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Ethics 2013

I. Competence, Diligence, Communications, Fees, Confidentiality

This CLE covers the Rules of Professional Conduct as adopted in Minnesota. Most states have adopted rules that are substantially similar. Therefore, this course gives a good refresher for attorneys in other states. During the program, we'll cover some of the differences in the rules adopted in neighboring states. Of course, especially in other states, lawyers should consult the actual rules as adopted in the particular state, since most states have made at least some modifications to the ABA model rules upon which they are based.

In these materials, a reference to "Rule ___" is a reference to the Minnesota Rules of Professional Conduct. The full rules are available online, in a volume of the Minnesota Statutes, and in the state rules of court pamphlet.

The Rules of Professional Conduct begin with a Preamble which states, in general terms, the obligations of lawyers. It also contains some advice as to how the rules should be construed. Paragraph 9 concedes that in many cases, various requirements of the rules can be seemingly in conflict with one another:

> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

In short, there are many situations where a lawyer needs to step back, and perhaps get outside legal advice as to how to proceed.

One new resource that will be of special interest to Minnesota lawyers, but also to lawyers in other states, is the new e-book Minnesota Legal Ethics by William Wernz. This e-book, which is still in progress, is available for free download at http://minnesotalawyering.com/ethics/ .

Rule 1.0: Terminology.

The first section of the rules contains definitions of many terms used elsewhere in the rules.

Rule 1.1: Competence

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

ABA Comment: "Expertise in a particular field of law may be required in some circumstances", but a lawyer "may accept representation where the requisite level of competence can be achieved by reasonable preparation."

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

A lawyer “shall abide by a client's decisions”, and the representation “does not constitute an endorsement of the client's political, economic, social or moral views or activities.” However, a lawyer may not assist in “conduct that the lawyer knows is criminal or fraudulent”. However, a lawyer may discuss the legal consequences of any proposed course of conduct and assist a client to make a good faith effort to determine the scope, meaning, or application of the law.

A lawyer may limit the scope of the representation if reasonable and if the client gives informed consent.

Rule 1.3: Diligence.

This rule states in its entirety, “A lawyer shall act with reasonable diligence and promptness in representing a client.” As the ABA Comment notes: “Perhaps no professional shortcoming is more widely resented than procrastination.”

Rule 1.4: Communication

A lawyer must communicate with his client in the following situations:

1. Any time the client needs to consent to some action under the rules.
2. Tell the client how his or her objectives are going to be carried out.
3. Keep the client informed about the status of the matter.
4. Comply with reasonable requests for information.
5. Let the client know of any relevant limitations on the lawyer's conduct.

ABA Comment: The client should have “sufficient information to participate intelligently in decisions. However, “not be expected to describe trial or negotiation strategy in detail.”

Rule 1.5: Fees.

Fees and expenses must not be "unreasonable". The following factors are relevant to determine whether the fee is reasonable: Time and labor required, novelty and difficulty, whether the representation will prevent the lawyer from taking other employment, customary charge in the locality, amount involved and results obtained, time limitations, nature and length of relationship with the client, the lawyer's experience and reputation, and whether fixed or contingent.

These factors are not exclusive.

Fee and scope of representation shall be communicated in writing. In Wisconsin, however, if the reasonably foreseeable cost will be less than $1000, this may be communicated orally.

Contingent fee agreements must be in writing and signed by the client, and the rule contains specific requirements for this written contract.

Contingency fees are not allowed in the following types of cases:

1. Family law cases

2. Criminal cases

Splitting fees between more than one attorney must be "in proportion to the services provided by each lawyer" or in cases in which both attorneys maintain responsibility for the case. While Minnesota has not specifically defined the level of responsibility that is required, the identical Wisconsin rule notes that the level of responsibility must be comparable to that of a partner.

Rule 1.6: Confidentiality:

"A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated" elsewhere in the rule.

However, as the ABA comment states, “Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.” Therefore, a lawyer **shall*** reveal information if the lawyer believes it is necessary to prevent the client from committing a criminal or fraudulent act that will result in death or serious bodily injury or substantial financial or property damage.

Note that this rule does not provide any “safe harbor”. In certain cases, the information must remain confidentiality. In other cases, the information must be disclosed. There is no gray area in which the information may be disclosed. (It should be noted that Wisconsin has a small gray area in which information may be disclosed, but in which disclosure is not necessary.)

A lawyer may also reveal client confidences "to secure legal advice about the lawyer's conduct under these rules." and "to comply with other law or a court order". However, in the case of a court order, the ABA comment points out that even then, “the lawyer must consult with the client about the possibility of appeal”

*- Some states, such as Nebraska, substitute the word “may”. Iowa uses the word “may”, but also includes a provision that the lawyer shall make the disclosure if the harm is imminent.

II. Conflicts of Interest

Rule 1.7: Conflicts of Interest with current clients.

A lawyer may not represent a client if the representation is directly adverse to another client, or if there is a "significant risk" that the representation of one or more clients may be "materially limited".

If the clients give informed consent, the lawyer may represent both parties unless the representation involves the assertion of a claim by one client against another client in the same litigation.

As might be expected, the seemingly simple rule prohibiting conflicts of interest can lead to many gray areas. The ABA comments regarding this rule are quite lengthy, and do discuss a number of specific situations that might arise.

Rule 1.8: More specific rules on conflicts of interest

A lawyer may not enter into a transaction with a client in which he acquires an interest adverse to the client (such as a security interest), unless the transaction is fair and reasonable, the client is advised in writing to obtain outside advice, and the client gives written consent.

Gifts from clients (including testamentary gifts)

In Minnesota, a lawyer shall not prepare an instrument giving himself or herself (or a parent, child, sibling or spouse) any substantial gift from a client. There is an exception when the "client is related to the donee."

Wisconsin has a much more specific rule. In Wisconsin, a lawyer may not "solicit any substantial gift" from a client, or prepare an instrument (such as a will) giving a gift to the lawyer unless all of these requirements are met:

1. The client is a relative and "natural object of the bounty of the client".

2. There is no reasonable ground to believe the instrument will be contested, or that the public will "lose confidence in the integrity of the bar".

3. The amount of the gift is reasonable and natural.

Until a case is concluded, a lawyer may not receive literary rights based upon the representation.

A lawyer may not provide financial assistance to a client, other than advancing certain costs and expenses.

If a lawyer's fee is paid by someone other than the client, all of the following requirements must be met:

1. The client must consent (Wisconsin includes an exception to this rule if the lawyer is appointed at government expense). (In Wisconsin, if the lawyer is being paid by an insurance company or similar, then the prior agreement with the insurance company meets the consent requirement.)

2. It does not interfere with the lawyer's independence.

3. Confidential information is maintained properly.

If a lawyer is representing more than one party, then any aggregate settlement must be approved by all of the clients.

A lawyer may not ask a client to prospectively waive malpractice claims (unless the client is independently represented when making that waiver) or to agree not to report the lawyer's conduct to disciplinary authorities.

A lawyer may not acquire a proprietary interest in a cause of action, except for the following:

1. An attorney's lien for his or her fee, if authorized by law.

2. A reasonable contingent fee in a civil case.

A lawyer may not have sexual relations with a client (unless the relationship predated the legal representation). This includes the person(s) who supervise the lawyer, in the case of an institutional client.

With the exception of the last paragraph, these prohibitions also apply to all lawyers in the same firm.

Rule 1.9: Duties to former clients

A lawyer who has represented a former client may not represent another person in the same or substantially related matter without the informed written consent of the former client. Wisconsin adds that such consent must be signed by the former client.

If the firm in which a lawyer had represented a person, then the lawyer may not represent a person

materially adverse to that person about whom the lawyer had acquired certain confidential information. Note: As the ABA comments state, with respect to the former client of a former firm, "the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel."

A lawyer may not use information relating to the representation of a former client to the former client's disadvantage, unless as otherwise permitted by the rules (or when the information has become generally known).

A lawyer may not reveal information relating to a representation of a former client (other than would be permitted with respect to a current client).

Rule 1.10: Imputed Disqualification.

In general, if a lawyer in a firm is prohibited from representing a client under Rule 1.7 or 1.9, then the same prohibition extends to all lawyers in the firm.

There are two exceptions to this disqualification:

1. The other lawyers in the firm are not disqualified if the prohibition is based on a personal interest of the prohibited lawyer, and there is not a significant risk that the representation by the other lawyers would be materially limited.

2. If the lawyer is disqualified under Rule 1.9 (duties to former clients), then the other lawyers are not disqualified if all three of the following conditions are met:

   i. The personally disqualified lawyer performed only minor and isolated services in the earlier matter, and only with the former firm.

   ii. That lawyer is screened from any participation in the new matter, and receives no fee from it.

   iii. Written notice is given to the former client.

In general, if a lawyer is no longer part of a firm, then the firm is not disqualified because the former member's having represented a client. However, the former firm might be disqualified in one of the following four situations:

1. The matter is the same or substantially related to the matter in which the formerly associated lawyer represented the client.

2. One of the firm's remaining lawyers has certain confidential information.

3. The conflict has been waived, in the same manner as the waiver under Rule 1.7.

4. In the case of Government lawyers, a different rule (1.11) applies.

Rule 1.11: Special rules regarding former and current government officers and employees.

Rule 1.9(c) (use of information gained from a previous representation) does apply in the case of a former government attorney. Also, in general, such a lawyer may not represent a client in connection with a matter in which that lawyer participated personally, unless the government agency gives its written informed consent.

If one lawyer in a firm is disqualified under the previous paragraph, then the firm is also disqualified, unless both of the following conditions are met:

1. The disqualified lawyer is screened, and shares no portion of the fee.

2. Written notice is given to the government agency.

If a lawyer has gained confidential government information about a person during his government employment, then he may not represent a private client whose interests are adverse to that person, if the information could be used to that person's material disadvantage. In this case, the lawyer's firm may represent such a client, if the disqualified lawyer is screened and does not share in the fee.

Current government lawyers are bound by Rules 1.7 and 1.9. Such a lawyer may not participate in matters in which he participated outside of government, unless the agency gives its written informed consent.

Current government lawyers may not negotiate for employment with any person involved in a matter in which he is participating. (There is an exception for current judicial law clerks, subject to conditions.)

Wisconsin adds a provision making clear that the conflicts of a current government lawyer are NOT imputed to other lawyers in that agency. However, the lawyer must be screened from any participation in that matter. This explicit Wisconsin rule is based upon ABA comments to the rule, which states that it would be “prudent” to screen the lawyer.

Rule 1.12: Former judges, arbitrators, mediators, and neutrals.

In general, a lawyer should not represent anyone in a matter in which he or she served as a judge, arbitrator, mediator, or neutral. A lawyer shall not negotiate for employment with such a person (with an exception for law clerks, subject to conditions). In many states, including Minnesota, such a lawyer may participate in the matter, if the conflict is waived.

If a lawyer is disqualified under this rule, then the rest of the lawyer's firm is also disqualified, unless the lawyer is screened and shares no part of the fee, and notice is given.

In general, a partisan arbitrator in a multi-member arbitration panel may subsequently represent that party in the same matter.

III. Special Client Rules, Client Property, Attorney Functions

Rule 1.13: Organization as client.

A lawyer retained by an organization represents the organization. Therefore, if he becomes aware that some person within the organization is going to act in violation of a legal obligation to the organization, or violate a law that is likely to result in substantial injury to the organization, then the lawyer must act in the best interest of the organization. In general, he must refer the matter to higher authorities within the organization.

If the highest authority within the organization fails to address this matter, and if the lawyer reasonably believes that this will cause substantial injury to the organization, then the lawyer may make limited disclosure, even if the disclosure would otherwise violate Rule 1.6. (This does not apply if the lawyer has been retained to investigate a possible violation of law or to defend a claim arising out of a violation.)

If the lawyer believes that he has been fired for being a "whistleblower", then he or she is required to bring

this information to the attention of the organization's highest authority.

When dealing with officers, directors, employees, etc., the lawyer should explain that the organization is the client, if it is apparent that the organization's interests are adverse to those persons.

In general, the organization's lawyer may also represent officers, employees, etc. But see Rule 1.13(g) regarding required consent.

Rule 1.14: Client with Diminished Capacity

In general, a lawyer should, to the extent reasonably possible, maintain a normal client-lawyer relationship. Diminished capacity may be the result of minority, mental impairment, or some other reason.

If the lawyer reasonably believes that a client with diminished capacity is at the risk of "substantial physical, financial, or other harm", then the lawyer **may** take reasonably necessary protective action. This can include consulting with others who have the ability to take action. If appropriate, the lawyer may seek to have appointed a guardian ad litem, conservator, or guardian.

The client's confidential information is still protected by Rule 1.6. However, the lawyer is impliedly authorized to reveal information, if necessary to take such protective action. However, note that the lawyer is not **required** to take action under this rule. He or she is merely **authorized** to take action. Therefore, care should be taken to ensure that confidential information is not released to the client's detriment. As the ABA comment notes, "at the very least, the
lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client."

Rule 1.15: Safekeeping a Client's property.

The rules require lawyers to deposit funds belonging to clients or other third parties to be deposited into a trust account if they are held in connection with a representation.

The only funds belonging to the lawyer which can be held in such accounts are reasonable amounts to cover service charges, and funds belonging jointly to the lawyer and client.

Fees belonging to the attorney must be withdrawn from the trust account within a reasonable time after being earned. A written accounting must be made for any such withdrawals.

A lawyer must promptly notify a client or third person upon receiving such funds, securities, or other properties.

Securities and property must be identified and labeled promptly, and promptly placed in a "safe deposit box or other place of safekeeping".

Complete records must be kept of all such property.

Property must be paid or delivered promptly if requested by the person entitled to receive it.

Generally, all advance fees must be deposited into the trust account and withdrawn as earned, unless subject to a written agreement under Rule 1.5.

If funds are held only for a short period of time, or are nominal in amount, then they should be deposited into a pooled IOLTA (Interest on Lawyer Trust Account) account.

In other cases, separate accounts must be maintained for individual clients, with the client receiving any interest on those amounts.

In addition to rules governing trust accounts, the rule also governs the lawyer's office account. A lawyer engaged in the practice of law must maintain current books and records sufficient to demonstrate income and expenses. In general, these records must be maintained for six years, and the lawyer must certify compliance annually.

In Minnesota, the Lawyers Professional Responsibility Board annually publishes a list of the books and records that are required to be maintained. This list can be found at:

http://www.mncourts.gov/lprb/rulesapp1.html

The financial institution must meet certain requirements, which are outlined in the rules and supporting documents. And in all three states, the financial institution must agree to report any overdrafts, regardless of whether the overdraft is honored!

While not specific to Minnesota, the Iowa summary of the rules regarding books and records contains a number of useful pointers, and is worth looking at:

http://www.iowacourtsonline.org/wfdata/frame11315-1608/TrustOutline.pdf

For example, the Iowa document warns of the perils of "asking clients to ' wait until tomorrow' to cash a settlement check", even though this would not necessarily be a rule violation.

Rule 1.16: Declining or terminating representation.

A lawyer **shall not** represent a client, and **shall** withdraw from representing a client in any of the following situations:

1. The representation will result in violation of the rules or of other law

2. The lawyer's physical or mental condition materially impairs the lawyer's ability
3. The lawyer is discharged.

A lawyer **may** withdraw from representing a client* in any of the following situations:

1. There will be no material adverse effect on the client's interests.

2. The client persists in a course of action involving the lawyer's services, and the lawyer reasonably believes this is criminal or fraudulent.

3. The client has used the lawyer's services to perpetrate a crime or fraud.

4. The client insists on taking some action that the lawyer finds repugnant or with which the lawyer fundamentally disagrees.

5. The client fails to substantially fulfill an obligation (e.g. pay) for the lawyer's services, and sufficient warning has been given.

6. Continued representation would be an unreasonable financial burden for the lawyer, or the client has made it unreasonably difficult.

7. "other good cause for withdrawal exists".

*--Even though a lawyer may be permitted to withdraw under one of these circumstances, the lawyer must comply with any law requiring notice or permission by the court.

When ordered by the court, the lawyer must continue representing the client, notwithstanding good cause for terminating the representation.

If a lawyer does terminate a representation, the lawyer must take reasonable steps to protect the client's interests.

A client's papers must be returned at the end of the representation, if the client is entitled to them, and the Minnesota goes into detail, as to which papers the client must receive.

Rule 1.17: Sale of law practice.

A lawyer may sell or purchase a law practice, if the following conditions are met:

1. The seller ceases to practice law in that geographic area and/or that area of the practice of law.

2. The entire practice, or area of practice, is sold to one or more lawyers or law firms.

3. The seller gives a specific written notice to each client (in Wisconsin, the notice is required only to “affected” clients.)

4. Client fees may not increase due to the sale.

Rule 1.18: Duties to a prospective client.

A "prospective client" is a person who discusses with a lawyer the possibility of forming an attorney-client relationship.

In general, information revealed in such discussions cannot be used or revealed. (There is an exception only if Rule 1.9 permits revealing it with respect to a former client.)

If the lawyer has learned information that "could be significantly harmful" in those discussions, then the lawyer shall not represent a client with interests that are materially adverse. This prohibition extends to other lawyers in the firm.

There are two exceptions to this rule:

1. The lawyer may represent the client if both the client and the prospective client have given written informed consent.

2. If the lawyer took reasonable measures to avoid exposure to the information, then other lawyers in his or her firm may represent the client. Notice must be given to the prospective client.

Rule 2.1: Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In giving advice, the lawyer **may** also look to considerations besides the law, such as moral, economic, social, and political factors.

Note: there is no “Rule 2.2" in Minnesota (nor in Iowa or Wisconsin).

Rule 2.3: Evaluation for use by 3rd persons.

A lawyer may evaluate a matter affecting a client for use by someone else, if the lawyer reasonably believes that doing so is otherwise compatible with the relationship with the client.

If the evaluation will adversely affect the client's interests, then the lawyer must first obtain the client's informed consent.

Except as authorized in connection with the evaluation, confidential information remains protected by Rule 1.6.

Rule 2.4: Lawyer serving as 3rd-party neutral.

If a lawyer is serving as a third-party neutral (for example, arbitrator or mediator), the lawyer must inform unrepresented parties that he or she is not representing them. If the party does not understand the lawyer's role, then the lawyer must explain the difference between a third-party neutral and a lawyer representing a client.

Rule 3.1: Meritorious claims and contentions.

A lawyer shall not do any of the following in representing a client:

1. Knowingly advance a claim or defense that is unwarranted, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

2. Knowingly advance a factual position unless there is a non-frivolous basis.

3. File a suit, conduct a defense, or delay a trial if the lawyer knows (or it is obvious) that doing so would serve merely to harass or maliciously injure another person.

Exception: The lawyer for a defendant in a criminal case (or a case that could result in deprivation of liberty) may defend as to require that every element of the case be established.

Rule 3.2 Expediting litigation:

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

Rule 3.3: Candor toward the tribunal.

A lawyer shall not do any of the following:

1. Make a false statement of fact or law to a tribunal, or fail to correct a prior false statement.

2. Fail to disclose adverse legal authority if:
    a. it is from the controlling jurisdiction
    b. it is known to the lawyer
    c. it is directly adverse to the client's position
    d. it is not disclosed by opposing counsel.

3. Offer evidence known to be false. If a lawyer has offered material evidence and he or she comes to know of its falsity, the lawyer shall take reasonable remedial measures. This might

include disclosure to the tribunal. (If a lawyer knows evidence to be false, then he or she may refuse to offer that evidence, except in the case of a criminal defendant's testimony.)

If a lawyer in an adjudicative proceeding knows that a person has engaged or will engage in criminal or fraudulent conduct, then the lawyer must take reasonable remedial measures. If necessary, this can include disclosure to the tribunal.

The Minnesota and Iowa rules state that these duties continue until "the conclusion of the proceeding". Wisconsin does not include this language. Therefore, presumably, the duty in Wisconsin is continuing, even after the case has been concluded. Wisconsin has specifically rejected the ABA comment that a "practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established."

The duties set forth in this rule take precedence over Rule 1.6. Therefore, under this rule, a lawyer might be **required** to disclose otherwise confidential information.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts necessary to make an informed decision, whether or not those facts are adverse.

Rule 3.4 Fairness to opposing party and counsel.

A lawyer shall not do any of the following:

1. Unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal documents or other items having potential evidentiary value. A lawyer may not counsel or assist another person in doing so.

2. Falsify evidence, or counsel or assist a witness to testify falsely, or offer a witness an inducement that is prohibited by law.

3. Knowingly disobey obligations under court rules, except for an open refusal based upon an assertion that no such obligation exists.

4. Make frivolous discovery requests or fail to diligently comply with proper discovery requests.

5. Allude at trial to matters that the lawyer does not believe are relevant or supported by evidence, or assert personal knowledge unless actually testifying, or state personal opinions.

6. Request that someone other than a client not voluntarily give information to another party. There is an exception to this rule if both of the following conditions are met:

    a. The person is a relative, employee, or agent of a client, and

    b. The lawyer believes that the person's interests will not be adversely affected.

Rule 3.5: Impartiality and decorum of the tribunal

Note: The Minnesota rule, while expressing the same general principles, departs somewhat from the Model Rule adopted in other states..

With respect to contact with the jury, the rule is broken down by time: Before the trial, during the trial, and after the trial.

1. Before the trial, a lawyer shall not communicate with anyone the lawyer knows to be a member of the venire.

2. During the trial, a lawyer connected with the case may not communicate with any member of the jury. Even a lawyer who is not connected with the case is prohibited from communicating with a juror concerning the case.

3. After the jury has been discharged, a lawyer shall not ask questions or make comments to a juror that are "calculated merely to harass or embarrass the juror" or influence the juror's actions in future cases.

In addition to these rules, a lawyer is prohibited from conducting (or having other persons conduct) vexatious or harassing investigations of jurors or prospective jurors.

If a lawyer has knowledge of misconduct by a juror or prospective juror, or if a lawyer knows of improper conduct toward a juror, prospective juror, or family member, then the lawyer must promptly reveal this information to the court.

In an adversary proceeding, a lawyer may not communicate with the judge (or other official) with respect to the merits of the case, except in the following circumstances:

1. In the course of the official proceedings.

2. In writing, if the writing is promptly given to the adverse party.

3. Orally, if adequate notice is given to the other attorney.

4. As otherwise authorized by law.

In addition, "a lawyer shall not engage in conduct intended to disrupt a tribunal."

Rule 3.6 Trial publicity.

If a lawyer participates in the investigation or litigation of a matter, then he or she shall not make an extrajudicial statement if the lawyer knows or reasonably should know that it will be publicly disseminated, and there will be a substantial likelihood of prejudicing the matter.

In jury cases and criminal cases, the following kinds of statements are presumed to have such an effect:

1. Character, credibility, reputation, or criminal record of a party, suspect, or witness, or the identity of a witness, or the expected testimony.

2. In a criminal case, the possibility of a guilty plea, or the contents of any confession or statement, or the refusal to make a statement.

3. The performance or results of tests, or refusal or failure to take a test.

4. An opinion as to guilt or innocence

5. Evidence that is likely to be inadmissible.

6. The fact that the defendant has been charged, unless it is also stated that this is merely an accusation, and that the defendant is presumed innocent.

The prohibition under this rule applies to other lawyers associated in a firm or government agency.

Rule 3.7 Lawyer as witness.

If it is likely that a lawyer will be a necessary witness, then he or she shall not act as an advocate. There are the following exceptions:

1. The testimony relates to an uncontested issue.

2. The testimony relates to the nature and value of legal services rendered in the case.

3. There would be a substantial hardship to the client

It is permissible for a lawyer to be an advocate, even though an attorney in his or her firm will be a witness. However, he or she might be precluded because of confidential information, under Rules 1.7 or 1.9.

Rule 3.8 Special responsibilities of a prosecutor

A prosecutor may not prosecute a criminal case if he or she knows that the case is not supported by probable cause.

The obligation with respect to the accused's right to counsel is broader than in some other states, and it is not limited to situations involving a communication. In Minnesota and Iowa, the prosecutor must make reasonable efforts to assure that the accused has been advised of his right to obtain counsel and the procedure for obtaining counsel.

The prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing". Note, this is in contrast to the Wisconsin rule which specifically authorizes waiver in some circumstances.

The prosecutor must timely disclose mitigating evidence.

In general, a prosecutor should not subpoena a lawyer in a grand jury proceeding regarding the lawyer's past or present client. However, there are limited exceptions.

Minnesota imposes specific duties upon a prosecutor with regard to pretrial publicity.

Rule 3.9 Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative body or administrative agency shall disclose that the appearance is on behalf of a client. Most of rules 3.3, 3.4, and 3.5 apply to such a representation.

Rule 4.1 Truthfulness in statements to others

In the course of representing a client, a lawyer may not make a false statement of material fact or law to a third party.

Under the model rule adopted in other states, a lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act. The Minnesota rule does not contain this provision.

Rule 4.2 Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject with a person the lawyer knows to be represented by another lawyer. There is an exception if the other lawyer consents, or if authorized by law or court order.

Rule 4.3 Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, if the person misunderstands the lawyer's role, the lawyer has an affirmative duty to correct the misunderstanding.

The lawyer shall not give legal advice (other than the advice to secure counsel, if the lawyer believes the interests are likely to be in conflict.)

A lawyer shall not state or imply that he or she is disinterested.

Rule 4.4 Respect for rights of 3rd persons.

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden third parties. A lawyer must not use methods of obtaining evidence that violate a third person's rights.

If a lawyer accidentally receives a document and reasonably knows that it was inadvertently sent, then the lawyer shall promptly notify the sender.

IV. Responsibilities for Actions of Others

Rule 5.1: Responsibilities of partners, managers, and supervisory lawyers

A partner in a law firm, or another lawyer with comparable managerial authority, shall make reasonable efforts to ensure that there are measures reasonably assuring that all lawyers conform to the rules.

A lawyer with direct supervisory authority has a similar duty.

A lawyer is responsible for another lawyer's violation in either of the following two circumstances:

1. The lawyer orders or ratifies the conduct.

2. The lawyer has managerial or supervisory authority and knows of the conduct in time to mitigate it, but fails to do so.

Rule 5.2 Responsibilities of a subordinate lawyer

A lawyer is bound by the rules, even though he or she acted at the direction of another person.

However, it is not a violation if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question.

Rule 5.3 Responsibilities regarding nonlawyer assistants

Lawyers with managerial authority, such as partners, shall make reasonable efforts to ensure that non-lawyers employed or retained are compatible with the lawyer's professional obligations.

This duty also applies to persons with direct supervisory authority.

Lawyers are responsible for violations by such persons in the following circumstances:

1. The lawyer orders or ratifies the conduct.

2. The lawyer is a partner or comparable manager, and knew of the conduct in time to mitigate it, but failed to do so.

Rule 5.4 Professional independence of a lawyer

A lawyer shall not share fees with a nonlawyer. There are, however, four exceptions to this rule:

1. Certain payments to a lawyer's estate after his or her death.

2. Purchase of the practice of a deceased, disabled, or disappeared lawyer.

3. Certain retirement or compensation plans for non-lawyer employees

4. Court-awarded legal fees may be shared with certain non-profit organizations.

A lawyer may not form a partnership with a non-lawyer if one of the activities of the partnership is the practice of law.

A lawyer may not have his services directed or regulated by a person who recommends, pays, or employs him or her.

There are restrictions upon the ownership and control of professional corporations or associations.

Rule 5.5: Unauthorized practice of law; multijurisdictional practice of law.

A lawyer shall not practice law in a jurisdiction if it violates the regulation of the legal profession in that jurisdiction. (Wisconsin adds a specific provision that a lawyer may not assist another person in practicing

law in a jurisdiction that violates the rules of that jurisdiction.) However, a lawyer admitted in his or her home state does not violate this rule by conduct in another state, if the same conduct would be permitted by an out-of state lawyer by the following rules:

A lawyer admitted in another U.S. jurisdiction (who is not disbarred or suspended in any jurisdiction*) may provide any of the following types of services on a temporary basis:

1. Services in association with a lawyer who is admitted in the state, who actively participates in the matter.

2. Services that are reasonably related to a pending or potential proceeding (even if the proceeding is in this state), if the lawyer or the person the lawyer is assisting reasonably expects to be authorized by law or order to appear.

3. Reasonably related to a pending or potential arbitration, mediation, etc., (even if it is in this state), if both of the following conditions are met:

a. The services must be reasonably related to the lawyer's practice where he is admitted.

b. The services are not ones where the forum requires pro hac vice admission.

4. Arise out of or are reasonably related to the lawyer's practice where he is admitted. However, this provision applies only to matters that are not within the preceding paragraphs (2: proceedings before a tribunal, or 3: arbitration, mediation, etc.)

A lawyer from another jurisdiction (if not disbarred or suspended anywhere*) may provide legal services in the state if authorized by federal law, or some other law.

Even if one of these exceptions applies, a lawyer not admitted in a state shall not do either of the following:

1. Unless otherwise authorized, establish an office or systematic presence in the state to practice law.

2. Hold out to the public or represent that he is admitted to practice in the state.

Iowa also allows an out-of-state lawyer to provide legal services on behalf of his or her employer or its organizational affiliates, provided that these are not services that require pro hac vice admission. An out-of-state attorney providing such services for a **Nebraska** employer must be registered under Nebraska Supreme Court Rule 3-1201, et seq.: http://www.supremecourt.ne.gov/supreme-court-rules/ch3/art12

Registration is required of out-of-state attorneys who are "employed in Nebraska as counsel exclusively for a single corporation, partnership, association, or other legal entity, as well as any affiliate thereof, whose lawful business consists of activities other than the practice of law or provision of legal services, and who has a continuous presence in the State of Nebraska." The registered out-of-state lawyer is also authorized to participate in certain Nebraska pro bono activities.

*- In Wisconsin, the prohibition against disbarred and suspended attorneys applies only if they are suspended or disbarred "for disciplinary reasons or medical incapacity". The comment makes clear that if the lawyer is suspended or disbarred for any reason in his or her primary jurisdiction of practice, then he or she is not eligible.

In Wisconsin, a lawyer from another state who provides legal services in Wisconsin consents to the appointment of the Clerk of the Wisconsin Supreme Court as agent for service of process.

Rule 5.6 Restrictions on right to practice
A lawyer may not participate in any kind of business arrangement that restricts his or her right to practice law after terminating the relationship. There is an exception for agreements concerning retirement benefits.

A lawyer may not participate in an agreement that restricts his or her right to practice as part of the settlement of a client's case.

Iowa/Minnesota/Nebraska Rule 5.7: Responsibilities regarding law-related services.

A "law-related service" is a service that might reasonably be performed with and substantially related to the provision of legal services. However, it is the type of service that can be performed by a nonlawyer and not be prohibited as the unauthorized practice of law.

A lawyer providing such services is subject to the Rules of Professional Conduct in either of the following situations:

1. They are not distinct from the lawyer's provision of legal services to clients

2. If the lawyer fails to take reasonable measures to assure the person obtaining the services knows that they are not legal services, and that the protections of the lawyer-client relationship do not apply.

(Note: This rule has not been adopted in Wisconsin, although Wisconsin has a Rule 5.7 covering an unrelated subject.)

Minnesota Rule 5.8: Employment of disbarred, suspended, or involuntarily inactive lawyers.

A lawyer may not "employ" (which is broadly defined) lawyer who has been disbarred, suspended, etc., to do any of the following on behalf of a client:

1. Render legal consultation or advice

2. Appear on behalf of a client at any hearing or proceeding (unless the agency's rules permit appearance by a non-lawyer, and the client has been informed of the lawyer's status).

3. Appear as a representative of a client at a deposition or other discovery matter.

4. Negotiate on behalf of the client with third parties.

5. Handle client funds in any way

6. Engage in any activity that constitutes the practice of law.

It is permissible to employ a disbarred or suspended lawyer to perform research, drafting, clerical service, etc., including the following:

1. Preparatory work for an active lawyer's review, such as legal research, gathering information, drafting documents, etc.

2. Communicate with clients or third parties regarding matters such as scheduling, billing, updates, gathering information, or confirmation of receipt or sending of correspondence.
3. Accompany an active lawyer to a deposition or other discovery, but only for the limited purpose

of providing clerical assistance.

At the time of employing such a person (or upon learning of the status), the active lawyer must give written notice to the Office of Lawyers Professional Responsibility. The contents of the notice are specified by the rule. The Office must also be notified of the termination of such employment.

Rule 6.1 Voluntary pro bono publico service

"Every lawyer has a professional responsibility to provide legal services to those unable to pay." A lawyer "should aspire" to render at least 50 hours of pro bono service per year. This obligation can be fulfilled in the following ways:

A substantial majority of those fifty hours shall be without fee or expectation of fee to the following:

1. persons of limited means
2. charitable, religious, civic, government, etc., organizations, in matters that are designed primarily to help persons of limited means.

In addition, a lawyer should provide services for no fee or substantially reduced fee, to secure or protect civil rights or civil liberties, public rights. Or, a lawyer should provide services to charitable, religious, civic, etc., organizations in furtherance of those organizations' purposes, when standard fees would significantly deplete the organization's resources or would otherwise be inappropriate.

A lawyer should deliver legal services at a substantially reduced fee to persons of limited means.

A lawyer should participate in activities for improving the law, legal system, or legal profession.

In addition, a lawyer should voluntarily contribute financially to organizations that provide legal services to persons of limited means.

Rule 6.2 Accepting appointments

A lawyer shall "not seek to avoid appointment" by a tribunal, except for good cause. Examples of good cause include:

1. Representing the person is likely to result in a rule violation.

2. It would be an unreasonable financial burden.

3. The person's cause is so repugnant that it will likely impair the lawyer's ability to represent the person.

Rule 6.3 Membership in legal services organization

A lawyer may serve as a director, officer, or member of a legal services organization, even though the organization serves persons with interests adverse to one of his or her clients. However, the lawyer should not knowingly participate in any decision or action of the organization in either of the following cases:

1. Doing so would be a conflict of interest under Rule 1.7.

2. The decision could have a material adverse effect on the organization's representation of such a client.

Rule 6.4 Law reform activities affecting client interests

A lawyer is permitted to serve as a director, officer, or member of an organization involved in the reform of the law or its administration. This is true even though the reform may affect the interests of one of his or her clients. But if the lawyer knows that a client's interests may be materially benefited by a decision in which the lawyer participates, the lawyer must disclose this fact. However, the lawyer need not identify the client.

Rule 6.5 Nonprofit and court-annexed limited legal services programs

The following rules apply to a lawyer who participates in a program sponsored by a nonprofit organization or court which provides short-term legal services to clients, where neither the lawyer nor the client expect that the lawyer will provide continuing representation in the matter. (Wisconsin adds language to make clear that this also applies to programs sponsored by bar associations or accredited law schools.)

The lawyer is subject to Rules 1.7 (conflicts of interest) and 1.9(a) (conflicts of interest with former clients), only if the lawyer knows that the representation involves a conflict of interest.

The lawyer is subject to Rule 1.10 (imputed conflict of interest of firm) only if he knows that another lawyer in his or her firm would be disqualified. Otherwise, Rule 1.10 does not apply.

V. Communications and Advertising

Rule 7.1 Communications concerning a lawyer's services

A lawyer is prohibited from making false or misleading communication about the himself or herself, or about his or her services. This includes communications that contain a material misrepresentation of fact or law, or if it omits a fact necessary to make the statement not materially misleading.

Rule 7.2 Advertising

A lawyer may advertise. Advertising is subject to Rules 7.1 and 7.3. The following rules also apply:

A lawyer may not give anything of value to someone to recommend his services, with the following exceptions:

1. Pay the reasonable cost of permitted advertisements or communications.

2. Pay the usual charges for a legal service plan or a lawyer referral service. (The lawyer referral service must be non-profit or approved by the appropriate regulatory authority.)

3. Pay for a law practice under Rule 1.17.

4. Refer clients to another lawyer or other professional under an agreement that the other person will refer clients to the lawyer. However, such an agreement must be otherwise permitted by the rules, and the following conditions must apply:

    a. The reciprocal referral agreement is not exclusive
    b. The client is informed of the existence and nature of the agreement.

Any communications made under this rule must include the name of at least one lawyer or law firm who is responsible for its content.

Rule 7.3: Direct contact with prospective clients

A lawyer shall not solicit professional employment from prospective client in person or by live telephone contact, if a significant motive is the lawyer's pecuniary gain. There are two exceptions to this rule:

1. The person contacted is a lawyer, or

2. The person contacted is family, has a close personal relationship, or has a prior professional relationship.

In addition, a lawyer shall not solicit professional employment in any manner (written, recorded, electronic, in-person or telephone) if either of the following is true:

1. The prospective client has made known a desire not to be solicited, or

2. The solicitation involves coercion, duress, or harassment.

Any written, recorded, or electronic communication soliciting professional employment from someone known to be in need of services in a particular matter must conspicuously include the words "Advertising Material" on any outside envelope, and within the communication. There are the same two exceptions as in the first rule:

1. The person contacted is a lawyer, or

2. The person contacted is family, has a close personal relationship, or has a prior professional relationship.

This rule does not prohibit a lawyer from participating in a prepaid or group legal service plan (not owned or directed by the lawyer) that uses in-person or telephone contact to solicit membership, if the persons are not known to need particular legal services.

Rule 7.4: Communication of fields of practice

A lawyer may communicate whether or not he or she practices in a particular field of law.

A lawyer admitted to engage in patent practice before the U.S. Patent and Trademark Office may use the designation "patent attorney" or similar.

A lawyer engaged in admiralty practice may use the designation "admiralty", "proctor in admiralty", or similar.

A lawyer shall not state or imply that he or she is certified as a specialist in a particular field unless both of the following are true:

1. The name of any certifying organization is clearly identified.

2. If the attorney is not certified as a specialist, or if the certifying organization is not accredited by the Minnesota Board of Legal Certification, then the communication must state that he or she is not certified by any organization accredited by the board. In any advertisement coming under Rule 7.2, this statement must be contained in the same sentence that communicates the certification.

Iowa: As in other states, the certifying organization must be clearly identified. But since Iowa does not accredit such organizations, the certification must be by an organization or state authority "that the attorney can demonstrate is qualified to grant such certification to attorneys who meet objective and consistently applied standards relevant to

practice in a particular area of law." Reference to the certification must be truthful, verifiable, and not misleading. It must also include a statement that the Iowa Supreme Court does not recognize certifications of specialty, and that certification is not a requirement to practice law in Iowa.

Rule 7.5 Firm names and letterheads

Firm names, letterheads, and other professional designations must comply with Rule 7.1 (e.g., no false or misleading information). A trade name may be used by a lawyer, but it is subject to the following requirements:

1. It may not imply a connection with a government agency or public or charitable
2. It may not imply a connection with a public or charitable legal services organization
3. It must not violate Rule 7.1

A firm with offices in more than one jurisdiction may use the same name in each jurisdiction. However, the identification of lawyers in an office shall indicate the jurisdictional limitations.

The name of a lawyer holding public office shall not be used during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

Iowa: Iowa Rule 7.5 now follows the model rule, but with two interesting twists. First of all, the law firms URL (web site address, e.g., richardclem.com) is specifically on the same footing as the firm name. Secondly, trade names, **including URL's**, must be registered with the Office of Professional Regulation.

The extension of this rule to URL's might be problematic for some firms. In states in which trade names have been allowed, lawyers are often careful to avoid using geographic names. For example, a law firm in Minneapolis would be wise to avoid using the trade name "Minneapolis City Attorneys", or even "Minneapolis Attorneys" since there is a government office with a similar name, and this could violate the rule. However, since the Minnesota rule does not directly address URL's, a similar URL might be used. Indeed, there is a firm using minneapolisattorneys.com. A URL such as desmoinesattorneys.com (which is apparently not in use other than by a placeholder page) might be problematic in Iowa under the proposed rule.

Under Iowa Court Rule 49.4, the URL must be registered as a separate trade name if it is "more than a minor variation on the official name of the lawyer, firm, or organization." This registration will be annual, and will include a fee. Therefore, presumably richardclem.com would not require registration, but hawkeyelawyers.com would.

Note, the rule applies to "Uniform Resource Locators" (URL's), and does not relate to domain names. So if your e-mail address is jane.lawyer@hawkeyelaw.com, then registration probably isn't required, as long as you don't have a website with that domain name. And since URL generally refers to the complete web address, and not just the domain name, it might be wise to register if you have a website at a third-party provider, and have a URL such as lawyers.com/desmoines.

It's unclear whether some other URL's might need to be registered. For example, I have a "profile" at findlaw.com. I don't pay for it, but I believe I provided the information at some point. That page has its own URL: http://pview.findlaw.com/view/2901163_1 . If I were an Iowa attorney, would I be required to register that URL? The literal language of the rule seems to say yes.

Even though Iowa attorneys are not currently using trade names, most probably have a URL for their website, and many of these will need to be registered with the state under the new rule.

Finally, even though trade names and URL's will be allowed for Iowa firms, the name of one or more principally responsible attorneys must also be displayed.

Iowa and Wisconsin Rule 7.6: Political contributions to obtain government legal engagements or appointments by judges.

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if he or she makes a political contribution or solicits contributions for the purpose of being considered.

Minnesota and Nebraska do not have a corresponding provision.

Rule 8.1 Bar admission and disciplinary matters

The following applies to an applicant for admission to the bar, or to a lawyer in connection with a bar admission application or with a disciplinary matter. Such a person shall not:

1. knowingly make a false statement of material fact, or

2. fail to disclose a fact necessary to correct a misapprehension that the person knows has arisen.

3. Knowingly fail to respond to a lawful demand for information.

However, this rule does not require disclosure of information that is otherwise confidential because of Rule 1.6 (or Iowa Code section 622.10).

Rule 8.2 Judicial and legal officials

A lawyer shall not knowingly or recklessly make a false statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or candidate for judicial or legal office.

A lawyer who is a candidate for judicial office shall comply with the code of judicial conduct.

Rule 8.3: Reporting professional misconduct.

A lawyer who knows that another lawyer has violated these Rules shall inform the appropriate authority.

A lawyer who knows that a judge has violated the applicable rules of judicial conduct shall inform the appropriate authority.

This rule does not require disclosure of information that is confidential under Rule 1.6 (or Iowa Code section 622.10). It does not require disclosure of information gained while participating in a lawyers assistance program. (In Iowa, the program must be an "approved" one.)

In Wisconsin, this rule does not require disclosure of information acquired while arbitrating or mediating certain disputes between lawyers.

Rule 8.4: Misconduct

The following are professional misconduct:

1. Violate the rules of professional conduct, knowingly assist or induce a violation, or do so through another's acts. (IA, MN, NE)

2. Commit a criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer. (IA, MN, NE)

3. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation or prejudicial to the administration of justice. (IA, MN, NE)

4. State or imply an ability to improperly influence a government agency or official or achieve results that violate these Rules or other law. (IA, MN, NE)

5. Knowingly assist a judicial officer in conduct that violates the rules of judicial conduct or other law (IA, MN, NE)

6. Harass or discriminate against a person (in connection with the lawyer's professional activities) based on sex, race, age, creed, religion, national origin, disability, sexual preference, or marital status. (Legitimate advocacy regarding these factors is not a violation.) (MN, NE) or engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so. (IA)

7. Engage in conduct that is prejudicial to the administration of justice (IA, MN, NE)

8. Refuse to honor a final and binding arbitration award after agreeing to arbitrate a fee dispute. (MN)

9. willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by state law (NE

Rule 8.5 Disciplinary authority; choice of law

Disciplinary Authority

A lawyer admitted to the bar in the state is subject to the disciplinary authority of the state regardless of where the conduct occurs.

A lawyer not admitted in the state is subject to the state's disciplinary authority if he or she offers to provide any legal services in the state.

A lawyer may be subject to disciplinary authority in more than one state for the same conduct.

Choice of Law

For conduct before a tribunal, the law of the jurisdiction where the tribunal sits shall apply (unless that court's rules provide otherwise.

For other conduct, if the lawyer is admitted only in one state, then the rules shall be the rules of that state.

If the lawyer is admitted in more than one state, then the rules of the jurisdiction where he or she principally practices shall apply. However, if the conduct has its predominant effect in another jurisdiction, then the rules of that jurisdiction will apply.

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