Ethics Committee concluded that an employment agreement that divides a client's fees between the departing attorney and the existing firm, including a division for work already performed by the firm, is valid so long as the percentages used in the agreement represent a generally fair allocation of fees based on historical experience. *If, however,* the firm's percentage is excessive, DC Rule 5.6 is violated. In addition, **Opinion 221** found invalid a provision in the agreement that allowed only the firm to send clients notice of a lawyer's departure, and prohibited the lawyer from speaking to clients until after they had responded to the firm's notice, stating that such a provision allows too much control by the firm of communications between lawyer and client. Emphasizing that the client must be free to choose counsel on his own, the Opinion concluded that the firm may not restrict a lawyer's right to send an announcement notifying clients of his departure and may not prohibit discussion between the lawyer and the client if the client initiates such discussion.

Ashcroft & Gerel v. Coady, 244 F. 3d 948 (DC Cir. 2001) was a suit between a law firm and an individual lawyer who had been employed as managing attorney of the firm's Boston office, under an employment agreement providing, *inter alia*, for liquidated damages in the amount of $400,000 to be paid by either party upon a material breach of the agreement. Each party claimed breach of the agreement by the other, and the firm secured judgment on its claim in the amount of the liquidated damages as provided in the agreement. The lawyer challenged that provision as violating Rule

5.6(a)'s prohibition of an employment agreement restricting a lawyer's right to practice after termination of the agreement, but the Court held upheld provision in question, stating that the terms of the employment agreement at issue were "readily distinguishable from a contract not to compete."

DC Ethics Opinion 77 (1979) ruled that an agreement obligating a departing lawyer to pay liquidated damages if he solicited (*i.e.*, actively sought to obtain) his former firm's clients otherwise than by sending a printed announcement card containing all of the information permitted by the Code did not violate DR 2-108(A). Clients were not restricted from seeking out the departing lawyer.

DC Ethics Opinion 122 (1983) ruled that a partnership agreement that absolutely prohibited a departing lawyer from representing firm clients for a specified period violated DR 2-108(A). The prohibition was ruled to be "inconsistent with the practice of law as a profession" and ethically impermissible also because it "directly interferes with clients' choice of an attorney." In addition, the Opinion held that an agreement requiring a departing lawyer to share a percentage of his fees from specific clients with his former firm violated DR 2-108(A). Such an agreement interfered with the departing lawyer's representation of his clients and gave the lawyer an incentive to charge larger fees to clients he represented at his former firm. See also **ABA Formal Opinion 94-381 (1994)** (finding a violation of Model Rule 5.6(a) in a retainer or employment agreement between a corporation and an outside lawyer whereby the lawyer agrees never to represent anyone against the corporation in the future); **ABA Formal Opinion 93-371 (1993)** (ruling invalid under Model Rule 5.6(a) provision by which a lawyer is restricted from representing certain other present and future clients against a specific defendant); **ABA Informal Opinion 1171 (1971)** (finding a violation of DR 2-108(A) in a provision that prohibited departing lawyers from representing clients of their former firm for two years, except those clients the departing lawyer brought to the firm).

DC Ethics Opinion 325 (2004) ruled that an agreement among partners in a firm that was about to merge with another firm to distribute profits from fee payments that were owed to the pre-merger firm for its previously completed legal work, but that were to be made over time, only to partners in the pre-merger firm who continued to practice for at least two years with the merged firm violates Rule 5.6(a). The **Opinion** distinguished situations in which an ongoing firm's partnership agreement would cut off elements of compensation to which a departing lawyer would be entitled if he or she were to remain at the firm.

DC Ethics Opinion 97 (1980) examined whether it is proper for an associate who leaves a firm to solicit clients of his former firm, and if so, whether the firm could restrict such practices through an employment agreement. The answer to the first question was said to be yes because, unlike DR 2-103(A) of the standard version of the Model Code, DR 2-103(A) of the DC Code did not prohibit solicitation of clients except when "accompanied by wrongful conduct" — untruths, coercion, overbearing. Finding that the answer to the latter question, whether the employment agreement could ethically restrict what would otherwise be permissible solicitation on the part of the

departing associate, depended on whether it amounted to an impermissible restriction on the lawyer's right to practice, the Opinion concluded that, if the associate was allowed to send announcements of his departure to clients of the firm, the firm's employment agreement could prohibit, consistent with DR 2-108(A), other direct solicitation of the firm's clients by the associate.

Agreements that limit a departing lawyer's ability to compete with his or her former firm, through the use of financial penalties, geographical constraints or advertisement restrictions, are a violation of DC Rule 5.6(a). See **DC Ethics Opinion 194 (1988)** (finding it a violation of DR 2-108(A) to reduce a lawyer's payment for unrealized accounts receivable for withdrawing to enter into a competitive practice, noting that such a financial penalty affects the lawyer's willingness to accept clients of the former firm, thus interfering with such clients' choice of counsel). See also **ABA Informal Opinion 1417 (1978)** (concluding that an agreement whereby a withdrawing partner agrees not to hire any of the firm's associates who are working at the firm at the time of withdrawal for a certain period of years is an indirect restriction on the attorney's ability to practice and thus a violation of DR 2-108(A)); **ABA Informal Opinion 1301 (1975)** (examining an agreement in which a corporate employer prohibited its departing lawyers for a period of two years following termination from accepting employment from a competitor unless the company receives assurances that the lawyer will not render services in direct competition with the company, and deeming the covenant superfluous since a lawyer is already restricted from divulging secrets of a former client).

Rule 5.6(a) in terms excepts from its prohibition "an agreement concerning benefits upon retirement." In **Neuman v. Akman, 715 A.2d 127 (1998)**, the Court addressed a partnership agreement that provided certain lifetime benefits, generally payable beginning at age sixty-five, to withdrawing partners who satisfied certain age and longevity agreements or who left the firm by reason of death or permanent disability, but withheld such benefits from partners who left in order to "engage in the private practice of law anywhere in the United States." The latter provision was challenged, as in violation of Rule 5.6(a), by a partner who had left, at age fifty-six, to join another law firm in the District of Columbia. The Court upheld the provision in question as coming within the phrase "benefits upon retirement." It noted that the term "retire" can mean not only withdrawal from gainful employment but also withdrawal from a particular position within an occupation, but held that the term as used in Rule 5.6(a) has the former meaning. The Court also noted, citing the decision of the New York Court of appeals in **Cohen v. Lord, Day and Lord, 550 N.E. 2d 410 (N.Y. 1989),** that the term "benefits" implies a distinction between income that a departing partner had already earned (or a deferred payout of a current asset), and a future distribution of law firm profits (sometimes treated as compensation for a partner's share of a firm's goodwill). Here, the Court concluded, the benefits contemplated by the partnership agreement were of the former variety, not the latter. See also **Gryce v. Lavine, 675 A.2d 67 (DC 1996),** where, in a similar dispute about whether a partner who had withdrawn from a firm at age sixty-eight and continued the practice of law with another firm was entitled to retirement benefits, the Court held that the firm's partnership agreement was

ambiguous, precluding the summary judgement that the trial court had awarded to the firm.

5.6:300 Settlements Restricting a Lawyer's Future Practice

- Primary DC References: DC Rule 5.6(b)
- Background References: ABA Model Rule 5.6(b), Other Jurisdictions
- Commentary: ABABNA § 51-1202, ALI-LGL §, Wolfram §

DC Rule 5.6(b) forbids lawyers to enter into settlement agreements that restrict their right to represent or sue certain parties. Such agreements create a conflict between the interests of present and future clients and restrict the public's free access to lawyers. See **ABA Formal Opinion 93-371 (1993)** (explaining the rationale behind Model Rule 5.6); **ABA Formal Opinion 95-394 (1995)** (finding an agency in violation of Model Rule 5.6 for conditioning a settlement offer on the opposing counsel's agreement never to represent clients against that agency in the future).

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, above] was a violation of Rule 5.6(b)'s prohibition on a lawyer making an agreement restricting the lawyer's right to practice as part of a settlement of a controversy between parties. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the lawyers' clients. The Rule 5.6(b) violation found in this case rested on the lawyers' undertaking in the secret agreement never to represent anyone with related claims against the defendant. The respondent argued that the Rule did not apply because there was no settlement of a "controversy between parties:" the agreement did not actually settle any of the clients' claims against the defendant; indeed, by its terms it left them untouched. The Board on Professional Responsibility reasoned, nonetheless, and the Court agreed, that the clients did, by reason of the agreement, lose their lawyers, their lawyers' work product and the names of potential class members, which was close to the equivalent of a release of their claims.

DC Ethics Opinion 335 (2006) held that settlement agreements may not contain confidentiality provisions that prohibit a lawyer from disclosing public information about the case, such as the name of the defendant, the allegations of the complaint, and information that readily can be inferred from the public record, such as the fact that the litigation settled. The Opinion explained that such agreements would are contrary to the basic principle underlying Rule 5.6(b): that clients should have the opportunity to retain the best available lawyer to represent them. The Opinion observed that a lawyer must abide by a client's instructions not to disclose public information, but noted that the client does not need the mechanism of a settlement agreement to enforce such instructions.

DC Ethics Opinion 147 (1985) condemned a settlement proposal that conditioned acceptance on the plaintiff's lawyer's waiver of a fee or acceptance of a reduced statutory fee. The Legal Ethics Committee stretched to find some disciplinary rule violated. The most it could say of DR 2-108(B), predecessor to Rule 5.6(b), was that its conclusion that the proposal of a waiver or reduced fee was unethical was "supported by the policy considerations reflected in" that disciplinary rule. **Opinion 147** was subsequently modified by **DC Ethics Opinion 207 (1989)**: see 8.4:500, below.

DC Ethics Opinion 130 (1983) concluded that the insistence on or acceptance of a term in a settlement agreement restricting plaintiff's lawyer from representing future clients against the defendant was unethical as in violation of DR 2-108(B).

And **DC Ethics Opinion 35 (1977)** concluded that DR 2-108(B) prohibited a lawyer for a settling plaintiff from agreeing as part of the settlement not to sue the defendant ever again in any matter. The inquiring lawyer also asked whether he could agree as part of a settlement agreement not to refer to another lawyer a potential client with a claim against the settling defendant. The Legal Ethics Committee answered no, finding the suggested abnegation "clearly contrary to the intent" of DR 2-108(b) because "DR 2-108(b) is an assurance of the public's right to counsel through the lawyer's right to practice."

5.7 Rule 5.7 Responsibilities Regarding Law-Related Services

5.7:100 Comparative Analysis of DC Rule

- Primary DC References:
- Background References: ABA Model Rule 5.7, Other Jurisdictions
- Commentary:

5.7:101 Model Rule Comparison

Prior to 2006, the DC Rules of Professional Conduct never included a Rule corresponding to Model Rule 5.7, in either its original form, adopted in 1971 and deleted in 1972, or in the more narrowly focused version that was adopted in 1994, although among the changes to the DC Rules recommended by the Peters Committee and adopted effective November 1, 1996, was a new Comment [25] (now renumbered [36]) to DC Rule 1.7 that addresses the general subject of "Businesses Affiliated with a Lawyer or Firm," and specifically the conflict of interest and disclosure considerations that may be involved in referrals between the law firm and the affiliated business, possible conflicts created by the work of the affiliated business, and problems of preserving confidences of firm clients who are also customers of the affiliated business.

However, the DC Rules Review Committee recommended, "in the interests of uniformity, and the DC Court of Appeals approved in 2006, the adoption of a DC Rule 5.7 that is identical, in both black letter text and Comments, to Model Rule 5.7 as it now stands.

5.7:102 Model Code Comparison

There was no counterpart to this rule in the Model Code.

5.7:200 Applicability of Ethics Rules to Ancillary Business Activities

- Primary DC References:
- Background References: ABA Model Rule 5.7, Other Jurisdictions
- Commentary: ABABNA § 101-2103, ALI-LGL § , Wolfram §

DC Ethics Opinion 306 (2001) addressed the ethical responsibilities of a lawyer who is also a licensed insurance broker. It observed that such a lawyer, in selling insurance products to the public generally, must comply with ethics rules applicable generally to lawyers acting in non-lawyer capacities, meaning principally Rule 8.4(c) (prohibiting conduct inviting dishonesty, fraud, deceit or misrepresentation); and must not mislead the customer into believing that the lawyer is acting as the customer's lawyer in the transaction. Where such a lawyer sells insurance to a *client*, on the other hand, both Rule 1.8(a) and Rule 1.7(b)(4) come into play, the first governing business transactions between a lawyer and a client, and the second addressing the potential conflicts of interest entailed by the lawyer's dual role. In those circumstances also, Rule 1.6 might come into play, in requiring the lawyer to refrain from disclosing confidences or secrets of the client to the insurer, even through the information involved was relevant to the insurer's evaluation of the proposed transaction -- the result being a conflict of interest that prevents the lawyer from consummating the sale.

VI. PUBLIC SERVICE

6.1 Rule 6.1 Pro Bono Public Service

6.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 6.1
- Background References: ABA Model Rule 6.1, Other Jurisdictions
- Commentary:

6.1:101 Model Rule Comparison

The DC Rules differ from the Model Rules by setting forth a lawyer's duty to represent people who cannot afford legal services and his or her duty to seek to improve the legal system in two separate rules. DC Rule 6.1, consisting of a single paragraph, pertains exclusively to a lawyer's duty to "participate in serving those persons, or groups of persons, who are unable to pay all or a portion of reasonable attorneys' fees or who are otherwise unable to obtain counsel." DC Rule 6.4(a) separately discusses a lawyer's obligation to participate in law reform activities.

Model Rule 6.1, on the other hand, discusses both the lawyer's duty to provide pro bono legal services and to participate in law reform activities. The difference in emphasis between DC Rules 6.1 and 6.4, on the one hand, and MR 6.1 on the other, has been substantially lessened by a thoroughgoing revision of the Model Rule in 1993. The Model Rule now sets up a hierarchy of public service that gives primary emphasis to services to persons of limited means and to organizations that serve them and relegates services to "cause" organizations to secondary status. Paragraph (a) says that a lawyer should devote "the substantial majority" of the lawyer's pro bono time to people unable to afford legal services and organizations that serve them. Paragraph (b) states that a lawyer should also provide "any additional services" to "cause" organizations, reduced fee services and law reform activities. Both the DC Rule and the Model Rule make pro bono service an aspirational goal rather than a mandatory obligation (and the 1993 amendments added the word "Voluntary" to the caption of MR 6.1).

The amendment of the Model Rule in 1993 also specifies an amount of pro bono service that lawyers should aspire to render, *i.e.*, at least fifty hours a year. The text of DC Rule 6.1 does not discuss the number of pro bono hours a lawyer should put in. Comment [5], however, does state that lawyers should be guided by the Resolutions on Pro Bono Services, passed by the Judicial Conferences of the District of Columbia and the DC Circuit from time to time, that call on members of the DC Bar each year, as a minimum, (1) to accept one court appointment, (2) to provide a specified number of hours of pro bono legal service (a figure originally set at 40 hours, but raised effective July 1, 1999 to 50 hours), or (3) to contribute, when personal representation is not feasible, the lesser of $400 (raised from $200 effective July 1, 1999) or one percent of earned income to a

legal assistance organization. See **DC Ethics Opinion 104 (1981)**. The DC Rule states that the pro bono services should be provided to "persons or groups of persons" otherwise unable to obtain legal counsel and does not list in as much detail as the Model Rule the types of organizations deserving of pro bono service.

With respect to the financial support of an organization, DC Rule 6.1 clearly states that the lawyer's obligation is, first and foremost, to provide professional services or to participate in the work of organizations that provide professional services. Only when that is "not feasible" should a lawyer's responsibilities under Rule 6.1 be satisfied by financial contributions. MR 6.1 states that a lawyer should voluntarily contribute financial support to legal service organizations *in addition to* supplying pro bono public service.

The Model Rule was changed in 2002, per recommendations by of Ethics 2000 Commission, by the addition of an initial sentence to the Rule itself, stating that every lawyer has a professional obligation to provide legal services to those unable to pay; and a new Comment [11] stating that law firms and other organizations employing lawyers should act reasonably to enable and encourage all lawyers to provide the pro bono legal service called for by the Rule. The DC Rules Review Committee recommended and the DC Court of Appeals approved in 2006 a similar final Comment [6] to the DC Rule.

6.1:102 Model Code Comparison

There is no direct counterpart to this Rule in the Model Code, but the Rule reflects principles set forth in Ethical Considerations 1-1, 2-1, 2-16, 2-24, 2-25, 2-29, 2-32 and 8-3. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer," and that every lawyer, "regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-3 stated: "Those persons unable to pay for legal services should be provided needed services." EC 2-16 stated that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." EC 2-29 stated: "When a lawyer is . . . requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons."

6.1:200 Lawyer's Moral Obligation to Engage in Public Interest Legal Service

- Primary DC References: DC Rule 6.1, DC Rule 6.4(a)
- Background References: ABA Model Rule 6.1, Other Jurisdictions
- Commentary: ABABNA § 91-6001, ALI-LGL § , Wolfram § 16.9

There appear to be no pertinent DC court decisions or ethics opinions on this subject. Comment [1] to the DC Rule, however, explains that Rule 6.1 reflects the longstanding ethical principle underlying Canon 2 of the Model Code, the principle that: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The Rule, per Comment [2], also expresses the notion that the primary responsibility for providing legal services for those unable to pay "ultimately rests upon the individual lawyer." The lawyer's obligation is described as especially pertinent today because "the rights and responsibilities of individuals and groups in the United States are increasingly defined in legal terms and . . . as a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the well-to-do." Comment [1]. Nonetheless, the lawyer's obligation to provide pro bono legal services, although a bedrock ethical principle underlying the legal profession, is not mandatory. Model Rule 6.1, Comment [1], expressly states that the Rule is not intended to be enforced through the profession's disciplinary process.

6.2 Rule 6.2 Accepting Appointments

6.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 6.2
- Background References: ABA Model Rule 6.2, Other Jurisdictions
- Commentary:

6.2:101 Model Rule Comparison

DC Rule 6.2 is substantially similar to Model Rule 6.2. Both rules state that "a lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause." Paragraphs (a), (b), and (c) provide three examples of good cause enabling a lawyer to avoid an appointment. DC Rule and MR 6.2(a) and (c) are identical; both permit a lawyer to avoid an appointment where the representation is likely to violate rules of professional conduct or the client or cause is so repugnant to the lawyer that the repugnance will impair the client-lawyer relationship or the lawyer's ability to represent the client. The language of DC Rule 6.2(b), however, departs from that in MR 6.2(b) by omitting the word "financial" and substituting "substantial and unreasonable burden" for "unreasonable burden." Accordingly, the DC Rule permits a lawyer to decline a representation if it is likely to "result in a substantial and unreasonable burden," financial or otherwise, on the lawyer.

No changes in the Model Rule were recommended by the Ethics 2000 Commission, and none were included among the changes made by the ABA House of Delegates in 2002. Similarly, the DC Rules Review Committee recommended no changes to the DC Rule, and none were included in the changes accepted by the DC Court of Appeals in 2006.

6.2:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code. EC 2-29 stated that when a lawyer is "appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons." EC 2-30 stated that a lawyer "should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

6.2:200 Duty to Accept Court Appointments Except for Good Cause

- Primary DC References: DC Rule 6.2
- Background References: ABA Model Rule 6.2, Other Jurisdictions
- Commentary: ABABNA § 91-6201, ALI-LGL § 14, Wolfram §

There appear to be no pertinent DC court decisions or ethics opinions on this subject. Rule 6.2 sets forth the "good cause" standard under which a lawyer is permitted to refuse an appointment and, without defining "good cause," provides three examples of good cause: (1) when the representation is likely to result in a violation of the rules of professional conduct; (2) when the representation is likely to result in a substantial or unreasonable burden on the lawyer; and (3) when the client or the cause is so repugnant to the lawyer that it will impair the client-lawyer relationship or the lawyer's ability to represent the client. Comment [2] goes on to state with more specificity that good cause exists if the lawyer could not handle a matter competently or if undertaking the representation would result in an improper conflict of interest. The Comment also explains that included among the "substantial and unreasonable burdens" permitting a lawyer to refuse an appointment are "financial sacrifice[s] so great as to be unjust." Finally, Comment [1] explains that a lawyer has a responsibility under Rule 6.1 to accept his or her fair share of clients that are repugnant to the lawyer, although a lawyer ordinarily is not obliged to accept such clients.

6.3 Rule 6.3 Membership in Legal Services Organization

6.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 6.3
- Background References: ABA Model Rule 6.3, Other Jurisdictions
- Commentary:

6.3:101 Model Rule Comparison

The DC Rule is identical to the Model Rule. DC Rule 6.3 and Model Rule 6.3 state that a lawyer may serve as a "director, officer, or member of a legal services organization," even though the organization serves persons having interests adverse to a client of the lawyer. Paragraph (a) states, however, that a lawyer shall not knowingly participate in a decision or action of the organization if such participation "would be incompatible with the lawyer's obligations to a client under Rule 1.7," which relates to conflicts of interest. Paragraph (b) states that a lawyer shall not knowingly participate in a decision or action if such participation "could have a material adverse effect on the representation of a client of the organization whose interests are adverse to the client of the lawyer."

No changes in the Model Rule were recommended by the Ethics 2000 Commission, and none were included among the changes made by the ABA House of Delegates in 2002. Similarly, the DC Rules Review Committee recommended no changes to the DC Rule, and none were included in the changes accepted by the DC Court of Appeals in 2006.

6.3:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code. EC 2-33 provided that "attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services," and that "[s]uch participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients."

6.3:200 Conflicts of Interest of Lawyers Participating in a Legal Services Organization

- Primary DC References: DC Rule 6.3
- Background References: ABA Model Rule 6.3, Other Jurisdictions
- Commentary: ABABNA § 91-6401, ALI-LGL § 135, Wolfram § 16.7.4

There appear to be no pertinent DC court decisions or ethics opinions on this subject. Comment [1] does state, however, that a lawyer who is an officer or a member of a legal services organization does not have a lawyer-client relationship with persons served by the organization. The comment explains that if the potential conflict between the interests of the organization's clients and interests of the lawyer's clients resulted in the disqualification of the lawyer, then the legal profession's involvement in such organizations would be severely curtailed. To reassure clients with respect to potential conflicts of interest, Comment [2] recommends that organizations have "[e]stablished, written policies" dealing with conflicting interests of board members.

6.4 Rule 6.4 Law Reform Activities Affecting Client Interests

6.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 6.4
- Background References: ABA Model Rule 6.4, Other Jurisdictions
- Commentary:

6.4:101 Model Rule Comparison

Paragraph (a) of DC Rule 6.4, stating that a lawyer should assist in "improving the administration of justice," as by participating in activities intended to improve the law, the legal system, or the legal profession, is unique to the DC Rules, though its subject is addressed in a more summary manner by Model Rule 6.1(b)(3). [See 6.1:101, above.] The DC Rule is accompanied by a Comment [1] that elaborates at some length on the importance of maintaining and improving on the legal system, and the special responsibility of lawyers therefor. The corresponding Comment [8] to Model Rule 6.1, explaining that Rule's subparagraph (b)(3), is again more summary than its DC counterpart.

DC Rule 6.4(b), on the other hand, is identical to the single paragraph constituting Model Rule 6.4, both stating that a lawyer may serve as a "director, officer, or member of an organization involved in the reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer." Both also provide that, when the lawyer knows that a client's interests may be "materially benefited," the lawyer shall disclose that fact but need not identify the client. Comment [2] to the DC Rule is likewise almost identical to the single Comment following the Model Rule.

No changes in the Model Rule were recommended by the Ethics 2000 Commission, and none were included among the changes made by the ABA House of Delegates in 2002. Similarly, the DC Rules Review Committee recommended no changes to the DC Rule, and none were included in the changes accepted by the DC Court of Appeals in 2006.

6.4:102 Model Code Comparison

There was no counterpart to Rule 6.4 in the Model Code. The Rule reflects the policy underlying Canon 8 that "[a] lawyer should assist in improving the legal system." EC 8-1 stated that "lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein." EC 8-2 stated that "[i]f a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he [or she] should endeavor by lawful means to obtain appropriate changes in the law." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance," and "therefore, lawyers should encourage, and should aid in making, needed changes and improvements."

6.4:200 Conflicts of Interest of Lawyers Participating in Law Reform Organizations

- Primary DC References: DC Rule 6.4
- Background References: ABA Model Rule 6.4, Other Jurisdictions
- Commentary: ABABNA § 91-6402, ALI-LGL § , Wolfram § 13.8

Comment [1] states that lawyers involved in organizations seeking to reform the law generally do not have a lawyer-client relationship with the organization, thereby permitting a lawyer to remain involved with an organization that indirectly affects a client of the lawyer. The lawyer, however, must be mindful of obligations to clients under Rule 1.7, the primary rule dealing with conflicts of interest. The comments explain that a lawyer specializing in antitrust litigation, for example, might be disqualified from drafting revisions of rules governing that subject. See DC Rule 6.4, Comment [1].

DC Ethics Opinion 204 (1989) states that a law firm that represents clients before an administrative agency is not, as a general matter, ethically precluded from submitting comments on its own behalf in response to a notice of proposed rulemaking issued by the agency. The Opinion then goes on to conclude, however, that the law firm may not submit any comments if (1) the firm represents, at the time the comments are submitted, clients with agency filings pending or imminent and (2) the subject matter of the law firm's comments could prejudice a client's filing before the agency.

DC Ethics Opinion 231 (1992) involved a lawyer and member of the D.C. Council who was required to vote on legislation concerning physician liability potentially affecting future clients of the lawyer's firm. The Opinion stated that a lawyer who is also a legislator voting on legislation potentially prejudicing clients of the lawyer's firm would not be violating the prohibition of DC Rule 1.3(b)(2) on intentionally damaging a client because any prejudice "would seem an incidental consequence of the legislator's exercise of public duties"; and that the lawyer/legislator would not violate Rule 1.7, on conflicts, because there was no suggestion that his actions as a legislator would affect his professional judgment in the representation of clients.

6.5 Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

6.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 6.5
- Background References: ABA Model Rule 6.5, Other Jurisdictions
- Commentary:

6.5:101 Model Rule Comparison

This new DC Rule, adopted by the DC Court of Appeals in 2006 on the recommendation of the DC Bar Pro Bono Committee and the DC Rules Review Committee, is in all respects but one identical to the new Model Rule 6.5, proposed by the Ethics 2000 Commission and adopted by the ABA House of Delegates in 2002. The Rule reflects a concern that strict application of the conflict of interest rules might deter lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm of the sort of circumstances in which such a problem might arise is the legal-advice hotline or pro se clinic, whose purpose is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented. To deal with the problem, the Rule limits the imputation of conflicts between such a volunteer lawyer and the lawyer's firm under Rules 1.7, 1.9(a) and 1.10 to those in which the volunteer lawyer knows of a conflict between a limited representation pursuant to such a program and a representation by the firm, or that another lawyer with the firm would be disqualified from the representation.

The sole respect in which the DC Rule or its Comments vary from the Model Rule is that DC Rule has a Comment [6] that the Model Rule does not have. That Comment points out that paragraph (e) of DC Rule 1.10 (which is also lacking in Model Rule 1.10) provides a somewhat similar suspension of disqualification for lawyers affiliated with a firm who provide legal advice to designated agencies of the District of Columbia Government.

6.5:102 Model Code Comparison

There was no comparable Disciplinary Rule in the Model Code.

6.5:200 Scope of Rule

6.5:300 Special Conflict of Interest Rule

VII. INFORMATION ABOUT LEGAL SERVICES

7.1 Rule 7.1 Communications Concerning a Lawyer's Services

7.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 7.1
- Background References: ABA Model Rule 7.1, Other Jurisdictions
- Commentary:

7.1:101 Model Rule Comparison

DC Rule 7.1 is the only rule in the DC Rules that addresses communications by a lawyer about the lawyer's services, while the Model Rules have four rules addressing various aspects of that subject. Model Rule 7.1, like the DC Rule, sets out a general standard of truthfulness applicable to all lawyer communications; Model Rule 7.2 deals with advertising, which is not separately addressed in the DC Rules beyond a brief reference in a Comment to DC Rule 7.1, although advertising would be subject to the general requirement of truthfulness in DC Rule 7.1; Model Rule 7.3 addresses in-person solicitation and targeted mailings, which are dealt with in a less detailed fashion by DC Rule 7.1(b); and Model Rule 7.4 has quite detailed provisions regarding communications about fields of practice, again a subject not specifically addressed in the DC Rules beyond the general requirement of truthfulness in DC Rule 7.1.

DC Rule 7.1's requirement of truthfulness in lawyers' communications generally is quite similar to that of Model Rule 7.1; indeed, the text of the initial sentence, setting out the basic prohibition on a lawyer's making a false or misleading communication about the lawyer or the lawyer's services, is identical in both rules, and the two versions differ only in that in the DC Rule that sentence is labeled as paragraph (a) and in the DC Rule it has no number or letter designation. As originally adopted, in both versions of the Rule this initial sentence was followed by the identification of several particular circumstances, identified in separate paragraphs (a) through (c) of the Model Rule, and in subparagraphs (a)(1) and (2) of the DC Rule, in which a communication would be false or misleading. In 2002, however, pursuant to recommendations of the Ethics 2000 Commission, the Model Rule was amended to drop two of those elaborating paragraphs, paragraphs (b) and (c). Paragraph (b) had said that a communication is false or misleading if it is likely to create unjustified expectations, or states or implies the lawyer can achieve results by means that violate the Rules or other law; the second of these was moved to Model Rule 8.4(c) [see 8.4:101, below]. DC Rule 7.1 did not and does not contain either of these prohibitions. The omitted paragraph (c) of the Model Rule said a communication is false or misleading if it compares the lawyer's services to the services of others unless the comparison can be factually substantiated; the DC Rule sets out the same proposition in subparagraph (a)(2).

The foregoing changes made in 2002 left Model Rule 7.1 consisting of two sentences, of which the first sets out the general prohibition stated above, and the second (formerly a separate paragraph (a)) states that a communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading. That second sentence appears also in the DC Rule as subparagraph (a)(1), along with a subparagraph (a)(2) described above.

Paragraph (b) of the DC Rule addresses solicitation, a subject that is more elaborately treated in Model Rule 7.3. It prohibits a lawyer seeking, by in-person contact, employment of the lawyer or the lawyer's partner or associate by a nonlawyer who hasn't sought the lawyer's advice, if the solicitation involves use of a statement or claim that is false or misleading, or involves the use of coercion, duress or harassment, or if the potential client is apparently in a physical or mental condition that would make it unlikely that the potential client could exercise reasonable judgment in selecting a lawyer. As originally adopted, this paragraph of the Rule allowed, subject to certain specified exceptions, for a lawyer to pay a third party to solicit clients on the lawyer's behalf -- a provision unique among American jurisdictions. One of the recommendations of the DC Rules Review Committee for revision of the DC Rules that were accepted by the DC Court of Appeals in 2006 was to eliminate this provision and substitute what is now subparagraph (b)(2) of DC Rule 7.1, forbidding a lawyer to give anything of value to a person other than the lawyer's partner or employee for recommending the lawyer's services through in-person contact. The Committee explained this change, from allowing to forbidding payment to another for soliciting clients, by saying that at the time the DC Rules were first adopted, there was little advertising by lawyers, so that allowing lawyers to pay others to recommend the lawyer's services would assist people to find a lawyer, but that the current prevalence of lawyer advertising had eliminated that problem. In addition, the Committee said there was reason to believe that some such hired solicitors, not being subject to regulation, were employing unseemly tactics in soliciting clients for lawyers. This newly added restriction in paragraph (b) of DC Rule 7.1 has something of a counterpart in what is now (since 2002) paragraph (b) of Model Rule 7.2, which more broadly forbids a lawyer from giving anything of value to a person for recommending the lawyer's services, without a limitation like the DC Rule's to recommendations made through in-person contact. The Model Rule, however, provides exceptions to the prohibition for payment of reasonable costs of advertising, for payment of the usual charges of a legal service plan or a not-for profit pr qualified lawyer referral service, and for payments for a law practice under Rule 1.17.

DC Rule 7.1(c) forbids a lawyer to cooperate with an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services if the promotional activities involve the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. Model Rule 7.3(a)(as amended in 2002) more broadly prohibits *all* in-person, live telephone or real-time electronic contacts with potential clients with whom the lawyer has no family or prior professional relationship, when "a significant motive" for doing so is pecuniary gain, subject to an exception

provided in paragraph (d) for participation in a prepaid or group legal services plan. Moreover, paragraph (b) of Model Rule 7.3 prohibits written or recorded communications, as well as in-person and live telephone communications, regardless of the lawyer's motive if either a prospective client has made known to the lawyer a desire not to be solicited, or the solicitation involves coercion, duress, or harassment. And paragraph (c) of the Model Rule requires that written, recorded and electronic communications soliciting employment by a prospective client known to be in need of legal services must bear a prominent label identifying it as *Advertising*. None of these provisions of Model Rule 7.3 has any counterpart in DC Rule 7.1 or any other DC Rule

Model Rule 7.4 sets out some fairly intricate restrictions on a lawyer's communications concerning his or her areas of practice and specialization, none of which has any parallel in DC Rule 7.1 or any other DC Rule. DC Rule 7.1 does apply to such communications, but the only restriction it applies to them is the requirement that they not be false or misleading.

DC Rule 7.1 does, however, have two provisions that are unique to the District of Columbia, Paragraph (d) of the Rule prohibits the solicitation of clients for purposes of representing them for a fee, within a specified distance from the DC Courthouse. This provision is derived from a Rule of the DC Court of Appeals, designed to discourage unseemly solicitation of clients around the courthouse. The Jordan Committee added to it the limitation to solicitations looking to a representation for a fee in order not to discourage solicitations for pro bono representation.

The other unique provision of DC Rule 7.1 is a new paragraph (e), added in 2006 in response to reports of the Public Defender Service, the United Sates Attorney's Office and the Office of Bar Counsel of lawyers who regularly solicit inmates already represented by counsel, for fee-paying representations with promises of a quick release from prison or a favorable resolution of their case. To protect the inmates in such matters, that provision requires notice to the current counsel before the lawyer who has solicited such a case accepts any funds from the inmate

7.1:102 Model Code Comparison

The DC Rule, addressing both advertising and solicitation, represents a substantial revision of DR 2-101 and DR 2-103. (The latter provision, in the DC version, and many of the related Ethical Considerations were significantly different from comparable provisions of the Model Code of Professional Responsibility.) DR 2-101(A), pertaining to publicity and advertising, stated that a lawyer shall not knowingly make any representation about his or her ability, background, experience, law partners or associates, or fees that is "false, fraudulent, misleading, or deceptive, and that might reasonably be expected to induce reliance by a member of the public." DR 2-101(B) addressed the types of statements or claims likely to be false, fraudulent, misleading, or deceptive. The DC version of DR 2-103, pertaining to solicitation of professional employment, was substantially similar to DC Rule 7.1(b) and (c). Paragraph (d) of DC Rule 7.1, containing the restriction on solicitation in or near the DC Courthouse, carries forward the substance of DR 2-103(E) of the DC Code of Professional Responsibility, which had no parallel in the Model Code.

7.1:200 Lawyer Advertising--In General

- Primary DC References: DC Rule 7.1
- Background References: ABA Model Rule 7.1, Other Jurisdictions
- Commentary: ABABNA § 81.1, Wolfram § 14.2

DC Ethics Opinion 316 (2002), enlarging on the treatment of issues relating to lawyers' use of the internet in **Opinion 302** (discussed immediately below), addressed the permissibility of lawyers participating in on-line "chat rooms," "listservs" and similar arrangements through which lawyers engage in interactive communications in "real time" (or nearly real) with internet users seeking legal information. The discussion was quite comprehensive, including a canvass of scholarly and ethics committee treatment, and a survey of practices in actual chat rooms and listservs. The **Opinion** observed that the ethical Rule ordinarily engaged by such communications for lawyers subject to the DC Rules is Rule 7.1, which does not make the sharp distinction generally found in other jurisdictions' ethics codes between advertising and solicitation (nor limit the latter to the extent commonly done). It also observed that a lawyer's seeking business through chat rooms or listservs effectively falls somewhere between a face-to-face communication and a written one, having the immediacy of the former, yet the ignorability of the latter. Under the DC Rules, the lawyer's principal ethical obligations in the circumstances are to avoid false or misleading communications, per Rule 7.1(a); and, where pertinent, not to use "undue influence" or take advantage of a potential client's "physical or mental condition," under Rule 7.1(b)(2) and (3), respectively.

The **Opinion** also pointed out a principal potential problem presented by lawyers' use of the internet in these circumstances: the risk of inadvertently establishing an attorney-client relationship—which, once established, will subject the lawyer to the full range of ethical obligations that would apply if the lawyer had intentionally entered into such a relationship; including avoidance of conflicts, under Rules 1.7, 1.8, 1.9 and 1.11; competence under Rule 1.1, diligence and zeal under Rule 1.3, and adequate communication under Rule 1.4. The risk of inadvertently establishing an attorney-client relationship arises from the fact that nothing more is needed to establish such a relationship than reasonable expectations and reliance by the putative client; no written agreement is necessary, and a written disclaimer will not necessarily be an effective preventive measure. Thus, the **Opinion** emphasized that that "lawyers wishing to avoid formation of attorney-client relationships through chat room or similar Internet communications should limit themselves to providing legal information, and should not seek to elicit or respond to the specifics of particular individual situations."

DC Ethics Opinion 302 (2000) explored issues relating to lawyers' use of internet-based web pages in two kinds of circumstances: soliciting plaintiffs for class action lawsuits through such web pages established by the lawyer, and offering legal work through web pages sponsored by others, on which potential clients post requests for bids

on legal projects. As to both categories of circumstance, the **Opinion** concluded, as had opinions of other ethics committees, that there is nothing untoward about lawyers communicating about their services through web sites so long as the communications conform to the general rules on communicating with clients, which in this jurisdiction means Rule 7.1. That rule, as has been noted above, is the sole counterpart of MR's 7.1, 7.2, 7.3, and 7.4, and its central requirement is simply that lawyers' communication about their services not be "false or misleading." Rule 1.7(a).

As respects use of web pages to solicit plaintiffs for a class action, the **Opinion** pointed out that there are a number of ways such communications could be false or misleading so as to fall afoul of the rule: by an inaccurate description of the lawsuit; by use of words, such as "Notice," suggesting that the communication is required or authorized by a court; by comparative claims about superiority of the lawyer's services that can't be substantiated, per Rule 7.1(a)(2) and Comment [1]; and, for reasons explained in **DC Ethics Opinion 249 (1995) [**discussed under 1.7:230, below] claims that the lawyer "can help you." The **Opinion** pointed out that the DC rules, unlike those of other jurisdictions, do not prohibit the use of for-profit agencies to provide advertising or referral services to lawyers so long as it is clear that a communication is a paid advertisement or, if the relationship between the lawyer and the web site host is more complicated, the lawyer takes reasonable steps to make sure the potential client is informed of the consideration paid by the lawyer to the intermediary, and the effect of such payment on the fee charged the client, per Rule 7.1(b)(5) and Comment [6]. The **Opinion** also pointed out that DC Rules 4.3 and 3.6 could also have a bearing on web site communications seeking class action plaintiffs, the former as requiring that it be made clear that the lawyer has a financial interest in the suit, and is not merely making a disinterested public announcement; the latter as requiring the lawyer to make sure the web site communications do not present " a serious and imminent threat to the impartiality of the judge or jury." The **Opinion** observed the potentially "multi-layered" character of communications through web sites, and the resulting possibility that such communications may become misleading because "relevant disclosures are hidden many clicks away from the main pages." It suggested in this regard that key disclosures be provided on "click through" boxes or pages, requiring visitors to verify that they have read important information. The **Opinion** also suggested various technical measures a lawyer might take to make the web site more efficient.

On the other subject addressed, the use of web sites on which clients post requests for bids on legal projects, the **Opinion** largely agreed with **New York City Ethics Op. 2000-1 (2000)** in approving the practice with certain restrictions, but noted that differences between the respective rules of the two jurisdictions resulted in differences with respect to applicable restrictions. Once again, the key provision under the DC Rules is Rule 7.1(a)'s prohibition of communications that are false or misleading. In DC, unlike New York, there is no prohibition on lawyers paying a fee for access to web sites containing postings of legal projects, provided appropriate disclosures are made to the client, under Rule 7.1(b)(5). Additionally, again unlike New York's, the DC Rules do not prohibit communications with potential clients who have not initiated the exchange: in other words, they make no distinction between advertising and

solicitation. The **Opinion** noted that a sample web site that had been reviewed in connection with the preparation of the **Opinion** offered assistance to law firms in responding to RFP's, and concluded that this would not offend Rule 5.4(a)'s prohibition on allowing a non-lawyer to direct or regulate the lawyer's professional judgment. The **Opinion** did conclude, however (here agreeing with the **New York City Opinion**), that there would be a problem if the fee paid to the web site were linked to or contingent on fees obtained by the lawyer from a posted project, since that would be sharing fees with non-lawyers in violation of Rule 5.4. And, again agreeing with the New York counterpart, the **Opinion** noted the potential confidentiality and conflicts problems presented by use of such web sites, and the need for appropriate measures to deal with such problems.

DC Ethics Opinion 261 (1995) addressed the application of Rule 7.1(b)(2) and (3), which prohibit solicitation involving undue influence or where the potential client cannot exercise considered judgment based on physical or mental condition, to a pro bono legal assistance program's practice of referring battered women in a hospital emergency room to lawyers if the women so requested. The Opinion held that neither Rule 7.1(b)(2) nor Rule 7.1(b)(3) applies when the individuals making the referrals are not affiliated with the recommended lawyers or when the victims are not asked to select a particular lawyer while in the emergency room.

DC Ethics Opinion 225 (1992) stated that, if a law firm participates in a prepaid legal services program whereby a third-party marketing company contacts potential clients, DC Rule 7.1 is applicable, and the law firm must satisfy itself that statements made by the marketing company comply with the requirements of Rule 7.1 so as to "avoid misleading potential subscribers as to what is being purchased." The DC Court of Appeals addressed DR 2-103, Rule 1.7(e)'s predecessor provision under the DC Code of Professional Responsibility, in **In re Gregory, 574 A.2d 265 (DC App 1990)**. The court refused to impose reciprocal punishment based on DR 2-103 after a lawyer had engaged in in-person solicitation of potential clients in the hallways of the District Court of Maryland in Montgomery County. The Court noted that under the literal language of DR 2-103, which pertained to in-person solicitation only in the vicinity of the DC Courthouse, the lawyer had not violated the rule and reciprocal punishment could not be imposed.

7.1:210 Prior Law and the Commercial Speech Doctrine

The U.S. Supreme Court has extended First Amendment protection to lawyer advertising as a form of commercial speech, provided that the communication is not false, misleading, or deceptive. See **In re R.M.J., 455 U.S. 191 (1982)**. The Supreme Court also has concluded that states have an interest in protecting the public from communications about a lawyer or a lawyer's services that are false and misleading. See **Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)**. Because DC Rule 7.1 essentially prohibits only "false or misleading" communications and the use of undue influence, it has not been necessary to amend the rule to reflect changes in commercial speech jurisprudence addressing such specific issues as in-person solicitation, targeted mailings, and communications about specialized fields of practice. For example, MR 7.3 and its comments were amended in 1989, in part as a response to **Shapero v. Kentucky State Bar, 486 US 466 (1988)**, which addressed a state's authority to regulate direct mail advertising to potential clients. Rather than totally banning direct mail advertising, like the restriction at issue in **Shapero**, the DC Rule permits such advertising as long as it conforms to paragraph (a)'s truthfulness standard. The Supreme Court, in **Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995)**, recently distinguished **Shapero** and upheld a Florida rule that prohibited targeted mail to accident victims and their relatives for 30 days after injury.

MR 7.4, moreover, was amended in 1992 in response to **Peel v. Attorney Registration & Disciplinary Comm'n, 496 US 91 (1990)**, which addressed restrictions on lawyer communications about the areas in which they practice or specialize. The Supreme Court held that states may not categorically prohibit lawyers from advertising their certification as "specialists" by bone fide organizations. Because Rule 7.1 does not contain express restrictions on communications concerning the lawyer's field of practice, it was not necessary to amend DC Rule 7.1.

Finally, in **Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)**, the Supreme Court upheld a blanket prohibition against any form of in-person solicitation of legal business for pecuniary gain. The DC Rule currently prohibits in-person solicitation only in or near the DC Courthouse, a permissible restriction under **Ohralik**.

7.1:220 False and Misleading Communications

DC Rule 7.1 expressly prohibits lawyers from making false or misleading communications to potential clients. The "false or misleading" standard has been addressed in numerous ethics opinions.

DC Ethics Opinion 303 (2001) addressed in a comprehensive way the ethical rules affecting the sharing of office space by unaffiliated lawyers. The **Opinion** commenced with the observation that there is no ethical prohibition against lawyers sharing office space, personnel, equipment or expenses as such, but pointed out that there are a number of ethical hazards to be avoided: misleading the public generally as to the nature of the professional relationship involved in violation of Rule 7.1 and more specifically as representing themselves as in a partnership when that is not the case, in violation of Rule 7.5(d); failing to preserve client confidences and secrets, in violation of Rule 1.6; and avoiding the imputation, under Rule 1.10, of conflicts arising under Rule 1.7. As respects misleading the public about the nature of the relationship among the lawyers sharing offices, the **Opinion** pointed out that office signage or letterhead referring to "law offices of A, B & C" would imply a joint practice of law among the three; and that if A were to be identified as practicing in the facilities of the "Law Firm of B, C & D," he or she would be understood to be in practice with those three. Parallel problems are presented by the way a common telephone line is answered; the preferable solution here being a simple identification of "Law Offices." An attendant hazard is that an office sign or letterhead suggesting that the lawyers sharing offices are in a firm may well suggest that they are also in a partnership, which would be a violation of Rule 7.5(d). As to client confidentiality, the **Opinion** pointed out that files, storage space, computerized records and work files must all be handled in a way that preserves the confidentiality of shared information; and that where there are shared employees, they must be instructed and supervised about preserving client confidences. Finally, the **Opinion** observed that Comment [1] to Rule 1.10 provides that "two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarding as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." The effect of two or more lawyers being in a "firm," of course, is to impute to each all the client obligations of the others, and thereby to risk creating conflicts under Rule 1.7 where there would be none for the lawyers practicing individually.

DC Ethics Opinion 224 (1992) stated that a lawyer one of whose partners had died and the other had retired could continue to use a firm name containing both of those partners' names, absent reason to believe that clients or potential clients were in fact led to believe that the lawyer continues to practice in a partnership with the other lawyers. The nub of the holding was that a firm name containing multiple names does not *necessarily* imply that the firm is a partnership or that all the names are those of active partners. The opinion distinguished **DC Ethics Opinion 189 (1987)**, which applied the predecessor Code provisions DR 2-101(B)(3) and DR 2-102(A), concluding that a

single lawyer could not adopt the name "John Doe & Associates" because it implied that the lawyer was in a multiple attorney firm.

DC Ethics Opinion 332 (2005) addressed firm names for solo practitioners and concluded that the use of the word "firm" in the firm's name is not presumptively misleading because it does not necessarily convey that the lawyer practices with other lawyers. The **Opinion** cautioned that solo practitioners who practice under a name that includes the term "firm" must exercise care in conducting their practice to avoid creating a misimpression and correct any confusion on the part of clients.

DC Ethics Opinion 53 (1978), which addressed Rule 7.1's predecessor Code provision DR 2-101(A), held that there is nothing inherently misleading if a lawyer fails to include his name in an advertisement.

DC Ethics Opinion 235 (1993) held (at a time when DC law did not yet provide for the creation of "limited liability partnerships" or "limited liability companies") that lawyers in a firm organized under the law of another jurisdiction could practice under the name of the firm, provided that the name used included the full descriptive phrase, and not merely the abbreviation "LLP" or "LLC." The opinion observed in passing that Rules 1.4(b) and 7.1(a) were satisfied by use of the abbreviation "PC" or "PA" in the case of an incorporated law firm, since DC law specifically provided for such entities. [This opinion has effectively been overruled by amendment of the DC Code to authorize both LLPs (DC Code § 41-143 to 148) and LLCs (DC Code § 29-1301 et seq.).] See **DC Ethics Opinion 254 (1995)** (permitting use of "LLP," "LLC," and "PLLC" abbreviations to reflect legislative changes).

A lawyer's communication regarding the fees to be charged to the client may also be barred under Rule 7.1. **DC Ethics Opinion 267 (1996)**, which is discussed at 1.5:500 above, held that Rule 7.1(a)(1)'s prohibition of false or misleading communications about a lawyer's services would apply to a fee schedule that did not adequately apprise the client of how fees would be calculated. The Opinion held that, when a client is informed that he or she will be billed on a time basis, it is a violation of DC Rule 7.1 to impose additional fees that are not disclosed to the client and are not calculated on the disclosed basis.

DC Ethics Opinion 253 (1995), however, stated that a law firm that proposed to pay an insurance company referral fees would not violate Rule 7.1 so long as the law firm informed clients that a referral fee was paid and that it would have no effect on the total fee for the client. The Opinion did note that the firm might be in violation of DC Rule 1.7 pertaining to conflicts of interest.

DC Ethics Opinion 110 (1981) held, with respect to DR 2-101, that a law firm's advertisement that included the descriptive term "The Immigration Lawyers" does not violate the prohibition against misleading advertising. The Opinion concluded that the use of the definite article "the" would not result in misleading the ordinary prudent person. See **DC Ethics Opinion 91 (1980)** (concluding that advertising for a prepaid

legal services plan was misleading under DR 2-101 where a misimpression would be created that the plan provided more services that it did).

Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc., 774 A. 2d 332 (DC 2001) was a suit by a corporation against a lawyer and his firm for defamation alleged to have occurred when the lawyer solicited one of the corporation's shareholders to bring a shareholder derivative or class action against the corporation; the dispositive issue was whether the judicial proceedings privileges applies to statements made prior to commencement of the proceedings. The court held that the privilege did apply, but also observed that there might be other remedies available in such circumstances, including disciplinary proceedings for violation of Rule 7.1(b). (The complaint also contained a count charging a violation of Rule 7.1(b); the court did not address this count on the merits but simply noted that the parties disputed whether the count stated a cognizable claim, and cited DC Rules Scope paragraph [4], which states in substance that the Rules are not intended to create new causes of action enforceable otherwise than in disciplinary proceedings.).

7.1:230 Creating Unjustified Expectations

DC Rule 7.1, unlike MR 7.1, does not expressly address in its text communications that are likely to create an unjustified expectation about the results a lawyer can achieve for the potential client. Communications must conform to Rule 7.1's general truthfulness standard. Comment [1] warns that certain advertisements such as those that describe the amount of a damage award or the lawyer's record in obtaining favorable verdicts or contain client endorsements, "unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others."

DC Ethics Opinion 249 (1995), for example, held that a lawyer's claim that he "can help you" is prohibited under Rule 7.1 because there is no way that such a claim can be accurate in the abstract and the lawyer cannot know whether or not he can help any client until some facts are known about the client's case.

DC Ethics Opinion 81 (1979) addressed DR 2-101(B)(3), which, unlike MR 7.1, expressly prohibited advertising "likely to create an unjustified expectation." The Opinion held that advertising by a business organization that contracted with various lawyers to provide legal services under the name "The Legal Counsellors" was likely to create an unjustified expectation in potential clients because it created the impression that the lawyers worked together in a single law firm, rather than independently. See **DC Ethics Opinion 95 (1980)** (advertisement for the "Accident Legal Assistance Center" permissible under DR 2-102(B) where Center essentially consisted of three attorneys one of whom was always available to assist clients); **DC Ethics Opinion 74 (1979)** (lawyer advertisement asserting that "you may be entitled to rent increase under DC law" not prohibited under DR 2-101(A), predecessor Code provision to DC Rule 7.1).

7.1:240 Comparison with Other Lawyers

DC Rule 7.1, unlike the MR 7.1, does not address in the black letter text communications that compare a lawyer's services with those of other lawyers. Rather, such communications must conform to the DC Rule 7.1's general truthfulness standard, which includes the requirement that any comparison be capable of "substantiation." Moreover, the DC Rule does not explicitly address a lawyer's claims of special expertise. The DC Court of Appeals, on the recommendation of the DC Bar, rejected Model Rule 7.4, which regulates claims of specialization.

DC Ethics Opinion 249 (1995) held that claims that a lawyer can help a client "when others cannot" is inherently incapable of substantiation and prohibited by DC Rule 7.1(a)(2). However, it was permissible for the lawyer to claim that he was "an expert in immigration law" because the basis of the lawyer's claim of experience, over 2,150 representations in immigration matters, was disclosed in the ad.

7.2 Rule 7.2 Advertising

7.2:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 7.1(a)
- Background References: ABA Model Rule 7.2, Other Jurisdictions
- Commentary:

7.2:101 Model Rule Comparison

DC has no Rule 7.2. The subject of advertising is dealt with only by DC Rule 7.1(a), and there only by the general requirement that a lawyer's communications about the lawyer or the lawyer's services must not be false or misleading, See 7.1:101, above.

7.2:102 Model Code Comparison

Not applicable.

7.2:200 Permissible Forms of Lawyer Advertising

- Primary DC References: DC Rule 7.1(a)
- Background References: ABA Model Rule 7.2(a), Other Jurisdictions
- Commentary: ABABNA § 81.1, Wolfram § 14.2

Not applicable.

7.2:300 Retaining Copy of Advertising Material

- Primary DC References:
- Background References: ABA Model Rule 7.2(b), Other Jurisdictions
- Commentary: ABABNA § 81.1, Wolfram § 14.2

Not applicable.

7.2:400 Paying to Have Services Recommended

- Primary DC References:
- Background References: ABA Model Rule 7.2(c), Other Jurisdictions
- Commentary: ABABNA § 81.1, Wolfram § 14.2

As has been pointed out under 7.1:101, above, until 2006, DC alone among American jurisdictions allowed a lawyer, subject to certain limitations, to pay others to recommend the lawyer's services; among the changes made to the DC Rules in 2006, however, was the rescission of that provision and the substitution of what is now DC Rule 7.1(b)(2), providing that a lawyer may not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact. The fact that this new provision is limited to recommendations made through *in-person* contact, and so does not apply to contacts other than face-to-face or by telephone, nor to advertisements, makes it somewhat less restrictive than the provisions of Model Rule 7.2(b), which prohibits a lawyer from giving anything to another person for recommending the lawyer's services, with exceptions for the reasonable cost of advertisements or communications otherwise permitted by that Rule, the usual charges of legal service plan or a not-for-profit or qualified lawyer referral service, or payment for a law practice under Rule 1.17.

DC Ethics Opinion 253 (1994) noted the tension between DC Rule 7.1(b)(5)'s blessing of certain referral fees without regard to whether the recipients were lawyers, and the prohibition in DC Rule 5.4(a) against a lawyer sharing fees with a nonlawyer. The inquiry there addressed concerned an arrangement under which a law firm proposed to pay an insurance coupon, for referrals of clients to the firm, at set rates per case, payable upon settlement or judgment in the referred cases. The **Opinion** recognized that DC Rule 5.4(a) prohibited such payments where Rule 7.1(b)(5) permitted them (provided that the prescribed disclosures were made), and concluded that the latter provision would trump the former. The **Opinion** went on, however, to suggest that the proposed arrangement might raise more serious problems of conflicts of interest under DC Rule 1.7(b)(4) and resulting limitations on the law firm's zeal and diligence on behalf of the clients referred to it by the insurance company.

DC Ethics Opinion 286 (1999) largely overruled **Opinion 253**'s treatment of the relationships between DC Rule 5.4(a) and 7.1(b)(5). The question there severally addressed was whether a payment to another person for the referral of legal business, contingent on the lawyer's receipt of revenue from the referred matter, is a sharing of legal fees governed by Rule 5.4(a), and therefore permitted only between lawyers, or a referral fee permitted by Rule 7.1(b) to be paid to anyone. The **Opinion** concluded that Rule 5.4(a) prevailed -- and pointed out as well that such an arrangement must conform to Rule 1.5(e)'s requirements regarding the division of fees between lawyers not in the same Firm.

DC Ethics Opinion 307 (2001) forms a somewhat discordant trilogy with **Opinions 253** and **286,** discussed above. **Opinion 307** addressed the question whether it is ethically permissible for a lawyer to participate in a governmental referral service that requires the lawyer to pay, as a fee for participation in the program, one percent of the legal fees resulting from such participation; the fee so charged being devoted to defraying the cost of the referral service, which was not supported by governmental funding. The ethical issue was whether the lawyer's participation in the program would be governed by Rule 5.4(a)'s prohibition on a lawyer's sharing fees with a non-lawyer, or by Rule 7.1(b(5)'s implicit authorization of the payment of referral fees to lay organizations; see cmt [6] to Rule 7.1. In **Opinion 253** the Ethics Committee had concluded that a contingent referral fee paid to an insurance company was governed by Rule 7.1(b)5) and therefore permissible; in **Opinion 286** the Committee concluded in a more general way (not tied to any stated set of facts) that a contingent referral fee paid to a non-lawyer constituted fee-sharing and was forbidden by Rule 5.4(a). In **Opinion 307**, the Committee reversed field again, and held that, at least in context of the particular governmental program giving rise to the inquiry under consideration, the payment involved, even though contingent and made to a non-lawyer entity, came under Rule 7.1(b)(5) and so was permissible. Factors leading to this conclusion were that the governmental program involved was an established, organizational referral service rather than an individual third party intermediary; the persuasiveness of opinions of other ethics committees approving referral service fees based on a percentage of lawyer fees earned through the service; the absence, in the context of such services, of the substantive evils associate with fee-spitting with non-lawyers; the benefits of having this particular referral service supported by non-governmental funds; and the reasonableness of the one percent fee. The **Opinion** also pointed out that Rule 1.7(b)(5) required lawyers securing governmental clients pursuant to this referral service to make the same disclosures to those clients about the fee paid, and the effect if any of the fee to be charged, as would be required in the case of private clients.

DC Ethics Opinion 329 (2005) [which is discussed more fully under 5.4:200, above] relied largely on **Opinion 307** [discussed above] in concluding that DC Rules would not be violated by a proposal under which a non-profit organization would pay a lawyer a $10,000 annual retainer to handle small workers' compensation claims on behalf of day laborers; allow the attorney to take a 10 percent contingency fee from client awards; and require the attorney to pay the non-profit the first $10,000 the lawyer receives in contingent fees each year to permit the non-profit to recoup its retainer costs.

7.2:500 Identification of a Responsible Lawyer

- Primary DC References:
- Background References: ABA Model Rule 7.2(d), Other Jurisdictions
- Commentary: ABABNA § 81.1, Wolfram § 14.2

Not applicable.

7.3 Rule 7.3 Direct Contact with Prospective Client

7.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 7.1(b)
- Background References: ABA Model Rule 7.3, Other Jurisdictions
- Commentary:

7.3:101 Model Rule Comparison

DC has no Rule 7.3. The subject of direct contacts with prospective clients is addressed, in a substantially more limited way, by DC Rule 7.1(b). See 7.1:101, above.

7.3:102 Model Code Comparison

Not applicable.

7.3:200 Prohibition of For-Profit In-Person Solicitation

- Primary DC References: DC Rule 7.1(b)
- Background References: ABA Model Rule 7.3(a), Other Jurisdictions
- Commentary: ABABNA § 81.2001, Wolfram § 14.2.5

Not applicable.

7.3:210 Solicitation by Non-Profit Public Interest Organization

Not applicable.

7.3:220 Solicitation of Firm Clients by a Departing Lawyer

DC Ethics Opinion 221 (1991) concerns the interaction of DC Rules 7.1 and 5.6(a) with regard to a firm's attempt to limit communication with firm clients by a departing lawyer.

7.3:300 Regulation of Written and Recorded Solicitation

- Primary DC References: DC Rule 7.1(b)
- Background References: ABA Model Rule 7.3(b), Other Jurisdictions
- Commentary: ABABNA § 81.2001, Wolfram § 14.2.5

Not applicable.

7.3:400 Disclaimers for Written and Recorded Solicitation

- Primary DC References:
- Background References: ABA Model Rule 7.3(c), Other Jurisdictions
- Commentary: ABABNA § 81.2011, Wolfram § 14.2.5

Not applicable.

7.3:500 Solicitation by Prepaid and Group Legal Services Plans

- Primary DC References:
- Background References: ABA Model Rule 7.3(d), Other Jurisdictions
- Commentary: ABABNA § 81.2503, Wolfram § 16.5.5

Not applicable.

7.4 Rule 7.4 Communication of Fields of Practice and Specialization

7.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 7.1(a)
- Background References: ABA Model Rule 7.4, Other Jurisdictions
- Commentary:

7.4:101 Model Rule Comparison

DC has no Rule 7.4. The subject of communication of fields of practice and specialization is dealt with only by DC Rule 7.1(a), and there only by the general requirement that a lawyer's communications about the lawyer or the lawyer's services must not be false or misleading. See 7.1:101, above.

7.4:102 Model Code Comparison

Not applicable.

7.4:200 Regulation of Claims of Certification and Specialization

- Primary DC References: DC Rule 7.1(a)
- Background References: ABA Model Rule 7.4, Other Jurisdictions
- Commentary: ABABNA § 21.4001, Wolfram § 14.2.4

DC Ethics Opinion 249 (1994) articulates standards for judging whether a claim about specialization is truthful under DC Rule 7.1 (which replaced MR 7.4).

7.5 Rule 7.5 Firm Names and Letterheads

7.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 7.5
- Background References: ABA Model Rule 7.5, Other Jurisdictions
- Commentary:

7.5:101 Model Rule Comparison

DC Rule 7.5, dealing with firm names and letterheads, was until 2002 identical to Model Rule 7.5 in both its black letter text and its Comments, although, as will be explained, it differed slightly in substance by reason of the reference to Rule 7.1 for the substantive standard against which firm names are measured. Slight, clarifying changes in the Model Rule and in its Comments were among the recommendations of the Ethics 2000 Commission that were adopted in 2002, and with the exception of one of the changes to a Comment were incorporated into the DC Rule along with the other changes recommended by the DC Rules Review Committee that were adopted in 2006.

The slight difference in substance by reason of the reference to Rule 7.1, mentioned above, involves paragraph (a) of the Rule, which in both the DC Rule and the Model Rule prohibits a lawyer from using a firm name, letterhead, or "other professional designation" that violates Rule 7.1. Although the language of that paragraph is identical in both versions of Rule 7.5, the prohibition in Rule 7.1 that is thus incorporated by reference is, as explained in 7.1:101, above, slightly different in the DC rule than in the Model Rule, although the difference was narrowed by the changes made to the Model Rule in 2002 and to the Model Rule in 2006. As they now stand, both versions of Rule 7.1 prohibit false or misleading communications about a lawyer or the lawyer's practice, and both say that a communication is false or misleading if it contains a material misrepresentation of law or fact, or omits a fact necessary to make the statement considered as a whole not materially misleading; but the DC Rule also says that a communication is misleading if it contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

In addition to prohibiting names that violate Rule 7.1, paragraph (a) in both the DC and the Model Rule versions of Rule 7.5 permits lawyers in private practice to use trade names if there is no implied connection to a government agency or to public or charitable legal services, and the name is not false or misleading. Paragraph (b) in both permits a multi-jurisdiction law firm to use the same firm name in each jurisdiction where it has an office but requires the firm to disclose, when listing the members of the firm on letterhead or in professional listings, any jurisdictional limitations with respect to its lawyers pertinent to the jurisdiction in which an office is located. And paragraph (b) in the Model Rule was amended in 2002 and in the DC Rule in 2006 by adding, after "name," the phrase "or other professional designation." Paragraph (c) in both prohibits a law firm from including in the firm name, or in any communications on the

firm's behalf, the name of a lawyer holding public office if that lawyer has not been "actively and regularly" practicing with the firm for a "substantial period." And paragraph (d) in both permits lawyers to state or imply that they practice in a partnership or other organization only when that "is the fact."

Comment [1] in the two versions of Rule 7.5 was amended, in 2002 and 2006, respectively, by the addition of a second sentence saying that a lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. The DC version of the Rule also was amended to add a final sentence saying that it is misleading to continue to use the name of a lawyer formerly associated with the firm who is currently practicing elsewhere, and citing **DC Ethics Opinion 277 (1997)**. Comment [2] to both versions of Rule 7.5 was amended to say that two lawyers sharing office facilities but are not in fact "associated in a law firm," rather than, as previously, "partners," may not use a name such as Smith & Jones because it suggests that they are "practicing law together in a law firm," rat her than, as previously, "partnership in the practice of law."

7.5:102 Model Code Comparison

Rule 7.5 represents a substantial revision of DR 2-102 of the Code. DR 2-102(A), one of the antecedents of paragraph (a) of the Rule, prohibited a lawyer or law firm from using or participating in the use of professional cards, announcements, office signs, letterheads, or other notices and devices unless they were "in dignified form" and conformed to specific requirements set out for each type of notice under DR 2-102(A)(1) to (4). Paragraph (a) of the DC Rule, in contrast, simply prohibits a lawyer from using professional designations that are false or misleading within the meaning of DC Rule 7.1. DR 2-102(B) prohibited a lawyer in private practice from practicing under a trade name. DC Rule 7.5(a), however, allows trade names subject to certain limitations.

DR 2-102(D) permitted a multi-jurisdiction firm to use the same firm name in each jurisdiction where it had an office, provided that the firms disclosed, when listing the members of the firm on letterhead or in professional listings, the jurisdictional limitations of lawyers not licensed to practice in all the listed jurisdictions. DC Rule 7.5 differs slightly in requiring that jurisdictional limitations be indicated only for those lawyers not admitted in the jurisdiction in which is located the office for which a listing of lawyers is made. DR 2-102(B) stated that the name of a lawyer holding public office could not be used in the name of a law firm or in professional notices of the firm during any "significant period" in which the lawyer was not "actively and regularly" practicing with the firm. DC Rule 7.5(c) states the same rule but substitutes "substantial" for "significant" to describe the period of inactivity with a firm that disables a lawyer entering public service from having his name used as the firm name or otherwise by the firm.

DR 2-102(C) prohibited a lawyer from holding himself or herself out as having a partnership with other lawyers unless they were, in fact, partners. DC Rule 7.5(d) similarly permits lawyers to state or imply that they practice in a partnership or "other organization" only when that is the fact.

7.5:200 Firm Names and Trade Names

- Primary DC References: DC Rule 7.5(a)
- Background References: ABA Model Rule 7.5(a), Other Jurisdictions
- Commentary: ABABNA § 81.3001, Wolfram § 14.2.4

DC Ethics Opinion 277 (1997) addressed an inquiry by a lawyer who had been the founding partner of a law firm that bore her name and that of the other founder, and who now planned to sever her relationship with the firm. The inquirer was unsure whether she would continue to practice law after withdrawing from the firm, but in any event wanted her name removed from the firm's name after she departed. Her inquiry was whether the Rules of Professional Conduct required the firm, at her request, to remove her name from the firm's name. The Opinion pointed out that Rule 7.5 explicitly recognized the propriety of a firm maintaining in a firm name the name of a deceased or retired partner, and held that whether that sort of "trade name" included the right to use the name of a former partner in the circumstances of the inquirer would depend on whether the lawyer practiced elsewhere (in which case use of the name would be misleading), or on "whether such use was authorized under common law, the firm's partnership agreement or otherwise." The **Opinion** offered no guidance as to the pertinent common law of the District of Columbia, or on the intended meaning of "otherwise" in the quoted phrase.

DC Ethics Opinion 338 (2007) addressed a situation in which a lawyer planned to practice in two firms, both of which would both bear his name. The lawyer intended to withdraw from the partnership and become "of counsel" to the first firm, and also form a new firm in which he would be a partner. The **Opinion** first held that a lawyer may be "of counsel" in one firm and a partner in another. It also observed that the firms would have to be treated as a single firm for conflicts of interest purposes, because the lawyer would be "associated with" each firm for purposes of imputation under Rule 1.10(a).

The **Opinion** also held that both firms could use the lawyer's name. **Opinion 277** [discussed above] had stated that it would be misleading for a firm to use a departed lawyer's name when the lawyer was practicing elsewhere, but **Opinion 338** distinguished the situation in which the lawyer planned to continue to practice with the firm as "of counsel." The **Opinion** concluded that the names would not be misleading as long as the lawyer "maintains a regular and continuing association with both firms and is generally available personally to render services at each firm." Three members of the Legal Ethics Committee dissented from the portion of the **Opinion** that allowed the old firm to retain the lawyer's name on the ground that it would be confusing or misleading to potential clients.

DC Ethics Opinion 271 (1997) said that a lawyer licensed to practice in several jurisdictions who intended to change his status in the DC Bar from "active" to "inactive" must disclose the inactive status on letterhead, business cards and

announcements in order to avoid misleading the public. An "inactive" lawyer may not practice in the District, and therefore it would be misleading for such a lawyer to state without more that he was a member of the DC Bar as well as the bars of the jurisdiction where he intended to remain active.

DC Ethics Opinion 244 (1993) concerned the inclusion of the name of a nonlawyer partner in the firm name. (The subject of DC law firms having nonlawyer partners is addressed under 5.4:101, above.) The Opinion ruled that the name of a nonlawyer partner may be included in the name of a law firm; but the law firm must make clear on firm stationery, business cards, and professional listings that the nonlawyer partner is not a lawyer in order to avoid misleading the public.

DC Ethics Opinion 224 (1991) ruled that the inclusion in a firm name of the names of partners who have died, retired, or otherwise left the firm is not prohibited so long as clients are not misled about those with whom a partner or partners currently practice. The particular inquiry raised the concern that a client might be misled to think that a sole practitioner practiced with others who no longer were associated with the firm. See also the discussion of **DC Ethics Opinion 273 (1997)**, under 1.4:200, above (pointing out the need to drop from a firm name the name of a lawyer who has left to join another firm).

DC Ethics Opinion 254 (1995) supplanted **DC Ethics Opinion 235 (1993)** and said that law firms organized as "limited liability companies," "limited liability partnerships," or "professional limited liability companies" may abbreviate those designations as "L.L.P.", "L.L.C." and "P.L.L.C." respectively in firm communications. The opinion relied on legislation passed by the District of Columbia Council permitting such companies and partnerships to use the abbreviations. See D.C. Code § 29-1304.

DC Ethics Opinion 332 (2005) addressed firm names for solo practitioners and concluded that the use of the word "firm" in the firm's name is not presumptively misleading because it does not necessarily convey that the lawyer practices with other lawyers. The **Opinion** cautioned that solo practitioners who practice under a name that includes the term "firm" must exercise care in conducting their practice to avoid creating a misimpression and correct any confusion on the part of clients.

DC Ethics Opinion 197 (1989), applying DR 2-102, determined that a law firm was not prohibited from using the term "of counsel" to describe its relationship with a lawyer in another jurisdiction, where that lawyer was regularly available for consultation and advice with the law firm and its clients.

DC Ethics Opinion 192 (1988) concluded that a law firm was not prohibited by DR 2-102 from stating on its letterhead or in a legal directory listing that it was "associated with" a firm in another jurisdiction or that the other law firm was its "correspondent firm" if these characterizations accurately described the relationship between the two firms.

DC Ethics Opinion 141 (1984) explained that it was permissible under DR 2-102 for a lawyer to state on business cards or stationery, or in change of address announcements or advertisements that he or she was a "Member of the Commercial Law League of America," so long as care was used to prevent the designation from misleading or deceiving the public or implying that the lawyer was a certified commercial law expert.

In **DC Ethics Opinion 87 (1980)** [also discussed under 7.5:300, below], the Legal Ethics Committee said that the name "The Legal Clinic" of A, B & C, Attorneys at Law, was permissible if in fact it lived up to what the committee took "clinic" to imply: that it provided standardized and multiple services and provided them at lower than average prices. It also insisted that, if it was a commercial enterprise (as was the inquiring firm), it must negate any implication that it was charitable or non-profit (as the inquirer had by a commercial-looking brochure, the use of individual names in the firm name and the publication of a price list). The Committee cited the then-recent decision of the Supreme Court in **Bates v. State Bar of Arizona, 433 US 350 (1977)**.

See **DC Ethics Opinion 92 (1980)** (concluding that the name "Accident Legal Assistance Center" was permissible under DR 2-102 because lawyers at the Center pooled their experience, consulted with one another and ensured that at least one lawyer was always available to help potential clients); **DC Ethics Opinion 81 (1979)** (concluding that the name "the Legal Counsellors" was impermissible under DR 2-102 where the name created the impression that lawyers were practicing together when they were only participating in a joint advertising referral program).

7.5:300 Law Firms with Offices in More Than One Jurisdiction

- Primary DC References: DC Rule 7.5(b)
- Background References: ABA Model Rule 7.5(b), Other Jurisdictions
- Commentary: ABABNA § 81.3005, Wolfram § 15.4

DC Ethics Opinion 278 (1998), addressing the question whether a member of the DC Bar could practice law in a partnership or other professional association with a lawyer licensed to practice in a foreign jurisdiction but not in any U.S. jurisdiction, referred to the possible application of Rule 7.5(b) in such circumstances. [The Opinion is discussed somewhat more fully under 5.1:200, above.]

All of the other ethics opinions on the subject of permissible firm names and communications involving multi-jurisdiction law firms applied DR 2-102(D), the predecessor Model Code provision to DC Rule 7.5(b). **DC Ethics Opinion 183 (1987)** concluded that under DR 2-102(D) a lawyer who was employed by a multi-jurisdiction firm and was located in an office where she was not yet a member of the bar must disclose on her business cards either that she was not a member of the local bar or that she was admitted only to the bar of another jurisdiction.

DC Ethics Opinion 87 (1980) [also discussed under 7.5:200, above], following DR 2-102(D), held that a law firm organized as a professional corporation was permitted to practice in more than one jurisdiction under the same firm name, provided that firm letterhead and other professional listings enumerating the members of the firm made clear the jurisdictional limits on those attorneys not licensed to practice in all jurisdictions where the firm had an office. The Opinion found no basis to distinguish between law firms organized as corporations and those organized as partnerships. See **DC Ethics Opinion 34 (1977)** (approving multi-jurisdiction firm's use of firm name that included names of partners not licensed to practice in the District of Columbia; all "enumerations" of the members and associates of the firm on letterhead and other listings must make clear the pertinent jurisdictional limitations).

DC Ethics Opinion 47 (1978) stated that it was not necessary for a firm with offices in the District of Columbia to indicate on its letterhead that none of the lawyers in the firm were admitted to practice in any other jurisdiction, even when dealing with a client who resided outside of the District of Columbia.

7.5:400 Use of the Name of a Public Official

- Primary DC References: DC Rule 7.5(c)
- Background References: ABA Model Rule 7.5(c), Other Jurisdictions
- Commentary: ABABNA § 81.3005, Wolfram § 14.2.4

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

7.5:500 Misleading Designation as Partnership, etc.

- Primary DC References: DC Rule 7.5(d)
- Background References: ABA Model Rule 7.5(d), Other Jurisdictions
- Commentary: ABABNA § 81.3008, ALI-LGL § 79, Wolfram § 14.2.4

DC Ethics Opinion 303 (2001) [which is more fully discussed under 7.1:220 above] discusses the ethical restrictions potentially affecting the sharing of office space by unaffiliated lawyers, including the possibility that the manner in which their offices and letterhead are labeled may fall afoul of Rule 7.5(d).

DC Ethics Opinion 278 (1998), addressing the question whether a member of the DC Bar could practice law in a partnership or other professional association with a lawyer licensed to practice in a foreign jurisdiction but not in any U.S. jurisdiction, referred to the possible application of Rule 7.5(d) in such circumstances. (The Opinion is discussed somewhat more fully under 5.1:200, above.)

As described above, **DC Ethics Opinion 254 (1995)** discussed use of the terms "limited liability company," "limited liability partnership," and "professional limited liability company" in a firm name, as well as the abbreviations of these terms. The Opinion overruled an earlier ethics opinion and permitted law firms to abbreviate those designations in their letterheads and other communications to potential clients. There do not appear to be any other pertinent ethics opinions or any pertinent DC court decisions on the subject.

Comment [2] to Rule 7.5, however, explains that lawyers sharing office facilities, but who are not in fact partners, may not designate themselves as partners.

7.6 Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

7.6:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 2.4
- Background References: ABA Model Rule 2.4, Other Jurisdictions
- Commentary:

7.6:101 Model Rule Comparison

This Model Rule was adopted by the ABA House of Delegates in 2000, on the recommendation of the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Sections of Business Law and of State and Local Government Law and the Association of the Bar of the City of New York. The Ethics 2000 Commission did not propose any changes in the Rule. DC Rules Review Committee did not recommend that such a rule be added to the DC Rules because the District of Columbia does not utilize an election process to select judges and there did not appear to be any evidence of abuse in obtaining government legal employment. The Committee also noted that neither of the District of Columbia's neighboring States, Maryland and Virginia, had adopted such a rule.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

8.1 Rule 8.1 Bar Admission and Disciplinary Matters

8.1:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 8.1
- Background References: ABA Model Rule 8.1, Other Jurisdictions
- Commentary:

DC Rule 8.1, like MR 8.1, is one small tile in a broad regulatory mosaic governing the practice of law in a particular jurisdiction. In the District of Columbia, as in most other jurisdictions, the broader framework includes (a) formal procedures governing how applicants become licensed lawyers through admission to the bar of a particular jurisdiction; (b) rules of professional conduct establishing minimum ethical standards for licensed lawyers; (c) a disciplinary system designed to protect the public by imposing sanctions on lawyers for unethical conduct in violation of the rules of professional conduct; (d) procedures to ferret out and prohibit non-members of the bar from engaging in unauthorized practice of law; and (e) legal standards governing reinstatement of lawyers as licensed members of the bar after they have been disbarred or suspended for prior ethical violations. Rule 8.1's contribution to this mosaic consists of a prohibition of certain conduct on the part of an applicant or lawyer in connection with any bar admission application or disciplinary proceeding: knowingly making a false statement of a material fact, failing to correct a known misapprehension by the authorities, or failing to respond to a lawful demand for information from the admissions or disciplinary authorities. Although both DC Rule 8.1 and its antecedent Code provisions apply to both bar admissions and disciplinary proceedings, as a practical matter they are principally invoked in the latter context. In the District of Columbia, as in most other jurisdictions, the bar admission process is administered by a separate Admissions Committee and is rarely the subject of disciplinary proceedings.

8.1:101 Model Rule Comparison

DC Rule 8.1 is virtually identical to MR 8.1. Both apply to persons seeking admission to the bar as well as to those already admitted. Both make it a professional offense for any lawyer, in connection with a bar admission application or any disciplinary proceeding, knowingly to make a misrepresentation of a material fact or fail to make a disclosure necessary to correct a known misapprehension of a material fact, or fail to respond properly to an information demand of any admissions or disciplinary authority. Comment [2] to both Rules makes clear in identical terms that, while the requirements of the Rule are subject to the Fifth Amendment privilege against compulsory self-incrimination, a person relying on this constitutional privilege in responding to a question "should do so openly."

Although the black letter text of DC Rule 8.1 is almost identical to that of its Model Rule counterpart, there are two small substantive differences and one difference in choice of words that has no substantive significance. One of the substantive differences reflects a change that was suggested by the DC Rules Review Committee without explanation and put into effect by the Court of Appeals in 2006: paragraph (a) of DC Rule 8.1, which until 2006 had, like the corresponding provision of the Model Rule, prohibited a lawyer from knowingly making a false statement material fact, was changed by deletion of the word "material." Correspondingly, Comment [1] to the DC Rule was amended by omission of the word material but the addition of the word "knowingly" in the second sentence of the Comment and the insertion of new third sentence stating that lack of materiality doesn't excuse a knowing false statement of fact. The second substantive difference between the DC Rule and the Model Rule, which has existed since the DC Rule was first adopted, is in paragraph (b) of the DC Rule, which, in addressing a response to a lawful demand for information from an admissions or disciplinary authority, requires only that the lawyer respond "reasonably," a limitation not found in the Model Rule. This variance was recommended by the Jordan Committee because the Committee was "concerned that this [Model Rule 8.1's] formulation might suggest that the lawyer had no proper basis for resisting a request from such [admissions or disciplinary] authority."

The difference in language that does not entail a substantive difference is that while paragraph (b) of the Model Rule refers to a "person," the DC Rule refers, more explicitly, to a "lawyer or applicant."

Comment [1] to Model Rule 8.1 was amended in 2002 to make clear that paragraph (b) requires correction of any prior factual misstatement that the lawyer or applicant may have made, and this change was also adopted in the DC Rule in 2006, At those respective times Comment [3] to both Rules was also amended to give additional emphasis to the brief recognition in paragraph (b) of the fact that Rule 8.1 does not require disclosure of information protected by Rule 1.6

8.1:102 Model Code Comparison

Under DR 1-101(A) of the Model Code, and its identical DC counterpart, applicants for admission to the Bar, after being admitted, were subject to discipline under DR 1-101(A) for any false statement of a material fact or deliberate failure to disclose a material fact in their Bar admission applications. Both DC Rule 8.1 and MR 8.1 include a somewhat broader requirement inasmuch as DR 1-101(A) was limited to failures to disclose material facts that were "requested," whereas Rule 8.1(b) requires disclosure of any fact "necessary to correct a misapprehension known by the lawyer or applicant to have arisen in the matter," irrespective of whether particular information has been requested.

DR 1-101(B) of the Model Code (again identical in the DC Code) provided that a lawyer "shall not further the application for admission to the bar of another person known to be unqualified with respect to character or other relevant attribute" — a somewhat broader but less precise prohibition than that imposed by Rule 8.1. Also of some pertinence was DR 2-102(A)(5), of both the Model Code and the DC Code, providing (again identically) that a lawyer shall not engage in conduct that is prejudicial to the administration of justice — a prohibition frequently applied to failure to respond to inquiries from Bar Counsel.

8.1:200 Bar Admission

- Primary DC References: DC Rule 8.1
- Background References: ABA Model Rule 8.1, Other Jurisdictions
- Commentary: ABABNA §§ 21.101, Wolfram §§ 15.2, 15.3

8.1:210 Bar Admission Agency

In the District of Columbia, the ultimate authority on admissions to the Bar is the DC Court of Appeals. DC Code § 11-2501 (1981). However, much of the Court's authority has been delegated in Court Rule 46(a), which creates a Committee on Admissions consisting of seven members of the Bar who are appointed for three-year terms and are permitted to serve two consecutive such terms. Members of the Admissions Committee, who receive such compensation and reimbursement of expenses as the Court may approve, are concerned primarily with administering the provisions of Rule 46(b) applicable to admission by examination.

Part of the Court's authority on admissions has also been delegated by Court Rule 49, which creates a Committee on Unauthorized Practice of Law and prohibits any person from engaging in the practice of law in the District of Columbia unless such person is enrolled as an active member of the DC Bar. Violations of Rule 49 are "punishable as contempt" and are also "subject to injunctive relief." Enforcement proceedings are commenced by the Committee on Unauthorized Practice and are conducted before a presiding judge from the DC Court of Appeals.

8.1:220 Bar Admission Requirements

The Court's Rule 46 provides two separate paths for admission to the DC Bar: admission by examination pursuant to Rule 46(b), and admission without examination of members of the Bar of other jurisdictions pursuant to Rule 46(c).

Admission by Examination

The principal requirements for admission by examination include: (a) a written application on a form approved by the Committee on Admissions, accompanied by a $100 fee; (b) proof of graduation from a law school approved by the American Bar Association, or from a law school not approved by the American Bar Association after the applicant has successfully completed at least 26 hours of study in subjects tested by the Bar examination in a law school approved by the American Bar Association; (c) attaining a minimum grade established by the Committee on Admissions in an examination on the Code of Professional Responsibility administered by the Multistate Bar Examination Committee; (d) completion of both a DC essay examination and the Multistate Bar Examination with a score not less than 133 on each of the two examinations; and (e) certification by the Committee on Admissions that the applicant has demonstrated "good moral character and general fitness to practice law."

Admission Without Examination

The requirements for admission without examination of members of the Bar of other jurisdictions are: (1) a written application on a form approved by the Committee on Admissions; (2) payment of a fee of $400 plus an additional fee payable to the National Conference of Bar Examiners in an amount specified on the application form; (3) proof that the applicant has "good moral character as it relates to the practice of law;" and either (4) proof that the applicant has been a member in good standing of a Bar of a court of general jurisdiction in any State or Territory of the United States for a period of five years immediately preceding the filing of the application, or else (5) a showing that the applicant (A) has graduated from a law school approved by the American Bar Association, (B) has been admitted to the practice of law in any State or Territory of the United States based on successful completion of a written Bar examination together with a score of at least 133 on the Multistate Bar Examination, and (C) has passed the Multistate Professional Responsibility Examination required for admission to the DC Bar by examination. Prior to adoption by the Court of Appeals, effective May 8, 1998, of an amendment to Rule 46(c) that had been proposed by the DC Bar, alternative (5) had been available only for the first 25 months after passage of the Multistate Bar Examination. The effect of the amendment then adopted was to eliminate what had previously been a "dead" period of almost three years (between 25 months and five years after admission to another bar), when a member in good standing of another bar could not secure admission on motion to the DC Bar.

8.1:230 Admission on Motion

In the District of Columbia, admission on motion is permitted in accordance with the requirements described above for "admission without examination of members of the Bar of other jurisdictions."

The provisions for admission on motion to the DC Bar, especially the alternative provisions for admitting lawyers licensed elsewhere having no experience in the practice of law in the other jurisdiction, are among the most liberal of any jurisdiction in the United States. This has been a matter of concern that has produced from the DC Bar two committee reports popularly known by the names of the respective committee chair-persons, *i.e.*, the Isbell Report of February 29, 1988 and the Hitchcock Report submitted to the DC Court of Appeals on July 28, 1992.

As noted in the Hitchcock Report, statistics on admissions to the DC Bar in 1983 showed that out of every five lawyers admitted to the Bar, four were on examination and only one on motion. By 1991, in contrast, 20 lawyers were being admitted on motion for every one lawyer successfully completing the DC Bar Examination. As noted in the Isbell Report, in 30 other jurisdictions permitting admission on motion, the number of applicants admitted on motion has never been greater than, or indeed even close to being equal to, the number admitted on examination.

The Isbell Committee concluded that one of the practical effects of the large number of DC admissions on motion has been "an impoverishment of the pool of applicants who take the examination here," resulting in an ever-increasing proportion of failures to pass the examination and an ever-increasing proportion of repeaters.

The Hitchcock Committee concluded that the disproportionate number of admissions on motion have involved applicants who "shopped" for a jurisdiction with a bar examination perceived as being easier to pass than the DC examination, particularly those other jurisdictions (such as Pennsylvania) in which Bar Examiners do not even read an applicant's essay examination if the applicant has scored 135 on multiple-choice questions in the Multistate Bar Examination. The Hitchcock Committee pointedly observed that "few clients (and even fewer courts) ask lawyers to answer multiple choice legal questions as part of their daily practice."

Both the Isbell and the Hitchcock Committees made recommendations intended to redress the imbalance between admissions on examination and on motion, but as of March 1997, the Court of Appeals had neither accepted nor rejected any of the various recommendations in either of the committees' Reports.

8.1:240 Admission Pro Hac Vice [see also 5.5:230]

In the District of Columbia, admission *pro hac vice* is governed by the provisions of the DC Court of Appeals Rule 49(c) and DC Superior Court Rule of Civil Procedure 101(a)(3). As more fully described in 5.5:210, above (under the subtopic the Prohibition of Unauthorized Practice — Rule 49), Rule 49 deals generally with the unauthorized practice of law (and was substantially amended effective February 1, 1998). Paragraph (c) of the Rule provides for a number of exceptions to the general prohibition on unauthorized practice, one of which, Rule 49(c)(7), explicitly addresses admissions *pro hac vice*. It allows the provision of legal services in the courts of the District of Columbia following *pro hac vice* admission but limits applications for such admission to five per year and to persons who do not maintain an office for the practice of law in District of Columbia or otherwise engage in the practice in District of Columbia. A fee of $100 and a sworn statement must accompany each application. The *pro hac vice* admission process is fully described in **DC Unauthorized Practice of Law Committee Opinion 2-98 (March 2, 1998)**. (There is a separate exception, in Rule 49(c)(3), for practice before a United States court, as well as other exceptions described in 5.5:210, above.)

DC Superior Court Rule of Civil Procedure 101(a)(3) mandates compliance with the restrictions prescribed by DC Court of Appeals Rule 49(c) for appearance in that court on a *pro hac vice* basis. Rule 101(a)(3) also requires that a lawyer appearing *pro hac vice* in the Superior Court join of record a member in good standing of the DC Bar "who will at all times be prepared to go forward with the case, and who shall sign all papers subsequently filed and shall attend all subsequent proceedings in the action" unless this requirement is waived by the judge.

Rule 49(c) also includes a series of special provisions authorizing the practice of law by government attorneys employed by the United States and permitting attorneys to appear and participate in a particular action or proceeding before any court, department, commission or agency of the United States. Additional special provisions in Rule 49(c) permit any attorney who is "a member in good standing of the highest court of any State" during the pendency of an application for admission to the DC Bar and while "employed by or affiliated with a non-profit [DC] organization [providing] . . . legal services for indigent clients without fee . . . to appear and participate in particular actions or proceedings of any court of the District of Columbia."

The language of both DC Rule 8.1 and MR 8.1 is sufficiently broad to encompass admissions on motions pro hac vice. However, through 1996 there were no reported disciplinary proceedings pursuant to Rule 8.1 arising from a motion *pro hac vice*. Nonetheless, there is no basis for concluding that conduct otherwise proscribed by DC Rule 8.1 is outside the scope of the rule merely because such conduct occurred in connection with admission on a motion *pro hac vice*. Further, the DC Court of Appeals has held an attorney in contempt and issued an injunction against him for violating that Court's Rule 49(c) on *pro hac vice* admissions in **Brookens v. Committee on**

Unauthorized Practice of Law, 538 A.2d 1120 (DC 1988). [See 5.5:230, above, for a more detailed discussion of this case.]

8.1:300 False Statements of Material Fact in Connection with Admission or Discipline

- Primary DC References: DC Rule 8.1(a)
- Background References: ABA Model Rule 8.1(a), Other Jurisdictions
- Commentary: ABABNA §§ 21.301, Wolfram § 15.3.1

Both DC Rule 8.1(a) and MR 8.1(a) make it a professional offense for a lawyer to make a false statement of a material fact in any Bar admission application or disciplinary proceeding. The duty imposed by the Rule applies to all admission and disciplinary proceedings, including proceedings in which a lawyer's own conduct is directly challenged as well as proceedings in which the alleged misconduct involves a lawyer's representation of others.

In more general terms, Rule 8.1 creates a broad duty of candor in both bar admission and disciplinary matters. With regard to admission proceedings, this duty existed in the District of Columbia long before adoption of either the Code or the Rules of Professional Conduct. See **Carver v. Clephane, 137 F.2d 685, 686 (DC Cir. 1943)** (an applicant's "lack of candor in his repeated applications for admission to the bar is reason enough for his exclusion"). However, problems of lack of candor in applications for admission are more frequently dealt with in the admission process itself than in disciplinary proceedings. In consequence, there have been few reported disciplinary cases involving bar admission under either Rule 8.1 or its Code predecessor, DR 1-101(A), and those few have involved applications by DC Bar members for admission to the bar of other jurisdictions. Thus, for example, in **In re Regent, 741 A.2d 40 (DC 1999)**, a member of the DC Bar was disbarred for submitting false and misleading statements on her applications to the bars of Arizona, Nevada and Hawaii. In **In re Rosen, 570 A.2d 728 (DC 1989)**, the Court of Appeals ordered a nine-month suspension of a member of the DC Bar who, at the time of filing an application for admission to the Maryland Bar, *correctly* reported "none" in answering a broad question as to whether he had ever been charged with professional misconduct; the suspension was imposed because several months after filing the Maryland application, the lawyer signed an oath stating that all facts in the Maryland application were still true and correct, whereas in the interim period the lawyer had been charged with professional misconduct in the DC disciplinary system. In **In re Gilbert, 538 A.2d 742 (DC 1988)**, a DC lawyer was disbarred for failing to disclose, in response to a question on his application to the Maryland bar asking for identification of litigation in which he had been a party, a suit in which he had been denied recovery of life insurance on his deceased wife on the ground that he had caused her death in order to harvest the proceeds of the policies.

As a practical matter, then, Rule 8.1 is principally of significance in connection with disciplinary proceedings. Indeed, in that context it is reinforced by the Court's Rule XI creating the DC disciplinary system, which expressly provides that, in addition to any offense under the Rules of Professional Conduct, it "shall also be grounds for

discipline" for any attorney to fail "to comply with any order of the Court or the Board issued pursuant to this Rule" and for any failure "to respond to a written inquiry from the Court or the Board in the course of a disciplinary proceeding without asserting, in writing, the grounds for refusing to do so." Rule XI § 2(b)(3)(4).

Violations of Rule 8.1 in disciplinary proceedings are seldom challenged alone in separate disciplinary proceedings, although this has occurred in at least one instance, see **In re Aldridge, 664 A.2d 354 (DC 1995)** (reciprocal suspension of three years for attempting, in a previous, separate disciplinary investigation and hearing, to conceal conduct that in that disciplinary proceeding had led to only a two-month suspension). More usually, if a lawyer violates Rule 8.1 by knowingly making a material false statement or failing to respond to requests for information during a disciplinary investigation or hearing in which the original charges involve a different rule, the Rule 8.1 violation is added as a supplementary charge in the same proceeding and effectively treated as an aggravating factor justifying a more severe sanction than would be called for by the originally charged offense alone. Thus, in **In re Starnes, 829 A.2d 488 (DC 2003)**, a recently admitted member of the Bar was suspended for six months for making a false statement on his application for admission, in violation of Rule 8.1(a), and for mishandling three separate cases, in violation of several other Rules. The false statement was a representation by the respondent that he had been practicing in DC under the supervision of a lawyer admitted in DC, whereas in fact he had undertaken the solo representation of three clients under his own firm name.

In **In re Powell, 898 A.2d 365 (DC 2006)**, the respondent, while under suspension from the DC Bar, filed a sworn application for admission to the Bar of the United States District Court for the District of Colorado in which he failed to disclose his admission to practice in the District of Columbia or his then pending suspension therefrom. He was held thereby to have violated not only DC Rule 8.1(a), but also Rules 8.4(c) and (d), and was suspended for a year, with reinstatement conditioned on demonstration of fitness to practice law.

There are no DC ethics opinions interpreting Rule 8.1, or discussing its predecessor Code provisions in circumstances where Rule 8.1 would apply.

8.1:400 Duty to Volunteer Information to Correct a Misapprehension

- Primary DC References: DC Rule 8.1(b)(1)
- Background References: ABA Model Rule 8.1(b)(1), Other Jurisdictions
- Commentary:

Rule 8.1(b)(1) requires applicants for admission and lawyers in disciplinary matters to "disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter." In disciplinary matters, this Rule is sometimes characterized as a duty to "cooperate" with the disciplinary authority. As explained in the identical Comment [1] to both DC Rule 8.1 and MR 8.1, this requires "affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware." However, there is no broader requirement obligating a lawyer to volunteer information in the absence of the lawyer's knowledge of a misunderstanding by the authorities.

In **In re Small, 760 A.2d 612 (DC 2000),** a member of the DC Bar was suspended for three years by reason of a conviction for vehicular negligent homicide, a felony, in New York, which was held to be a criminal act reflecting adversely on a lawyer's fitness to practise law, under Rule 8.4(b); and by reason of his failure to disclose the pendency of the charges at the time of his admission to the bar, in violation of Rule 8.1(b).

8.1:410 Protecting Client Confidential Information

As the final clause of Rule 8.1(b)(2) makes clear, all of the obligations imposed on a lawyer by the several provisions of the Rule are trumped by the lawyer's obligation under DC Rule 1.6 to preserve the confidences and secrets of the client.

8.1:500 Duty to Respond to Admission and Disciplinary Authorities

- Primary DC References: DC Rule 8.1(b)(2)
- Background References: ABA Model Rule 8.1(b)(2), Other Jurisdictions
- Commentary: ABABNA §§ 21.301, Wolfram § 15.3.1

The final obligation imposed by Rule 8.1 is to respond reasonably to lawful demands for information from an admissions or disciplinary authority, per Rule 8.1(b)(2). As with the other provisions of Rule 8.1, this provision is generally enforced, in a disciplinary context, in connection with other, more substantive rule violations. See, e.g., **In re Steele, 630 A.2d 196 (DC App. 1993)** (lawyer's failure to respond to Bar Counsel inquiries during pre-hearing investigation was an aggravating factor justifying a sanction requiring proof of fitness prior to reinstatement, in addition to the normal sanction of 60 days suspension for neglect of client's legal matter). See also **In re Dietz, 675 A.2d 33 (1996)** (reciprocal discipline of 60-day suspension imposed on a lawyer disciplined in Maryland for three instances of misconduct involving three different clients, and in addition, as to each instance, for failure to respond to Maryland Bar Counsel); **In re Goldsborough, 654 A.2d 1285 (DC 1995)** (reciprocal discipline of two-year suspension for conduct prejudicial to the administration of justice in violation of DR 1-102 and, later, Rule 8.4(d); and in addition, violation of Rule 8.1 for knowingly making a false statement of fact and failing to correct a misapprehension in the disciplinary proceeding); **In re Manning, 593 A.2d 643 (DC 1991)** (reciprocal disbarment for multiple violations involving four different clients, and in addition violation of Maryland Rule 8.1 by reason of failure to respond to requests for information from Maryland Bar Counsel).

In **In re Cater, 887 A.2d 1 (DC 2005)**, there were four consolidated proceedings against the same lawyer, in one of which the respondent was charged with violating DC Rules 5.3(b) and 1.1(b) by failing to act competently and failing adequately to supervise a nonlawyer assistant, in connection with her former secretary's embezzlement of $47,000 from the estates of two incapacitated adults for whom she had been the court-appointed guardian and conservator. (The court's decision with respect to these two rules is discussed under 5.3:300 and 1.1:220, above.) In the three other proceedings, the respondent had been charged with violating DC Rules 8.1(b) and 8.4(d) by reason of her repeated failures to respond to inquiries from Bar Counsel. The first of the three proceedings leading to the charges relating to Rules 8.1(b) and 8.4(d) was an investigation instituted by Bar Counsel as a result of a referral by the Superior Court judge presiding over the guardianships as to which the respondent had breached her fiduciary duties: in connection with that investigation, the respondent had failed to respond to requests for her response to the judge's complaint of her conduct and then an order from the Board on Professional Responsibility requiring her to respond. The other two proceedings involved two separate ethical complaints from other lawyers against the respondent, as to which she was similarly uncooperative. The Court observed that the "[r]espondent's repeated failures to respond to letters from Bar

Counsel and orders of the Board, which she received in three separate matters, unquestionably violated" Rule 8.1(b), and that this conduct also "hindered the expeditious resolution of the allegations against her," and so seriously interfered with the administration of justice in violation of Rule 8.4. *Id*. at 17.

In **In re Godette, 919 A.2d 1157 (DC 2007)**, a prison inmate whom the respondent had represented complained to the DC Bar disciplinary authorities that respondent had abandoned his case. The Office of Bar Counsel, attempting to investigate the complaint, sent seven separate letters to respondent, who failed to respond to any of them. Respondent similarly ignored a motion to compel a response. The Board on Professional Responsibility then issued an order requiring a response, to which the respondent replied with a telephone message saying he would respond by a specified date, but failed to do so. Thereafter, a process server tried seven different times, without success, to serve respondent with a specification of charges. Finally, after intervention by the Court, respondent acknowledged receipt of the charges, but he did not thereafter participate in the resulting disciplinary proceedings, before the Hearing Committee, the Board or the Court. He was found to have both failed to respond reasonably to a lawful demand for information from a disciplinary authority, in violation Rule 8.1(b), and to have seriously interfered with the administration of justice in violation of Rule 8.4(d). Similar findings of violation of Rules 8.1(b) and 8.4(d) as a result of a the respondent's failure to cooperate in Bar Counsel's investigation of the complaint of a former client were made in **In re Mabry, 851 A.2D 1276 (DC 2004)**, and of another respondent's failure to respond to Bar Counsel's requests and the Board's orders to respond to four separate ethics complaints against him, in **In re Follette, 862 A.2d 394 (DC 2004)**.

In **In re Beller, 802 A.2d 340 (DC 2002)**, the respondent was suspended for thirty days for failure to respond to repeated inquiries from Bar Counsel and the Board on Professional Responsibility regarding three ethical complaints. Her failure was held to have violated Rules 8.1(b) and 8.4(d), as well as DC Bar Rule XI, § 2(b)(3) (making failure to comply with orders of the Court or the Board grounds of discipline), and reinstatement was conditioned on full cooperation with Bar Counsel. This evidently had no effect, however, for two years later the same respondent was suspended for 120 days for failure to respond to three further investigations by Bar Counsel, in violation of the same provisions. **In re Beller, 841 A.2d 768 (DC 2004)**.

There are also numerous earlier decisions to similar effect applying DR 1-102(A)(5) of the DC Code, although that DR, the predecessor of Rule 8.4(d), addressed in very general terms conduct prejudicial to the administration of justice, and so covered a good deal more than the admission and disciplinary processes. See, e.g., **In re Greenspan, 578 A.2d 1156 (DC 1990)** (180-day suspension and requirement of proof of fitness for reinstatement, for violation of DR 1-102(A)(5) consisting of failures to respond both to the Superior Court Auditor-Master in a case the respondent was handling and to Bar Counsel's inquiries about that failure). See also **In re Hill, 619 A.2d 936 (DC 1993)** (public censure for neglect of a matter consisting of failure to file a brief in a court-appointed case and for failing to respond to Bar Counsel's inquiries in violation of DR

1-102(A)(5)); **In re Lenoir, 604 A.2d 14 (DC 1992)** (disbarment for "pervasive neglect, dishonesty, disregard of ethical obligations, and misappropriation of client funds," and in addition for failure to respond to Bar Counsel in violation of DR 1-102(A)(5)); **In re Washington, 541 A.2d 1276 (DC 1988)** (four-year suspension for misconduct in six matters exhibiting "a pattern of unethical conduct, evidencing a cavalier attitude toward [the respondent's] obligations to clients," and in addition for failure to respond to Bar Counsel in violation of DR 1-102(A)(5)).

8.1:600 Application of Rule 8.1 to Reinstatement Proceedings

- Primary DC References: DC Rule 8.1, Court Rule XI, § 16(a)
- Background References: ABA Model Rule 8.1, Other Jurisdictions
- Commentary:

In the District of Columbia any disbarred attorney, and any attorney subject to a suspension order requiring proof of rehabilitation, "shall not resume the practice of law until reinstated by order of the Court." Court Rule XI, § 16(a). A disbarred attorney is not eligible for reinstatement "until the expiration of at least five years from the effective date of the disbarment," and a suspended attorney is not eligible for reinstatement until expiration of a period equal to the period of suspension set forth in the Court's order. If a reinstatement petition is denied, the attorney cannot submit a further petition "until the expiration of at least one year following the denial." Rule XI, § 16(g). Unlike initial admissions to the DC Bar, which are administered by the Court along with the Committee on Admissions, admission by way of reinstatement is administered under the aegis of the disciplinary system, which includes the Board on Professional Responsibility and its Hearing Committees. (See discussion of the DC Disciplinary Process under 0.2:230 and 0.2:240, above.)

A petition for reinstatement by a disbarred or suspended attorney is a particularized type of application for admission to the Bar, and in DC such petitions are processed as disciplinary matters. Accordingly, petitions for reinstatement appear to fall within the purview of DC Rule 8.1 as involving an "admission application or . . . a disciplinary matter," although no DC precedent expressly so holds. However, leading DC precedents in reinstatement proceedings make clear that conduct of the type proscribed by Rule 8.1 can provide the basis for denying a reinstatement petition.

The Court has established "five factors to be considered in each reinstatement case: (1) the nature and circumstances of the misconduct for which the attorney was [previously] disciplined; (2) whether the attorney recognizes the seriousness of the misconduct; (3) the attorney's conduct since discipline was imposed, including the steps taken to remedy past wrongs and prevent future ones; (4) the attorney's present character; and (5) the attorney's present qualification and competence to practice law." **In re Roundtree, 503 A.2d 1215, 1217 (DC 1985)**. The Court stressed that in a reinstatement proceeding, "primary emphasis must be placed on the factors most relevant to the grounds upon which the attorney was disbarred [or suspended]." *Id.*

The Court's opinion in **In re Brown, 617 A.2d 194 (DC 1992)**, is instructive. There, the respondent lawyer consented to disbarment in the District of Columbia after Bar Counsel had charged him with serious disciplinary violations involving alleged misconduct in three separate probate cases. However, the lawyer's affidavit consenting to disbarment included admissions of misconduct with respect to only one of the probate cases, thereby allowing Bar Counsel's charges related to the other two cases to

remain unresolved but undisputed. Thereafter, in a Virginia proceeding to consider reciprocal discipline, the lawyer denied that there were "any other charges" in the DC case beyond the single matter covered by his affidavit, and the Virginia Board found this denial to be a deliberate misrepresentation. In the DC reinstatement proceeding occurring after reciprocal discipline in Virginia, the Court held that the attorney's "duplicitous conduct during the Virginia hearing . . . and his efforts during the [DC reinstatement] . . . hearing . . . to downplay that conduct plainly demonstrate a lack of rehabilitation" as required for DC reinstatement. *Id.* at 198. *Accord*, **In re Borders, 665 A.2d 1381, 1384 (DC 1995)** (in a reinstatement proceeding, a disbarred lawyer refused to answer questions concerning the criminal conduct underlying the initial disciplinary offense; the Court described this refusal as an "election to stonewall the post-crime investigations," which supported the Court's conclusion that the attorney "has not established by clear and convincing evidence his fitness to resume the practice of law").

8.2 Rule 8.2 Judicial and Legal Officials

8.2:100 Comparative Analysis of DC Rule

- Primary DC References:
- Background References: ABA Model Rule 8.2, Other Jurisdictions
- Commentary:

8.2:101 Model Rule Comparison

DC has no Rule 8.2, nor any rule differently numbered but corresponding to it in substance. The Jordan Committee report explained: "It is unnecessary in the District of Columbia [since judges there are appointed, not elected], and in any event overbroad in subjecting lawyers' comments regarding potential appointees to public office to requirements not applicable to nonlawyers." The report also noted that Rule 8.4(c) prohibited conduct by a lawyer involving dishonesty, fraud, deceit or misrepresentation, and expressed concern that a "reckless disregard" standard, such as applies to statements about judges and other public officers under Model Rule 8.2(a), punishing conduct other than knowing falsehoods, which are already caught by Rule 8.4(c)'s prohibition on misrepresentations, would have an undue chilling effect on candid comments regarding potential appointees.

The ABA Ethics 2000 Commission recommended no change in Model Rule 8.2, and the DC Rules Review Committee recommended and the DC Court of Appeals agreed that the DC Rules should continue to omit any provision similar to this Model Rule.

8.2:102 Model Code Comparison

Not applicable.

8.2:200 False Statements About Judges or Other Legal Officials

- Primary DC References: DC Rule 8.4(c)
- Background References: ABA Model Rule 8.2(a), Other Jurisdictions
- Commentary: ABABNA § 101.601, ALI-LGL § 114, Wolfram § 11.3.2

In re De Maio, 893 A.2d 583 (DC 2006), involved reciprocal discipline in a matter which the respondent had been disbarred in Maryland by reason of "false, spurious and inflammatory repressentations and allegations" against the Chief Judge of the Maryland Court of Special Appeals and the clerk of that court. This conduct had been found by the Maryland disciplinary authorities to violate Maryland Rules of Professional Conduct 1.1, 3.1, 3.3 and 8.4, all of which had counterparts in the DC Rules, but in addition Maryland Rule 8.2(a), which, like its Model Rule counterpart, prohibited making false statements about the integrity of a judge, but for which there is no counterpart in the DC Rules. The Board on Professional Responsibility concluded that, because the DC Rules did not include a provision corresponding to that Maryland Rule, prohibiting false statements made with "reckless disregard as to truth or falsity," but only a prohibition of *knowing* misrepresentations under Rule 8.4(c), a less stringent reciprocal discipline than disbarment was called for, and the Court agreed.

In re Hermina, 907 A.2d 790 (DC 2006) also involved reciprocal discipline of a lawyer who had been found by the Maryland Court of Appeals to have violated various Maryland Rules of Professional Conduct -- namely, Rules 3.3(a)(1), 3.4(c) and 8.4(a), (c) and (d) -- all of which were either the same as or equivalent to correspondingly numbered DC Rules. The respondent had also been found to have violated Maryland Rule 8.2(a) which has no corresponding provision in the DC Rules. However, the DC Court of Appeals found the other violations with which the respondent was charged sufficient to support the same sanction of public censure that the Maryland authorities had imposed.

There appear to be no other DC court decisions or ethics opinions addressing this subject.

8.2:300 Lawyer Candidates for Judicial Office

- Primary DC References:
- Background References: ABA Model Rule 8.2(b), Other Jurisdictions
- Commentary: ABABNA § 101.610, ALI-LGL § 114, Wolfram §

There appear to be no pertinent DC court decisions or ethics opinions on this subject.

8.3 Rule 8.3 Reporting Professional Misconduct

8.3:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 8.3, DC Rule 1.6(h)
- Background References: ABA Model Rule 8.3, Other Jurisdictions
- Commentary:

8.3:101 Model Rule Comparison

Aside from a comma added in paragraph (a), the DC Rule as originally adopted followed Model Rule 8.3 in its original form. The Model Rule was amended in 1991 by the addition to paragraph (c) of a clause providing that if information learned by a lawyer working with a lawyer assistance program reveals lawyer misconduct, it is to be treated as if learned in a lawyer-client relationship and therefore need not be reported under Rule 8.3(a). The DC Rule as originally adopted by the DC Court of Appeals, in 1990, already provided a somewhat broader protection of information communicated in such circumstances because DC Rule 8.3(c) (like its Model Rule counterpart) stated that the Rule's disclosure obligation did not apply to information protected by Rule 1.6, and paragraph (h) of DC Rule 1.6, which has no counterpart in Model Rule 1.6, provided that information imparted in lawyer counseling programs should be treated as confidences or secrets. [See 1.6:250, above.]

Pursuant to recommendations of the Ethics 2000 Committee, relatively modest changes were made in 2002 to the language of Model Rule 8.3: in paragraphs (a) and (b) of the Rule, the phrase "having knowledge" was changed to the more active phrase "who knows," and the language of paragraph (c) was simplified and made clearer. The DC Rules Review Committee recommended identical changes to paragraphs (a) and (b) of the DC Rule. The Committee also recommended adding, to paragraph (c)'s exemption from disclosure of information protected by Rule 1.6, information protected by "other law;" and elaborated on the treatment of Rule 1.6"s exemptions of information otherwise required by Rule 8.3 to be disclosed, in Comments [2], [4] and [5] to the DC Rule. All of these recommended changes were approved by the DC Court of Appeals in 2006.

8.3:102 Model Code Comparison

Rule 8.3 both expands and narrows the provisions of its predecessor DR 1-103. The DC version of DR 1-103 contained a single paragraph, which was identical to DR 1-103(B) of the Model Code (requiring a lawyer to disclose violations only "upon proper request" of appropriate authority). It did not contain the mandate to report all violations of DR 1-102 (the predecessor of Rule 8.4) that appeared as DR 1-103(A) of the Model Code. Rule 8.3, like that provision of the Model Code, establishes an affirmative duty to report violations to the appropriate authority, and it extends the violations subject to reporting to all the Rules (not just Rule 8.4); but it also limits the violations that must be reported to those indicating unfitness to practice law.

8.3:200 Mandatory Duty to Report Serious Misconduct

- Primary DC References: DC Rule 8.3(a)
- Background References: ABA Model Rule 8.3(a), Other Jurisdictions
- Commentary: ABABNA § 101.201, ALI-LGL § 3, Wolfram § 12.10

DC Ethics Opinion 270 (1997), discussed more fully under 1.16:500 above, held that a subordinate lawyer who learns that an employing lawyer has sent a client what purport to be copies of correspondence written on the client's behalf, but where the letters were in fact never sent, has a duty under DC Rule 8.3 to report the employing lawyer to the disciplinary authorities, a duty that continues after the subordinate lawyer resigns upon learning of the deception.

DC Ethics Opinion 260 (1995) (discussed under 8.4:400 below) ruled that a lawyer consulted by a client about the possible settlement of another lawyer's claim against that client for fees, on terms that involve waiver of any malpractice claim, has an absolute duty to report any unprivileged knowledge of a violation by the other lawyer if the misconduct meets the standards established in Rule 8.3(a).

DC Ethics Opinion 246 (1994) sets forth a four-part analysis, which tracks and somewhat elaborates the terms of the rule, to be used in determining when a lawyer must report the misconduct of another lawyer. First, a lawyer must have actual knowledge of facts that create the lawyer's clear belief that misconduct has occurred. Second, the lawyer must report misconduct only if the report can be made without violating Rule 1.6's requirement of confidentiality: not only is a lawyer excused from reporting information protected by Rule 1.6, but a lawyer *may not* report information protected by Rule 1.6. On this branch of the analysis, the opinion further advised that even public information may be protected as a "secret" under Rule 1.6 if either the client requests that the information not be reported or the reporting would be detrimental to the client. Disclosure in one forum — in this instance through the filing of a malpractice lawsuit — does not validate disclosure in another forum, namely, reporting the malpractice defendant's misconduct pursuant to Rule 8.3, if such reporting would "lessen the client's ultimate chances of recovery" and had not been consented to by the client. The Opinion also suggested that, in addition to Rule 1.6, Rule 1.3(b)(2) may preclude the reporting of misconduct under Rule 8.3 if the information is prejudicial or damaging to the client. [See 1.3:101] The third prong of the analysis limits the obligation to report misconduct to violations of the disciplinary rules; negligent conduct alone, without a violation of one of the DC Rules, does not invoke the mandatory duty to report misconduct, even if the conduct gives rise to a malpractice claim. Finally, a lawyer has a duty to report a violation only if the conduct raises a substantial question as to the opposing lawyer's honesty, trustworthiness or fitness to practice law "in other respects." Thus, "not all violations of the disciplinary rules must be reported, only the most serious ones." The Opinion, which revised and reaffirmed an earlier draft opinion after it had been challenged by Bar Counsel, pointed out that Rule

8.3, in making some reporting mandatory, does not forbid voluntary reporting of another lawyer's misconduct in other circumstances.

DC Ethics Opinion 239 (1993) also addressed the issue of when reporting is mandatory and concluded that mere suspicions of misconduct should not be reported. **DC Ethics Opinion 220 (1991)** noted (in n. 6) that although neither the black letter text nor the Comments explain precisely what is meant by "informing" the appropriate professional authority, filing a disciplinary charge clearly "falls within its plain meaning."

8.3:300 Reporting the Serious Misconduct of a Judge

- Primary DC References: DC Rule 8.3(b)
- Background References: ABA Model Rule 8.3(b), Other Jurisdictions
- Commentary: ABABNA § 101.206, ALI-LGL § 3, Wolfram § 12.10

In In re Borders, 665 A.2d 1381 (DC 1995), the Court of Appeals refused Borders' petition for reinstatement to the DC Bar in part because he failed to fulfill his obligation to report the misconduct of a judge under Rule 8.3(b) and the former DR 1-103. Despite the grant of use immunity, Borders had refused to testify against a judge being investigated for involvement in the same bribery scheme for which Borders had been convicted.

8.3:400 Exception Protecting Confidential Information

- Primary DC References: DC Rule 1.3(b)(2), DC Rule 1.6
- Background References: ABA Model Rule 8.3(c), Other Jurisdictions
- Commentary: ABABNA § 101.204, ALI-LGL § 3, Wolfram § 12.10

Under Rule 8.3(c), a lawyer is not required to disclose the misconduct of another lawyer or judge to the appropriate authority if reporting the misconduct would violate the rules of confidentiality enunciated in Rule 1.6. [See 1.6:250, above]

As mentioned above, **DC Ethics Opinion 246 (1994)** held that not only is a lawyer excused from reporting information protected by Rule 1.6, a lawyer *may not* report information protected by Rule 1.6. **Opinion 246** also suggested that Rule 1.3(b)(2) may preclude reporting of misconduct under Rule 8.3 if the information is prejudicial or damaging to the client. [See 1.3:101, above]

In **DC Ethics Opinion 130 (1983)**, the Legal Ethics Committee determined that DR 1-103(A) of the DC Code neither required nor prohibited the disclosure of an unethical settlement offer made during negotiations that the parties had agreed would remain confidential. The lawyer was instructed to assess the confidentiality agreement using principles of contract law before deciding whether to report the misconduct. The settlement offer in question violated DR 2-108(B), now Rule 5.6, by conditioning the settlement of the parties on the inquiring lawyer's agreement not to represent other clients against the opposition.

8.4 Rule 8.4 Misconduct

8.4:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 8.4, DC Rule 9.1
- Background References: ABA Model Rule 8.4, Other Jurisdictions
- Commentary:

8.4:101 Model Rule Comparison

DC Rule 8.4 preserves the general substance and tenor of Model Rule 8.4, but it also has some significant differences. Paragraphs (a), (b), (c) and (f) of the DC Rule are identical to their Model Rule counterparts, and paragraph (e) was identical until 2002, when the Model Rule's provision was modified as described below. On the other hand, paragraph (d) of the DC Rule differs from its Model Rule counterpart as described below, and its paragraph (g) has no counterpart in the Model Rule, and there are substantial variances in the Comments.

Paragraph (d) of the Model Rule retains the language of the previous Model Code DR 1-102(A)(5), which prohibited conduct that is "prejudicial" to the administration of justice. In contrast, paragraph (d) of the DC Rule prohibits a lawyer engaging in conduct that "seriously interferes" with the administration of justice. The Jordan Committee recommended this change on the ground that the term "prejudicial" is too vague for a rule defining professional misconduct; it took the substituted phrase from what is now Comment [2] to the Model Rule. Comment [2] to the DC Rule explains that paragraph (d)'s prohibition includes conduct that had been proscribed under DR 1-102(A)(5). As originally adopted, that Comment to the DC Rule was followed by Comments [3]-[5], summarizing DC case law applying DR 1-102(A)(5). The only changes to DC Rule 8.4 recommended by the DC Rules Review Committee and approved by the DC Court of Appeals in 2006 (aside from elimination of initial capitals on the words "rules of judicial conduct," in paragraph (f)) were to condense Comments [2] - [5] into a single Comment [2], summarizing the circumstances in which paragraph (d) would apply, without citations to the case law.

Paragraph (e) of the Model Rule was amended in 2002 on the recommendation of the Ethics 2000 Commission, by the addition, to the prohibition on a lawyer's stating or implying an ability to influence improperly a government agency or official, of the phrase "or to achieve results by means that violate the Rules of Professional Conduct or other law." This phrase was among those that were being deleted from Model Rule 7.1 at the same time. [See 7.1:101, above.] The only other change made to Model Rule 8.4 in 2002 was the addition of a new Comment [1], explaining when a lawyer is violating or attempting to violate a Rule through the acts of another, and distinguishing such conduct from advising a client of actions that the client is entitled to take.

As stated above, Paragraph (g) of DC Rule 8.4 has no counterpart in the Model Rule. It preserves the substance of DR 7-105 of the Code, providing that a lawyer shall not seek or threaten to seek criminal charges or disciplinary charges solely to obtain advantage in a civil matter. By contrast, the Model Rules do not carry forward this prohibition from the Model Code. See **ABA Formal Opinion 92-363** (Use of Threats of Prosecution in Connection With a Civil Matter) and **ABA Formal Opinion 94-384** (Withdrawal by Lawyer Against Whom Opposing Counsel Has Filed a Disciplinary Grievance).

A further difference between the two versions of Rule 8.4 is that the Model Rule has a Comment (originally numbered [2] but now [3]), added in 1998, which states that a lawyer who in the course of representing a client manifests bias or prejudice based on race, sex, religion, national origin, age, sexual orientation or socioeconomic status violates paragraph (d) of the Rule when such conduct is prejudicial to the administration of justice. DC Rule 8.4 has no such Comment, but there is a separate DC Rule 9.1, for which there is no counterpart in the Model Rules, that flatly prohibits a lawyer from discriminating on the same grounds, *in employment.* That Rule was not in the Rules as originally proposed to the DC Court of Appeals by the DC Bar, but was added by the Court. It is more fully discussed under 8.4:800, below.

DC Rule 8.4 also differs from the Model Rule in that it has no Comments corresponding to what are now the Model Rule's Comment [4], making the point that a lawyer may refuse to comply with an obligation imposed by law if the lawyer believes the law to be invalid, and Comment [5], suggesting that a lawyer's abuse of public office or a position of private trust may thereby show "an inability to fulfill the professional role of lawyers." Indeed, the only Comment the two versions of Rule 8.4 share is what used to be an identical Comment [1] in both (but is now [2] in the Model Rule), expatiating on what sorts of criminal acts reflect adversely on a lawyer's fitness as a lawyer, so as to come within paragraph (b) of the Rule..

8.4:102 Model Code Comparison

DC Rule 8.4 preserves the substance of DR 1-102(A) of the DC Code, yet differs somewhat in language and content.

The DC Code was itself a substantial departure from the Model Code. The DC Court of Appeals altered the content of DR 1-102(A) on April 1, 1972 by amending two of the Model Code provisions. First, the Court added to DR 1-102(A)(3), which provided that a lawyer shall not "engage in illegal conduct involving moral turpitude," the phrase "that adversely reflects on his fitness to practice law." In addition, the Court deleted subparagraph (6) of DR 1-102(A), which provided that a lawyer should not "engage in conduct that adversely reflects on his fitness to practice law."

In turn, DC Rule 8.4 incorporates a number of substantive changes from the antecedent Code provisions. DR 1-102(A)(1) provided that a lawyer should not violate a disciplinary rule; DR 102(A)(2) that a lawyer should not circumvent a disciplinary rule through the actions of another. These two provisions collapse into Rule 8.4(a), which provides that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." The DC Rule is thus substantially broader than the antecedent Code provisions, covering conduct that would not have been covered previously, such as an attempted violation of the Rule, and the knowing inducement of another to commit a violation.

Rule 8.4(b) also differs from its Code counterpart. Whereas DR 1-102(A)(3) provided that a lawyer shall not "engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law," Rule 8.4(b) states that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Comment [1] to the Rule elucidates the type of conduct that will be considered misconduct under this provision.

Rule 8.4(c) is identical to DR 1-102(A)(4).

Rule 8.4(d) preserves the tenor of DR 1-102(A)(5) while altering its language. As discussed under the Model Rule comparison above, the Model Code proscribed conduct that was "prejudicial" to the administration of justice. Rule 8.4(d) forbids a lawyer to "seriously interfere" with the administration of justice. As previously noted, Comment [2] to Rule 8.4 specifies that the prohibition of paragraph (d) includes conduct previously proscribed under the Model Code, and that it should be interpreted with respect to the extensive case law on DR 1-102(A)(5).

Paragraph (e) of DC Rule 8.4 is taken from DR 9-101(A) of the DC Code, which corresponded to DR 9-101(C) of the Model Code. The DC Code expanded upon the Model Code by replacing the phrase "upon irrelevant grounds" with the phrase "or upon grounds irrelevant to a proper determination on the merits." Further, the DC Code

added the word “legislator” to the list of bodies and persons that a lawyer should not unduly seek to influence. In turn, DC Rule 8.4(e) omits this addition and provides more generally that a lawyer shall not “imply an ability to influence improperly a government agency or official.”

Paragraph (f) of DC Rule 8.4 does not have a direct counterpart in the Code. However, EC 7-34 provided that “[a] lawyer . . . is never justified in making a gift or loan to a [judicial officer] except as permitted by . . . the Code of Judicial Conduct.” In addition, EC 9-1 stated that a lawyer “should promote public confidence in our [legal] system and in the legal profession.”

As discussed under the Model Rule comparison above, paragraph (g) of DC Rule 8.4 is taken from DR 7-105, which was identical in the DC and the Model Code.

Neither the DC Code nor the Model Code contained a provision comparable to Rule 9.1.

8.4:200 Violation of a Rule of Professional Conduct

- Primary DC References: DC Rule 8.4(a)
- Background References: ABA Model Rule 8.4(a), Other Jurisdictions
- Commentary: ABABNA § 101.101, ALI-LGL § 2, Wolfram § 3.3

In re Hermina, 907 A.2d 790 (DC 2006) applied reciprocal discipline to a lawyer who had been found by the Maryland Court of Appeals to have violated the Maryland Rules of Professional Conduct 3.3(a)(1) and 3.4(c), and in consequence to have violated Rules 8.4(a), (c) and (d) as well -- all of which Maryland Rules were either the same as or equivalent to correspondingly numbered DC Rules. The violation of Rule 3.3(a)(1) had consisted of the respondent's deliberately misrepresenting to a judge that he had been precluded from conducting any discovery by virtue of a protective order that another judge had issued in the case, and the violations of Rule 3.4(c) had consisted of respondent's failing to respond to discovery in asserted retaliation for discovery failures on the part of his opponent, and knowingly failing to participate in a pre-trial conference.

In **In re Goldsborough, 654 A.2d 1285 (DC 1995)**, the Court of Appeals imposed the discipline proposed by the Board on Professional Responsibility in a case involving numerous ethical violations under the Maryland rules. The Maryland court found that respondent was "deliberately untruthful" in his testimony and had provided misleading information to Maryland Bar Counsel. With respect to these violations, the Board "had no trouble concluding that the misconduct regarding misrepresentations and false testimony established in Maryland as violating Maryland Rules 8.1 and 8.4(a) constitutes misconduct in the District of Columbia.'" Id. at 1286. The Court accepted the Board's conclusions with respect to these violations, and ordered a two-year suspension, with a requirement of proof of fitness for reinstatement.

In **United States v. Ferrara, 847 F. Supp. 964 (DDC 1993), aff'd, 54 F.2d 825 (DC Cir 1995)**, the District Court entertained a suit brought by the United States to enjoin an inquiry by the Disciplinary Board of the Supreme Court of New Mexico into the conduct of an assistant United States Attorney. The allegations by defendant in its specification of charges before the Disciplinary Board included the claim that the AUSA had violated, *inter alia*, DR 1-102(A)(2) of the DC Code (still in effect at the time of the incident) by communicating with an adverse party known to be represented by counsel without the consent of that counsel. The Court did not rule on the merits of this allegation, but granted defendant's motion to dismiss for lack of personal jurisdiction over defendant. [The background of the **Ferrara** case is discussed in 4.2:220, above.]

In **In re Pearson, 628 A.2d 94 (DC 1993)**, the Court of Appeals reviewed the Board's recommendation that a lawyer disbarred from practice in Maryland, who was also a member of the District of Columbia bar, be disbarred in the District of Columbia under DC Bar Rule XI, §11, which governs "Reciprocal Discipline." The respondent had

been charged with violating Rule 8.4 of the Maryland Rules by forging his wife's signature on certain legal documents. The Court found the Maryland record, prepared by an inquiry panel called the "Attorney Grievance Commission," to be misleading because the panel failed to take into account respondent's version of key facts. Moreover, the Court held that, because the Maryland Court of Appeals did not find as a fact that respondent was guilty of the charge alleged, reciprocal discipline was inappropriate. Accordingly, the Court declined to enter an order of disbarment. However, the Court noted that, had respondent indeed been found guilty of the charge, the identical discipline would have been appropriate since the District of Columbia rules contain the counterpart of Maryland Rule 8.4.

In **In re Lieberman, 592 A.2d 1060 (DC 1991)**, the Court of Appeals ordered the reciprocal disbarment of a lawyer who had consented to disbarment from the practice of law by the Court of Appeals of Maryland based on numerous ethical violations, including misappropriation of client funds. In the Maryland proceeding, respondent conceded, *inter alia*, that misappropriation would constitute a violation of Maryland Rule 8.4(a), which defines professional misconduct as the direct or indirect violation of the Rules of Professional Conduct.

In **In re Hunter, 734 A.2d 654 (DC 1999)**, the Court approved the imposition of reciprocal discipline upon a lawyer who had been suspended by the US District Court for ethical violations arising out of her representation of a criminal defendant in a case in which an officer with whom the lawyer was romantically involved had participated in the arrest of a co-defendant and was to be a government witness at trial. The District Court had found the lawyer's conduct violative of, *inter alia*, Rules 1.3(a),1.4(b), 1.7(b)(4), 8.4(a) and 8.4(d).

In **In re Reid, 540 A.2d 754 (DC 1988)**, the Court of Appeals reviewed the disciplinary recommendation of the Board on Professional Responsibility in a case involving disciplinary violations under, *inter alia*, the Maryland Code of Professional Responsibility Rules DR 1-102(A)(1). The Maryland court noted that ordinarily respondent's misconduct would warrant disbarment but that his alcoholism was a factor in mitigation, and ordered an indefinite suspension instead. The D.C. Court of Appeals concluded that the Board was empowered to recommend discipline substantially different from that imposed in the foreign jurisdiction without proceeding de novo if the proceeding elsewhere comports with due process. The Court held that the record in the case at hand, which included acts constituting numerous ethical violations, such as misappropriation of client funds, commingling, conversion of client funds, and dishonesty, warranted disbarment in the District of Columbia.

In **In re Gilbert, 538 A.2d 742 (DC), cert. denied, 488 US 828 (1988)**, the Court of Appeals entertained another reciprocal disbarment case involving violations in Maryland of DR 1-101(A) and DR 1-101(A)(1) and (4). The Maryland Court of Appeals ordered that respondent be disbarred for his failure to disclose his involvement in a previous lawsuit in his application for admission to the Maryland Bar. Applying DC Bar Rule XI, §18(5), which governs reciprocal disbarment, the Court found no

infirmity in the Maryland court's determination of misconduct, and ordered that defendant be disbarred from the practice of law in the District of Columbia.

In **In re Velasquez, 507 A.2d 145 (DC 1986)**, the Court entertained a reciprocal disbarment proceeding involving previous disbarment from Maryland for violations of, *inter alia*, Maryland DR 1-102(A)(1). The Court accepted the conclusions of the Maryland Court of Appeals that the hearing judge's findings of fact relating to commingling and failure to keep accurate and safe records of clients' property were supported by clear and convincing evidence. Also, the Court agreed with the Maryland court that the activities of respondent, who had used client funds deposited in an escrow account for general law firm administrative purposes, constituted illegal, dishonest conduct and misrepresentation. Noting that the violations found in the Maryland proceeding would be violations of the DC Code, and that disbarment is the usual sanction in DC for misappropriation, the Court ordered respondent disbarred.

In **In re Morris, 495 A.2d 1162 (DC 1985), cert. denied, 475 US 1047 (1986)**, the Court of Appeals held that a lawyer admitted in both Maryland and the District of Columbia, who was disbarred in Maryland for violations of, *inter alia*, DR 1-102(A)(1), (3)-(6) of the Maryland Code of Professional Responsibility, violated the corresponding provisions of the DC Code. The Maryland proceedings adduced proof that respondent had misappropriated client funds and engaged in misconduct in an estate matter. The Court accepted the Board's conclusion that misappropriation of client funds and commingling merited disbarment in DC as they had in Maryland and ordered the lawyer disbarred in DC.

DC Ethics Opinion 321 (2003) [which is discussed more fully under 4.3200, above] addressed the ethical obligations of a lawyer with respect to the conduct of an investigator sent by the lawyer to interview a person not represented by counsel, in a context where the person to be interviewed was seeking a contempt order against the lawyer's client, for violation of a Civil Protection Order (CPO). The **Opinion** recognized that although the applicable ethical restrictions governing the interview were to be found in Rule 4.3, the lawyer's official responsibility for the investigator's conduct rested on Rules 5.3 and 8.4(a).

DC Ethics Opinion 81 (1979), interpreting DC DR 2-102(A), which prohibits misleading and deceptive advertising, emphasized that lawyers are responsible for knowing the content of any advertising they may sponsor. The Legal Ethics Committee stated that a lawyer cannot avoid liability under DR 2-102(A) by leaving the development of advertising claims in the hands of a service, and cited DR 1-102(A) as providing that a lawyer may not "circumvent a Disciplinary Rule through the actions of another."

8.4:300 Commission of a Crime

- Primary DC References: DC Rule 8.4(b)
- Background References: ABA Model Rule 8.4(b), Other Jurisdictions
- Commentary: ABABNA § 101.301, ALI-LGL § 2, Wolfram § 3.3.2

Rule 8.4(b)'s predecessor in the Code, DR 1-102(A)(3), prohibited illegal conduct involving moral turpitude, whereas Rule 8.4(b) forbids illegal conduct reflecting adversely on a lawyer's fitness as a lawyer. Comment [1], which is identical in the DC and the Model Rule, explains the reasons for this change in focus: namely, that moral turpitude may be involved in some matters of personal morality, such as "adultery and comparable offenses," that do not relate to fitness to practice law. In the case of the DC Rule, however, there was not so marked a change from Code to Rule, for the DC version of DR 1-102(A)(3) was amended in April 1972 to say that a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude that adversely reflects on . . . fitness to practice law." It should be noted, too, that in the District of Columbia, moral turpitude continues to be a pertinent aspect of criminal conduct by lawyers, for **DC Code § 11-2503(a) (1995)** calls for disbarment of a lawyer who has been convicted of a crime of moral turpitude. See **In re Fox, 627 A.2d 511, 512 (DC 1993); In re Carroni, 683 A.2d 150 (DC 1996)**. For these two reasons, the jurisprudence under the DC version of DR 1-102(A)(3), although phrased in terms of moral turpitude, as DC Rule 8.4(b) is not, remains pertinent under DC Rule 8.4(b).

The DC Court of Appeals has defined moral turpitude as conduct "contrary to justice, honesty, modesty, or good morals." **In re Colson, 412 A.2d 1160, 1168 (DC 1979)** (en banc) (quoting BLACK'S LAW DICTIONARY 1160 (4th ed. 1951)). More specifically, the crime must be "an act of baseness, vileness, or depravity in the . . . social duties which a man owes to his fellow men or society in general." *Id.*

Acts involving fraud and intentional dishonesty for personal gain are acts of moral turpitude. In **In re Appler, 669 A.2d 731 (DC 1995)**, the Court of Appeals found, contrary to the decision of the Board on Professional Responsibility, that a lawyer who asked several clients to pay him for legal services directly rather than pay the firm in which he was an associate committed an act of moral turpitude. On the other hand, in **In re Weiss, 839 A.2d 670 (DC 2003)**, a lawyer who had confessed to surreptitiously diverting $676,466 of his law firm's funds into a personal account was found to deserve only a three-year suspension, for violation of DC Rules 8.4(b) and (c), and there was no discussion in the Court's opinion as to whether moral turpitude had been involved. In **In re Powell, 836 A.2d 579 (DC 2003) (per curiam)**, where the respondent had pled guilty in Virginia to a misdemeanor charge of drawing a check on insufficient funds, and been reprimanded therefore, the Board on Professional Responsibility determined, and the Court agreed, that although the respondent had violated DC Rule 8.4(b), there was no moral turpitude involved, so no reciprocal discipline was needed. In **In re Cerroni, 683 A.2d 150 (DC 1996)**, a lawyer who had submitted false information to the U.S. Department of Housing and Urban Development and the Federal Housing

Administration and had pled guilty to violations of 18 USC §§ 1010 & 1012 in connection therewith was found to have violated Rule 8.4(b) and Rule 8.4(c) [treated under 8.4:400, below]. Because the offense was determined not to constitute moral turpitude per se and the Hearing Committee determined that the surrounding circumstances did not constitute moral turpitude, the penalty was a year's suspension, with reinstatement contingent on completion of certain continuing legal education courses, rather than disbarment. See also **In re Dorsey, 469 A.2d 1246 (DC 1983)** (finding lawyer who obtained money fraudulently and dishonestly acted with moral turpitude under DR 1-102(A)(3)); **In re Willcher, 447 A.2d 1198 (DC 1982)** (reversing Board's decision and finding that lawyer's solicitation of money from an indigent defendant whom he had been appointed to represent under the District of Columbia Criminal Justice Act constituted an act of moral turpitude).

Illegal drug possession or use standing alone was not illegal conduct involving moral turpitude under DR 1-102(A)(3). See **In re Reynolds, 649 A.2d 818 (DC 1994)**, where the Court of Appeals, evaluating the lawyer's pre-1991 conduct, stated that illegal drug use standing alone did not constitute illegal conduct involving moral turpitude under DR 1-102(A)(3). However, the court noted that repeated use of illegal drugs affecting a lawyer's fitness to practice law may result in discipline under DC Rule 8.4(b). See also **In re Gardner, 650 A.2d 693 (DC 1994)** (holding that possession of cocaine does not constitute conduct involving moral turpitude). But in **In re Campbell, 572 A.2d 1059 (DC 1990)**, the court held that unlawful possession of a controlled substance coupled with the intent to distribute the controlled substance is a crime of moral turpitude.

In **In re Bewig, 791 A.2d 908 (DC 2002) (per curiam)**, the respondent had pled guilty to misdemeanor sexual conduct with a minor, and when this conviction was reported to the DC Court of Appeals, it issued an order determining that the crime involved was not a "serious crime" as defined by DC Bar Rule XI, § 10(b) (which would have automatically entailed some discipline), but referring the matter to the Board on Professional Responsibility for investigation. The Board determined that, on the facts of the case, the crime had involved moral turpitude "because the evidence demonstrated that respondent sufficiently understood the wrongfulness of his behavior and was aware that the minor victim was legally incapable of consent, and thus respondent was not sufficiently [mentally] impaired" to warrant a lesser penalty than disbarment. The Board also found, and the Court affirmed, that the respondent had violated Rule 8.4(b). In contrast, in **In re Childress, 811 A.2d 805 (DC 2002)**, the Court determined that a finding by a Maryland court that the respondent had committed criminal conduct by proposing over the internet to engage in sexual conduct with a child under 14 years of age was sufficient to support a determination that the respondent had violated DC Rule 8.4(b), but the Court also determined, without addressing the question whether moral turpitude was involved, that a one-year suspension and a requirement that the respondent demonstrate his fitness to practice law as a condition of reinstatement sufficed as a sanction.

The DC Court of Appeals' jurisprudence on the issue of moral turpitude is more fully discussed under 0.2.245, above.

In **In re Small, 760 A.2d 612 (DC 2000),** a member of the DC Bar was suspended for three years by reason of a conviction for vehicular negligent homicide, a felony, in New York, which was held to be a criminal act reflecting adversely on a lawyer's fitness to practice law, under Rule 8.4(b); and by reason of his failure to disclose the pendency of the charges at the time of his admission to the bar, in violation of Rule 8.1(b). **In re Sims, 844 A.2d 353 (DC 2004)** was a disciplinary case in which the respondent had been convicted, on stipulated facts, of violating 18 U.S.C. § 208 when he abused his practice as a hearing examiner in the Bureau of Traffic Adjudication in the DC government by fixing some 20 traffic tickets on cars belonging to himself or members of his family, in effect eliminating some $1,280 in fines and penalties. The Court remanded the case to the Board on Professional Responsibility for a determination as to whether the offense, which had been found to violate Rules 8.4(b),(c) and (d), had also involved moral turpitude, so as to require disbarment. The Court canvassed its decisional authority regarding the determination as to moral turpitude where the offense had been a misdemeanor rather than a "serious crime" as defined by DC Bar Rule XI § 10(b), and then summarized the applicable standards as follows:

> Bar Counsel has the burden of showing by clear and convincing evidence that an attorney's conduct involves moral turpitude on the facts. *See* [**In re Tucker, 766 A.2d 510 (DC 2000)**], at 512; BPR Rule 11.5 ("Bar Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence"). To rise to the level of moral turpitude, an attorney's conduct must be an act of "baseness, vileness or depravity," [**In re Tidwell, 831 A.2d 953 (DC 2003)**], at 957, or be the type that manifests "a revulsion of society toward conduct deeply offending the general moral sense of right and wrong. [**In re McBride, 602 A.2d 626 (DC 1992)**], at 632-33. Clear and convincing evidence relating to conduct underlying a criminal conviction may include an FBI or other law enforcement affidavit, [**In re Shillaire, 549 A.2d 336 (DC 1988)**], at 353; a statement given to the FBI or other law enforcement agency and signed by the attorney, [**Tucker**, *supra*], 766 A.2d at 513; audio or videotapes made by an FBI agent or other law enforcement official showing the attorney in an act of wrongdoing, [**In re Tucker, 689 A.2d 1214 (DC 1997)**], at 1215; testimony by an FBI agent or other law enforcement official before the hearing committee, *id*.; and admissions of the attorney who is subject to discipline, *id*. at 1217.

In a subsequent decision in the same case, **In re Sims, 861 A.2d 1 (DC 2004)**, the court, in a divided decision, held that the respondent's conduct had indeed involved moral trupitude, warranting disbarment as a sanction.

In **In re Tidwell, 831 A.2d 953 (DC 2003)**, it was determined that a conviction for leaving the scene of a fatal automobile accident without reporting it involved, in the

circumstances presented, not only a violation of Rule 8.4(b) but also moral turpitude, calling for disbarment. The critical circumstance leading to this finding of moral turpitude was the respondent's awareness of the time of the accident that he had hit someone (here, a man on a bicycle).

In re Slattery, 767 A.2d 203 (DC 2001) held that a lawyer's appropriation of $10,262.30 from the bank account of a fraternal organization was a criminal act coming within Rule 8.4(b) despite the fact that the respondent had not been convicted of any criminal offense in connection with it; and that respondent's efforts to conceal the act were a violation of Rule 8.4(c).

In **In re Gil, 656 A.2d 303, 304 (DC 1995)**, a reciprocal discipline case, the Court of Appeals held that conduct amounting to larceny or theft under District of Columbia law is a "criminal act" in violation of DC Rule 8.4(b). In construing the phrase criminal act, the court noted that it could look to the law of any jurisdiction that could have prosecuted the lawyer for his or her misconduct.

In re Reynolds, 763 A.2d 713 (DC 2000) was a disciplinary proceeding with respect to conduct resulting in misdemeanor convictions for driving while intoxicated, hit and run and eluding a police officer. Although the Board on Professional Responsibility found, and the Court agreed, that these criminal convictions did not involve moral turpitude, so as to implicate DC Code § 11-2503(a) and require disbarment, they did, given the respondent's history, reflect adversely on his "fitness as a lawyer," and so constituted a violation of DC Rule 8.4(b). That history included four prior convictions for DUI and "an extended pattern of alcohol abuse over more than a decade," and the respondent's acknowledgment of the "potentially harmful effects his addition [to alcohol] could have on his ability to provide . . . legal advice to the best of his ability." Id at 713. The respondent was suspended for six months, with a requirement of a showing of fitness to practice law as a condition of reinstatement. (The respondent subsequently applied for reinstatement but was held to have failed to demonstrate by clear and convincing evidence that he was fit to resume practicing law, **In re Reynolds, 867 A.2d 977 (DC 2005)**.)

In **In re Abrahamson, 852 A.2d 949 (DC 2004)**, the respondent had pled guilty to a misdemeanor count of unlawful receipt of compensation with intent to defeat the purposes of the United States Department of Housing and Urban Development in violation of 18 USC §1012. The Board on Professional Responsibility determined that the crime did not involve moral turpitude per se, but referred the matter to a Hearing Committee for a determination as to whether it involved moral turpitude on the particular facts and for a recommendation as to the appropriate penalty. The Hearing Committee determined that the conduct had not involved moral turpitude but recommended a six month suspension for conviction of a serious crime as defined by DC Bar Rule XI, §10(b). The Board accepted these two conclusions of the Hearing Committee, but also held, contrary to the Hearing Committee's decision, that the respondent had violated Rule 8.4(b), as well as Rules 3.4(a) and 8.4(d).

In **In re Harkins, 899 A.2d 755 (DC 2006)**, the respondent had been convicted of misdemeanor sexual abuse by reason of his having touched a fellow Metro passenger inappropriately several times and followed her when she changed seats in order to avoid him. The Board on Professional Responsibility had concluded that this conduct did not amount to a violation of Rule 8.4(b), but recommended that if the Court disagreed, the penalty should be no more than a censure. The Court, however, disagreed with the Board on both points, holding, as to the ethics violation, that, "[d]espite not directly implicating honesty or trustworthiness, sexually abusive contact, because of its inherently violent nature, calls into question one's fitness as a lawyer and thus falls within the ambit of Rule 8.4(b)." **Id. at 760**. As regards the appropriate penalty, the Court noted that "[t]he discipline for violation of Rule 8.4(b) has never been as lenient as public censure," **id. at 761**, and imposed instead a thirty-day suspension.

See also **In re Hermina, 907 A.2d 790 (DC 1006)** (summarized under 8.2:200, above).

DC Ethics Opinion 200 (1989) concluded that a lawyer's acceptance of a fee in good faith reliance on the client's statement as to its non-tainted source did not violate DR 1-102(A)(3) because there was no specific criminal prohibition against the lawyer's acceptance of the fee.

In **In re Tidwell, 831 A.2d 953 (DC 2003)**, it was determined that a conviction for leaving the scene of a fatal automobile accident without reporting it involved, in the circumstances presented, not only a violation of Rule 8.4(b) but also moral turpitude, calling for disbarment. The critical circumstance leading to this finding of moral turpitude was the respondent's awareness of the time of the accident that he had hit someone (here, a man on a bicycle).

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8.4:400 Dishonesty, Fraud, Deceit and Misrepresentation

- Primary DC References: DC Rule 8.4(c)
- Background References: ABA Model Rule 8.4(c), Other Jurisdictions
- Commentary: ABABNA § 101.401, ALI-LGL § 2, Wolfram § 3..5.8

DC Rule 8.4(c), like its Model Rule counterpart and its predecessor DR-1-102(A)(4), prohibits acts of dishonesty, fraud, deceit and misrepresentation. In **In re Shorter, 570 A.2d 760 (DC 1990)**, the Court of Appeals emphasized that the four categories of conduct proscribed in DR 1-102(A)(4) should be understood as separate categories; thus, "each term should be read narrowly, so as not to engulf any of the remaining three." *Id.* at 767. And when more than one of the terms could apply to a given set of facts, the court held that the more general term should be used. *Id.* ("[W]e will find only one violation of the disciplinary rule upon a single set of facts."). Noting that the term "dishonesty" encompasses fraudulent, deceitful, and misrepresentational behavior, the court found it to be the most general term used in DR 1-102(A)(4). Indeed, the court recognized that dishonesty can also mean a "lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Id.* at 768.

In re Abrams, 689 A.2d 6 (DC 1997) (en banc), cert. denied, 521 U.S. 1121 (1997), presented the issue of whether a presidential pardon following a criminal conviction requires dismissal of a disciplinary proceeding based upon the conviction. The respondent in the case was a former Assistant Secretary of State for Inter-American Affairs, who had been convicted, upon a plea of guilty, of violations of 2 USC § 192, by reason of testifying falsely to a congressional committee. On the basis of these convictions he was charged by Bar Counsel with violations of DR 1-102(A)(4). Those charges were sustained by the Hearing Committee and the Board on Professional Responsibility, which recommended a one-year suspension as penalty. While the disciplinary proceeding was pending, however, President Bush issued a full and unconditional pardon, and Abrams took an appeal to the DC Court of Appeals on the ground that the pardon "blotted out not only his convictions but also the underlying conduct." *Id*. at 7. A panel of the Court of Appeals agreed, **In re Abrams, 674 A.2d 867 (DC 1995)**, but the court granted Bar Counsel's petition for rehearing en banc, **In re Abrams, 674 A.2d 499 (DC 1996) (en banc)**, and the en banc court reversed the panel, 5 to 4. Although four members of the majority would have imposed a six-month suspension, there was not a fifth vote for so severe a penalty, so that the penalty imposed was a public censure.

In **In Re Morrell, 684 A.2d 361 (DC 1996)**, the Court upheld the recommended disbarment of a lawyer who had misappropriated hundreds of thousands of dollars from a client, received compensation from his law firm for representing the client and received compensation directly from the client for the same work, and taken a kickback, in violation of DR 1-102(A)(3) and (4), the predecessors of Rule 8.4(b) and (c), and DC DR 9-103(A) and (B), the predecessors of Rule 1.15.

In **In re Bernstein, 774 A.2d 309 (DC 2001)** the lawyer respondent had represented a client in a workers' compensation proceeding before the Industrial Commission of Virginia (the "Commission"), negotiated a settlement under which the employer was to pay the client $30,000, and then entered into an agreement with the client under which he would receive $9,000 out of the settlement as a fee. The Commission, whose approval was required, approved only a fee of $6,000, but the lawyer, without informing the client of the Commission's action, retained the full $9,000 his client had agreed to. The lawyer was found to have engaged in dishonesty in violation of Rule 8.4(c), by reason of taking a fee in excess of that awarded, and failing to tell the client what the Commission had awarded; and in addition, to have violated Rule 1.5(a) because the fee he took, being in excess of what the Commission awarded, was illegal and therefore unreasonable.

In re Slattery, 767 A.2d 203 (DC 2001) held that a lawyer's appropriation of $10,262.30 from the bank account of a fraternal organization was a criminal act coming within Rule 8.4(b) despite the fact that the respondent had not been convicted of any criminal offense in connection with it; and that respondent's efforts to conceal the act was a violation of Rule 8.4(c).

Miranda v. Contreras, 754 A2d 277 (DC 2000), involved a motion to set aside a default judgment under Super. Ct. Civ. R..60(b)(6), on the basis of allegations that plaintiff's counsel had represented to defendant's counsel that he would consent to striking the default if settlement negotiations were unsuccessful, and that defendant's counsel in reliance had refrained from filing an answer or other response to the complaint. The Court of Appeals held that the allegations, if true, would constitute an 'extraordinary circumstance" warranting relief under the rule, and remanded for a hearing on the allegations. Referring in this connection to both Rule 8.4(c) and the DC Bar Voluntary Standards of Conduct, the Court observed,

> As colleagues at bar and officers of the court, and to ensure the efficient, accurate and just operation of judicial proceedings, counsel must be able reasonably to rely on representations made by fellow counsel in the context of litigation. Conversely, counsel should not be able to reap the windfall of his or her misrepresentation to fellow counsel.

Id at 280.

One of the numerous ethical transgressions found in **In re Hager, 812 A.2d 904 (DC 2002)** [which is more fully discussed under 1.7:500, above] was a violation of Rule 8.4(c)'s designating as professional misconduct a lawyer's engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In the underlying case the lawyers representing the plaintiffs in a potential class action had made a side deal with the defendant, unknown to their clients, under which the defendant paid them $225,000 as attorneys fees and expenses, the lawyers agreed never to represent anyone with related claims against the defendant and to keep totally confidential and not to disclose to anyone all information learned during their investigation relating to the case, and all the parties agreed not to disclose most of the terms of the settlement, even to the

lawyers' clients. The Rule 8.4(c) violation found by the Board on Professional Responsibility in this case and affirmed by the Court was dishonesty both in the lawyers' failure to disclose to the clients the secret fee agreement, and falsely telling one of the clients that she was not represented at the time that agreement was negotiated.

In **In re Uchendu, 812 A.2d. 933 (DC 2002)**, the respondent lawyer was found to have signed his clients' names to probate documents that they were required personally to sign, sometimes with his initials following the name and sometimes not; and to have notarized some of the same documents. Despite the fact that respondent had had his clients' authorization to sign on their behalf, had not falsified any contents of the documents, had no intent to defraud, and had not prejudiced either the clients or the probate court's decision-making, he was held to have violated DC Rules 3.3(a)(1), 8.4(c) and 8.4(d), for which he was subjected to a 30-day suspension. The false signatures and notarizations fell under the prohibition of Rule 8.4(c) because they were "dishonest" and misleading even though the substance of the documents to which they were affixed was accurate.

In re Arneja, 790 A.2d 552 (DC 2002) also involved, **inter alia**, a finding of dishonest conduct in violation of Rule 8.4(c), on the ground of the respondent's having filed a suit purportedly on behalf of a client who had fired him five months earlier, falsely representing himself as counsel for that client; and for misrepresenting to both the former client and that client's new counsel that he had turned over the entirety of the client's file when he had not in fact done so.

In **In re Ayeni, 822 A.2d 420 (DC 2003)**, the Court approved disbarment of a lawyer for a number of violations, including a violation of Rule 8.4(c) by filing a brief on his client's behalf that was virtually identical to one that had been filed earlier on behalf of a co-defendant, and seeking payment for what he asserted was more than nineteen hours researching and writing the brief.

In **In re Corrizzi, 803 A.2d 438 (DC 2002)**, the respondent was found to have committed a number of ethical delicts, of which the most serious involved counseling two clients, in separate cases, to commit perjury on their depositions. These two offenses, which themselves violated several different Rules, including Rule 8.4(c) as well as DC Rules 3.3(a)(2), 3.4(b) and 1.3(b)(2), were held sufficient to warrant disbarment.

In **In re Romansky, 825 A.2d 311 (DC 2003)**, the Board on Professional Responsibility had determined, *inter alia*, that the respondent had violated Rule 8.4(c)'s prohibition or *dishonesty* by inflating bills he sent certain clients so as to charge premium billing rates rather than the rates called for by the firm's standard engagement letter. The firm was at the time in the process of changing its engagement letter to contemplate premium billing, and the respondent contended on appeal that his improper billing was negligent rather than intentional. The Court held that although some actions are obviously wrongful and intentionally done, so that no separate proof is necessary to show bad intention and in consequence dishonesty, this was not necessarily the case

with a mistake in billing, and so remanded the case to the Board for a determination as to whether the respondent had acted knowingly or recklessly in the erroneous billing, so as to fall under Rule 8.4(c)'s prohibition on dishonesty. The Court also offered a fairly comprehensive summary of its jurisprudence under that Rule.

In **In re Austin, 858 A,2d 959 (DC 2004)**, the respondent was found to have violated both DC Rule 1.8(a) and Rule 8.4(c) by reason of having, over a period of eighteen months, taken advantage of a vulnerable, uneducated elderly client of very limited means by borrowing money from her in a series of ten instances, totaling almost $27,000, and not repaying any more than trifling amounts. He was found to have violated Rule 1.8(a) by failing to advise the client to consult other counsel before agreeing to lend money to the respondent, and Rule 8.4(c) by acts that amounted to theft and fraud, and which the Court also termed "fraudulent acts of dishonesty." *Id*. at 977. Although the Board had recommended a sanction of eighteen months' suspension, with reinstatement conditional upon full reimbursement of the loans he had extracted from his client, the Court imposed the sanction of disbarment, with reinstatement also conditioned on full restitution.

In **In re Cleaver-Bascombe, 892 A.2d 396 (DC 2006)**, the Court approved a finding by the Board on Professional Responsibility that the respondent, who had been appointed by the Superior Court under the Criminal Justice Act to represent the defendant in an extradition proceeding, had submitted a voucher claiming payment for her services which listed several items of time purportedly spent in that representation that had not in fact been spent at all. The Court also approved the Board's conclusion that the respondent had thereby violated DC Rule 8.4(c) as well as Rules 1.5(a), 3.3(a) and 8.4(d). With respect to the violation of Rule 8.4(c), the Court observed that "dishonesty," as used in that Rule, while encompassing fraud, deceit and misrepresentation, also includes "conduct evincing a lack of honesty, probity or integrity of principle; a lack of straightforwardness" (quoting **In re Shorter, 570 A.2d 769, 767-68 (DC 1990)(per curiam)**), and went on to say that "when an attorney . . . deliberately and knowingly makes a false representation in her CJA voucher, she violates Rule 8.4(c) [citation omitted]. Moreover, an attorney who recklessly maintains inadequate time records, and consciously disregards the risk that she may overcharge a client (or, here, the CJA fund) also engages in dishonesty within the meaning of Rule 8.4(c)." **892 A.2d at 204**. With respect to the sanction to be imposed, however, the Court remanded the matter to the Board for a determination as to whether the submission of the false voucher had been the product of deliberate falsification, on the one hand, or on the other, record-keeping so shoddy that despite a lack of wrongful intent it was "legally equivalent to dishonesty."

In re Hermina, 907 A.2d 790 (DC 2006) applied reciprocal discipline to a lawyer who had been found by the Maryland Court of Appeals to have violated the Maryland Rules of Professional Conduct 3.3(a)(1) and 3.4(c), and in consequence to have violated Rules 8.4(a), (c) and (d) as well -- all of which Maryland Rules were either the same as or equivalent to correspondingly numbered DC Rules. The violation of Rule 3.3(a)(1) had consisted of the respondent's deliberately misrepresenting to a judge that he had been

precluded from conducting any discovery by virtue of a protective order that another judge had issued in the case, and the violations of Rule 3.4(c) had consisted of respondent's failing to respond to discovery in asserted retaliation for discovery failures on the part of his opponent, and knowingly failing to participate in a pre-trial conference.

In **In re Powell, 898 A.2d 365 (DC 2006)**, the respondent, while under suspension from the DC Bar, filed a sworn application for admission to the Bar of the United States District Court for the District of Colorado in which he failed to disclose his admission to practice in the District of Columbia or his then pending suspension therefrom. He was held thereby to have violated not only DC Rule 8.1(a), but also Rules 8.4(c) and (d), and was suspended for a year, with reinstatement conditioned on demonstration of fitness to practice law.

In **In re Outlaw, 917 A.2d 684 (DC 2007)**, the respondent lawyer had negligently allowed the statute of limitations on the client's tort claim to run before initiating meaningful negotiations with the defendant's insurer, and had thereby violated DC Rules 1.1(a) and (b) and 1.3(a). The respondent had also failed to advise her client of her professional lapses, and thus violated Rule 1.4(a). In the latter connection, the respondent was also found to have deliberately avoided disclosing to the client the true posture of the case, and so to have violated Rule 8.4(c) as well.

In **In re Hawn, 917 A.2d 693 (2007)(per curiam)**, respondent was found to have violated DC Rule 8.4(c) by falsifying his law school transcripts in an attempt to obtain legal employment in another jurisdiction; he reported this to the DC disciplinary authorities, albeit only after the prospective employer and his law school had raised questions about it. As discipline for this violation, he was suspended for 30 days.

In **In re Scanio, 919 A.2d 1137 (DC 2007)** the respondent lawyer was found to have violated Rule 8.4(c) by multiple misrepresentations that did not relate to the representation of a client, but rather to the respondent's efforts to procure a more substantial recovery from an insurance company with respect to an automobile accident in which he was rear-ended by the insurance company's insured. Those efforts included a number of misrepresentations to the insurer's claims adjuster, among them false assertions that he was a partner in his law firm (where he was in fact a salaried employee), and that his loss of income because of the accident was the value of the billable hours that he would have billed during the lost time (although in fact as a salaried employee he had not been docked for any lost time). When the adjuster checked respondent's story with his law firm, which denied the truth of the claims he had made, he made a number of additional misrepresentations seeking unsuccessfully to deny that he had made the previous ones.

At the firm's request, the claims adjuster submitted to the firm the respondent's correspondence with her; and the firm then presented respondent with a memorandum detailing his misrepresentations, and telling him that his conduct was "inconsistent with the ethics and values of this firm," and terminating his employment. The firm also forwarded the relevant correspondence between the adjuster, the respondent and the

firm to the Office of Bar Counsel, in compliance with its reporting obligation under Rule of Professional Conduct 8.3(a). As to the appropriate sanction, all concerned recognized that there was no decisional precedent for penalizing a violation of Rule 8.4(c) that, as was the case here, did not involve the representation of a client. The Hearing Committee and the Board on Professional Responsibility recommended that respondent's penalty be a public censure, but the Court concluded that the more severe sanction was called for by respondent's "blatant lies," and imposed a thirty-day suspension instead.

DC Ethics Opinion 336 (2006) [which is discussed more fully under 3.3:600, above] observed that Rule 8.4(c) is one of several rules that govern a lawyer's conduct even when the lawyer is not acting in a representation capacity. The Opinion involved an inquiry by a lawyer who was appointed to serve as the guardian of an incapacitated individual and later learned that the individual had obtained benefits under a false name and social security number.

DC Ethics Opinion 323 (2004) addressed the question whether government lawyers who, in the conduct of non-representational official duties, act deceitfully, thereby violate Rule 8.4(c). The inquirer specifically asked about misrepresentations made by intelligence officers acting in their official capacity. The **Opinion's** answer was that deceit in an official capacity is not prohibited by the Rule so long as the lawyer in question reasonably believes the deceit is authorized by law -- which, it noted, could be the case with clandestine intelligence work, which may require falsification of "identity, employment status or fidelity to the United States.". The **Opinion's** analysis started with recognition that the prohibition of Rule 8.4(c) applies to lawyers in whatever capacity they are acting, whether or not in a representation capacity or in an official one. It also pointed out that the prohibition applies only to conduct that calls into question a lawyer's "suitability to practice law," pointing in this connection to cmt [1] to DC Rule 8.4 (which is identical to Model Rule 8.4's cmt [2]). The **Opinion** found its conclusion buttressed by reference to DC Rule 4.2(a)'s exception for communications "authorized by law" and the exegesis of that provision offered by its cmt [8], which explains the exception as being intended to exempt from the Rule's prohibition law enforcement activities "authorized and permissible under the Constitution and the laws of the Constitution and law of the United States and the District of Columbia." The **Opinion** found the "authorized by law" exception in Rule 4.2 and cmt [8]'s gloss thereon not only to cast light on Rule 8.4, but also to apply to *intelligence*, as distinguished from *law enforcement*, activities. The **Opinion** also found reassurance for its conclusions in cmt [1] to Scope in the DC Rules, which states that the Rules "are rules of reason," and "should be interpreted with reference to the purposes of legal representation and of the law itself." Although the **Opinion** did not say so, presumably this reference was viewed as validating the **Opinion's** addition to the "authorized by law" concept borrowed from Rule 4.2 of the modifying concept of reasonable belief.

DC Ethics Opinion 319 [which is more fully discussed under 1.8:220, above], addressing the purchase by a lawyer of a legal claim from a non-lawyer, pointed out in

passing that Rule 8.4(c) puts limits on the negotiation and execution of any transaction, including one with a non-client.

DC Ethics Opinion 287 (1999) [which is discussed more fully under 4.2:210, above], while holding that Rule 4.2 does not prevent a lawyer's communicating with a *former* employee of an opposing party, warned that the lawyer must not in such circumstances solicit information that is or should be known to be "protected by an established evidentiary privilege." Soliciting such information, the **Opinion** held, would violate Rule 4.4, and knowing *use* of such information might violate Rule 8.4(c). **Opinion 287, note 3.**

DC Ethics Opinion 276 (1997) [which is discussed more fully under 1.7:210, above] stated that a lawyer asked to act as a neutral mediator would be misrepresenting her neutrality, in violation of Rule 8.4(c), if she failed to disclose a representation by herself or her firm that presented a conflict with a party to the mediation.

DC Ethics Opinion 267 (1996) concluded that any bill sent to a client must reflect fees for time "actually expended on legal work." An attempt to include fees not calculated on the basis agreed to with the client, such as "unidentified processing or administrative fees," constitutes conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c).

DC Ethics Opinion 260 (1996) discussed the possible DC Rule 8.4(c) violations when a lawyer, having sued a former client for non-payment of fees, agrees in settlement discussions to accept a portion of the claimed fees in exchange for a release of all claims against the lawyer. Concluding that a violation would occur if (1) the former client was not represented by counsel at the time the release was executed; (2) the former client executed the release in consideration of the lawyer's release of the former client from any liability arising out of the lawyer's claim for unpaid fees; and (3) the lawyer was aware of facts and circumstances that the lawyer reasonably believed might rise to a claim of malpractice by the former client, the Opinion noted that a lawyer may agree to forgo full payment of fees in exchange for a release from or waiver of liability to a client in a malpractice action if the lawyer timely notifies the client that independent counsel should be retained before negotiating such a release. But the Opinion held that a lawyer may never require a release that would bar a client from filing a complaint with Bar Counsel.

DC Ethics Opinion 318 (2002)(which is more fully discussed under 1.15:220, above) addressed the obligations of a lawyer in an adversary proceeding who receives a privileged document of an opposing party, not from that party or its authorized agent but from some other person or entity, where the document may have been stolen or taken without authorization from the opposing party. The **Opinion's** analysis rested largely on the Legal Ethics Committee's earlier **Opinion 256** (described immediately below), where the circumstances were similar except that there the documents were provided, inadvertently, by the opposing party or its agents, whereas in **Opinion 318** they came through a third person, and may have been stolen. **In re Kagan, 351 F.3d 1157 (DC Cid. 2003)** [which is discussed more fully under 1.15:200, above] approved a

report by the Court's Committee on Admissions and Grievance that relied on **DC Ethics Opinions 318** and **256**.

DC Ethics Opinion 256 (1995) stated that a lawyer who realizes that he or she has inadvertently received another party's confidential information is under an obligation to seek guidance from the sending lawyer. If that lawyer confirms the inadvertence of the disclosure and requests that the documents be returned unread, the receiving lawyer must abide by those directives. Failing to do so constitutes a dishonest act in violation of Rule 8.4(c).

DC Ethics Opinion 229 (1992) concluded that a per se rule with respect to surreptitious tape recording by a lawyer is not appropriate. Rather, the Opinion emphasized that each factual situation must be evaluated separately to determine whether the particular conduct at issue constitutes dishonesty, fraud, deceit or misrepresentation in violation of DC Rule 8.4(c) or its predecessor DR 1-102(A)(4). In this instance, the Opinion held that in the absence of an affirmative misrepresentation, the lawyer's conduct was not unethical.

DC Ethics Opinion 200 (1989) concluded that a lawyer who accepted a fee that was ultimately found to be directly traceable to tainted funds would not violate DR 1-102(A)(4) if (1) the lawyer had made clear to her client at the outset that she would not accept the representation if her fee was to be paid from tainted funds and (2) the lawyer conducted the representation in good faith belief that her fee had not been so paid.

DC Ethics Opinion 185 (1987) emphasized that under DR 1-102(A)(4) charges billed to clients for services performed by third parties described as "disbursements" must be in amounts no greater than the sums actually "disbursed."

DC Ethics Opinion 178 (1987) concluded that a lawyer asking to interview a witness represented by counsel is obligated to inform the witness's lawyer if the interview is going to be recorded, suggesting that otherwise DR 1-102(A)(4) would be violated.

DC Ethics Opinion 160 (1985) concluded that a lawyer would violate DR 1-102(A)(4) by associating himself with a firm whose partners had been suspended from practice. "By associating himself with the firm, the lawyer at least tacitly would be misrepresenting to clients that the firm is authorized to practice law in the District of Columbia." *Id.* at n.2.

DC Ethics Opinion 153 (1985) concluded that a lawyer who learns in the course of a proceeding that information provided a tribunal was false or misleading must withdraw from further representation if the client refuses to rectify the fraud. The lawyer may continue to represent a client in a matter unconnected with the proceeding in which the false or misleading information was given.

DC Ethics Opinion 152 (1985), interpreting, *inter alia*, DR 1-102(A)(4), concluded that a lawyer in an agency's general counsel's office could serve as the hearing examiner in a hearing concerning an employee's grievance against the agency. If the

lawyer is serving as the fact-finding representative of the agency's chairman in the hearing and as legal adviser to the chairman as to the same matter, however, the lawyer must be careful to avoid the possibility of fraud or deception. This may include the need to advise the employee that the lawyer in the role of hearing examiner is gathering the facts as a representative for the chairman.

DC Ethics Opinion 148 (1985) emphasized that a lawyer employed by a government agency represents the agency, not its employees as individuals; thus, there is no attorney-client privilege between the lawyer and the individual employees when the lawyer is serving as counsel for the agency. The Legal Ethics Committee emphasized that if, at any time, the lawyer believes that an employee is making disclosures to the lawyer with an expectation of attorney-client confidentiality, the lawyer, to avoid a violation of DR 1-102(A)(4), must advise the employee that there would be no confidentiality as against the agency.

DC Ethics Opinion 119 (1983) recognized that the term "fraud" almost always concerns acts of affirmative representation rather than a failure to disclose material facts. **DC Ethics Opinion 79 (1979)** interpreted the term "fraud" as including a false or misleading statement.

Rule 8.4(c), like Rule 8.4(b) and its predecessor DR 1-102(A)(4), applies to acts of a lawyer not in the course of practicing law. See **In re Gil, 656 A.2d at 304** (accepting recommendation of Board to disbar lawyer who mishandled fiduciary funds of a non-client); **In re Kennedy, 542 A.2d 1225 (DC 1988)** (applying DR 1-102(A)(4) to misconduct not connected with the lawyer's practice of law); **In re Hadzi-Antich, 497 A.2d 1062 (DC 1985)** (adopting Board's determination that lawyer's submission of false information in resume sent to prospective employer violated DR 1-102(A)(4) and warranted public censure); **In re Vogel, 382 A.2d 275 (DC 1978)** (imposing sanctions on lawyer under DR 1-102(A)(4) for misusing the escrowed funds of a third party who was not his client).

The sanctions for violating DC Rule 8.4(c) and its predecessor DR 1-102(A)(4) range from public censure to disbarment. In aggravated cases of dishonesty, the DC Court of Appeals has disbarred the offending lawyer. See **In re Goffe, 641 A.2d 458 (DC 1994)** (disbarring lawyer for repeated misconduct in forging signatures on legal documents, falsely notarizing legal documents, creating evidence, and testifying falsely, all to obtain economic benefit for the lawyer; no mitigating factors); **In re Garner, 636 A.2d 418 (DC 1994)** (disbarring lawyer who provided false information on an application to the Office of Comptroller of the United States Currency and who had a significant prior record of professional misconduct).

Virtually all cases of misappropriation of another person's funds will be found to involve dishonesty, and disbarment will be the appropriate sanction "unless it appears that the misconduct resulted from nothing more than simple negligence." **In re Addams, 579 A.2d 190, 191 (DC 1990) (en banc)** (ordering disbarment pursuant to DR 1-102(A)(4) where balance of lawyer's escrow account went below the amount that was owed); *compare* **In re Harrison, 461 A.2d 1034 (DC 1983)** (imposing a

suspension of one year and a day for commingling accompanied by an unintentional misappropriation) *with* **In re Larsen, 589 A.2d 400 (DC 1991)** (disbarring lawyer who used client's funds, which had been earmarked to pay client's physician, for his own personal use). [See also 1.15:300, above.]

In other cases of dishonest conduct in violation of Rule 8.4(c), the Court of Appeals has imposed suspensions of up to three years. See **In re Aldridge, 664 A.2d 354 (DC 1995)** (suspending lawyer for three years for lawyer's attempts to conceal negligent behavior during investigation and hearings concerning charges filed against lawyer); **In re Perrin, 663 A.2d 517 (DC 1995)** (three-year suspension of lawyer who participated in scheme to obtain money by making false representations); **In re Martin Fogel, 422 A.2d 966 (DC 1980)** (suspending lawyer for one year and a day for lawyer's multiple instances of dishonesty to client, disciplinary committee, and court relating to excuses for failure to make court appearances); **In re Sheehy, 454 A.2d 1360 (DC 1983)** (imposing two-year suspension on lawyer who negligently permitted statute of limitations to expire and misled Bar Counsel in its investigations).

Where the dishonest conduct is of an isolated nature, and other mitigating factors are present, the Court of Appeals has imposed sanctions of one year or less. See **In re Thompson, 538 A.2d 247 (DC 1987)** (suspending lawyer for one year for making false statements to immigration authorities in violation of DR 1-102(A)(4)); **In re Hutchinson, 534 A.2d 919 (DC 1987) (en banc)** (imposing one-year suspension for conduct involving isolated lies to the SEC, along with two other violations, where mitigating factors were present).

In simple misrepresentation cases, the sanctions range from public censure to one-year suspensions. **In re Brown, 672 A.2d 577 (DC 1996)** (upholding a 60-day suspension of lawyer who engaged in several acts of misrepresentation on certificates of service in violation of Rule 8.4(c)); **In re Robertson, 618 A.2d 720 (DC 1993)** (suspending lawyer for six months for misrepresenting that a Washington Post reporter was a lawyer or an assistant to gain admittance to restricted cellblock); **In re Ontell, 593 A.2d 1038 (DC 1991)** (imposing 30-day suspension for neglect and misrepresentation to client); **In re Rosen, 481 A.2d 451 (DC 1984)** (affirming 30-day suspension for three separate written misrepresentations to a court).

Factors the District of Columbia Court of Appeals will take into account when deciding the appropriate sanction include the lawyer's attempt to advance his or her own interest opposed to that of the client. See **In re Miller, 553 A.2d 201 (DC 1989)** (noting that lawyer's conduct in going through confidential files of her employer to find her personal records, although a violation of DR 1-102(A)(4), was not motivated by a desire for personal economic gain and did not involve subversion of the judicial process); **In re Austern, 524 A.2d 680 (DC 1987)** (emphasizing that lawyer's conduct at issue was not motivated by the desire for personal gain and caused no pecuniary harm to anyone involved); *cf.* **In re Sandground, 542 A.2d at 1249** (taking into account fact that lawyer's actions threatened to advance interests of a personal friend at the expense of the friend's wife). The court will also analyze (1) whether the lawyer's misconduct is

part of a premeditated plan, see, *e.g.*, **In re Goffe, 641 A.2d at 464-65** (stressing that lawyer's conduct was part of a plan to commit fraud), (2) whether the lawyer cooperated in the disciplinary process, see, *e.g.*, **In re Reback, 513 A.2d 229 (en banc)** (emphasizing that lawyer admitted wrongdoing and cooperated throughout disciplinary proceedings), and (3) whether the lawyer has any prior disciplinary record, see, *e.g.*, **In re Waller, 573 A.2d 780 (DC 1990)** (citing lawyer's prior record of misconduct).

Other mitigating circumstances include alcohol and prescription drug addictions, if the lawyer demonstrates that such circumstances substantially affected the lawyer's professional conduct. See **In re Woodard, 636 A.2d 969 (DC 1994)** (reducing sanction due to lawyer's addiction to prescription drugs); **In re Reid, 540 A.2d at 755** (finding alcoholic condition was the cause of lawyer's misconduct and therefore should be treated as a mitigating factor); **In re Kersey, 520 A.2d 321 (DC 1987)** (treating alcoholism as a mitigating factor); see also **In re Larsen, 589 A.2d at 400** (ordering disbarment but imposing probation due to lawyer's manic-depressive mental illness); **In re Peek, 565 A.2d 627 (DC 1989)** (finding chronic depression to be a mitigating circumstance).

8.4:500 Conduct Prejudicial to the Administration of Justice

- Primary DC References: DC Rule 8.4(d)
- Background References: ABA Model Rule 8.4(d), Other Jurisdictions
- Commentary: ABABNA § 101.501, ALI-LGL § 2, Wolfram § 3.3.2

As noted under 8.4:101 above, paragraph (d) of the DC Rule says that, to amount to professional misconduct affecting the administration of justice, a lawyer's actions must "seriously interfere with" the administration of justice, while its predecessor DR 1-102(A)(5) prohibited conduct "prejudicial to the administration of justice." Comment [2] makes clear, however, that paragraph (d) is not intended to convey a different meaning and includes any conduct that would have been covered by the language "prejudicial to" in DR 1-102(A)(5). Additionally, Comment [2] emphasizes that the case law interpreting DR 1-102(A)(5) is incorporated into DC Rule 8.4(d).

As also noted under 8.4:101, DC Rule 8.4 does not have a Comment comparable to the Comment [2] (now renumbered as Comment [3]) which was added to the Model Rule in 1998, asserting that discriminatory conduct by a lawyer in the course of representing a client violates Rule 8.4(d).

In **In re Hopkins, 677 A.2d 55 (DC 1996)**, the Court of Appeals set out a three-prong test defining "conduct prejudicial to the administration of justice" in DR 1-102(A)(5), the identically phrased predecessor of ule 8.4(d), as (1) an improper act or failure to act, (2) that bears directly upon the judicial process with respect to an "identifiable case or tribunal," and (3) does so in more than a *de minimis* way; that is, the conduct must at least potentially impact upon the process adversely and to a serious degree. *Id*. at 60-61. There, the Court, reversing a decision of the Board on Professional Responsibility, concluded that a lawyer's failure to protect the assets of an estate seriously prejudiced the Probate Division's ability to administer the estate assets and thus constituted a violation of DR 1-102(A)(5).

In **In re Godette, 919 A.2d 1157 (DC 2007)**, a prison inmate whom the respondent had represented complained to the DC Bar disciplinary authorities that respondent had abandoned his case. The Office of Bar Counsel, attempting to investigate the complaint, sent seven separate letters to respondent, who failed to respond to any of them. Respondent similarly ignored a motion to compel a response. The Board on Professional Responsibility then issued an order requiring a response, to which the respondent replied with a telephone message saying he would respond by a specified date, but failed to do so. Thereafter, a process server tried seven different times, without success, to serve respondent with a specification of charges. Finally, after intervention by the Court, respondent acknowledged receipt of the charges, but he did not thereafter participate in the resulting disciplinary proceedings, before the Hearing Committee, the Board or the Court. He was found to have both failed to respond reasonably to a lawful demand for information from a disciplinary authority, in

violation Rule 8.1(b), and to have seriously interfered with the administration of justice in violation of Rule 8.4(d). Similar findings of violation of Rules 8.1(b) and 8.4(d) as a result of a respondent's failure to cooperate in Bar Counsel's investigation of the complaint of a former client were made in **In re Mabry, 851 A.2D 1276 (DC 2004)**, and of another respondent's failure to respond to Bar Counsel's requests and the Board's orders to respond to four separate ethics complaints against him, in **In re Follette, 862 A.2d 394 (DC 2004)**.

Similarly, in **In re Cater, 887 A.2d 1 (DC 2005)**, which is more fully discussed under 8.1:500 and 5.3:300, above, there were four consolidated disciplinary proceedings against the same respondent, in three of which the respondent was charged with failing to respond to letters and orders relating to complaints that had been made about her, in violation of DC Rule 8.1(b), and in consequence in violation of DC Rule 8.4(d) as well. With regard to the latter charge, the Court observed that the "[r]espondent's repeated failures to respond to letters from Bar Counsel and orders of the Board, which she received in three separate matters, unquestionably violated" Rule 8.1(b), and that this conduct also "hindered the expeditious resolution of the allegations against her," and so seriously interfered with the administration of justice in violation of Rule 8.4(d). *Id*. at 17.

However, **In re Owusu, 886 A.2d 536 (DC 2005)** held that a respondent's failure to respond to multiple notices of a disciplinary proceeding against him did not, absent proof that he had been aware of the efforts to give him notice, constitute a violation of Rule 8.4(d). In that case, a disciplinary proceeding was instituted in response to a client's complaint against the respondent, but repeated efforts to give the respondent notice of the proceeding were unsuccessful: a letter sent to the respondent's most recent address in the DC Bar's records was returned with the notation "Moved, left no forwarding address;" repeated attempts by a process server to contact the respondent were unsuccessful; and all subsequent motions, letters and pleadings mailed to him at all known addresses were returned as undeliverable. The proceeding went forward without respondent's participation, and resulted in findings that the respondent had violated Rules 1.1(a), 1.3(a), 1.3(b)(1) and (b)(2) and 1.4(a) in connection with his representation of the complainant client. Bar Counsel also sought a determination that respondent had violated Rule 8.4(d) by failing to appear and participate in the proceeding, but the Board on Professional Responsibility declined to so rule, and the Court concurred, because there was no evidence showing that the respondent had purposely avoided being served. Bar Counsel argued that the respondent's failure to keep the Bar apprised of his current address violated not only the separate Bar Rule II §2(1) and (4), which impose such a requirement, but DC Rule of Professional Conduct 8.4(d) as well. As to this, the Court observed that "[i]mputing knowledge of Bar Counsel's inquiry in these circumstances would effectively transform a violation of an administrative Bar rule into the more serious violation of failure to respond to Bar Counsel under Rule 8.4(d), without any evidence of purpose linking the failure to register and failure to respond. Our cases defining a Rule 8.4(d) violation prohibit that course" *Id*. at 540-41.

In **In re Powell, 898 A.2d 365 (DC 2006)**, the respondent, while under suspension from the DC Bar, filed a sworn application for admission to the Bar of the United States District Court for the District of Colorado in which he failed to disclose his admission to practice in the District of Columbia or his then pending suspension therefrom. He was held thereby to have violated not only DC Rule 8.1(a), but also Rules 8.4(c) and (d), and was suspended for a year, with reinstatement conditioned on demonstration of fitness to practice law.

In re Hermina, 907 A.2d 790 (DC 2006) applied reciprocal discipline to a lawyer who had been found by the Maryland Court of Appeals to have violated the Maryland Rules of Professional Conduct 3.3(a)(1) and 3.4(c), and in consequence to have violated Rules 8.4(a), (c) and (d) as well -- all of which Maryland Rules were either the same as or equivalent to correspondingly numbered DC Rules. The violation of Rule 3.3(a)(1) had consisted of the respondent's deliberately misrepresenting to a judge that he had been precluded from conducting any discovery by virtue of a protective order that another judge had issued in the case, and the violations of Rule 3.4(c) had consisted of respondent's failing to respond to discovery in asserted retaliation for discovery failures on the part of his opponent, and knowingly failing to participate in a pre-trial conference.

In **In re Cleaver-Bascombe, 892 A.2d 396 (DC 2006)**, the Court approved a finding by the Board that the respondent, who had been appointed by the Superior Court under the Criminal Justice Act to represent the defendant in an extradition proceeding, had submitted a voucher claiming payment for her services which listed several items of time purportedly spent in that representation that had not in fact been spent at all. The Court also approved the Board's conclusion that the respondent had thereby violated DC Rule 8.4(d), as well as Rules 1.5(a), 3.3(a) and 8.4(c). With respect to the charged violation of Rule 8.4(d), the Court applied the three-part test that it had set out in In re Hopkins, 677 A.2d 55, 60-61 (DC 1996), above. The other three rule violations left no issue as to the impropriety of respondent's conduct; that conduct bore directly upon the judicial process because "[t]he CJA program is an integral part of the judicial process," *Id*. at 404-05; and "[w]hether Respondent acted with intent to defraud or recklessly, the consequences for the judical process of a false voucher were more than minimal." *Id* at 405.

In **In re Evans, 902 A.2d 56 (DC 2006)**, a disciplinary proceeding in which the respondent's principal ethical transgression was a conflict of interest in violation of DC Rule 1.7(b)(4) by reason of the respondent's having represented a client in a matter that involved a business in which he had a personal financial interest [discussed more fully under 1.7:210, above], this conflict was found to have been accompanied by violations of Rule 1.1(a) and (b) [discussed under 1.1:210, above], and in addition, a violation of Rule 8.4(d). The respondent owned a title company, and also engaged in a law practice that included probate and real estate matters. His title company was contacted to close a real estate loan, but when it appeared that the property to be encumbered was not owned

by the borrower but instead belonged to the unprobated estate of the borrower's deceased mother-in-law, the respondent undertook to represent the borrower in initiating a probate proceeding to secure the borrower's title to the property. He undertook this engagement without advising the borrower of his conflict of interest or getting her informed consent to his proceeding with the engagement despite the conflict of interest, and this was the basis of the violation of Rule 1.7(b)(4). In addressing the charged violation of Rule 8.4(d), the Board applied the three-fold test of **In re Hopkins**, above, and found numerous instances of improper conduct, satisfying the first prong of the test; and that they bore directly upon the judicial process by tainting the probate proceeding that the respondent had initiated, and had more than a de minimis effect upon the proceeding, and thus met the second and the third prongs as well.

In re Spikes, 881 A.2d 1118 (DC 2005), which is more fully discussed under 3.1:200, above, was a disciplinary proceeding in which respondent was held to have violated DC Rule 3.1 by filing a frivolous suit in the U.S. District Court against several lawyers in the Office of Corporation Counsel (now Attorney General) of the District of Columbia, , charging them with conspiring to defame him and deprive him of civil rights. The asserted claims were based on those layers having expressed in various ways a concern that the respondent was trying to bribe a witness to provide perjurious testimony in a pending case. The claims were held to be frivolous because all of the communications on which they rested were cloaked in one or another privilege, including an absolute privilege for complaints to the Office of Bar Counsel. The respondent's persistence in maintaining the frivolous suit, and also appealing it, was also charged and found to have been conduct that seriously interfered with the administration of justice, in violation of Rule 8.4(d); and the Court of Appeals, applying the three-fold test of **In re Hopkins**, above, sustained that determination as well.

In **In re Uchendu, 812 A.2d. 933 (DC 2002)**, the respondent lawyer was found to have signed his clients' names to probate documents that they were required personally to sign, sometimes with his initials following the name and sometimes not; and to have notarized some of the same documents. Despite the fact that respondent had had his clients' authorization to sign on their behalf, had not falsified any contents of the documents, had no intent to defraud, and had not prejudiced either the clients or the probate court's decision-making, he was held to have violated DC Rules 3.3(a)(1), 8.4(c) and 8.4(d), for which he was subjected to a 30-day suspension. As to Rule 8.4(d), the Court found that respondent's conduct met the three-part test of **Hopkins** (improper act in connections with an identifiable case, that taints the judicial process in a more than *de minimis* way) even though the false signatures and notarizations didn't actually affect the judicial process, because they had the *potential* to do so

See also **In re Utley, 698 A. 2d. 1107 DC (1997)** (discussed more fully under 1.15:300, above), where, because a conservator's "activities hampered the administration of [an] estate and caused the court unnecessary hearings, she clearly violated DR 1-102(A)(5) and Rule 8.4(d)." Id. at *2. In **In re Brown, 709 A. 2d. 724 (1998)**, the Respondent was found to have violated Rule 8.4(d) by tendering a check to the Superior Court in payment of a filing fee which was returned for insufficient funds, and then failing,

despite numerous demands by court personnel, to pay the sum due the court. In **In re Travers, 764 A.2d 242 (DC 2000)** the court held that a lawyer's failure to satisfy a judgment against him for fees improperly taken by him from an estate was a violation of Rule 8.4(d).

In **In re Shorter, 570 A.2d 760 (DC 1990)**, the Court of Appeals, in reversing the Board on Professional Responsibility's recommendation, found that a willful failure to file income tax returns was not a violation of DR 1-102(A)(5). Emphasizing that "DR 1-102(A)(5) was drafted to protect the integrity of particular decisions and of the decision-making process, and thus was directed against a lawyer's efforts to subvert that process respecting a particular identifiable case or tribunal," the Court of Appeals concluded that the lawyer's actions did not adversely affect any decision or decision-making process of a tribunal. **Id. at 768**. See also **In re Reynolds, 649 A.2d at 820** (concluding that violation of a court-imposed probation was not misconduct under DR 1-102(A)(5) because the violation did not interfere with decision-making process of a tribunal).

In addition to acts directly affecting the courts' decision-making process, conduct that adversely affects some aspect of the judicial process violates DC Rule 8.4(d). See **In re L.R., 640 A.2d 697 (DC 1994)** (finding lawyer violated DR 1-102(A)(5) by charging indigent client for work because it was "presumptively prejudicial to the administration of the CJA system, if for no other reason than because of the belief it likely will instill in the defendant that the quality of his representation may yet depend upon gathering together funds to compensate the attorney whom he has not selected"). And the Court of Appeals has found violations of DR 1-102(A)(5) where there was no apparent violation of a specified court procedure. See, *e.g.*, **In re Sablowsky, 529 A.2d at 293-94** (imposing sanctions for lawyer's attempt to sell information to other lawyers to be used as evidence in a case).

DR 1-102(A)(5), predecessor to DC Rule 8.4(d), prohibited conduct that taints the decision-making process or the judicial process even if such conduct "fosters a correct decision." **In re Keiler, 380 A.2d 119 (DC 1977), overruled in part, 534 A.2d 927 (1987)** (finding lawyer violated DR 1-102(A)(5) by failing to advise a union representative that a proposed arbitrator was respondent's law partner). Clearly, willfully withholding information from a court violates DR 1-102(A)(5) and DC Rule 8.4(d). See, *e.g.*, **In re Sandground, 542 A.2d at 1248** (imposing sanctions on lawyer for concealing information about client's funds in response to discovery requests in pending divorce suit). But the Court of Appeals has declined to adopt a scienter requirement for DC Rule 8.4(d); rather, conduct has been found prejudicial to the administration of justice "[where it] was reckless or somewhat less blameworthy." **In re L.R., 640 A.2d at 701**.

In **In re Hunter, 734 A.2d 654 (DC 1999)**, the Court approved the imposition of reciprocal discipline upon a lawyer who had been suspended by the US District Court for ethical violations arising out of her representation of a criminal defendant in a case in which an officer with whom the lawyer was romantically involved had participated in

the arrest of a co-defendant and was to be a government witness at trial. The District Court had found the lawyer's conduct violative of, *inter alia*, Rules 1.3(a),1.4(b), 1.7(b)(4), 8.4(a) and 8.4(d).

DC Rule 8.4(d), like DR 1-102(A)(5), prohibits acts wasteful of the resources and time of the court. In **In re Goldsborough, 654 A.2d 1285 (DC 1995)**, the Court of Appeals found that a lawyer violated Rule 8.4(d) by supplying false testimony to a Maryland Circuit Judge and misleading information to Bar Counsel concerning episodes of spanking and kissing clients. See also **In re Lyles, 680 A.2d 408 (DC 1996)** (holding that lawyer violated Rule 8.4(d) by failing to appear at hearing and timely file an amended bankruptcy plan); **In re Brown, 672 A.2d at 578-79** (concluding that lawyer's failure to timely respond to various discovery requests and a motion for sanctions violated DR 1-102(A)(5)); **In re Robinson, 635 A.2d 352 (DC 1993)** (imposing sanctions on lawyer under DR 1-102(A)(5) for not attending court proceedings in two separate matters); **In re Thompson, 492 A.2d 866 (DC 1985)** (imposing sanctions on lawyer under DR 1-102(A)(5) for twice failing to appear at scheduled trials).

Failure to respond to inquiries from Bar Counsel amounts to conduct prejudicial to the administration of justice in violation of DC Rule 8.4(d). See Comment [3] to the DC Rule; **In re Lilly, 699 A.2d 1135 (DC 1997)** (Rule 8.4(d) violated by failure to respond to Bar Counsel's inquiries about a complaint; respondent suspended for thirty days, with reinstatement conditioned on full compliance with Bar Counsel's requests for information); **In re Smith, 655 A.2d 315 (DC 1995)** (finding that lawyer's persistent failure to cooperate with Bar Counsel and Board violated DC Rule 8.4(d)); **In re Lockie, 649 A.2d 546 (DC 1994)** (finding that lawyer violated DC Rule 8.4(d), *inter alia*, by failing to cooperate with the Board and Bar Counsel in the investigation of charges); **In re Siegel, 635 A.2d 345 (DC 1993)** (finding that lawyer with DC Rule 8.4(d) violation failed to cooperate with Board and respond to Board's orders); **In re Jones, 521 A.2d 1119 (DC 1986)** (finding violation of DR 1-102(A)(5) where lawyer did not reply to Bar Counsel's legitimate written inquiries); **In re Willis, 505 A.2d 50 (DC 1986)** (finding that lawyer violated DR 1-102(A)(5) by failing to provide Bar Counsel with proper address); **In Re Washington, 489 A.2d 452 (DC 1985)** (finding that lawyer violated DR 1-102(A)(5) by failing to provide information to court's designee and to respond to repeated requests from Bar Counsel for information about that failure). In **In re Beller, 802 A.2d 340 (DC 2002)**, the respondent was suspended for thirty days for failure to respond to repeated inquiries from Bar Counsel and the Board on Professional Responsibility regarding three ethical complaints. Her failure was held to have violated Rules 8.1(b) and 8.4(d), as well as DC Bar Rule XI, § 2(b)(3) (making failure to comply with orders of the Court or the Board grounds of discipline), and reinstatement was conditioned on full cooperation with Bar Counsel. This evidently had no effect, however, for two years later the same respondent was suspended for 120 days for failure to respond to three further investigations by Bar Counsel, in violation of the same provisions. **In re Beller, 841 A.2d 768 (DC 2004)**.

In **In re Hallmark, 831 A.2d 366 (DC 2003)**, the Court upheld, over Bar Counsel's challenge, a finding by the Board that respondent's submission of an untimely and

inaccurate CJA voucher form did not "seriously interfere" with the administration of justice so as to come under Rule 8.4(d)'s prohibition, even though it put a burden on the Court's administrative staff and the presiding judge.

DC Ethics Opinion 320 (2003) addressed the ethical permissibility of jury nullification arguments by criminal defense counsel. The **Opinion** pointed out that although in early periods of American history, "the power of a jury to nullify the law was explicitly and affirmatively approved," under contemporary substantive legal standards, "a suggestion by a lawyer to a jury that it should ignore the law as stated by the judge may be tantamount to an explicit invitation to the jury to ignore the judge's instructions," which the **Opinion** suggests would violate DC Rule 8.4(d). The **Opinion** goes on to point out that a criminal defense lawyer has obligations, under DC Rules 1.3, 3.1 and 3.3, that are different from those of a lawyer in a civil case, and to conclude that there is room for a criminal defense lawyer to make arguments that have a good faith basis but nonetheless "have the incidental effect of appeal to a jury's prejudice or enhancing its awareness of its ability to decide the case against the evidence."

DC Ethics Opinion 260 (1996) concluded that, under any circumstance, a lawyer would violate DC Rule 8.4(d) if the lawyer entered into an agreement with a former client whereby the client agreed not to file a complaint against the lawyer with Bar Counsel.

DC Ethics Opinion 207 (1989), interpreting DR 1-102(A)(5), withdrew a portion of prior **DC Ethics Opinion 147 (1985)**, which had found it unethical per se for a lawyer representing a defendant in a Title VII action, or other similar action in which statutory fees are provided, to condition an offer of settlement upon the plaintiff's waiver or reduction of attorneys' fees. The Legal Ethics Committee recognized that **Opinion 147** had been effectively overruled by the Supreme Court's decision in **Evans v. Jeff D, 475 US 717 (1986)**. It emphasized, nonetheless, that a request for fee waivers would be unethical if the defendant had no basis for the proposal other than to deter similar future actions or avoid payment of a fee to which the plaintiff was clearly entitled. See also **Moore v. National Association of Securities Dealers, 762 F.2d 1093 (DC Cir. 1985)** (holding it permissible for a plaintiff in a Title VII action voluntarily to offer to waive attorneys fees).

DC Ethics Opinion 206 (1989) concluded that, before discarding documents that the lawyer prepared or used in representing a client, a lawyer must determine that (1) there is no legal obligation or pending litigation for which the documents should be retained and (2) no foreseeable prejudice to the former client will result from the destruction of the documents, either because copies have previously been given or are otherwise readily available to the former client, or the former client has no reasonable expectation that this material will be preserved.

DC Ethics Opinion 205 (1989) concluded that parties to an uncontested divorce action would not violate DR 1-102(A)(5) by summarily dismissing cross-appeals of the divorce decree, thus allowing the decree to become final without waiting for the expiration of the appeal period.

DC Ethics Opinion 130 (1983) concluded that a settlement offer conditioned upon a lawyer's refusal to represent future clients against the defendant government agency is unethical. A lawyer would violate DR 1-102(A)(5) by insisting that another lawyer adhere to an unethical settlement agreement.

DC Ethics Opinion 119 (1983) concluded that the intentional destruction of a memorandum that a lawyer knows may be the subject of discovery or subpoena in pending or imminent litigation was conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). Noting that DR 1-102(A)(5) was directed primarily toward pending litigation, the Legal Ethics Committee emphasized that some circumstances may be so close to pending litigation that DR 1-102(A)(5) would apply even though no pleadings had yet been filed with a court.

8.4:600 Implying Ability to Influence Public Officials

- Primary DC References: DC Rule 8.4(e)
- Background References: ABA Model Rule 8.4(e), Other Jurisdictions
- Commentary: ABABNA § 101.701, ALI-LGL § 113, Wolfram §

DC Rule 8.4(e) is substantially similar to DR 9-101(A) of the DC Code, which corresponds to DR 9-101(C) of the Model Code. DR 9-101(A) prohibited a lawyer from stating or implying that "he is able to influence improperly or upon ground irrelevant to a proper determination of the merits any tribunal, legislative body, legislator or public official." Further, EC 9-4 provided that "any statement or suggestion by a lawyer that he can or would attempt to circumvent [ ] procedures is detrimental to the legal system and tends to undermine public confidence in it." DC Rule 8.4(e) provides more generally that a lawyer shall not "imply an ability to influence improperly a governmental agency or official."

In **In re Keiler, 380 A.2d at 124**, the Court of Appeals emphasized that a lawyer was not only prohibited by DR 1-102(A)(5) from claiming he could exercise influence over a governmental agency or official but also prohibited from actually exercising such influence.

DC Ethics Opinion 177 (1986) concluded that a lawyer can represent private clients in cases before a District of Columbia government agency at which the lawyer was previously in charge of an office that employed lawyers to act as hearing examiners provided that the lawyer stresses to the client that her previous employment does not afford her any influence with or special access to her former office or its hearing examiners.

DC Ethics Opinion 137 (1984) responded to several questions about the proper role of a lawyer practicing before a government agency at which his or her spouse is employed. Addressing DR 9-101, *inter alia*, the Opinion concluded that: (1) a lawyer can represent a client before a government agency in which his spouse is employed, but not on matters in which the spouse participates; (2) the lawyer cannot seek to influence the outcome in any proceeding in which the lawyer's firm is involved and the spouse is participating; and (3) the lawyer's firm could seek to influence the outcome of the proceeding by representing the client if the lawyer were screened from participation. Likewise, in a rulemaking proceeding where the lawyer's spouse is drafting a rule, the Opinion concluded that the lawyer may not file comments and the lawyer's firm may not participate, unless the lawyer is screened. Finally, in a separate inquiry, the Opinion concluded that a husband and wife cannot represent differing interests in the same proceeding; specifically, the opinion stated that to avoid a violation of DR 9-101(A) "one or the other, but not both, spouses may serve professionally in a single consolidated proceeding."

DC Ethics Opinion 133 (1984) concluded that a lawyer employed by the District of Columbia Department of Transportation did not violate DR 9-101(A) by representing clients in cases in which the District is a party or has an interest, provided that: (1) the case does not involve any activity of the Department of Transportation; (2) the lawyer informs his client that his employment with the District does not afford him any special influence or advantage in cases involving the District; (3) the lawyer is not in violation of any statute or regulation relating to employment by the District of Columbia; and (4) the lawyer does not use his position with the District of Columbia to obtain access to documents or other information to which he would not have access as an outside private practitioner.

DC Ethics Opinion 114 (1982) addressed whether a private lawyer may accept representation of government officials in a challenge to reclassification of their civil service grade when the lawyer regularly appears before officials of that agency who might be affected by the reclassification proceeding, including individual officials the lawyer has been asked to represent. Finding that acceptance of such representation was not absolutely barred by a disciplinary rule, the Opinion nevertheless emphasized that a representation of a "majority" of the limited number of officials employed in the agency office might result in a violation of DR 9-101(A). Specifically, such representation could imply that the lawyer has the ability to exercise improper influence over the actions of the office; thus, "a conclusion by the inquiring lawyer that it would be prudent for him to decline the contemplated representation would certainly be justified."

DC Ethics Opinion 92 (1980) concluded that a volunteer lawyer for the District would create an appearance of impropriety in violation of DR 9-101(A) if the lawyer represented an agency that he or she was simultaneously suing in private practice. This Opinion has, however, been superseded by **DC Ethics Opinion 268 (1996)**, which held that a lawyer could undertake the representation of an agency that he was opposing on behalf of a private client, if both clients consented.

DC Ethics Opinion 50 (1978) addressed an inquiry from the general counsel of a federal regulatory agency who sought to participate in adjudicatory proceedings in which his wife's law firm represented clients. The Committee concluded that any appearance of impropriety could be dispelled by candid disclosure of the husband-wife relationship and uncoerced waiver of objection by all involved parties.

ABA Informal Opinion 86-1516 (Propriety of Judicial Award Program) notes that publicizing an award accepted by a judge from an association of lawyers that has a clearly identifiable partisan litigation viewpoint, whose members are likely to appear before the judge, may improperly imply an ability to influence a judge.

8.4:700 Assisting Judge or Official in Violation of Duty

- Primary DC References: DC Rule 8.4(f)
- Background References: ABA Model Rule 8.4(f), Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § 113, Wolfram §

DC Rule 8.4(f) states that it is professional misconduct for a lawyer to assist a judge or judicial official in "conduct that is a violation of applicable rules of judicial conduct or other laws." The propriety of a lawyer's conduct toward a judge thus may be determined by the applicable provisions of the Code of Judicial Conduct. Comment [1] to DC Rule 3.5, which prohibits a lawyer from improperly influencing a judge, cautions that "a lawyer is to avoid contributing to a violation" of the provisions of the Code of Judicial Conduct. Similarly, although the Disciplinary Rules of the DC Code and the Model Code do not contain a direct counterpart to Rule 8.4(f), DR 7-110(A) and EC 7-34 of the Model Code and DC Code expressly refer to the Code of Judicial Conduct for the standard for determining the appropriateness of a gift by a lawyer to a judge.

8.4:800 Discrimination in the Practice of Law

- Primary DC References: DC Rule 9.1
- Background References: Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § , Wolfram §

The DC Rules include, in Rule 9.1, a prohibition against a lawyer's discriminating against anyone in conditions of employment on the ground of race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility or physical handicap. This prohibition is here discussed under Rule 8.4, since other jurisdictions with rules on the subject of discrimination generally place them in their counterpart to Rule 8.4. As has been noted under 8.4:101 and 8.4:500 above, such a prohibition was effectively incorporated in Model Rule 8.4 by the addition, in 1998, of what is now Comment [3] to that Rule. Rule 9.1 was not part of the DC Bar's original recommendation to the Court of Appeals; rather, it was added by the DC Court of Appeals.

Comment [1] to the Rule states that it is modeled on the DC Human Rights Act, DC Code § 1-2512 (1981), and also states that it is not intended to create professional ethical obligations that exceed the obligations imposed by generally applicable law. Comment [4] states that a disciplinary proceeding for violation of the Rule may be deferred or abated when there is a legal proceeding pending that concerns the same alleged conduct.

DC Ethics Opinion 222 (1991) states that DC Rule 9.1 does not apply to employment decisions made in another jurisdiction that are lawful in that jurisdiction even if they would violate the Rule and the DC Human Rights Act if made in the District. The Opinion recognizes that DC Bar members remain subject to the Court of Appeals' authority for actions taken outside the District's territorial limits but reached its conclusion on the basis of Comment [1]'s assertion that the rule was not intended to "create ethical obligations that exceed those imposed on a lawyer by applicable law." Given this result, the opinion did not find it necessary to address whether the fact that the employment decision was made in the lawyer's capacity as a member of the board of a religious organization, rather than in his capacity as a lawyer, would affect the outcome.

8.4:900 Threatening Prosecution

- Primary DC References: DC Rule 8.4(g)
- Background References: Other Jurisdictions
- Commentary: ABABNA § , ALI-LGL § , Wolfram §

Paragraph (g) of DC Rule 8.4 prohibits a lawyer's seeking or threatening to seek criminal charges or disciplinary charges solely to obtain advantage in a civil matter. It thus preserves the substance of DR 7-105 of the Model Code (but adding disciplinary charges to criminal prosecutions), a provision the ABA decided not to carry forward. See, in this connection, ABA Formal Opinion 94-383 (Use of Threatened Disciplinary Grievance Against Opposing Counsel) and **ABA Formal Opinion 94-384 (Withdrawal by Lawyer Against Whom Opposing Counsel Has Filed a Disciplinary Grievance)**.

DC Ethics Opinion 263 (1996) concluded that a criminal contempt proceeding is not a criminal "prosecution" within the meaning of DC Rule 8.4(g).

DC Ethics Opinion 220 (1991) concerns when threats to file disciplinary charges against a lawyer or against a non-lawyer with a relevant professional board would be considered "for the sole purpose of gaining advantage in a civil matter" and thus to violate Rule 8.4(g).

8.5 Rule 8.5 Disciplinary Authority; Choice of Law

8.5:100 Comparative Analysis of DC Rule

- Primary DC References: DC Rule 8.5
- Background References: ABA Model Rule 8.5, Other Jurisdictions
- Commentary:

8.5:101 Model Rule Comparison

As first adopted, both Model Rule 8.5 and DC Rule 8.5 dealt solely, and in identical terms, with disciplinary jurisdiction, enunciating the simple principle that a lawyer admitted to practice in the jurisdiction was subject to the jurisdiction's disciplinary authority even if practicing elsewhere. The Model Rule was amended in 1993 to incorporate choice of law guidelines for determining which jurisdiction's ethical rules apply when lawyers are admitted (whether fully or pro hac vice) in more than one jurisdiction. The Peters Committee recommended that the DC Rules follow suit, and the Court of Appeals approved the change, effective November 1, 1996.

The two versions of Rule 8.5 remained identical thereafter until 2002, when the Model Rule was amended, pursuant to recommendations of the Ethics 2000 Commission, both to extend the disciplinary authority set out in paragraph (a) of the Rule so as to apply to the conduct within the jurisdiction of lawyers who are not admitted to practice there, and to modify the choice of law guidelines in paragraph (b), to substitute, for the former relatively objective and easily applied choice of law provisions turning mainly on the location where the lawyer's conduct occurred and where the lawyer's principal office was located, a more subjective standard turning on where, as among several jurisdictions, the "predominant effect" of the conduct is found. The DC Rules Review Committee declined to recommend adoption of either of these substantive changes for DC Rule 8.5. It did, however, recommend, and the DC Court of Appeals accepted, changes that had been made in the phraseology of subparagraph (b)(1) of the Model Rule, to refer to a "matter pending before a tribunal" rather a "proceeding in a court;" as well as an identical revision of the terminal Comment ([6] for the DC Rule and [7] for the Model Rule), in each case dealing with choice of law in transnational practice.

8.5:102 Model Code Comparison

There was no counterpart to this Rule in the Model Code.

8.5:200 Disciplinary Authority

- Primary DC References: DC Rule 8.5
- Background References: ABA Model Rule 8.5, Other Jurisdictions
- Commentary: ABABNA § 101.2003, ALI-LGL § 2, Wolfram § 3.2

There appear to be no pertinent DC court decisions or ethics opinions relating to this aspect of DC Rule 8.5.

8.5:300 Choice of Law

- Primary DC References: DC Rule 8.5
- Background References: ABA Model Rule 8.5, Other Jurisdictions
- Commentary: ABABNA § 101.2101, ALI-LGL § 2, Wolfram § 2.6.1

DC Ethics Opinion 222 (1991) addressed the question whether DC Rule 9.1, prohibiting discrimination in employment practices on the basis, *inter alia*, of sexual orientation [see 8.4:800 above], applied to conduct of a member of the DC Bar, when the conduct took place in jurisdictions where there was no such prohibition. Applying DC Rule 8.5 as it then stood (in the same form as the then Model Rule), the Opinion held that it did not give extraterritorial effect to Rule 9.1.

DC Ethics Opinion 311 (2002) provided a comprehensive exegesis of the choice of law provisions of Rule 8.5(b), in particular as applied to circumstances where the lawyer's conduct is not in connection with a proceeding before a court to which the lawyer is admitted, so that it is not governed by the clear choice of law principle set out in Rule 8.5(b)(1), but rather the more complicated provisions of Rule 8.5(b)(2). Where a lawyer is admitted only in one jurisdiction the **Opinion** explained, then under Rule 8.5(b)(2)(i) the lawyer is subject only to the ethical rules of that jurisdiction, even though the conduct is in a jurisdiction where the pertinent rule is different; and regardless of whether the lawyer is associated in the conduct in question with a lawyer who is admitted in the other jurisdiction, and therefore bound by a different ethical requirement for the same conduct. Addressing the case where a lawyer is admitted in more than one jurisdiction, the **Opinion** pointed out that the general choice of law principle under Rule 8.5(b)(2)(ii) looks to the jurisdiction where the lawyer principally practices. This refers, the **Opinion** emphasized, to where the particular *lawyer* practices, not where her law firm's principal office is located. Rule 8.5(b)(2)(ii) also has an exception for circumstances where the conduct "clearly has its predominant effect" in another jurisdiction where the lawyer is admitted. Recognizing that Rule 8.5's choice of law provisions are intended to provide, to the maximum feasible extent, "bright line" rules, and pointing to the observation in cmt [4] that the predominant effect exception is a "narrow one," the **Opinion** emphasized that the exception should be strictly construed.

In re Gonzalez, 773 A2d 1026 (DC 2001) (discussed more fully under 1.6:220, above), following the choice of law rule set out in Rule 8.5(b)(1), approved original (as distinct from reciprocal) discipline for a DC lawyer's violation of a Virginia ethical rule in the conduct of a case in a Virginia court.

9.1 Rule 9.1 Discrimination in Employment

This DC Rule, which has no Model Rule or Model Code counterpart, is discussed under 8.4:101 and 8.4:800, above.