

Oregon State Bar
2003 House of Delegates Meeting

*Seaside Civic and Convention Center
415 First Ave.
Seaside, Oregon 97138
Saturday, September 20, 2003, 10:00 a.m.*



Dear Oregon State Bar Member:

Enclosed is your agenda for the 2003 Oregon State Bar House of Delegates Meeting, which will be held on Saturday, September 20, 2003, at the Seaside Civic and Convention Center, Seaside, Oregon, beginning at 10:00 a.m.

Although only delegates may vote on the resolutions, members are welcome and are encouraged to participate in the discussion and debate of agenda items. If you are unable to attend, please contact one or more of your delegates to express your views on the items to be considered. Delegates are listed on the bar's webpage at www.osbar.org.

Matters that will be considered by the House of Delegates include:

- A major reformulation of the Oregon Code of Professional Responsibility to conform to the format of the ABA Model Rules of Professional Conduct.
- A resolution expressing appreciation to lawyer-legislators.

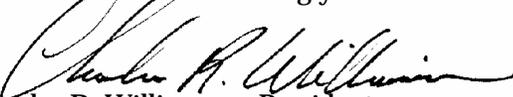
The full text and explanatory statements for all resolutions are in the enclosed agenda. The agenda includes a report of the actions taken by the Bar to implement resolutions approved at the 2002 House of Delegates meeting.

I also encourage you to attend the Annual Awards Dinner, which will begin at 7:30 p.m. on Friday, September 19, 2003. Tickets (\$37.50 per person) can be obtained by filling out the registration form in the convention materials previously mailed and sending it with your payment to the Oregon State Bar. You may also purchase tickets online at the Oregon State Bar website using your VISA or MasterCard, or by calling the Oregon State Bar Order Desk at 800-452-8260, ext. 413 (in Oregon only) or 503-620-0222, ext. 413. Seating is limited, so reserve your place soon! Our special award honorees are:

- Award of Merit: Joseph D. Robertson
- President's Membership Service Award: David C. Culpepper, Tom Kranovich, Mark Morrell and David P.A. Seulean
- President's Public Services Award: Roderick Aaron Boutin
- President's Special Award of Appreciation: Eric B. and Hollie Lindauer

If you have any questions about the House of Delegates meeting, please contact Teresa Wenzel, Executive Assistant, at 800-452-8260, ext. 386 (in Oregon only), at 503-620-0222, ext. 386, or by e-mail at twenzel@osbar.org.

I look forward to seeing you in Seaside!


Charles R. Williamson, President
Oregon State Bar

OREGON STATE BAR
2003 House of Delegates Meeting
Seaside Civic and Convention Center
Seaside, Oregon
Saturday, September 20, 2003, 10:00 a.m.
Presiding Officer: Charles R. Williamson

Agenda

1. Call to Order
Charles R. Williamson
2. Overview of Parliamentary Procedure
George A. Riemer
3. Report of the President
Charles R. Williamson
4. Adoption of Final Meeting Agenda
Charles R. Williamson
5. Report of the Board of Governors Budget and Finance Committee
David A. Hytowitz

2004 Membership Fee Resolution

6. 2004 Membership Fee Resolution (no increase in fees over 2003; this is an informational item only) Page 3

Other Resolutions

7. In Memoriam (Board of Governors Resolution No. 1) Page 3
Presenter: Charles R. Williamson
8. Proposed Oregon Rules of Professional Conduct (Board of Governors Resolution No. 2) Page 4
Presenters: Gerry Gaydos and Nancy M. Cooper

9. Resolution of Appreciation to Lawyer Legislators (Board of Governors Resolution No. 3) Page 4
Presenter: William G. Carter

HOD Informational Update

10. Report to the Oregon State Bar House of Delegates on Implementation of Resolutions Approved at the 2002 Annual Meeting Page 5

Additional Information

11. Final Report of the Special Legal Ethics Committee on Disciplinary Rules Page 8
12. Proposed Oregon Rules of Professional Conduct Page 10

2004 Membership Fee Resolution

6. The Board of Governors approved the following Membership Fee Resolution establishing 2004 Membership Fees on Friday, August 1, 2003. 2004 membership fees remain the same as 2003 fees. This is an informational item only.

Board of Governors 2004 Fee Resolution

It is hereby resolved by the Board of Governors of the Oregon State Bar that the 2004 annual membership fees and Client Security Fund assessment be unchanged from 2003, and shall be as follows:

1. Active Members.

A. For members admitted in any jurisdiction before January 1, 2002: \$397.00 for the basic membership fee; \$30.00 for the Affirmative Action Program fee; and \$5.00 for the Client Security Fund assessment; for a total of \$432.00.

B. For members admitted in any jurisdiction before January 1, 2002 who fail to pay their active fees and assessments of \$432.00 by the due date: \$482.00.

C. For members admitted in any jurisdiction on or after January 1, 2002: \$340.00 for the basic membership fee; \$15.00 for the Affirmative Action Program fee; and \$5.00 for the Client Security Fund assessment; for a total of \$360.00.

D. For members admitted in any jurisdiction on or after January 1, 2002 who fail to pay their active fees and assessments of \$360.00 by the due date: \$402.00.

E. For those members admitted in Oregon in 2004, the fees shall be apportioned. The Client Security Fund assessment of \$5.00 shall be paid in full by each new admittee.

F. For those members who pass away in 2004, the fees shall be apportioned upon request of appropriate representatives. The Client Security Fund assessment of \$5.00 and the increase of fees due to payment made after the due date shall not be included in the apportioned refund.

G. Exemptions to active member fees:

(1) Members who were admitted to practice law in Oregon prior to January 1, 1954 are exempt from the payment of all active membership fees and assessments.

(2) Members who are on active military duty in compliance with the terms of ORS 408.450 are exempt from the payment of all active membership fees and assessments. Members who are in the VISTA or Peace Corps programs in compliance with Board of Governors Policy 10.302 are exempt from the payment of all active membership fees and assessments. The payment of active membership fees may also be waived if members satisfy

the requirements of Board of Governors Policy 10.301 on hardship exemptions.

2. Active Pro Bono and Active Emeritus Members

A. For members who qualify under BOG Policy 15.700 for Active Pro Bono or Active Emeritus membership: \$110.00 for the basic membership fee and \$5 for the Client Security Fund assessment, for a total of \$115.00.

B. For Active Pro Bono or Active Emeritus members who fail to pay their fees and assessments of \$115.00 by the due date: \$140.00.

3. Inactive Members.

A. The 2004 membership fee for inactive members shall be \$110.00.

B. For those inactive members who fail to pay their fees of \$110.00 by the due date: \$135.00.

C. Exemptions to inactive member fees:

(1) Members who were admitted in Oregon prior to January 1, 1954.

(2) Members in active military duty in compliance with the terms of ORS 408.450 are exempt from the payment of inactive membership fees. Members who are in the VISTA or Peace Corps programs in compliance with Board of Governors Policy 10.302 are exempt from the payment of inactive membership fees. The payment of inactive membership fees may also be waived if members satisfy the requirements of Board of Governors Policy 10.301 on hardship exemptions.

5. Payment Date: All fees and assessments shall be paid simultaneously, in one remittance, not later than the due date, or within 60 days of date of admission to the Oregon State Bar, whichever occurs last.

6. Definitions: Apportioned fees pertain only to those members admitted in Oregon or who passed away during calendar year 2004. If the member is admitted or passes away in January, the apportioned fee or refund, as the case may be, shall be 12/12; February shall be 11/12; ...; December shall be 1/12. The calculation shall be rounded up to the nearest dollar for each fee allocation.

Approved by the Board of Governors on August 1, 2003. The board set the due date for 2004 membership fees as Monday, February 2, 2004.

Other Resolutions

7. In Memoriam (BOG Resolution No. 1)

Resolved, that the Oregon State Bar House of Delegates and members assembled stand for a moment of silence in honor of the members of the Oregon State Bar whose deaths have been reported since the 2002 House of Delegates Meeting (through August 15, 2003).

In Memoriam

Cliff A Allison, Salem, OR
Elizabeth A Baldwin, Astoria, OR
Darrell E Bewley, Keizer, OR
Bruce K Black, Salem, OR
Rebecca J Bloom, Walla Walla, WA
Louis S Bonney, Salem, OR
Joseph E Buley, Lake Oswego, OR
James E Burdett, Jr, Portland, OR
James M Burns, Portland, OR
Chapin D Clark, Eugene, OR
G Howard Cliff, Lake Oswego, OR
David G Cromwell, Salem, OR
David M Cuniff, Philomath, OR
Willard L Cushing, Lake Oswego, OR
William L Dickson, San Diego, CA
Eugene D Farley, Portland, OR
W Dean Fitzwater, Clackamas, OR
Michael E Ford, Eugene, OR
David G Frost, Hillsboro, OR
Leonard Marsden Gardner, Great Falls, MT
Wayne A Gottshall, Eugene, OR
Burl L Green, Wilsonville, OR
Ronald D Gregory, Lynnwood, WA
Hal R Gross, Wilsonville, OR
P K Hammond, West Linn, OR
Thomas M Hanavan, Portland, OR
Paul W Haviland, Medford, OR
Gregory L Hawkes, Tualatin, OR
Allard J Heitkemper, Portland, OR
Richard T Howsley, Portland, OR
Robert C Irelan, Portland, OR
Paul J Jolma, Clatskanie, OR
Brian R Jones, Portland, OR
George M Joseph, Portland, OR
J Kenneth Kaseberg, Portland, OR
Ann Kelley, Rickreall, OR
Scott M Kelley, Portland, OR
Patrick L Kittredge, Klamath Falls, OR
Benjamin Lombard, Jr, Ashland, OR
Ernest Lundeen, Eugene, OR
George Luoma, Roseburg, OR
Keith Alan Moore, Tempe, AZ
Ervin W Potter, Salem, OR
Ray D Robinett, Netarts, OR
Thomas H Ryan, Portland, OR
Lucy B Schafer, Eugene, OR
Donald R Schmidt, Nelscott, OR

Brice L Smith, Portland, OR
E William Stein, Portland, OR
John G Struve, Pendleton, OR
Francis E Sturgis, Seaside, OR
David P Templeton, Portland, OR
William F White, Lake Oswego, OR
Lynn B Witte, Los Angeles, CA
Donald D Yokom, Pendleton, OR
Oglesby H Young, Portland, OR

Presenter: Charles R. Williamson

8. Proposed Oregon Rules of Professional Conduct (BOG Resolution No. 2).

Whereas, the Board of Governors adopted the Report of the Special Legal Ethics Committee on Disciplinary Rules (see condensed report at page 8) and formulated new Rules of Professional Conduct pursuant to ORS 9.490(1) on June 14 and August 1, 2003; and

Whereas, the Oregon State Bar House of Delegates must approve any changes in the rules of professional conduct before they may be presented to the Oregon Supreme Court for adoption pursuant to ORS 9.490(1); now, therefore, be it

Resolved, that the Oregon Code of Professional Responsibility be replaced with the new Oregon Rules of Professional Conduct as set forth hereinafter (see page 10), on a date determined by the Oregon Supreme Court, pursuant to ORS 9.490(1).

Presenters: Gerry Gaydos and Nancy M. Cooper

9. Resolution expressing the appreciation of the Oregon State Bar to Senate President Peter Courtney, Senator Kate Brown, Senator Charlie Ringo, Representative Rob Patridge, Representative Lane Shetterly, and Representative Max Williams (BOG Resolution No. 3).

Whereas, State Senator Peter Courtney has served this session as President of the Oregon State Senate, has previously served as Minority Leader in the Oregon State House of Representatives, has been a member of the Oregon State Bar since 1973, and has served the people of the State of Oregon admirably by leading a divided Senate through an extremely difficult session and ultimately proving instrumental in crafting a state budget that met divergent and sometimes conflicting goals; and

Whereas, State Senator Kate Brown is the Democratic Leader of the Senate, has served this session as Co-Chair of the Senate Rules Committee, has been a member of the Oregon State Bar since 1985 and has long been a supporter of the Oregon State Bar, of improving the laws of the State of Oregon and of protecting the rights of all Oregonians; and

Whereas, Senator Charlie Ringo has served this session on the Senate Judiciary Committee, has been a

member of the Oregon State Bar since 1989, and has been effective this session in bringing the perspectives of an attorney to the Senate Judiciary Committee and in promoting improvements to Oregon law generally; and

Whereas, State Representative Rob Patridge has served this session as Chair of the Ways and Means subcommittee on Public Safety, is Majority Whip of the House of Representatives, has been a member of the Oregon State Bar since 1991, and has taken the lead in working to craft a judicial budget that meets the needs of Oregonians; and

Whereas, State Representative Lane Shetterly has served this session as Chair of the House Revenue Committee, served this session on the House Judiciary Committee, has been a member of the Oregon State Bar since 1981, has been a voice of reason and moderation in both of these areas, has risen above ideological differences that have divided his colleagues both on budgetary and judicial matters, and has been a strong supporter of adequate judicial funding; and

Whereas, State Representative Max Williams has served this session as Chair of the House Judiciary Committee, has served this session on the House Revenue Committee, has been a member of the Oregon State Bar since 1991, has done much to further the Oregon State Bar's law improvement proposals and to improve the state of the law in Oregon generally, and has been of great assistance in passing an adequate judicial budget; now, therefore, be it

Resolved, that the Oregon State Bar House of Delegates hereby expresses its sincere appreciation to Senate President Peter Courtney, Senator Kate Brown, Senator Charlie Ringo, Representative Rob Patridge, Representative Lane Shetterly, and Representative Max Williams for their hard work and dedication to the improvement of the laws and the administration of justice in Oregon.

Presenter: William G. Carter

10. Report to the Oregon State Bar House of Delegates on Implementation of Resolutions approved at the 2002 Annual Meeting.

The House of Delegates approved a number of resolutions at its annual meeting on October 5, 2002. The purpose of this report is to inform the House of the actions taken to date to implement those resolutions.

1. BOG Resolution Number 1 increasing membership fees by \$20 to fund the Casemaker® legal research service and the implementation of the recommendations of the Disciplinary System Task Force.

The Casemaker® legal research service is on track to begin on September 24, 2003. The service will be showcased at the 2003 Annual Meeting of the House of Delegates in Seaside on September 18-20.

The actions taken by the Bar to implement the recommendations of the Disciplinary System Task Force are described below under 2.

2. BOG Resolution Number 2 directing the Board of Governors to pursue and implement the recommendations of the Disciplinary System Task Force. (The final recommendations can be found on the Bar's website at www.osbar.org.)

The House of Delegates directed the Board of Governors to do twelve things recommended by the Disciplinary System Task Force:

(a) Continue studying the Oregon Code of Professional Responsibility and recommend changes that will make the rules simpler, clearer, and easier for practitioners to understand and follow.

The Board of Governors received a preliminary report from the Special Legal Ethics Committee in January 2003, followed by a final report and recommendations on June 14, 2003. The Committee recommended and the Board approved submitting to the House of Delegates a proposal to replace the existing Oregon Code of Professional Responsibility with new Oregon Rules of Professional Conduct patterned after the ABA Model Rules of Professional Conduct. The proposed new rules are the subject of BOG Resolution No. 8 in this agenda and may also be found on the Bar's website at www.osbar.org.

(b) Recommend that the Supreme Court adopt a new disciplinary rule giving consideration in disciplinary proceedings to a lawyer's reliance on bar ethics opinions as evidence of the lawyer's good faith effort to comply with the code, and as a basis for mitigation of sanctions.

The Board of Governors presented proposed DR 1-105 (Written Advisory Opinions on Professional Conduct; Consideration Given in Disciplinary Proceedings) to the Supreme Court; the Court adopted the rule on June 17, 2003, effective July 1, 2003. A bar counsel article explaining the new disciplinary rule and the Board's new policies implementing the new rule was published in the June 2003 issue of the Oregon State Bar *Bulletin*.

(c) Develop and offer Continuing Legal Education programs and support services targeted to high-risk practice areas identified by Disciplinary Counsel.

Disciplinary Counsel's Office and the CLE Seminars Department are working on future continuing legal education programming to help lawyers in high-risk practice areas avoid ethics problems.

(d) Establish a Consumer Assistance Program under General Counsel's Office to resolve minor problems between lawyers and clients that do not involve violations of disciplinary rules.

The Board of Governors promulgated new Bar Rules of Procedure to implement this directive. The rules were presented to the Supreme Court in April 2003, after which Bar representatives met with the Supreme Court twice to

discuss and refine them. The Court adopted new Bar Rules of Procedure creating a Client Assistance Office (CAO) in General Counsel's Office on July 9, 2003, effective August 1, 2003.

Since the approval of the rules, General Counsel's Office staff has developed procedures and guidelines and arranged staffing for the CAO. The CAO is managed by former Assistant Disciplinary Counsel Chris Mullmann, whose title is now Assistant General Counsel. On June 14, 2003, the Board of Governors passed a resolution committing the Bar to report periodically to the Supreme Court regarding the operation of this new program.

(e) Establish a diversion program for minor misconduct where the violation does not cause serious harm to a client, does not raise questions about the lawyer's moral fitness or integrity, and is due primarily to a personal problem that is amenable to treatment that will make it unlikely that a future violation will occur.

The Board of Governors promulgated a Bar Rule of Procedure on diversion and presented it to the Supreme Court. The Court approved the rule on July 9, 2003, with an effective date of August 1, 2003. Bar staff is currently working on the specific procedures for implementing this rule in consultation with the Oregon Attorney Assistance Program.

(f) Pursue the adoption of a statutory change to the Public Records Law that allows dismissed disciplinary complaints to be expunged from the Bar's public records after four years, but retained and made available to a petitioner if approved by a circuit court upon good cause shown.

The Board of Governors and Bar staff presented this proposal to leaders in the 2003 Legislative Assembly. The Bar was informed that this proposal would not receive a hearing considering the other significant issues facing the legislature this session, but that it could be reviewed during the interim for possible consideration by the 2005 Legislative Assembly. The legislators also felt that the Bar should address this issue through the Client Assistance Office before seeking changes in the law. The Board of Governors' Public Affairs Committee and Bar staff will continue to pursue this issue.

(g) Seek an amendment of the Bar Rules of Procedure to authorize the State Professional Responsibility Board to decline prosecution of disciplinary violations in situations where the SPRB determines that prosecution will not advance the interest of public protection.

The Board of Governors promulgated a Bar Rule of Procedure to so authorize the SPRB and presented it to the Supreme Court. The Court approved the rule on July 9, 2003, with an effective date of August 1, 2003.

(h) Create a "case manager" or "administrator" in General Counsel's Office for the Disciplinary Board, to receive and docket all formal disciplinary complaints and

subsequent pleadings; to assist the state chair of the Disciplinary Board in appointing trial panels and scheduling hearings; and to receive and distribute trial panel decisions.

The Board of Governors promulgated changes in the Bar Rules of Procedure to implement this directive and these rule changes were adopted by the Supreme Court on June 17, 2003, effective July 1, 2003. General Counsel's Office now serves as the Disciplinary Board Clerk to receive and maintain the official record in disciplinary proceedings.

(i) Establish a voluntary alternative dispute resolution process for contested disciplinary cases, similar to the "case assessment" and "mediation" models of the Oregon Dispute Resolution Commission, subject to approval in the same manner as Discipline by Consent.

The Board of Governors promulgated a new Bar Rule of Procedure on mediation and the new rule was adopted by the Supreme Court on June 17, 2003, effective July 1, 2003. Bar staff is working on procedures for the operation of the mediation program.

(j) Seek a statutory amendment to require Supreme Court review of disciplinary cases only when one party requests review.

The Board of Governors submitted this statutory change to the Legislative Assembly as a part of House Bill 2057. The bill passed and has been signed by the Governor. The change will be effective for trial panel decisions issued on or after January 1, 2004. The Board of Governors promulgated companion changes to the Bar Rules of Procedure and the Supreme Court adopted them on June 17, 2003, effective January 1, 2004.

(k) Encourage the Disciplinary Board and Supreme Court to make greater use of probation pursuant to BR 6.2 as a sanction in disciplinary cases where educational requirements, practice monitoring, representation of low-income clients or office management assistance will aid the lawyer in developing better practice habits and avoid further discipline.

Disciplinary Counsel submitted a letter to the Supreme Court regarding the use of probation and this topic was discussed with the Supreme Court in April 2003. Further consideration of the use of probation in disciplinary cases is under study to determine what kinds of probation work best and how probations are best monitored.

(l) Create a new label for initial inquiries to the Bar about lawyer conduct, and label as "disciplinary complaints" only those that have been determined to raise an actual issue of a disciplinary violation.

With the adoption of new Bar Rules of Procedure establishing the Client Assistance Office, all inquiries and complaints about lawyer conduct are screened by the CAO. Only those that raise an actual ethics issue will be referred on to Disciplinary Counsel's Office, at which

point they will be recorded as disciplinary complaints. The standard for the referral of inquiries or complaints from the CAO to Disciplinary Counsel's Office is whether the matter presents credible evidence to support an allegation that misconduct has occurred. As with records relating to Disciplinary Counsel's handling of disciplinary complaints, the records relating to CAO inquiries are subject to the Public Records Law.

3. *BOG Resolution Number 4 supporting the Public Defender Services Commission budget in the 2003 Ways and Means Committee for an appropriation sufficient to fund these goals.*

The Bar has worked hard for increased resources for the Oregon Judicial Department and the Public Defender Services Commission. A tentative legislative leadership decision has been made to increase funding for both over the Governor's Balanced Budget proposal.

4. *BOG Resolution Number 5 opposing Initiative Measure 21 regarding new procedures for appointing and electing judges.*

This measure was defeated at the polls on November 5, 2002, by a vote of 668,256 to 526,450.

5. *BOG Resolution Number 6 opposing Initiative Measure 22 requiring election of appellate judges by district.*

This measure was defeated at the polls on November 5, 2002, by a vote of 610,063 to 595,936.

6. *BOG Resolution Number 7 supporting adequate funding for legal services to low-income Oregonians.*

This resolution called upon the Bar to support a number of activities aimed at enhancing the level of legal services available to low-income Oregonians. These

efforts are being spearheaded by the Board of Governors' Access to Justice Committee and include on-going legislative efforts to increase filing fees for the benefit of legal aid programming in Oregon, encouraging Congress to increase funding for the Legal Services Corporation, assisting with increasing contributions to the Campaign for Equal Justice, and promoting pro bono service by Oregon lawyers.

7. *BOG Resolution Number 8 supporting adequate funding for the Judicial Department.*

Oregon State Bar President Charles Williamson, the entire Board of Governors and Bar staff have made this issue a key priority this year. Signs are encouraging, as of the date of this report, that the Legislative Assembly will increase funding for the Judicial Department over the Governor's Balanced Budget.

8. *Delegate Resolution Number 3 urging the Supreme Court to study electronic filing systems and procedures.*

This resolution was discussed with the Chief Justice. Considering the significant budget reductions and staff and court operations cut-backs during the last five months of the 2001-2003 biennium, the Chief Justice concluded that the study of electronic filing was not a project the Judicial Department could undertake at this time.

9. *BOG Resolution Number 9 approving new Disciplinary Rule 2-105 on the receipt of referral fees from nonlawyers.*

This new disciplinary rule was submitted to the Supreme Court and the Court adopted the rule on February 6, 2003, effective that same day.



FINAL REPORT OF THE SPECIAL LEGAL ETHICS COMMITTEE ON DISCIPLINARY RULES

(Condensed)

INTRODUCTION

The Oregon State Bar Board of Governors (BOG) created the Special Legal Ethics Rules Committee on Disciplinary Rules (“the Rules Committee”) in August 2001, following the release of the final report of the American Bar Association’s Ethics 2000 Commission (the E2K Commission). That report and its recommendations for amendments to the ABA Model Rules of Professional Conduct was the result of a comprehensive four-year study of the Model Rules, including hearings and the solicitation of comment from interested members of the bar, bench and public. Recognizing the importance of the E2K Commission’s work, the Board of Governors charged the Rules Committee with making a comprehensive study of the Oregon Code of Professional Responsibility and suggesting amendments based on the E2K Commission recommendations.

The Oregon Code was adopted in 1970, patterned after the ABA Model Code of Professional Responsibility. In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct. By 1985, a large number of jurisdictions had followed suit. In 1985, the Oregon State Bar conducted a comprehensive review of the Oregon Code and in 1986 the Oregon Supreme Court adopted wide-ranging amendments, many of which incorporated concepts and actual language of the Model Rules. In the ensuing seventeen years, additional revisions have been made to the Oregon Code on an as-needed basis; many of those changes were also based on the Model Rules.

During that same seventeen year period, the practice of law has changed dramatically. The Board of Governors recognized that it was time for a thorough study of the adequacy of the Oregon Code to regulate lawyer conduct in the new century.

THE PROCESS

The Rules Committee began its work with a general discussion of the development of the Oregon Code and the differences, perceived and real, between it and the ABA Model Rules. The Rules Committee also noted that by 2001, some version of the Model Rules has been adopted by the overwhelming majority of jurisdictions, including Oregon’s “reciprocity partners,” Washington and Idaho. The Rules Committee then identified and discussed the following reasons for and against replacing the Oregon Code with some version of the Model Rules.

Reasons for:

- Oregon is increasingly out of step with the majority of jurisdictions;
- Cross-border issues with our reciprocity partners will be easier to resolve if we all follow the same (or at least generally similar) rules;
- Having the Model Rules would give Oregon lawyers a larger base of analysis and authority,

including the official comment and national resources focusing on the Model Rules;

- There are few significant distinctions between the Code and the Model Rules, so that a change would be principally in form rather than substance;
- An increasing number of members are familiar with the Model Rules and would likely not find a change unsettling;
- The “cut and paste” approach we have used in the past of engrafting parts of the Model Rules into the Code deprives us of whatever benefit there is from the overall structure of the Model Rules, including the preamble and scope provisions.

Reasons against:

- There is a perception that the Code is stricter and has a more client-protective approach;
- Our members are familiar with our rules;
- It is not clear that the Model Rules, either in format or structure, are clearer or easier to understand.

In spite of the relatively small number of reasons that could be identified for retaining the Oregon Code, the Rules Committee chose to approach its assignment initially with the philosophy of “if it ain’t broke, don’t fix it.”

Beginning with DR 1-101, the Rules Committee compared each provision of the Oregon Code with its analogous Model Rule, adopting the Model Rule language where it appeared to be clearer and easier to understand and follow, but retaining the Oregon Code provision where no compelling reason for change was identified. After reviewing all of the DRs, the Rules Committee then looked at Model Rules that have no counterpart in the Oregon Code and determined that several of those rules should be added to the Oregon Code. The resulting draft was an amalgam in Model Code format of rules from the Model Code and the Model Rules, together with Oregon’s own distinct rules.

The Rules Committee then returned to its consideration of whether Oregon should adhere to its Code-based rules and Model Code format or replace the Oregon Code with rules patterned on the Model Rules. After consideration, there was agreement that trying to incorporate more of the Model Rules concepts into the Oregon Code created a product that was cumbersome to follow and difficult to correlate to the Model Rules, making reliance on the Comment and other authorities more difficult.

Three developments that occurred during the Rules Committee’s review process reinforced the view that Oregon should join the steady march toward the nationwide adoption of the ABA Model Rules. First, Oregon was invited to join Washington and Idaho in a joint study looking at making the disciplinary rules of the three jurisdictions more uniform. Because Washington and Idaho are Model Rules jurisdictions, the Rules Committee concluded that increasing uniformity is likely to require more change by Oregon than its reciprocity partners.

Second, the House of Delegates adopted recommendations of the Disciplinary System Task Force which included a directive that the Oregon Code be studied for ways to make it simpler and clearer. The Rules Committee believed that goal would be advanced in part by adoption of the same rules followed by the great majority

of jurisdictions, thereby increasing the body of authority available for interpretive guidance.

Finally, the Rules Committee noted that Tennessee recently became the 44th jurisdiction to adopt a version of the Model Rules in place of its Code-based rules, and that New York is conducting a review of its Code. If, as is anticipated, New York replaces its Code with a version of the Model Rules, Oregon will be one of only five jurisdictions retaining the old Model Code structure.

The Rules Committee concluded that Oregon needs to be in the mainstream of American legal ethics and that its lawyers should enjoy the benefits of a national body of case law and authority for guidance on professional conduct. This cannot be accomplished by retaining the Code-based rules merely because they are familiar, or because they are perceived to be “better” than the Model Rules, or because we cherish the reputation for doing things differently in Oregon.

On that premise, the Rules Committee undertook a second review of the disciplinary rules, this time working through the Model Rules and comparing them with their analogous Oregon Code provisions. In so doing, the Rules Committee was guided by three occasionally competing values: uniformity; retention of those aspects of the rules that are unique to Oregon or special in some other way; and having the best written rule.

Attempting to achieve uniformity generally meant following the ABA Model Rule language unless there was a compelling reason to retain the language of the Oregon Code. Compelling reason was found where a rule had been adopted or amended relatively recently after considerable study (i.e., DR 1-102(D) and DR 5-106), or where the Rules Committee believed that the Oregon rule was better-written or offered clearer guidance. The Rules Committee endeavored to avoid following the Model Rules slavishly, while also not departing from them lightly.

The Rules Committee’s recommendation does not include adoption of the official Comment to the Model Rules at this time. Nevertheless, it is the intention of the Rules Committee that the Comment be a recognized interpretive guide.

COMMENT PERIOD

The BOG gave its preliminary approval to the report in January 2003. Thereafter, the report and the proposed rules were publicized to the membership by broadcast e-mail, an article in the *Bulletin*, and by prominent placement on the OSB website. In March and April, the Rules Committee conducted six open forums around the state (one in each BOG region) to introduce and discuss the proposal with members. The Rules Committee noted the comments made at those meetings and also encouraged members to submit written comment by the end of April 2003. In May and June, the Rules Committee held four meetings to review the comments received and make adjustments to the proposal that were determined to be appropriate or desirable.

The bulk of the substantive comment came primarily from two groups: the Solo and Small Firm Practitioners (SSFP) and several of its individual members, and from the Oregon District Attorneys Association, its constituent members, the US Attorney and the Oregon Attorney

General. The SSFP expressed concerns about a variety of the proposed rules; the “prosecutor group” expressed concern primarily about Rule 3.8 and Rule 5.3, although there was some comment about Rules 4.2 and 4.4. The Rules Committee considered all of these concerns carefully, including inviting the prosecutor group to the Rules Committee’s meeting on May 14 to express its views in person.

For the most part, the SSFP comments did not result in any changes to the rules proposal. Many of the concerns reflected a misunderstanding of the settled interpretation of the existing regulation; others addressed the substance of the regulations. For instance, there was a suggestion that the dishonesty rule should be limited to the lawyer’s performance of professional duties. The Rules Committee reiterated that its goal was not to alter the substance of lawyer regulation, but to choose the better of the Oregon rule or the Model Rule formulation. As noted in the proposal, however, some minor changes were made in response to the suggestions of the SSFP members and others.

In response to the prosecutor concerns, the Rules Committee deleted two subsections of Rule 3.8, and amended Rules 4.2 and 4.4. The Rules Committee declined to make the requested change in Rule 5.3. The Rules Committee anticipates that the prosecutors and the Attorney General will renew their concerns at the House of Delegates meeting.

In anticipation of the ABA’s adoption of amendments to MR 1.13 in August 2003, the Rules Committee recommended that this proposal include the newest version of MR 1.13, which is designed to give lawyers representing organizations clearer guidance about the exercise of independent judgment without damaging the necessary collaborative relationship with corporate officers. The Rules Committee believes the amendments to MR 1.13 improve the rule and its utility to lawyers. The Rules Committee was divided on the merits of the ABA’s changes to MR 1.6 regarding disclosure of client fraud and did not recommend inclusion of it in this proposal.

CONCLUSION

The Rules Committee presents this report and its recommendation for adoption of the Oregon Rules of Professional Conduct with confidence that it is the right thing for Oregon lawyers and their clients. The Rules Committee has given each of its recommendations serious and lengthy consideration and has attempted to bring as much variety of opinion to the analysis as possible.

Finally, the members of the Rules Committee express their appreciation to the Board of Governors for the opportunity to participate in this challenging and important project.

Respectfully submitted, June 14, 2003 by Nancy M. Cooper (Chair); Lianne Butterfield, Michael Caro, Mark Fucile, Arden Olson, Stephen Moore, John Svoboda and Sylvia E. Stevens (Staff Liaison).

PROPOSED
OREGON RULES OF PROFESSIONAL CONDUCT
CONTENTS

<p><i>PREAMBLE AND SCOPE</i>..... 11</p> <p> Preamble: A Lawyer’s Responsibilities 11</p> <p> Scope 11</p> <p> Rule 1.0 Terminology 12</p> <p><i>CLIENT-LAWYER RELATIONSHIP</i> 13</p> <p> Rule 1.1 Competence 13</p> <p> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer..... 14</p> <p> Rule 1.3 Diligence 14</p> <p> Rule 1.4 Communication 14</p> <p> Rule 1.5 Fees 14</p> <p> Rule 1.6 Confidentiality of Information..... 15</p> <p> Rule 1.7 Conflict of Interest: Current Clients 15</p> <p> Rule 1.8 Conflict of Interest: Current Clients: Specific Rules 16</p> <p> Rule 1.9 Duties to Former Clients 17</p> <p> Rule 1.10 Imputation of Conflicts of Interest; Screening 18</p> <p> Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees 18</p> <p> Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral..... 19</p> <p> Rule 1.13 Organization as Client 20</p> <p> Rule 1.14 Client with Diminished Capacity..... 20</p> <p> Rule 1.15 Safekeeping Property 21</p> <p> Rule 1.16 Declining or Terminating Representation..... 22</p> <p> Rule 1.17 Sale of Law Practice 22</p> <p> Rule 1.18 Duties to Prospective Client 23</p> <p><i>COUNSELOR</i>..... 23</p> <p> Rule 2.1 Advisor..... 23</p> <p> Rule 2.2 Reserved..... 23</p> <p> Rule 2.3 Evaluation for Use by Third Persons..... 24</p> <p> Rule 2.4 Lawyer Serving as Mediator..... 24</p> <p><i>ADVOCATE</i>..... 24</p> <p> Rule 3.1 Meritorious Claims and Contentions 24</p> <p> Rule 3.2 Expediting Litigation..... 24</p> <p> Rule 3.3 Candor Toward the Tribunal 24</p> <p> Rule 3.4 Fairness to Opposing Party and Counsel 25</p> <p> Rule 3.5 Impartiality and Decorum of the Tribunal..... 25</p> <p> Rule 3.6 Trial Publicity 26</p> <p> Rule 3.7 Lawyer as Witness..... 26</p> <p> Rule 3.8 Special Responsibilities of a Prosecutor..... 27</p> <p> Rule 3.9 Advocate in Nonadjudicative Proceedings 27</p>	<p><i>TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS</i>..... 27</p> <p> Rule 4.1 Truthfulness in Statements to Others 27</p> <p> Rule 4.2 Communication with Person Represented by Counsel 27</p> <p> Rule 4.3 Dealing with Unrepresented Persons 27</p> <p> Rule 4.4 Respect for the Rights of Third Persons..... 28</p> <p><i>LAW FIRMS AND ASSOCIATIONS</i>..... 28</p> <p> Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers 28</p> <p> Rule 5.2 Responsibilities of a Subordinate Lawyer 28</p> <p> Rule 5.3 Responsibilities Regarding Nonlawyer Assistants 28</p> <p> Rule 5.4 Professional Independence of a Lawyer..... 29</p> <p> Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice 29</p> <p> Rule 5.6 Restrictions on Right to Practice..... 30</p> <p> Rule 5.7 [Reserved]..... 30</p> <p><i>PUBLIC SERVICE</i>..... 30</p> <p> Rule 6.1 [Reserved]..... 30</p> <p> Rule 6.2 [Reserved]..... 30</p> <p> Rule 6.3 Membership in Legal Services Organization 30</p> <p> Rule 6.4 Law Reform Activities Affecting Client Interests..... 31</p> <p> Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs..... 31</p> <p><i>INFORMATION ABOUT LEGAL SERVICES</i>..... 31</p> <p> Rule 7.1 Communication Concerning a Lawyer’s Services 31</p> <p> Rule 7.2 Advertising 32</p> <p> Rule 7.3 Direct Contact with Prospective Clients 32</p> <p> Rule 7.4 [Reserved]..... 33</p> <p> Rule 7.5 Firm Names and Letterheads 33</p> <p> Rule 7.6 [Reserved]..... 33</p> <p><i>MAINTAINING THE INTEGRITY OF THE PROFESSION</i>..... 33</p> <p> Rule 8.1 Bar Admission and Disciplinary Matters 33</p> <p> Rule 8.2 Judicial and Legal Officials 34</p> <p> Rule 8.3 Reporting Professional Misconduct 34</p> <p> Rule 8.4 Misconduct..... 34</p> <p> Rule 8.5 Disciplinary Authority; Choice of Law..... 35</p> <p> Rule 8.6 Written Advisory Opinions on Professional Conduct; Consideration Given in Disciplinary Proceedings 35</p>
--	--

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as

substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

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

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

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

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas

under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption

in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Preamble and this note on Scope provide general orientation, but the text of each Rule is authoritative.

Committee Notes

The Preamble and Scope provisions, like the official Comment, have no corollary in the Oregon Code. In contrast to the Ethical Considerations that accompanied the former Canons of Professional Ethics and which suggested aspirational standards other than articulated in the disciplinary rules, the Preamble, Scope and Comment provide context for and explanation of the Model Rules. The Rules Committee decided against recommending adoption of the official Comment to the Model Rules at this time. However, the Rules Committee recommends adoption of these Preamble and Scope provisions because they express the overall theory and structure of the Model Rules and will be particularly helpful to Oregon practitioners in connection with the migration from the Oregon Code to this new ethics rules structure.

The Preamble and Scope provisions here are identical to the Model Rules provisions as amended in February 2002 to include the Ethics 2000 Commission recommendations. However, since the Rules Committee is not recommending adoption of the Comment, references to the Comment have been deleted from paragraph [21].

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (h) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Electronic communication" includes but is not limited to messages sent to newsgroups, listservs and bulletin boards; messages sent via electronic mail; and real time interactive communications such as conversations in internet chat groups and conference areas and video conferencing.

(d) "Financial institution" denotes those institutions defined in ORS 706.005.

(e) "Firm" or "law firm" denotes a lawyer or lawyers, including "Of Counsel" lawyers, in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization or the legal department of a corporation or other

public or private organization. Any other lawyer, including an office sharer or a lawyer working for or with a firm on a limited basis, is not a member of a firm absent indicia sufficient to establish a de facto law firm among the lawyers involved.

(f) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(g) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former 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.

(h) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

(i) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question, except that for purposes of determining a lawyer's knowledge of the existence of a conflict of interest, all facts which the lawyer knew, or by the exercise of reasonable care should have known, will be attributed to the lawyer. A person's knowledge may be inferred from circumstances.

(j) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

(k) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

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

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

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

(o) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

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

(q) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(r) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including

handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Committee Notes

Comparison to Oregon Code

This rule replaces DR 10-101 and is significantly more expansive. Some DR 10-101 definitions were retained, but others were not incorporated into this rule.

The definition of "firm member" was eliminated on the ground that it was not necessary under the new rules on conflicts and imputed disqualification, although a reference to "of counsel" was retained in the definition of "firm." The definition of "firm" also distinguishes office sharers and lawyers working in a firm on a limited basis.

The concept of "full disclosure" is replaced by "informed consent," which, in some cases, must be "confirmed in writing."

The definition of "professional legal corporation" was deleted, as the term does not appear in any of the rules and does not require explanation.

The definitions of "person" and "state" were also eliminated as being unnecessary.

Comparison to ABA Model Rule

The Oregon Code definition of "electronic communication" has been carried over to the ORPC because it was adopted relatively recently in response to a perceived need for clarification in that area.

The Rules Committee also added a definition for "information relating to the representation of a client" to make it clear that the adoption of MR 1.6 continues protection of the same kinds of information protected by DR 4-101 and the term is defined with the DR definitions of confidences and secrets.

The definition of "firm" was revised to include a reference to "of counsel" lawyers. The definition of "knowingly, known or knows" was revised to include language from DR 5-105(B) regarding knowledge of the existence of a conflict of interest.

The definition of "matter" was moved to this rule from MR 1.11 on the belief that it has a broader application than to only former government lawyer conflicts. The MR definition of "writing" has been expanded to include "facsimile" communications.

CLIENT-LAWYER RELATIONSHIP

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.

Committee Notes

Comparison to Oregon Code

This rule is identical to DR 6-101(A).

Comparison to ABA Model Rule

This is the ABA Model Rule.

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

(a) Subject to paragraphs (b) and (c), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Committee Notes

Comparison to Oregon Code

The Rules Committee believes this rule offers helpful guidance to lawyers on important issues relating to the allocation of authority between lawyer and client. Although the rule has no real counterpart in the Oregon Code, subsection (a) is similar to DR 7-101(A) and (B) but expresses more clearly that lawyers must defer to the client's decisions about the objectives of the representation and whether to settle a matter.

Subsection (b) is a helpful clarification of the lawyer's right to limit the scope of a representation. Subsection (c) is similar to DR 7-102(A)(7), but recognizes that counseling a client about the meaning of a law or the consequences of proposed criminal or fraudulent conduct is not the same as assisting the client in such conduct.

Comparison to ABA Model Rule

The Rules Committee did not recommend adoption of ABA Model Rule 1.2(b), which states 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," because it is not a rule of discipline, but rather a statement intended to encourage lawyers to represent unpopular clients.

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Committee Notes

Comparison to Oregon Code

This rule is similar to DR 6-101(B), which requires that a lawyer "not neglect a legal matter entrusted to the client." The Rules Committee preferred the affirmative standard of Rule 1.3 and also believes it avoids any confusion between "neglect" and "negligence." The Rules Committee considered and rejected a proposal to create an exception to this rule for lawyers handling indigent defense appeals who by necessity seek numerous extensions of the time to file their briefs. The Rules Committee's decision reflects its view that requesting a legitimate extension of time to file a brief does not constitute

neglect; it is the failure to file the brief within the time allowed that might constitute neglect. The Rules Committee also concluded that creating exceptions in the disciplinary rules is not the proper avenue to address the issue of overburdened defense lawyers.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.4 COMMUNICATION

(a) A lawyer shall:

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

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

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

(4) promptly comply with reasonable requests from the client for information; and

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

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

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although the duty to communicate with a client may be inferred from other rules and from the law of agency. The Rules Committee believes a clear expression of the lawyer's obligation in this regard will be helpful.

Comparison to ABA Model Rule

This is the ABA Model Rule, with the addition of the words "from the client" in paragraph (a)(4) to clarify the scope of the obligation. ABA MR 1.4 incorporates provisions previously found in MR 1.2; it also specifically identifies five aspects of the duty to communicate.

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee or a clearly excessive amount for expenses.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge or collect:

- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support or a property settlement; or
- (2) a contingent fee for representing a defendant in a criminal case.

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (2) the total fee is not clearly excessive.

(e) Paragraph (d) does not prohibit payments to a former firm member pursuant to a separation or retirement agreement, or payments to a selling lawyer for the sale of a law practice pursuant to Rule 1.17.

Committee Notes

Comparison with Oregon Code

Paragraphs (a), (b) and (c) are taken directly from DR 2-106, except that paragraph (a) is amended to include the Model Rule prohibition against charging a “clearly excessive amount for expenses.” Paragraph (d) is similar to DR 2-107(A), with the additional requirements that the client consent to the share of the fee each lawyer will receive and that the client’s consent be in writing. Paragraph (e) is essentially identical to DR 2-107(B).

Comparison with ABA Model Rule

ABA Model Rule 1.5(b) requires that the scope of the representation and the basis or rate of the fees or expenses for which the client will be responsible be communicated to the client before or within a reasonable time after the representation commences, “preferably in writing.” Model Rule 1.5(c) sets forth specific requirements for a contingent fee agreement, including an explanation of how the fee will be determined and the expenses for which the client will be responsible. It also requires a written statement showing distribution of all funds recovered. Model Rule 1.5(e) permits a division of fees between lawyers only if it is proportional to the services performed by each lawyer or if the lawyers assume joint responsibility for the representation.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (3) to secure legal advice about the lawyer's compliance with these Rules;

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

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

Committee Notes

Comparison with Oregon Code

This rule replaces DR 4-101(A) through (C). The most significant difference is that the Model Rule requires protection of “information relating to the representation of a client” rather than “confidences and secrets.” Because the Model Rule does not have a definition of “information relating to the representation of a client,” the Rules Committee created a definition in Rule 1.0 that incorporates the definitions of “confidences” and “secrets” to make it clear that the scope of the lawyer’s duty is unchanged under this new rule. Paragraph (a) includes the exceptions for client consent found in DR 4-101(C)(1) and allows disclosures “impliedly authorized” to carry out the representation, which is similar to the exception in DR 4-101(C)(2).

The exceptions to the duty of confidentiality set forth in paragraph (b) incorporate those found in DR 4-101(C)(2) through (C)(5). There are also two new exceptions not found in the Oregon Code: disclosures to prevent “reasonably certain death or substantial bodily harm” whether or not the action is a crime, and disclosures to obtain legal advice about compliance with the Rules of Professional Conduct.

Comparison with ABA Model Rule

ABA Model Rule 1.6 does not have an exception for disclosing the client’s intent to commit a crime (other than a crime that will result in “reasonably certain death or substantial bodily harm”). There is no counterpart in the Model Rule for information relating to the sale of a law practice.

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
- (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter

adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

Committee Notes

Comparison to Oregon Code

The concurrent conflicts of interest prohibited in paragraph (a) are the self-interest conflicts currently prohibited by DR 5-101(A) and current client conflicts prohibited by DR 5-105(E). Paragraph (a)(2) refers only to a "personal interest" of a lawyer, rather than the specific "financial, business, property or personal interests" enumerated in DR 5-101(A)(1). Paragraph (a)(3) incorporates the "family conflicts" from DR 5-101(A)(2).

Paragraph (b) parallels DR 5-101(A) and DR 5-105(F) in permitting a representation otherwise prohibited if the affected clients give informed consent, which must be confirmed in writing. The Rules Committee believes that a clear requirement for consent confirmed in writing is an improvement over the language of DR 10-101 which can be read to require only a "contemporaneous confirmation" of the disclosure of the risk, but not of the client's consent. Paragraph (b)(3) incorporates the "actual conflict" definition of DR 5-105(A)(1) to make it clear that a lawyer cannot provide competent and diligent representation to clients in that situation.

Paragraph (b) also allows consent to simultaneous representation "not prohibited by law," which has no counterpart in the Oregon Code. According to the official Comment to MR 1.7 this would apply, for instance, in jurisdictions that prohibit a lawyer from representing more than one defendant in a capital case, to certain representations by former government lawyers, or when local law prohibits a government client from consenting to a conflict of interest.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, except for the addition of paragraphs (a)(3) and (b)(3) discussed above. The Model Rule allows the clients to consent to a concurrent conflict if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the

advice of independent legal counsel on the transaction; and

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

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

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the client maintains a close familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, provided the client remains ultimately liable for such expenses to the extent of the client's ability to pay.

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

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information related to the representation of a client is protected as required by Rule 1.6.

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

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement;
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
- (3) enter into any agreement with a client regarding arbitration of malpractice claims without informed consent, in a writing signed by the client; or
- (4) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or to pursue any complaint before the bar's disciplinary authority.

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

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

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

(j) A lawyer shall not have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them before the lawyer/client relationship commenced; or have sexual relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation. For purposes of this rule:

(1) "sexual relations" means sexual intercourse or any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the lawyer for the purpose of arousing or gratifying the sexual desire of either party; and
(2) "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

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

Committee Notes

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, although it incorporates prohibitions found in several separate disciplinary rules.

Paragraph (a) replaces DR 5-104(A). The Rules Committee preferred the Model Rule approach which prohibits business transactions with clients even with consent except where the transaction is "fair and reasonable" to the client. The Rules Committee also favors the express requirement to disclose the lawyer's role and whether the lawyer is representing the client in the transaction.

Paragraph (b) is virtually identical to DR 4-101(B).

Paragraph (c) is similar to DR 5-101(B), but broader because it prohibits soliciting a gift as well as preparing the instrument. It also has a more inclusive list of "related persons."

Paragraph (d) is identical to DR 5-104(B).

Paragraph (e) retains the prohibition in DR 5-103(B). The Rules Committee rejected a request to adopt the Model Rule that allows lawyers to pay costs for indigent clients and to have the repayment of other costs contingent on recovery. A similar proposal was considered and rejected by the House of Delegates in recent years, reflecting the membership's preference for the Oregon rule.

Paragraph (f) replaces DR 5-108(A) and (B) and is essentially the same as it relates to accepting payment from someone other than the client. The Rules Committee believes that the clear direction to protect confidential client information is helpful. This rule is somewhat narrower than DR 5-108(B), which prohibits allowing influence from someone who "recommends, employs or pays" the lawyer.

Paragraph (g) is virtually identical to DR 5-107(A).

Paragraph (h)(1) and (2) are similar to DR 6-102(A), but do not include the "unless permitted by law" language. Paragraph (h)(3) retains DR 6-102(B), but substitutes "informed consent, in a writing signed by the client" for "full disclosure." Paragraph (h)(4) is new and was taken from Illinois Rule of Professional Conduct 1.8(h).

Paragraph (i) is essentially the same as DR 5-103(A).

Paragraph (j) retains DR 5-110, reformatted to conform to the structure of the rule.

Paragraph (k) applies the same vicarious disqualification to these personal conflicts as provided in DR 5-105(G).

Comparison to ABA Model Rule

This rule is identical to ABA Model Rule 1.8 with the following exceptions. In paragraph (b), the Rules Committee added a requirement that the client's informed consent be confirmed in writing to retain the standard in DR 4-101(B). Paragraph (e) is taken from DR 5-103(B) and requires that the client be responsible for costs advanced by the lawyer "to the extent of the client's ability to pay." Paragraph (h) contains an additional provision from DR 6-102(B) regarding agreements to arbitrate malpractice claims. Paragraph (j) retains DR 5-110 instead of the Model Rule formulation, which does not address sexual relations with representatives of corporate clients and does not contain definitions of important terms.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Committee Notes

Comparison to Oregon Code

This rule replaces DR 5-105(C), (D) and (H). Like Rule 1.7, this rule is a significant departure from the language and structure of the Oregon Code on conflicts. Here, too, however, the Rules Committee believes that adoption of the Model Rule offers a clearer and easier analytical framework to reach the same result. Paragraph (a) replaces the confusing reference to "actual or likely conflict" between current and former client with the simpler "interests [that are] materially adverse." The prohibition applies to matters that are the same or "substantially related," which is virtually identical to the Oregon Code standard of "significantly related."

Paragraph (b) replaces the limitation of DR 5-105(H), but is a clearer expression of the prohibition. The new language makes it clear that a lawyer who moves to a new firm is prohibited from being adverse to a client of the lawyer's former firm only if the lawyer has acquired confidential information material to the matter while at the former firm.

Paragraph (c) makes clear that the duty not to use confidential information to the client's disadvantage continues after the conclusion of the representation, except where the

information "has become generally known." Some interpretations of DR 5-105(C) suggest that information in the "public record" is not a secret of a client; the Rules Committee believes the "generally known" standard is preferable.

Comparison to ABA Model Rule

Consistent with DR 5-105(D), the Rules Committee has modified the ABA Model Rule to require in paragraphs (a) and (b) that "each affected client" give informed consent, rather than only "the former client."

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in them matter. For purposes of this rule, screening requires that:

- (1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;
- (2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and
- (3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if

all firm members having knowledge of the accepted employment do not know of the disqualification.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Committee Notes

Comparison with Oregon Code

Paragraph (a) is similar to the vicarious disqualification provisions of DR 5-105(G), except that it does not apply when the disqualification is based only on a "personal interest" of the disqualified lawyer that will not limit the ability of the other lawyers in the firm to represent the client.

Paragraph (b) is substantially the same as DR 5-105(J).

Paragraph (c) retains the provisions of DR 5-105(H) and (I) allowing screening to avoid disqualification of a firm when a lawyer joining the firm is personally disqualified from a representation.

Paragraph (d) is similar to DR 5-105 in allowing clients to consent to what would otherwise be imputed conflicts.

Paragraph (e) has no counterpart in the Oregon Code because the Oregon Code does not have a special rule addressing government lawyer conflicts.

Comparison to ABA Model Rule

Paragraphs (a) and (b) are identical to the ABA Model Rule. Paragraph (c) has no equivalent in the Model Rule; screening is limited in the Model Rules to certain situations under Rules 1.11 and 1.12 and does not apply generally.

The title has been changed to include "Screening."

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as Rule 1.12 or law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9 (c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not 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. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by

law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

- (i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.
- (ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.
- (iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.
- (iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.
- (v) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the lawyer's former client and the appropriate government agency give informed consent, confirmed in writing; or
- (vi) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) Notwithstanding any Rule of Professional Conduct, and consistent with the "debate" clause, Article IV, section 9, of the Oregon Constitution, or the "speech or debate" clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.

(f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:

- (1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10 (the required affidavits shall be served on the Attorney General); and
- (2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Committee Notes

Comparison to Oregon Code

This rule has no exact counterpart in the Oregon Code, under which the responsibilities of government lawyers are addressed in DR 5-109 and DR 8-101, as well as in the general conflict limitations of DR 5-105. This rule puts all the requirements for government lawyers in one place.

Paragraph (a) is essentially the same as DR 5-109(B).

Paragraph (b) imputes a former government lawyer's unconsented-to conflicts to the new firm unless the former government lawyer is screened from participation in the matter, as would be allowed under DR 5-105(I).

Paragraph (c) is new and prohibits use of confidential information about a person adversely to that person. The definition of "confidential government information" is the same as in DR 8-101(A)(4)(a). It also allows screening of the disqualified lawyer to avoid disqualification of the entire firm.

Paragraph (d) applies concurrent and former client conflicts to lawyers currently serving as a public officer or employee; it also incorporates in (d)(2) (i)–(iv) the limitations in DR 8-101(A)(1)-(4), with the addition in (d)(2)(iv) of language from MR 1.11 that a lawyer is prohibited from using only that government information that the lawyer knows is confidential. Paragraph (d)(2)(v) is the converse of DR 5-109(B), and has no counterpart in the Oregon Code other than the general former client conflict provision of DR 5-105. Paragraph (d)(2)(vi) has no counterpart in the Oregon Code; it is an absolute bar to negotiating for private employment while a serving in a non-judicial government position.

Paragraph (e) is taken from DR 8-101(C) to retain a relatively recent addition to the Oregon Code.

Paragraph (f) is taken from DR 8-101(D), also to retain a relatively recent addition to the Oregon Code.

Comparison to ABA Model Rule

Paragraph (a) is identical to the ABA Model Rule, with the addition of a cross-reference to Rule 1.12, to clarify the scope of the rule.

Paragraphs (b) and (c) are identical to the Model Rule, except that the limitation on apportionment of fees does not apply when a former government lawyer is disqualified and screened from participation in a matter. The Rules Committee decided not to adopt this limitation, finding no compelling evidence that sharing fees with a disqualified lawyer will adversely affect the firm's loyalty or zealous representation of the client. This rule also requires screening substantially in accordance with Rule 1.10(c) rather than leaving it to the firm to devise "timely...procedures that are reasonably adequate," in accordance with the ABA Model Rule 1.0 definition of screening.

Paragraphs (d)(2)(i)-(iv) are not found in the Model Rules; as discussed above, they are taken from DR 8-101(A). Paragraph (d)(2)(v) is modified to require consent of the Lawyer's former client as well as the appropriate government agency, to continue the Oregon Code requirement of current and former client consent in such situations.

Paragraph (e) has no counterpart in the Model Rules. The Rules Committee chose to include this provision because it was recently adopted after careful study and consideration by the membership, the House of Delegates and the Supreme Court.

Paragraph (f) also has no counterpart in the Model Rules and was retained because of its recent adoption. The Rules Committee noted the different treatment of former government lawyers under paragraphs (b) and (c), which do not require the screened lawyer to forego a share of the fee. The Rules Committee concluded that the constitutional underpinning for (f) justifies the different treatment of lawyer-legislators.

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

(a) Except as stated in Rule 2.4(b) and in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person

or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

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

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter substantially in accordance with the procedures set forth in Rule 1.10(c); and
- (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

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

Committee Notes

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 5-109(A), with an exception created for lawyers serving as mediators under Rule 2.4(b).

Paragraph (b) has no equivalent rule in the Oregon Code; like Rule 1.11(d)(2)(vi) it address the conflict that arises when a person serving as, or as a clerk to, a judge or other third party neutral, negotiates for employment with a party or a party's lawyer. This situation is covered under DR 5-101(A), but its application may not be as clear.

Paragraph (c) applies the vicarious disqualification that would be imposed under DR 5-105(G) to a DR 5-109 conflict; the screening provision is broader than DR 5-105(I), which is limited to lawyers moving between firms.

Paragraph (d) has no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule, except that it requires screening substantially in accordance with the specific procedures in Rule 1.10(c).

RULE 1.13 ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the

highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d),

(1) if despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. The Rules Committee believes this rule provides important guidance about the obligations of lawyers representing organizations. The rule permits, but does not require, disclosure of the client's violation of law if the lawyer believes disclosure is necessary to prevent substantial injury to the organization.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended on August 13, 2003.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably

necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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

Committee Notes

Comparison to Oregon Code

Paragraph (b) is similar to DR 7-101(C), but in the opinion of the Rules Committee offers a clearer statement of the circumstances when a lawyer can take protective action in regard to a client. Paragraph (a) and (b) have no counterparts in the Oregon Code, but provide helpful guidance for lawyers representing clients with diminished capacity.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property. Funds, including advances for costs and expenses and escrow and other fund held for another, shall be kept in a separate "Lawyer Trust Account" maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Each lawyer trust account shall be an interest bearing account in a financial institution selected by the lawyer or law firm in the exercise of reasonable care. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a lawyer trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a lawyer trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) A lawyer or law firm who receives client funds which are so nominal in amount, or are expected to be held for such a short period of time, that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest bearing lawyer trust account for such funds in compliance with the following requirements:

(1) the lawyer trust account shall be maintained in compliance with paragraphs (a) through (e) of this rule;

(2) no earnings from the lawyer trust account shall be made available to the lawyer or law firm;

(3) all earnings from the lawyer trust account, net of any transaction costs, shall be remitted to the Oregon Law Foundation; and

(4) the lawyer trust account shall be operated in accordance with such other operating regulations and procedures as may be established by the Oregon State Bar with the approval of the Oregon Supreme Court.

(g) All client funds shall be deposited in the lawyer trust account specified in paragraph (f) unless they are deposited in:

(1) a separate interest bearing lawyer trust account for a specific and individual matter for a particular client. There shall be a separate lawyer trust account opened for each such particular matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in paragraphs (a) through (d) of this rule for the principal funds of the client; or

(2) a pooled interest bearing lawyer trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net of any transaction costs, to each client. Interest so earned must be held in trust as property of each client in the same manner as is provided in (a) through (d) of this rule for the principal funds of the client.

(h) In determining whether to use a lawyer trust account specified in paragraph (f) or a lawyer trust account specified in paragraph (g), a lawyer or law firm shall consider:

(1) the amount of interest which the funds would earn during the period they are expected to be deposited;

(2) the cost of establishing and administering the lawyer trust account, including the cost of the lawyer or law firm's services; and

(3) the capability of the financial institution to calculate and pay interest to individual clients.

(i) Lawyers engaged in the private practice of law shall permit their lawyer trust accounts to be maintained only in financial institutions which enter into an agreement with the Oregon State Bar requiring the financial institution to report to the Oregon State Bar Disciplinary Counsel when any properly payable instrument is presented against such account containing insufficient funds, whether or not the instrument is honored

(j) Overdraft notification agreements with financial institutions shall require that the following information be provided in writing to Disciplinary Counsel within ten banking days of the date the item was returned unpaid:

(1) the identity of the financial institution;

(2) the identity of the lawyer or law firm;

(3) the account number; and

(4) either (i) the amount of the overdraft and the date it was created; or (ii) the amount of the returned instrument and the date it was returned.

(k) Agreements between financial institutions and the Oregon State Bar shall apply to all branches of the financial institution and shall not be canceled except upon a thirty-day notice in writing to Disciplinary Counsel.

(l) Nothing in this rule shall preclude financial institutions which participate in any trust account overdraft notification program from charging lawyers or law firms for the reasonable costs incurred by the financial institutions in participating in such program.

(m) Every lawyer who receives notification from a financial institution that any instrument presented against his or her

lawyer trust account was presented against insufficient funds, whether or not the instrument was honored, shall promptly notify Disciplinary Counsel in writing of the same information required by paragraph (j). The lawyer shall include a full explanation of the cause of the overdraft.

Committee Notes

Comparison to Oregon Code

Paragraphs (a)-(e) contain all of the elements of DR 9-101(A)-(C) and (D)(1), albeit in slightly different order. The rule is broader than DR 9-101 in that it also applies to the property of prospective clients and third persons received by a lawyer. Paragraph (c) makes it clear that fees and costs paid in advance must be held in trust until earned.

Paragraphs (f)-(h) incorporate the IOLTA provisions in DR 9-101(D), with slight changes to conform the formatting.

Paragraphs (i)-(m) incorporate the trust account overdraft notification provisions of DR 9-102, with slight changes to conform the formatting. It should be noted that the trust account overdraft program, including review of overdraft notices, continues to be handled by Disciplinary Counsel's Office and not by the newly-created Client Assistance Office that reviews all other complaints and inquiries about lawyer conduct.

Comparison to ABA Model Rule

Paragraph (a) has been modified slightly. The Model Rule applies only to property held "in connection with a representation," while Oregon's rule continues to apply to all property, regardless of the capacity in which it is held by the lawyer. The rule also retains Oregon's requirement that funds be held separately in a "Lawyer Trust Account." The Rules Committee has also inserted language from DR 9-101(D)(1) requiring the account to be selected by the lawyer "in the exercise of reasonable care."

Paragraphs (b) and (c) also require that funds be held in a "lawyer trust account" rather than a "client trust account."

The Model Rule has no equivalent to paragraphs (f) through (m) regarding IOLTA and the trust account overdraft notification program.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been

given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Committee Notes

Comparison to Oregon Code

This rule is essentially the same as DR 2-110, except that it specifically applies to declining a representation as well as withdrawing from representation. Paragraph (a) parallels the circumstances in which DR 2-110(B) mandates withdrawal, and also includes when the client is acting "merely for the purpose of harassing or maliciously injuring" another person, which is prohibited in DR 2-109(A)(1) and DR 7-102(A)(1).

Paragraph (b) is similar to DR 2-110(C) regarding permissive withdrawal. It allows withdrawal for any reason if it can be accomplished without "material adverse effect" on the client. Withdrawal is also allowed if the lawyer considers the client's conduct repugnant or if the lawyer fundamentally disagrees with it.

Paragraph (c) is like DR 2-110(A)(1) in requiring compliance with applicable law requiring notice or permission from the tribunal; it also clarifies the lawyer's obligations if permission is denied.

Paragraph (d) incorporates DR 2-110(A)(2) and (3). The final sentence has no counterpart in the Oregon Code; it recognizes the right of a lawyer to retain client papers to the extent permitted by other law. The "other law" includes statutory lien rights as well as court decisions determining lawyer ownership of certain papers created during a representation. A lawyer's right under other law to retain papers remains subject to other obligations, such as the lawyer's general fiduciary duty to avoid prejudicing a former client, which might supercede the right to claim a lien.

Comparison with ABA Model Rule

This is the ABA Model Rule.

RULE 1.17 SALE OF LAW PRACTICE

(a) A lawyer or law firm may sell or purchase all or part of a law practice, including goodwill, in accordance with this rule.

(b) The selling lawyer, or the selling lawyer's legal representative, in the case of a deceased or disabled lawyer, shall provide written notice of the proposed sale to each current client whose legal work is subject to transfer, by certified mail, return receipt requested, to the client's last known address. The notice shall include the following information:

- (1) that a sale is proposed;
- (2) the identity of the purchasing lawyer or law firm, including the office address(es), and a brief description

of the size and nature of the purchasing lawyer's or law firm's practice;

(3) that the client may object to the transfer of its legal work, may take possession of any client files and property, and may retain counsel other than the purchasing lawyer or law firm;

(4) that the client's legal work will be transferred to the purchasing lawyer or law firm, who will then take over the representation and act on the client's behalf, if the client does not object to the transfer within forty-five (45) days after the date the notice was mailed; and

(5) whether the selling lawyer will withdraw from the representation not less than forty-five (45) days after the date the notice was mailed, whether or not the client consents to the transfer of its legal work.

(c) The notice may describe the purchasing lawyer or law firm's qualifications, including the selling lawyer's opinion of the purchasing lawyer or law firm's suitability and competence to assume representation of the client, but only if the selling lawyer has made a reasonable effort to arrive at an informed opinion.

(d) If certified mail is not effective to give the client notice, the selling lawyer shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in subsection (B).

(e) A client's consent to the transfer of its legal work to the purchasing lawyer or law firm will be presumed if no objection is received within forty-five (45) days after the date the notice was mailed.

(f) If substitution of counsel is required by the rules of a tribunal in which a matter is pending, the selling lawyer shall assure that substitution of counsel is made.

(g) The fees charged clients shall not be increased by reason of the sale except upon agreement of the client.

(h) The sale of a law practice may be conditioned on the selling lawyer's ceasing to engage in the private practice of law or some particular area of practice for a reasonable period within the geographic area in which the practice has been conducted.

Committee Notes

Comparison to Oregon Code

This rule continues DR 2-111 which, when adopted in 1995 was derived in large part from Model Rule 1.17.

Comparison to ABA Model Rule

The Model Rule requires sale of the entire practice or practice area, and also requires that the selling lawyer cease to engage in the private practice of law, or the area of practice sold, within a certain geographic area. The Model Rule gives the client 90 days to object before it will be presumed the client has consented to the transfer of the client's files. The Model Rule requires notice to all clients, not only current clients, but does not require that it be sent by certified mail. The Model Rule does not address the selling lawyer's right to give an opinion of the purchasing lawyer's qualifications. The Model Rule does not allow for client consent to an increase in the fees to be charged as a result of the sale.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall

not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the prospective client.

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. It is consistent with the rule of lawyer-client privilege that defines a client to include a person "who consults a lawyer with a view to obtaining professional legal services." OEC 503(1)(a). The rule also codifies a significant body of case law and other authority that has interpreted the duty of confidentiality to apply to prospective clients.

Comparison to ABA Model Rule

This is the ABA Model Rule.

COUNSELOR

RULE 2.1 ADVISOR

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

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code, although it codifies the concept of exercising independent judgment that is fundamental to the role of the lawyer and which is mentioned specifically in DRs 2-103, 5-101, 5-104, 5-108 and 7-101.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.2 RESERVED

Committee Notes

Former ABA Model Rule 2.2 on the role of lawyers as "intermediaries" was repealed in 2002; this number is reserved for future amendments and to conform to the ABA Model Rule numbering.

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

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

Committee Notes

Comparison to Oregon Code

This rule is similar to DR 7-101(D), which was adopted in 1997 based on former ABA Model Rule 2.3. Paragraph (b) is new in 2002 to require client consent only when the evaluation poses a risk of material and adverse affect on the client. Under paragraph (a), when there is no such risk, the lawyer needs only to determine that the evaluation is compatible with other aspects of the relationship. Paragraph (c) substitutes "authorized" for "required" to more accurately characterize the disclosures made in connection with an evaluation.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 2.4 LAWYER SERVING AS MEDIATOR

(a) A lawyer serving as a mediator:

- (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and
- (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as mediator.

(b) A lawyer serving as a mediator:

- (1) may prepare documents that memorialize and implement the agreement reached in mediation;
- (2) shall recommend that each party seek independent legal advice before executing the documents; and
- (3) with the consent of all parties, may record or may file the documents in court.

(c) Notwithstanding Rule 1.10, when a lawyer is serving or has served as a mediator in a matter, a member of the lawyer's firm may accept or continue the representation of a party in the matter in mediation or in a related matter if all parties to the mediation give informed consent, confirmed in writing.

(d) The requirements of Rule 2.4(a)(2) and (b)(2) shall not apply to mediation programs established by operation of law or court order.

Committee Notes

Comparison to Oregon Code

This rule retains DR 5-106, except that the requirement in (c) for consent after full disclosure has been changed to require informed consent, confirmed in writing.

Comparison to ABA Model Rule

ABA Model Rule 2.4 applies to a lawyer serving as a "third-party neutral," including arbitrator, mediator or in "such other capacity as will enable the lawyer to assist the parties to resolve the matter." It requires that the lawyer inform unrepresented

parties that the lawyer is not representing them and, when necessary, explain the difference in the role of a third-party neutral. The Model Rule does not address the lawyer's drafting of documents to implement the parties' agreement, or the circumstances in which a member of the lawyer's firm can represent a party.

ADVOCATE

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established.

Committee Notes

Comparison to Oregon Code

This rule is similar to DR 2-109(A)(2) and DR 7-102(A)(2), although neither Oregon rule expressly confirms the right of a criminal defense to defend in a manner that requires establishment of every element of the case.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 3.2 EXPEDITING LITIGATION

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

Committee Notes

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;
- (4) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal; or
- (5) knowingly engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, unless compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Committee Notes

Comparison to Oregon Code

Paragraph (a)(1) is similar to DR 7-102(A)(5), but also requires correction of a previously made statement that turns out to be false.

Paragraph (a)(2) is the same as DR 7-106(B)(1).

Paragraph (a)(3) combines the prohibition in DR 7-102(A)(4) against presenting perjured testimony or false evidence with the remedial measures required in DR 7-102(B). The rule clarifies that only materially false evidence requires remedial action. While the rule allows a criminal defense lawyer to refuse to offer evidence the lawyer reasonably believes is false, it recognizes that the lawyer must allow a criminal defendant to testify. Only if the lawyer know the criminal defendant's testimony is the lawyer precluded from offering it.

Paragraphs (a)(4) and (5) are the same as DR 7-102(A)(3) and (8), respectively.

Paragraph (b) is similar to and consistent with the interpretations of DR 7-102(B)(1).

Paragraph (c) makes it clear that the duty of candor continues to the end of the proceeding, but that, notwithstanding the language in paragraphs (a)(3) and (b), does not require disclosure of confidential client information otherwise protected by Rule 1.6.

Paragraph (d) has no equivalent in the Oregon Code.

Comparison to ABA Model Rule

Subsections (4) and (5) have been added to paragraph (a) of the Model Rule. Also, paragraph (c) has been amended to provide that the duties apply "unless" information protected by Rule 1.6 must be disclosed, so that the rule maintains Oregon's tradition of never requiring a lawyer to disclose confidential information about a client. The Model Rule requires disclosure "even if" confidential information must be disclosed.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence; counsel or assist a witness to testify falsely; offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case; except that a lawyer may advance, guarantee or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for the witness' loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(g) threaten to present criminal charges to obtain an advantage in a civil matter unless the lawyer reasonably believes the charge to be true and if the purpose of the lawyer is to compel or induce the person threatened to take reasonable action to make good the wrong which is the subject of the charge.

Committee Notes

Comparison to Oregon Code

Paragraph (a) is similar to DR 7-109(A).

Paragraph (b) includes the rules regarding witness contact from DR 7-109, and also the prohibition against falsifying evidence that is found in DR 7-102(A)(6).

Paragraph (c) is generally equivalent to DR 7-106(C)(7).

Paragraph (d) has no equivalent in the Oregon Code.

Paragraph (e) is the same as DR 7-106(C)(1), (3) and (4).

Paragraph (f) is similar to DR 7-109(B).

Paragraph (g) retains DR 7-105.

Comparison to ABA Model Code

Paragraphs (a) and (c) through (f) are the Model Code. Paragraph (b) has been amended to retain the specific rules regarding contact with witnesses from DR 7-109, beginning with "...or pay..." Paragraph (g) does not exist in the Model Code, but the Rules Committee concluded that this was the proper place to retain DR 7-105.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

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

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

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

- (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment;
- (d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

Committee Notes

Comparison to Oregon Code

Paragraph (a) has no counterpart in the Oregon Code.

Paragraph (b) replaces DR 7-110, making ex parte contact subject only to law and court order, without additional notice requirements.

Paragraph (c) is similar to DR 7-108(A)-(F).

Paragraph (d) is similar to DR 7-106(C)(6).

Paragraph (e) retains the DR 7-108(G).

Comparison to ABA Model Rule

This is the ABA Model Rule, with the addition of paragraph (e), which has no counterpart in the Model Rule.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may:

(1) make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(2) reply to charges of misconduct publicly made against the lawyer.

(3) participate in the proceedings of legislative, administrative or other investigative bodies.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) A lawyer shall exercise reasonable care to prevent the lawyer's employees from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

Committee Notes

Comparison with Oregon Code

Paragraph (a) replaces DR 7-107(A). Although DR 7-107 was amended in 1997, the Rules Committee departed from its general practice of retaining recently amended rules because of its strongly held conclusion that the ABA Model Rule was clearer and easier to understand.

Paragraph (b) has no counterpart in the Oregon Code; the Rules Committee believes it provides helpful guidance to assist lawyers in conforming their public statements to the limitations of the rule.

Paragraph (c)(1) has no counterpart in the Oregon Code; paragraphs (c)(2) and (3) retains the exceptions in DR 7-107(B) and (C).

Paragraph (d) applies the limitation of the rule to other members in the subject lawyer's firm or government agency; DR 7-107(c) requires lawyers to exercise reasonable care that their employees do not make prohibited statements.

Comparison with ABA Model Rule

This is the ABA Model Rule, with the addition of paragraphs (c)(2) and (3) from DR 7-107(B) and (C).

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer's client unless:

(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) disqualification of the lawyer would work a substantial hardship on the client.

(4) the lawyer is appearing pro se.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness on behalf of the lawyer's client.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the lawyer's firm may be called as a witness other than on behalf of the lawyer's client, the lawyer may continue the representation until it is apparent that the lawyer's or firm member's testimony is or may be prejudicial to the lawyer's client.

Committee Notes

Comparison with Oregon Code

This rule retains DR 5-102 in its entirety.

Comparison with ABA Model Rule

This rule is similar to the ABA Model Rule. Paragraph (a) of the Model Rule applies only when the lawyer is likely to be a necessary witness. In the Model Rule, paragraph (b) does not apply if the witness lawyer will be required to disclose information protected by Rule 1.6 or 1.9. Paragraph (c) has no counterpart in the Model Rule.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, unless the accused is appearing pro se with approval of the tribunal or has knowingly waived any rights to counsel and silence;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Committee Notes

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 7-103(A).

Paragraph (d) is essentially the same as DR 7-103(B), with the addition of an exception for protective orders.

Paragraphs (b) and (c) have no counterpart in the Oregon Code. The Rules Committee believes this rule is a better expression of the special obligation of public prosecutors to balance their duty as an advocate with their duty to administer justice.

Comparison to ABA Model Rule

The ABA Model Rule contains two additional provisions that were disfavored by Oregon's prosecutors. Paragraph (e) of the Model Rule prohibits a prosecutor from subpoenaing a lawyer to present evidence about current or past clients except when the information is unprivileged, necessary to successful completion of an ongoing investigation or prosecution, and there is no other feasible means of obtaining the information.

Paragraph (f) prohibits the prosecutor from making extrajudicial public statements that will heighten public condemnation of the accused; it also requires prosecutors to exercise reasonable care that other people assisting or associated with the prosecutor do not make extrajudicial public statements that the prosecutor is prohibited from making by Rule 3.6. Except for the second part of (f), neither of these additional provisions is widely adopted in other jurisdictions.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. The Rules Committee believes it is appropriate to ensure that lawyers in nonadjudicative matters adhere to the same ethical standards required of lawyers representing clients at trial.

Comparison to ABA Model Rule

This is the ABA Model Rule.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Committee Notes

Comparison to Oregon Code

This rule has no direct counterpart in Oregon, but it expresses prohibitions found in DR 1-102(A)(3), DR 7-102(A)(5) and DR 1-102(A)(7).

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client or the lawyer's own interests, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject unless:

- (a) the lawyer has the prior consent of a lawyer representing such other person;
- (b) the lawyer is authorized by law or by court order to do so; or
- (c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer.

Committee Notes

Comparison to Oregon Code

This rule retains the language of DR 7-104(A), except that the phrase "or on directly related subjects" has been deleted. The Rules Committee also moved "or the lawyer's own interests" to the beginning of the rule to highlight the application of the rule in that circumstance.

Comparison to ABA Model Rule

This rule is very similar to the ABA Model Rule, except that the Model Rule does not apply expressly to a lawyer acting in the lawyer's own interest. The Model Rule also makes no exception for communication required by a written agreement.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an

unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

Committee Notes

Comparison to Oregon Code

This rule replaces DR 7-104(B). It is expanded to parallel Rule 4.1 by applying to situations in which the lawyer is representing the lawyer's own interests. The rule is broader than DR 7-104(B) in that it specifically prohibits a lawyer from stating or implying that the lawyer is disinterested. It also imposes an affirmative requirement on the lawyer to correct any misunderstanding an unrepresented person may have about the lawyer's role. The rule continues the prohibition against giving legal advice to an unrepresented person.

Comparison to ABA Model Rule

This is essentially identical to the ABA Model Rule, with the addition "or the lawyers own interests" at the beginning and end to make it clear that the rule applies even when the lawyer is not acting on behalf of a client.

RULE 4.4 RESPECT FOR THE RIGHTS OF THIRD PERSONS

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

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

Committee Notes

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code, although paragraph (a) incorporates aspects of DR 7-102(A)(1). Paragraph (b) codifies the conclusion of the ABA Formal Opinions 92-368 and 94-382 and in OSB Formal Op. No. 1998-150.

Comparison to ABA Model Rule

This is the ABA Model Rule, with the addition of the modifier "knowingly" in paragraph (a) to make it clear that a lawyer is not responsible for inadvertently violating the legal rights of another person in the course of obtaining evidence.

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) 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.

(c) A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:

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

Committee Notes

Comparison to Oregon Code

Paragraphs (a) and (b) have no counterpart in the Oregon Code.

Paragraph (c) is essentially the same as DR 1-102(B) although it specifically applies to partners or others with comparable managerial authority, as well as lawyers with supervisory authority.

Comparison to ABA Model Rule

This is the ABA Model rule.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) 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.

Committee Notes

Comparison to Oregon Code

Paragraph (a) is identical to DR 1-102(C).

Paragraph (b) has no equivalent in the Oregon Code. It has been adopted verbatim in nearly every Model Rules jurisdiction. The committee believes that the exception is sufficiently narrow and that it recognizes the authority of a supervising lawyer to make decisions about a questionable course of action. It will not relieve the subordinate lawyer if a question of professional duty can be answered clearly in only one way.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. Paragraph (b) is somewhat similar to the requirement in DR 4-101(D), but broader because not limited to disclosure of confidential client information.

Paragraph (c) applies the requirements of DR 1-102(B) to nonlawyer personnel. An exception by cross-reference to Rule 8.4(b) is included to avoid conflict with the rule that was formerly DR 1-102(D).

Comparison to ABA Model Rule

This is the ABA Model Rule, with the addition of “except as provided in 8.4(b)” in paragraph (c), to avoid any conflict with the provisions of DR 1-102(D), which have been incorporated in these Rules as Rule 8.4(b).

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm or firm members may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price.
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.
 - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation, except as authorized by law; or

- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not refer a client to a nonlawyer with the understanding that the lawyer will receive a fee, commission or anything of value in exchange for the referral, but a lawyer may accept gifts in the ordinary course of social or business hospitality.

Committee Notes

Comparison to Oregon Code

Paragraph (a)(1) is the same as DR 3-102(A)(1). Paragraph (a)(2) is similar to DR 3-102(A)(2), except that it addresses the purchase of a deceased, disabled or departed lawyer's practice and payment of an agreed price, rather than only authorizing reasonable compensation for services rendered by a deceased lawyer. Paragraph (a)(3) is identical to DR 3-102(A)(3).

Paragraph (a)(4) has no counterpart in the Oregon Code.

Paragraph (b) is identical to DR 3-103.

Paragraph (c) is identical to DR 5-108(B).

Paragraph (d) is essentially identical to DR 5-108(D).

Paragraph (e) is the same as DR 2-105, approved by the Supreme Court in April 2003.

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of paragraph (e), which has no counterpart in the Model Rule.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
 - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
 - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
 - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
 - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or
 - (5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Committee Notes

Comparison to Oregon Code

Paragraph (a) contains the same prohibitions as DR 3-101(A) and (B).

Paragraphs (b), (c) and (d) have no counterpart in the Oregon Code.

Comparison to ABA Model Rule

This rule is taken from ABA Model Rule 5.5. Paragraphs (a), (b) and (c)(1) through (c)(4) are identical to the Model Rule. This rule deviates from the Model Rule by allowing temporary practice by in-house counsel in paragraph (c)(5), whereas Model Rule 5.5(d)(1) allows “systematic and continuous presence” of in-house counsel. The Committee did not recommend adoption of Model Rule 5.5(d)(1) because it conflicts with Rules for Admission of Attorneys Rule 16.05 adopted by the Oregon Supreme Court in November 2001. The Oregon rule retains the substance of MR 5.5(d)(2), which permits systematic and continuous presence to render legal services that are authorized by federal or other law.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a direct or indirect restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Committee Notes

Comparison to Oregon Code

Paragraph (a) is similar to DR 2-108(A), but in addition to partnership or employment agreements, includes shareholders, operating “or other similar type of agreement” in recognition of the fact that lawyers associate together in organizations other than traditional law firm partnerships.

Paragraph (b) is similar to DR 2-108(B), but the Rules Committee added the words “direct or indirect” to encompass other agreements that might be made in the course of settlement but are not strictly “settlement agreements” or part of the settlement between the parties.

Comparison to ABA Model Rule

This is the ABA Model Rule with the addition of the words “direct or indirect” in paragraph (b) discussed above.

RULE 5.7 [RESERVED]

Committee Notes

ABA Model Rule 5.7, entitled Responsibilities Regarding Law-Related Services, addresses the obligations of a lawyer who provides other services in circumstances not distinct from the lawyer's provision of legal services. The Model Rule has been adopted by only a handful of jurisdictions. At least in part because the OSB House of Delegates has indicated a desire not to pursue multidisciplinary practice issues, the Rules Committee

concluded that the rule has limited applicability and that its inclusion in the ORPC would not add anything of value.

PUBLIC SERVICE

RULE 6.1 [RESERVED]

Committee Notes

ABA Model Rule 6.1 is an aspirational *pro bono* standard. The committee initially recommended including such a standard, although its recommendation was for a rule based on the Washington rule and not the ABA Model Rule. Several members commented that aspiration rules have no place in a regulatory code. Based on those comments, the committee voted to delete the proposed rule.

RULE 6.2 [RESERVED]

Committee Notes

ABA Model Rule 6.2, entitled Accepting Appointments, is an aspirational standard that encourages lawyers not to avoid court-appointed cases except for good cause, such as when the representation is likely to result in a violation of the Rules of Professional Conduct, the representation is likely to be an unreasonable financial burden on the lawyer, or when the client's cause is so repugnant to the lawyer that it is likely to impair the lawyer's ability to represent the client.

The Rules Committee concluded that this rule is unnecessary in view of Oregon's indigent defense system, in which appointments are made only to lawyers who have indicated a willingness to accept them.

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer's.

Committee Notes

Comparison to Oregon Code

This rule is similar to DR 5-108(C), which requires lawyers serving on legal service program boards to avoid influencing decisions of the legal aid attorneys and to avoid participating in decisions of the board that might involve a potential conflict of interest with a client of the lawyer. The rule also requires lawyers employed by legal aid to avoid permitting the relationship with board members to influence their judgment if the opposing party in a case is represented by the board member. Finally, DR 5-108(C) requires lawyers to avoid influencing the legal aid program in a way that will benefit the lawyer's client differently in kind or degree from members of the general public.

The Rules Committee believes that this rule is a clearer expression of the appropriate limits on the participation of a lawyer on a legal services organization board, with reference to specific conflict of interest rules.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interest of a client of the lawyer. When the lawyer knows that the interest of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Committee Notes

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code. The Rules Committee recommends its adoption because it is a useful corollary to Rule 6.3.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is subject to Rule 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
- (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Committee Notes

Comparison to Oregon Code

This rule has no equivalent in the Oregon Code. It was adopted by the ABA in 2002 to address concerns that strict application of conflict of interest rules might be deterring lawyers from volunteering in programs that provide short-term limited legal services to clients under the auspices of a nonprofit or court-annexed program. The Rules Committee believes this rule will alleviate any such concerns by clarifying the conflict limitations.

Comparison to ABA Model Rule

This is the ABA Model Rule.

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make or cause to be made any communication about the lawyer or the lawyer's firm, whether in person, in writing, electronically, by telephone or otherwise, if the communication:

- (1) contains a material misrepresentation of fact or law, or omits a statement of fact or law necessary to make the

communication considered as a whole not materially misleading; or

(2) is intended or is reasonably likely to create a false or misleading expectation about results the lawyer or the lawyer's firm can achieve; or

(3) except upon request of a client or potential client, compares the quality of the lawyer's or the lawyer's firm's services with the quality of the services of other lawyers or law firms; or

(4) states or implies that the lawyer or the lawyer's firm specializes in, concentrates a practice in, limits a practice to, is experienced in, is presently handling or is qualified to handle matters or areas of law if the statement or implication is false or misleading; or

(5) states or implies an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; or

(6) contains any endorsement or testimonial, unless the communication clearly and conspicuously states that any result that the endorsed lawyer or law firm may achieve on behalf of one client in one matter does not necessarily indicate that similar results can be obtained for other clients; or

(7) states or implies that one or more persons depicted in the communication are lawyers who practice with the lawyer or the lawyer's firm if they are not; or

(8) states or implies that one or more persons depicted in the communication are current clients or former clients of the lawyer or the lawyer's firm if they are not, unless the communication clearly and conspicuously discloses that the persons are actors or actresses; or

(9) states or implies that one or more current or former clients of the lawyer or the lawyer's firm have made statements about the lawyer or the lawyer's firm, unless the making of such statements can be factually substantiated; or

(10) contains any dramatization or recreation of events, such as an automobile accident, a courtroom speech or a negotiation session, unless the communication clearly and conspicuously discloses that a dramatization or recreation is being presented; or

(11) is false or misleading in any manner not otherwise described above; or

(12) violates any other Rule of Professional Conduct or any statute or regulation applicable to solicitation, publicity or advertising by lawyers.

(b) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must be clearly and conspicuously identified as an advertisement unless it is apparent from the context that it is an advertisement.

(c) An unsolicited communication about a lawyer or the lawyer's firm in which services are being offered must clearly identify the name and post office box or street address of the office of the lawyer or law firm whose services are being offered.

(d) A lawyer may pay others for disseminating or assisting in the dissemination of communications about the lawyer or the lawyer's firm only to the extent permitted by Rule 7.2.

(e) A lawyer may not engage in joint or group advertising involving more than one lawyer or law firm unless the advertising complies with Rules 7.1, 7.2, and 7.3 as to all involved lawyers or law firms. Notwithstanding this rule, a bona fide lawyer referral service need not identify the names and addresses of participating lawyers.

Committee Notes

Comparison to Oregon Code

The Rules Committee opted to retain most of Oregon's rules on advertising in their current form. The rules were comprehensively reviewed and amended in 1992 and the Rules Committee concluded it is too soon to sweep away all of that effort in the absence of compelling reason to do so.

Paragraph (a) retains DR 2-101(A), except that DR 2-101(A)(5) prohibits statements or implication that the lawyer can improperly influence a "court or other public body or official." The language in (a)(5) is taken from ABA Model Rule 8.4(e) and is identical to DR 1-102(A)(5).

The Rules Committee dropped the requirement in DR 2-101(B) that records of communications about a lawyer or the lawyer's services be retained for two years from dissemination. The ABA deleted a similar provision in 2002, concluding that the retention requirement was increasingly and unnecessarily burdensome to lawyers. To the extent that such records will provide a defense to a disciplinary rule violation, the Rules Committee believes that choice should be left to the lawyer.

Paragraph (b) retains DR 2-101(C).

Paragraph (c) retains DR 2-101(E).

Paragraph (d) retains DR 2-101(F).

Paragraph (e) retains DR 2-101(G).

Comparison to ABA Model Rule

ABA Model Rule 7.1 is much shorter and less specific. It prohibits a lawyer from making false or misleading communications about the lawyer or the lawyer's services and defines a false or misleading communication as one that contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement not materially misleading.

RULE 7.2 ADVERTISING

(a) A lawyer may pay the cost of advertisements permitted by these rules and may hire employees or independent contractors to assist as consultants or advisors in marketing a lawyer's or law firm's services. A lawyer shall not otherwise compensate or give anything of value to a person or organization to promote, recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except as permitted by paragraph (c) or Rule 1.17.

(b) A lawyer shall not request or knowingly permit a person or organization to promote, recommend or secure employment by a client through any means that involves false or misleading communications about the lawyer or the lawyer's firm. If a lawyer learns that employment by a client has resulted from false or misleading communications about the lawyer or the lawyer's firm, the lawyer shall so inform the client.

(c) A lawyer or law firm may be recommended, employed or paid by, or cooperate with, a prepaid legal services plan, lawyer referral service, legal service organization or other similar plan, service or organization so long as:

- (1) the operation of such plan, service or organization does not result in the lawyer or the lawyer's firm violating Rules 5.4, Rule 5.5, ORS 9.160, or ORS 9.500 through 9.520; and
- (2) the recipient of legal services, and not the plan, service or organization, is recognized as the client; and
- (3) no condition or restriction on the exercise of any participating lawyer's professional judgment on behalf of a client is imposed by the plan, service or organization; and

(4) such plan, service or organization does not make communications that would violate Rule 7.3 if engaged in by the lawyer.

Committee Notes

Comparison to Oregon Code

This rule retains DR 2-103 in its entirety, except that the references in (c)(4) are limited to Rule 7.3.

Comparison to ABA Model Rule

ABA Model Rule 7.2(a) permits advertising through written, recorded or electronic communication, including public media, subject to the requirements of Rule 7.1 and 7.3.

ABA Model Rule 7.2(b) is similar to DR 2-103(A). It prohibits a lawyer from compensating a person for recommending the lawyer's services, but allows a lawyer to pay the cost of advertisements allowed by the Rules, to pay the usual charges of a legal service or referral plan, or to purchase a practice under Rule 1.17. MR 7.2(b)(4) allows a lawyer to refer clients to a lawyer or nonlawyer professional under a reciprocal referral agreement if the agreement is not exclusive and the client is informed of the existence and nature of the reciprocal agreement.

ABA Model Rule 7.2(c) requires that communications under the rule include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

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

- (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the prospective client is such that the person could not exercise reasonable judgment in employing a lawyer;
- (2) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (3) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertisement" in noticeable and clearly readable fashion on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraph (a).

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

Committee Notes

Comparison to Oregon Code

Paragraph (a) is similar to and replaces DR 2-104(A)(1) and (2), although this rule prohibits personal solicitation of a client only when pecuniary gain is a significant motive of the lawyer.

Paragraph (b) is similar to DR 2-101(D).

Paragraph (c) is essentially the same as DR 2-101(H).

Paragraph (d) is the same as to DR 2-104(A)(3).

Comparison to ABA Model Rule

Paragraphs (a) and (d) are the Model Rule.

Paragraph (b) is the Model Rule with the addition of (b)(1) from DR 2-101(D).

Paragraph (c) is the Model Rule, with the addition of "in noticeable and clearly readable fashion" to incorporate Oregon's requirement that "Advertisement" be larger and darker than the type used for the text of the communication.

RULE 7.4 [RESERVED]

Committee Notes

ABA Model Rule 7.4, Communication of Fields of Practice and Specialization, allows lawyers to communicate the areas in which they practice but prohibits a lawyer from stating or implying a specialty unless the lawyer is certified by an organization recognized by state authority or by the ABA. Because the Rules Committee recommends retaining the provisions of DR 2-101(A)(4) in Rule 7.1(a)(4), this rule is unnecessary.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer may use professional announcement cards, office signs, letterheads, telephone and electronic directory listings, legal directory listings or other professional notices so long as the information contained therein complies with Rule 7.1 and other applicable Rules.

(b) A lawyer may be designated "Of Counsel" on a letterhead if the lawyer has a continuing professional relationship with a lawyer or law firm, other than as a partner or associate. A lawyer may be designated as "General Counsel" or by a similar professional reference on stationery of a client if the lawyer or the lawyer's firm devotes a substantial amount of professional time in the representation of the client.

(c) A lawyer in private practice:

(1) Shall not practice under a name that is misleading as to the identity of the lawyer or lawyers practicing under such name or under a name that contains names other than those of lawyers in the firm.

(2) May use a trade name in private practice if the name does not state or imply a connection with a governmental agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(3) May use in a firm name the name or names of one or more of the retiring, deceased or retired members of the firm or a predecessor law firm in a continuing line of succession. The letterhead of a lawyer or law firm may give the names and dates of predecessor firms in a continuing line of succession and may designate the firm or a lawyer practicing in the firm as a professional corporation.

(d) Except as permitted by paragraph (c), a lawyer shall not permit his or her name to remain in the name of a law firm or to be used by the firm during the time the lawyer is not actively and regularly practicing law as a member of the firm. During

such time, other members of the firm shall not use the name of the lawyer in the firm name or in professional notices of the firm. This rule does not apply to periods of one year or less during which the lawyer is not actively and regularly practicing law as a member of the firm if it was contemplated that the lawyer would return to active and regular practice with the firm within one year.

(e) Lawyers shall not hold themselves out as practicing in a law firm unless the lawyers are actually members of the firm.

(f) Subject to the requirements of paragraph (c), a law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of the firm members in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

Committee Notes

Comparison to Oregon Code

This rule retains DR 2-102 in its entirety.

Comparison to ABA Model Rule

Paragraph (a) of ABA Model Rule encompasses the same provisions as paragraphs (a) and (c)(2) of this rule. Paragraph (b) of the Model Rule is essentially the same as paragraph (f) of this rule. Paragraph (c) of the Model Rule is similar to paragraph (d) of this rule, but without the "one year" exception. Paragraph (d) of the Model Rule is essentially the same as paragraph (e) of this rule.

RULE 7.6 [RESERVED]

Committee Notes

ABA Model Rule 7.6, entitled Political Contributions to Obtain Government Legal Engagements or Appointments by Judges, prohibits a lawyer from making political contributions for the purpose of obtaining legal engagements or appointments. The Rules Committee could find no compelling reason to add this rule to the Oregon Rules of Professional Conduct.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

(a) An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with disciplinary matter, shall not:

(1) knowingly make a false statement of material fact; or

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

(b) A lawyer admitted to practice in this state shall, within 30 days after receiving notice thereof, report in writing to the disciplinary counsel of the Oregon State Bar the commencement against the lawyer of any disciplinary proceeding in any other jurisdiction.

(c) A lawyer who is the subject of a complaint or referral to the State Lawyers Assistance Committee shall, subject to the exercise of any applicable right or privilege, cooperate with the committee and its designees, including:

(1) responding to the initial inquiry of the committee or its designees;

- (2) furnishing any documents in the lawyer's possession relating to the matter under investigation by the committee or its designees;
- (3) participating in interviews with the committee or its designees; and
- (4) participating in and complying with a remedial program established by the committee or its designees.

Committee Notes

Comparison to Oregon Code

Paragraph (a) replaces DR 1-101, but is broader because the Oregon rule applies only to misconduct in connection with the lawyer's own or another person's application for admission. This formulation incorporates DR 1-103(B) and (C) regarding a lawyer's duty to cooperate in investigations of the lawyer's own conduct or the conduct of others. DR 1-103(B) specifically requires cooperation with investigations of judicial misconduct; the Rules Committee believes that the reference to lawyer here is sufficient to include judges.

Paragraph (b) is the same as DR 1-103(D). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Paragraph (c) is the same as DR 1-103(F). It is placed here because it pertains to the obligations of a lawyer regarding the lawyer's own professional conduct.

Comparison to ABA Model Rule

Paragraph (a) is identical to Model Rule 8.1. Paragraphs (b) and (c) have no counterpart in the Model Rules and are taken from the Oregon Code.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to a judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Committee Notes

Comparison to Oregon Code

Paragraph (a) is essentially the same as DR 8-102(A) and (B), although the Oregon rule prohibits "accusations" rather than "statements" and applies only to statements about the qualifications of the person. Also, the Oregon rule applies only to judicial candidates, judges or other adjudicative officers.

Paragraph (b) is essentially the same as DR 8-103.

Comparison to ABA Model Rule

This is the ABA Model Rule.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform Oregon State Bar Client Assistance Office.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or ORS 9.460(3), or apply to lawyers who obtain such knowledge or evidence while:

- (1) acting as a member, investigator, agent, employee or as a designee of the State Lawyers Assistance Committee; or
- (2) acting as a board member, employee, investigator, agent or lawyer for or on behalf of the Professional Liability Fund or as a Board of Governors liaison to the Professional Liability Fund; or
- (3) participating in the loss prevention programs of the Professional Liability Fund, including the Oregon Attorney Assistance Program.

Committee Notes

Comparison to Oregon Code

This rule replaces DR 1-103(A) and (E). Paragraph (a) is essentially the same as DR 1-103(A), although the exception for confidential client information is found in paragraph (c). Also, the rule now requires that misconduct be reported to the OSB Client Assistance Office, to conform to changes in the Bar Rules of Procedure that were effective August 1, 2003.

Paragraph (b) has no counterpart in the Oregon Code, although the obligation might be inferred from DR 1-103(A).

Paragraph (c) incorporates the exception for information protected by rule and statute. It also incorporates the exception contained in DR 1-103(E).

Comparison to ABA Model Rule

This is essentially the ABA Model Rule, expanded slightly. Paragraph (c) includes a reference to ORS 9.460(3) to parallel the exceptions in DR 1-103(A). Paragraph (c) in the Model Rule refers only to "information gained...while participating in an approved lawyer assistance program."

RULE 8.4 MISCONDUCT

(a) It is professional misconduct for a lawyer to:

- (1) 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;
- (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) engage in conduct that is prejudicial to the administration of justice; or
- (5) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these disciplinary rules. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Committee Notes

Comparison to Oregon Code

This rule is essentially the same as DR 1-102(A), the so-called “catch-all provision” of misconduct not specifically prohibited elsewhere in the Rules. Paragraph (a)(1) of this rule prohibits attempts as well as actual violations.

Paragraphs (a)(2), (a)(3) and (a)(4) are the same as DR 1-102(A)(2), (A)(3) and (A)(4).

DR 1-102(A)(5), which prohibits stating or implying the ability to influence improperly a government agency or official has been moved to Rule 7.1 on the Rules Committee’s conclusion that it fit better in the rule governing advertising and communication about the lawyer’s services.

Paragraphs (a)(5) is new and has no equivalent in the Oregon Code.

Paragraph (b) retains DR 1-102(D).

Comparison to ABA Model Rule

Paragraphs (a)(1) through (5) are the same as Model Rule 8.4(a) through (d) and (f).

The Model Rule contains the “influence improperly a government agency of official” language that has been moved to Rule 1.7 in these Rules.

Paragraph (b) has no counterpart in the Model Rules.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Committee Notes

Comparison to Oregon Code

This rule has no counterpart in the Oregon Code. A similar version based on *former* ABA Model Rule 8.5 was adopted by the Supreme Court in 1996 as Bar Rule of Procedure 1.4.

BR 1.4(a) specifically provides that the Supreme Court’s jurisdiction over a lawyer’s conduct continues whether or not the lawyer retains authority to practice law in Oregon and regardless of where the lawyer resides.

BR 1.4(b)(1) is essentially the same as 8.5(b)(1).

BR 1.4(b)(2) applies the Oregon Code if the lawyer is licensed only in Oregon. If the lawyer is licensed in Oregon and another jurisdiction, the rules of the jurisdiction in which the lawyer principally practices apply, or if the conduct has its predominant effect in another jurisdiction in which the lawyer is licensed, then the rules of that jurisdiction will apply.

Comparison to ABA Model Rule

This is the ABA Model Rule, as amended in 2002 in conjunction with the adoption of the amendments to Rule 5.5 regarding multijurisdictional practice. As amended, the rule applies to lawyers not licensed in the jurisdiction if they render or offer to render any legal services in the jurisdiction. The Rules Committee recommends adoption of the Model Rule to enhance uniformity and facilitate compliance by lawyers with cross-border practices.

RULE 8.6 WRITTEN ADVISORY OPINIONS ON PROFESSIONAL CONDUCT; CONSIDERATION GIVEN IN DISCIPLINARY PROCEEDINGS

(a) The Oregon State Bar Board of Governors may issue formal written advisory opinions on questions under this code. The Oregon State Bar Legal Ethics Committee and General Counsel’s Office may also issue informal written opinions on questions under these Rules. The General Counsel’s Office of the Oregon State Bar shall maintain records of both OSB formal and informal ethics opinions and shall make copies of each available to the Oregon Supreme Court, Disciplinary Board, State Professional Responsibility Board, and Disciplinary Counsel. The General Counsel’s Office may also disseminate the bar’s advisory opinions as it deems appropriate to its role in educating lawyers about these Rules.

(b) In considering alleged violations of these Rules, the Disciplinary Board and Oregon Supreme Court may consider any lawyer’s good faith effort to comply with an opinion issued under paragraph (a) of this rule as:

- (1) a showing of the lawyer’s good faith effort to comply with these Rules; and
- (2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of these Rules.

(c) This rule is not intended to, and does not, preclude the Disciplinary Board or the Oregon Supreme Court from considering any other evidence of either good faith or basis for mitigation in a bar disciplinary proceeding.

Committee Notes

Comparison to Oregon Code

This rule was approved by the Supreme Court effective July 1, 2003 as DR 1-105. It is amended only to refer to “General Counsel’s Office” in the second sentence of paragraph (a), rather than only to “General Counsel,” to make it clear that opinions of assistant general counsel are covered by the rule. The rule is similar to JRs 6-101 and 6-102 of the Oregon Code of Judicial Conduct.

Comparison to ABA Model Rule

This rule has no counterpart in the Model Rules.



5200 S. W. Meadows Road
P. O. Box 1689
Lake Oswego, OR 97035-0889

Presorted
First-Class Mail
U. S. Postage
PAID
Portland, OR
Permit NO. 341