

2016 Delaware Trust Conference
“Songs in the Key of Wealth!”
October 25th & 26th, 2016

**“PRIVATE EYES” –
ATTORNEY CLIENT PRIVILEGE IN THE
TRUST WORLD**

A discussion about the attorney client privilege as it applies to the trust industry. How does it apply between trustee and outside counsel and between trustee and inside counsel.

Donald F. Parsons, Jr., Esq.
Senior Counsel
Morris Nichols Arsht & Tunnell LLP

S. Thomas Davidson, JD
Director Trust Administration
RBC Trust Company (Delaware) Ltd.

W. Donald Sparks, II, Esq.
Director
Richards Layton & Finger, PA

The authors gratefully acknowledge the assistance of Janice M. Matier, Esq., an associate at Richards, Layton & Finger, in connection with the preparation of these materials.

“Private Eyes” – Attorney Client Privilege in the Trust World

TABLE OF CONTENTS

I. Privilege vs. Confidentiality1

II. Confidentiality and Privilege in the Trust Context5

III. The Fiduciary Exception to Privilege in Delaware (and Beyond...).....6

IV. Practical Application for Administering Delaware Trusts14

V. Case Study.....15

APPENDIX.....17

“Private Eyes” – Attorney Client Privilege in the Trust World

I. Privilege vs. Confidentiality

A. Confidentiality

1. All lawyers have a duty to keep client information confidential.
2. The public policy consideration underlying the confidentiality rule is that “people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.” Preamble to the Delaware Lawyers’ Rules of Professional Conduct (“DLRPC”).
3. DLRPC Rule 1.6(a) provides “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).” Paragraph (b) provides a narrow list of circumstances under which it may be necessary to reveal information, such as to prevent reasonably certain death or substantial bodily harm or to comply with a court order.
4. It is a “fundamental principle in the client lawyer relationship” that the lawyer must not reveal information relating to the representation. Delaware Lawyers’ R. Prof’l Conduct 1.6 cmt. 2. (emphasis added).
5. Note that revealing information is prohibited absent informed client consent, not just discouraged.
6. The rules highlight that confidentiality applies to all information relating to the representation, whatever its source, not only matters communicated to the lawyer by the client. Delaware Lawyers’ R. Prof’l Conduct 1.6 cmt. 3.
7. Confidentiality is a matter of professional ethics and responsibility such that violation of the rules regarding confidentiality can subject a lawyer to discipline by the Office of Disciplinary Counsel.

B. Privilege

1. Generally, privilege refers to the ability of a person involved in a legal proceeding to refuse to disclose, and to prevent others from disclosing, certain communications that would otherwise be required to be disclosed. The attorney client privilege is an evidentiary rule intended to promote the policies underlying the confidentiality rules applicable to attorneys.¹ The

¹ The term “privilege” will be used throughout these materials in reference to the attorney-client privilege. A discussion of other types of privilege (such as accountant privilege, spousal privilege, or religious privilege) is beyond the scope of these materials.

purpose of the rules regarding privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

2. Privilege in the United States traces its roots to the common law of England, and is “the oldest of the privileges for confidential communications known to the common law.” *Id.* (citing 8 J. Wigmore, *Evidence in Trials at Common Law* §2290 (McNaughton Rev. 1961)). *See also Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 524 (Del. Ch. 1970) (“Attorney-client privilege is established law in Delaware, not by statute but by application of common law principles.”).
3. Since privilege rules are a function of state and federal common law, they vary from jurisdiction to jurisdiction. In addition to the common law developed in each jurisdiction, the relevant rules of evidence also often address privilege determinations.
4. The United States Supreme Court has stated the general rule for privilege as “[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.” *Fisher v. United States*, 425 U.S. 391 (1976) (citing 8 J. Wigmore, *Evidence in Trials at Common Law* §2292 (McNaughton Rev. 1961)).
5. In the landmark case of *U.S. v. United Shoe Machinery Corp.*, the Court set out a four part test for determining when privilege applies: “if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.” *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357 (D. Mass. 1950).
6. The Delaware Rules of Evidence provide in Rule 502 that privilege applies to “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative, (2) between the lawyer and the lawyer’s representative, (3) by the client or the client’s representative or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.” D.R.E. 502.

7. The party asserting the privilege has the burden of proving each of the necessary elements. *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania*, 623 A.2d 1118, 1122 (Del. Super. 1992).
8. While the requirement that there must be a “communication” is fairly unambiguous, it is important to remember that only the communication is protected, and not the facts underlying the communication. Therefore, “a party may always be compelled to disclose relevant information even when the information was received through a communication which is itself privileged.” *Id.*
9. The communication must be confidential, and the client must expect that the communication will remain confidential. *See Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) (communications made to an attorney which the client intends for the lawyer to convey to others are not confidential, and are therefore not protected.) If third parties other than the client and the attorney participate in a communication, or are subsequently informed of the communication, the privilege will be waived. *In re Quest Software Inc. Shareholders Litig.*, 2013 WL 3356034, at *4 (Del. Ch. July 3, 2013) (“In most instances, a party waives the attorney-client privilege by communicating privileged information to a third party.”).
10. Not every conversation with a lawyer is privileged. The client’s purpose in communicating with a lawyer must have been to obtain legal advice, and no protection is provided for business or personal advice. “Thus, [i]f a communication involves a business matter rather than a legal matter, the attorney-client privilege will not protect it, even if the client’s legal advisor is a party to the communication.” *MPEG LA, L.L.C. v. Dell Global B.V.*, 2013 WL 6628782, at *2 (Del. Ch. Dec. 9, 2013) (quoting *Cephalon, Inc. v. Johns Hopkins Univ.*, 2009 WL 5103266, at *1 (Del. Ch. Dec. 4, 2009)).
11. A key determination in analyzing whether a communication is privileged is whether the communication was with a client. If counsel has been formally retained and an engagement letter was signed prior to the communication at issue, the lawyer-client relationship is easily established. Otherwise, such a determination is purely fact based and will depend on the circumstances of each case. *Benchmark Capital Partners IV, L.P. v. Vague*, 2002 WL 31057462, at *3 (Del. Ch. Sept. 3, 2002).
12. Privilege is not limited to individual clients, and extends to organizational clients such as corporations. Restatement (Third) of the Law Governing Lawyers § 73 (2000); *Upjohn Co.*, 449 U.S. at 390. The Delaware Rules of Professional Conduct recognize that a lawyer employed or retained by an organization “represents the organization acting through its duly authorized constituents.” *Delaware Lawyers’ R. Prof’l Conduct 1.13*. The comments to such rule clarify that “officers, directors, employees and shareholders are the constituents of the corporate organizational client.” *Delaware Lawyers’ R. Prof’l Conduct 1.6 cmt. 1*. Since a corporation acts

only through its officers, employees, or other agents, there must be a communication between such an individual and an attorney concerning a legal issue faced by the corporation. Courts have developed two “tests” for determining the scope of the privilege for an organization:

- (a) The “control group” test provides that privilege applies if the corporate employee participating in the communication “is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.” *Philadelphia v. Westinghouse. Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).
 - (b) The “subject matter” test provides that the privilege applies to communications with employees who are not part of the corporation’s control group “where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.” *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff’d*, 400 U.S. 348 (1971).
 - (c) In *Upjohn*, the Supreme Court declined to apply the control group test and instead applied a standard in line with the subject matter test, while noting that privilege determinations, and the determination of the applicable tests to use, must be made on a case by case basis. *Upjohn Co.*, 449 U.S. at 396.
 - (d) Delaware cases have cited favorably to *Upjohn* but have not explicitly adopted the subject matter test. *See, e.g., Deutsch v. Cogan*, 580 A.2d 100, 106 (Del. Ch. 1990).
13. Courts generally do not distinguish between communications with in-house counsel and outside counsel when making privilege determinations. *See, e.g. Upjohn Co.*, 449 U.S. at 390. When communications are with in-house counsel, however, it may be more difficult to establish that the communication was for the purpose of obtaining legal advice, and not for business purposes. *See, Avianca, Inc. v. Corriea*, 705 F. Supp. 666 (D.C. Cir. 1989) (“Where the communication is with in-house counsel for a corporation, particularly where that counsel also serves a business function, the corporation must clearly demonstrate that the advice to be protected was given “in a professional legal capacity.” This limitation is necessary to prevent corporations from shielding their business transactions from discovery simply by funneling their communications through a licensed attorney.”) (citation omitted).
14. Privilege protection can be claimed by the client or the client’s attorney, but only on behalf of the client. D.R.E. 502(c). Only the client may waive privilege or authorize that it be waived. *In re Lyle*, 74 A.3d 654, 2013 WL 4543284, at *1 (Del. Aug. 23, 2013) (TABLE).

II. Confidentiality and Privilege in the Trust Context

1. When advising a trustee in connection with the administration of a trust, counsel for the trustee will necessarily have cause to consider the interests of the beneficiaries, and may even communicate with the beneficiaries. This is especially true for in-house counsel. Clearly implicated also is the issue of what duties counsel for the trustee owes to the beneficiaries, and the impact of those duties on confidentiality and privilege.
2. As discussed above, a lawyer owes a duty of confidentiality to the lawyer's clients. Furthermore, privilege protects communications between a lawyer and client from disclosure. Thus, identifying the client is a critical question to answer. When a trustee consults with in-house counsel, or retains outside counsel, it might seem obvious that the trustee is the client. In practice the analysis is much more complex.
3. If a trustee consults with counsel with respect to a suit that has been filed against the trustee by the beneficiaries, only the trustee is the client. When there is a suit against the trustee, it is clear that counsel defending the trustee from liability is solely protecting the interests of the trustee. Thus, counsel is said to represent the trustee "individually" or "personally". *See*, ACTEC Commentaries on the Model Rules of Prof'l Conduct 2 (5th ed. 2016) (hereinafter "ACTEC Commentaries") *available at* http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf.
4. When a trustee consults counsel with respect to questions arising in the course of administration of the trust, rather than in connection with specific litigation, the lawyer is said to represent the trustee "generally". *Id.*
5. It is generally accepted that counsel representing a trustee individually does not represent the beneficiaries, and owes few duties to the beneficiaries. Courts have taken different views as to whether counsel representing a trustee generally is considered to represent the beneficiaries of the trust, although most courts have determined that the lawyer does owe some duties to the beneficiaries. This distinction is illustrated by the ACTEC Commentaries to Rule 1.2 of the American Bar Association Model Rules of Professional Conduct (hereinafter "MRPC"), which provide that when a lawyer is retained to represent a trustee generally, the lawyer's services are in furtherance of the fulfillment of the trustee's fiduciary responsibilities and not the trustee's individual goals. ACTEC Commentaries at 39.
6. It is undisputed that a trustee has a duty to furnish information to the trust beneficiaries, and to administer the trust in the interest of the beneficiaries. *See*, Rust E. Reid, *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Prop. Prob. & Tr. J. 541 (Winter 1996). Based in part upon this duty, it has been argued that when counsel is representing a trustee generally, i.e., counsel is advising the trustee as to

fulfilling the trustee's fiduciary duties, the real recipient of the legal advice is the beneficiary, and the trustee must share all related communications with the beneficiaries. *See, e.g., Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976).

7. The identity of the client will obviously impact the duties owed by the trustee's counsel. With respect to confidentiality, the trustee's counsel must maintain the confidentiality of client information in accordance with Rule 1.6 of the Delaware Lawyers' Rules of Professional Conduct (hereinafter "DLRPC"). If the trustee is the client, then counsel may not be able to share information with the trust beneficiaries. If, however, the beneficiary is the client, then such disclosure will be permissible. The ACTEC Commentary on MRPC 1.6, which mirrors DLRPC 1.6, suggests that when representing a trustee generally with respect to the administration of a trust, a lawyer's duty of confidentiality to the trustee may be qualified with respect to the beneficiaries. ACTEC Commentaries at 81. Further, counsel for the trustee may be impliedly authorized to disclose confidential information received from the trustee in the course of the representation of the trustee in order to protect the interests of the beneficiaries. *Id.* The American Bar Association, however, took a contrary position in Formal Opinion 94-380, holding that a lawyer who represents a fiduciary is subject to all the same limitations imposed by the Ethical Rules. ABA Comm. on Ethics and Professional Responsibility, *Formal Op. 94-380* (1994). Specifically, ABA Formal Opinion 94-380 holds that the lawyer's obligation to maintain the confidentiality of information related to the representation of the fiduciary is not altered by the fact that the client is a fiduciary, regardless of any duties that may or may not be owed to the beneficiaries.
8. With respect to privilege, the identity of the client will clearly affect both the ability to claim that communications are privileged, and who may waive privilege. If the trustee is the client, then the trustee will be able to protect communications with counsel from disclosure to the beneficiaries. If, however, the beneficiary is the actual client, then the trustee will not be able to refuse to produce such communications to the beneficiaries, especially in light of the trustee's duty to keep the client informed. Jurisdictions which have followed the view that the beneficiary is the ultimate client have therefore adopted the "fiduciary exception" to privilege for communications with counsel when the trustee is represented generally with respect to the administration of the trust.

III. The Fiduciary Exception to Privilege in Delaware (and Beyond...)

1. The purpose of privilege is to uphold the public policy concerns that underlie the privilege. The effect of a determination of privilege, however, will often be to limit the information available to the court. Therefore, numerous exceptions and limitations have developed and privilege is often narrowly construed. *See Fisher v. United States*, 425

U.S. 391, 403 (1976) (“Since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.”); *see also Balin v. Amerimar Realty Co.*, 1995 WL 170421, at *9 (Del. Ch. Apr. 10, 1995) (because it “obstructs the truth-finding process,” the privilege must be “construed narrowly.”).

2. One such exception that the courts have developed is the so-called “fiduciary exception” to privilege. Simply put, this exception provides that in light of the duties owed by a trustee to the beneficiaries of a trust, the trustee may not claim that communications related to the trustee’s exercise of its fiduciary duties are privileged. ACTEC Commentaries at 81.
3. The fiduciary exception traces its roots to the 1865 English Chancery Court decision in *Talbot v. Marshfield*, (1865) 62 Eng. Rep. 728. *See* Mike W. Bartolacci, *The Attorney-Client Privilege and the Fiduciary Exception: Why Frank Discussions Between Fiduciaries and their Attorneys Should be Protected by the Privilege*, 48 Real Prop. Tr. & Est. L.J. 1 (Spring 2013).
4. The exception was first adopted in the United States in the trust context by the Delaware Court of Chancery in the *Riggs* case. *Riggs National Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

In *Riggs*, the trustees retained the law firm of Richards, Layton & Finger to provide an opinion in connection with a petition for instructions, and in anticipation of tax litigation on behalf of the trust with the Delaware Division of Revenue. The fees for the legal services were paid from the trust. Approximately a year later, the trust beneficiaries brought a surcharge action against the trustees based on the tax litigation. As part of their discovery efforts, the beneficiaries sought the production of the opinion memorandum prepared by Richards, Layton & Finger for the trustees. The trustees refused to produce the memorandum, stating that it was privileged as it was “the result of confidential communications between the trustee and his attorneys for the purpose of securing legal assistance.” *Id.* at 710. The beneficiaries argued that since the memorandum was prepared to aid the trustee in his duties in administering the trust, and in consideration of the substantive law of trusts, the memorandum was actually prepared for their benefit and therefore was not privileged.

The Court stated that whether the memorandum was required to be produced was to be determined “in light of the purpose for which it was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened.” *Id.* at 711. The Court then determined that the memorandum was ultimately prepared “for the benefit of the beneficiaries of the trust and [n]ot for the purpose of the trustees’ own defense in any litigation against themselves.” *Id.*

The Court focused on the fact that there was no threatened litigation against the trustees *personally* when the memorandum was prepared. Rather, the trustees were seeking advice on issues faced by the trustee “in their service to the beneficiaries” such that “the ultimate or real clients were the beneficiaries of the trust and the trustee . . . in his capacity as a fiduciary, was, or at least should have been, acting only on behalf of the beneficiaries in administering the trust.” *Id.*

Noting that the trustees had substantive fiduciary duties to the trust beneficiaries, the Court cited to Scott on Trusts; Bogert on Trusts; and the English common law for the proposition that trust beneficiaries are entitled to inspect opinions of counsel with respect to the management of the trust to ensure the beneficiaries have the knowledge of the “affairs and mechanics of the trust management” which is necessary for the beneficiaries to ensure the trustees are properly executing their fiduciary duties. *Id.* at 712. Thus, the attorney for the trustee owed a fiduciary obligation to the beneficiaries, as well as the trustees, such that the beneficiaries were the actual clients. Finally, the fact the legal fees had been paid from the trust was a strong indication as to who the real clients were.

The Court recognized the policy considerations underlying the attorney-client privilege, but also noted that since privilege “is an exception to the general rule requiring full disclosure . . . its scope can be limited where circumstances so justify.” *Id.* at 713.

5. In 2007, Delaware appeared to take a small step back from the fiduciary exception as developed in *Riggs* when 12 Del. C. § 3333 was adopted. According to the synopsis of the bill, it was intended to “codify a fiduciary’s right to retain counsel under the circumstances set forth in the statute.” Del. S.B. 117 syn., 144th Gen. Assem. (2007). 12 Del. C. § 3333 as originally enacted provided, in pertinent part, as follows:

“Retention of Counsel by Fiduciary. Except as provided in the governing instrument, a fiduciary may retain counsel in connection with any claim that has or might be asserted against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney client privilege.”

12 Del. C. § 3333 has recently been modified to clarify the scope of the fiduciary exception under Delaware law. *See infra*. ¶ 10, pp. 11-12.

6. In 2010, the Court of Chancery narrowly construed *Riggs* and denied a beneficiary’s motion to compel the production of privileged documents on the basis of the fiduciary exception in the case of *N.K.S. Distributors, Inc. v. Tigani*, 2010 WL 2011603 at *1 (Del. Ch. May 7, 2010). In *N.K.S. Distributors*, the beneficiary, a contingent remainder beneficiary, was

seeking access to communications between counsel and the trustee, who was also the sole current beneficiary of the trust. The beneficiary argued that *Riggs* stood for the proposition that a trustee was required to produce to a beneficiary all communications pertaining to the trust or the trustee's performance of his duties as trustee. The Court of Chancery refused to construe *Riggs* so broadly, and determined that it was distinguishable as the policy considerations underlying *Riggs* were not implicated. According to the Court, the *Riggs* holding "stems from the court's conclusion that the legal services in that case were performed for the benefit of the beneficiaries, who were the lawyer's ultimate clients." *N.K.S. Distributors, Inc.* at *1. In *N.K.S. Distributors*, however, the trustee had sought legal advice from counsel regarding problems the trustee believed the beneficiary was causing. Thus, the beneficiary was more akin to an adverse party than a beneficiary who could be the lawyer's ultimate client. *Id.* Additionally, the Court stated that the documents were prepared in anticipation of litigation between the trustee and the successor beneficiary. *Id.* Finally, the Court noted that the beneficiary in *N.K.S. Distributors* was a contingent beneficiary with a non-vested interest, whose interest in the trust was subject to divestment, and therefore the interest of the beneficiary in the trust was very different than the interest of the primary beneficiary whose rights were examined in the *Riggs* case. *Id.* at *2.

7. The Court of Chancery affirmed the continued applicability of *Riggs* in a privilege ruling issued in a case involving a motion to compel filed by trust beneficiaries seeking to have the court order the production of certain documents related to the trust which contained communications between the trustee and counsel. *Mennen v. Wilmington Trust Co.*, 2013 WL 4083852 at *1 (Del. Ch. July 25, 2013).

Mennen involved claims of breach of fiduciary duty brought by the beneficiaries of a trust created by George S. Mennen for the benefit of his son, John, and John's children. Wilmington Trust and Jeff Mennen, John's brother, were co-trustees of the trust. Jeff, as the individual trustee, had the power to direct Wilmington Trust with respect to certain actions, including trust investment decisions. In their suit against the co-trustees, the beneficiaries claimed that the trustees had breached their fiduciary duties by improperly investing in various business ventures that failed, resulting in substantial losses to the trust. The beneficiaries sought damages in excess of \$100 million.

10 months prior to the beneficiaries filing suit, Wilmington Trust had filed a petition for instructions with respect to the trust (the "Petition Action"). In the Petition Action Wilmington Trust sought, among other things, Jeff's removal as co-trustee based on Wilmington Trust's assertion that investment decisions Jeff had directed had caused the trust to lose substantial value. The Petition Action was stayed once the beneficiaries filed their complaint.

The beneficiaries issued a first request for production of documents to Wilmington Trust. In response, Wilmington Trust “refused to produce any of its internal or external communications with counsel related to the Petition Action,” and refused to create a privilege log for the documents it withheld related to the Petition Action. *Mennen*, 2013 WL 4083852, at *2. The beneficiaries then filed a motion to compel the production of all privileged documents related to the trust through the date the beneficiaries filed their complaint, including communications with counsel regarding the Petition Action, and all documents related to the trust created after the complaint was filed that were not created in connection with Wilmington Trust’s defense. They further sought production of documents and communications with counsel concerning Wilmington Trust’s “duties and powers under the trust agreement.” *Id.*

The beneficiaries argued that, under *Riggs*, Wilmington Trust was required to turn over all documents related to the Petition Action and all documents related to Wilmington Trust’s duties and powers since all such documents and communications were ostensibly for the benefit of the trust beneficiaries, who were therefore the ultimate clients. *Id.* Wilmington Trust initially asserted that *Riggs* did not apply, and was no longer good law due to the adoption of Delaware Rule of Evidence 502. Wilmington Trust also argued that the legal advice it obtained with respect to the Petition Action was intended for its benefit, not for the benefit of the beneficiaries; that litigation between it and the beneficiaries was reasonably anticipated when it retained counsel; and that Wilmington Trust paid for the legal advice, and did not pay the fees out of the trust, and that therefore *Riggs* did not apply. *Id.* In her final report, Master LeGrow concluded that the Petition Action documents were privileged, but that those documents related to the powers and responsibilities of Wilmington Trust as trustee were not privileged unless they related to the Petition Action or Wilmington Trust’s defense against the beneficiaries’ complaint.

Master LeGrow confirmed that *Riggs* is still the law in Delaware, *id.* at *3, and that in *Riggs*, “the application of the fiduciary exception to the attorney-client privilege turned on a determination of who the “real” or “ultimate” client was,” *id.* at *4. In order to make the determination of who the real client was, Master LeGrow noted that *Riggs* and subsequent federal cases examined the following factors: “(i) the purpose of the legal advice, (ii) whether litigation was pending or threatened between the trustee and the beneficiaries at the time the advice was obtained; and (iii) the source from which the legal fees associated with the advice were paid.” *Id.*

Master LeGrow determined that “the legal advice Wilmington Trust received surrounding the Petition Action was in fact obtained for the benefit and protection of Wilmington Trust.” *Id.* Further, she stated that there was a “real possibility” that the beneficiaries would bring suit

against the trustees at the time of the Petition Action and that pending litigation was not “a prerequisite to finding that the trustee had a legitimate personal interest in legal advice.” *Id.* at *5. Finally, as to the source of payment for the legal advice, Master LeGrow referenced 12 Del. C. § 3333 and noted that the payment of legal fees is not dispositive on the issue of the identity of the “real client.” It was noted, however, that Wilmington Trust paid the counsel fees for the advice at issue and did not pay the fees, or seek reimbursement, out of the trust. Based on these factors, Master LeGrow determined that the beneficiaries could not be said to be the “real clients” who received the legal advice concerning the Petition Action even if the Petition Action would ultimately benefit the beneficiaries. Therefore, the Petition Action documents were protected by the privilege in accordance with *Riggs*. *Id.* at *6.

As to the documents related to Wilmington Trust’s duties and powers under the trust agreement, Master LeGrow rejected Wilmington Trust’s argument that such legal advice is privileged because the trustee has a personal interest in such advice. She cited directly to the language in *Riggs* providing that beneficiaries must have knowledge of how the trust is managed in order to hold the trustee to the proper standard of care, concluding that “in the interest of preserving the policy of full disclosure that is essential to the trustee-beneficiary relationship, Wilmington Trust must produce the Powers and Responsibilities Documents.” *Id.* at *7. Ultimately, the Court of Chancery held in favor of the beneficiaries of the Mennen Trust and held Jeff liable for damages. *Mennen v. Wilmington Trust Co.*, 2015 WL 1914599, at *1 (Del. Ch. Apr. 24, 2015), *adopted sub nom. Mennen v. Wilmington Trust Co.* (Del. Ch. Aug. 18, 2015). Wilmington Trust settled with the beneficiaries on the eve of trial. *Id.* Decisions in the *Mennen* case were appealed by both sides to the Delaware Supreme Court on issues regarding the enforceability of the judgment obtained against Jeff, and regarding the finding of Jeff’s liability. The Delaware Supreme Court has recently remanded the *Mennen* case to the Court of Chancery on procedural grounds to consider the merits of the beneficiaries’ exceptions to the Court of Chancery’s finding that the judgment could not be enforced against a spendthrift trust created for Jeff’s benefit. *Mennen v. Fiduciary Trust Int’l of Delaware*, No. 1, 2016 (Del. October 11, 2016). The Court retained jurisdiction to consider the remaining issues, including the substantive rulings regarding Jeff’s liability. *Id.*

8. In a case that is currently pending in the Court of Chancery involving a Delaware statutory trust, a trust beneficiary filed a motion to compel the production of certain documents and communications between the trustee and counsel. *In re CMDS TRUST*, Petr.’s Mot. to Compel ¶ 7., 2016 WL 3974883 (Del. Ch. July 19, 2016). The beneficiary cited to *Riggs* and stated that if the trustee’s purpose in obtaining legal advice was to make certain determinations regarding the ability of the trustee to resign, the impact of such resignation, or the consideration of the trustee filing a

petition, then the beneficiary should be able to review the documents. *Id.* The Court of Chancery denied the motion to compel as to this issue, stating that citation to *Riggs* and asserting that the fiduciary exception should apply was not sufficient to compel production as the beneficiary had not “made the type of specific showing that is necessary to invoke the fiduciary exception.” *In re CMDS Trust*, 2016 WL 4183592, at *1 (Del. Ch. August 4, 2016) (TRIAL ORDER).

9. Delaware courts have also recognized a fiduciary exception to privilege in the corporate context, permitting shareholders of a corporation access to otherwise privileged corporate documents upon a showing of good cause in a suit by shareholders against the corporation. *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264 (Del. 2014).
10. While not abolishing the fiduciary exception, the Delaware legislature did enact legislation intended to clarify the scope of the exception in 2015. 12 Del. C. § 3333 was revised to “(1) provide that the attorney-client privilege is deemed to protect communications between a fiduciary and counsel in cases where counsel is retained by the fiduciary and paid by the fiduciary from the fiduciary’s own funds, and (2) clarify that the fiduciary exception to the attorney-client privilege does not apply in cases where a fiduciary retains counsel in connection with a claim against the fiduciary or in connection with a matter that might reasonably be believed to be a matter that will lead to such a claim, even if the privileged communications have the effect of guiding the fiduciary in the performance of fiduciary duties”. Del. H.B. 164 syn., 148th Gen. Assem. (2015). The section now provides in pertinent part:

“(a) In the case of a fiduciary that retains counsel in connection with any matter whether or not related to any claim that has been or might be asserted against the fiduciary and pays such counsel’s fees and related expenses entirely from such fiduciary’s own funds, any communications with such counsel shall be deemed to be within the attorney-client privilege.

(b) Except as otherwise provided in the governing instrument, a fiduciary may retain counsel in connection with any matter that is or that might reasonably be believed to be one that will become the subject of or related to a claim against the fiduciary, and the payment of counsel fees and related expenses from the fund with respect to which the fiduciary acts as such shall not cause the fiduciary to waive or to be deemed to have waived any right or privilege including, without limitation, the attorney-client privilege even if the communications with counsel had the effect of guiding the fiduciary in the performance of fiduciary duties.”

As discussed further below, in spite of the expansion of 12 Del. C. § 3333, a cautious fiduciary should likely pay counsel fees from its own funds to avoid an argument that the payment of counsel fees from the trust fund implicates the fiduciary exception to privilege.

11. Several states have specifically rejected the fiduciary exception, either by statute or in case law. *See*, S.C. Code Ann. § 62-1-110 (2014) (expressly rejecting *Riggs* and *Floyd v. Floyd*, 615 S.E.2d 465 (S.C. Ct. App. 2005); F.S.A. §90.5021(2) (“A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary.”); *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996) (refusing to permit the beneficiary to discover communications between the trustee and its counsel “notwithstanding the trustee’s fiduciary duty to the beneficiary, [as] only the trustee, not the trust beneficiary, is the client of the trustee’s attorney.”) In each of these jurisdictions, either the court or the legislature, as applicable, has taken the position that the trustee is the actual client, and there is no deemed representation of the beneficiary which would implicate the fiduciary exception.
12. The United States Supreme Court extensively discussed the background of the fiduciary exception in *United States v. Jicarilla Apache Nation*, a suit brought by the tribe alleging mismanagement of the tribal trust by the United States. *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). The Jicarilla Apache Nation sought the production of communications between the United States, as Trustee, and its attorneys. The Court of Appeals for the Federal Circuit adopted the fiduciary exception, relying mainly on the duty to inform found within the statute applicable to the management of tribal funds. *In re United States*, 590 F.3d 1305 (Fed. Cir. 2009), *rev’d and remanded sub nom. United States v. Jicarilla Apache Nation*, 564 U.S. 162. On appeal, the Supreme Court assumed the common-law fiduciary exception existed since neither party disputed such existence, but distinguished the trust relationship with respect to tribal funds from the typical common law private trust such that the application of the fiduciary exception was not justified as, “[t]he reasons for the fiduciary exception—that the trustee has no independent interest in trust administration, and that the trustee is subject to a general common-law duty of disclosure—do not apply in this context.” *Jicarilla*, 564 U.S. at 165.
13. The Uniform Trust Code (“UTC”), which has now been adopted in some form in over 30 jurisdictions, specifically leaves the fiduciary exception open for further discussion by the courts. *Unif. Trust Code* § 813 (2010) *available at* http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf. UTC § 813 addresses the trustee’s duty to keep the beneficiaries reasonably informed about the administration of the trust, and of the material facts necessary for the beneficiaries to protect their interests. The comments to UTC § 813 note that there is a division among

the courts as to the propriety of the fiduciary exception given the competing interests of upholding privilege and requiring trustees to keep beneficiaries informed. *Unif. Trust Code* § 813 cmt. (2010). Further, the comments note an additional concern with the “beneficiary as client” theory behind the fiduciary exception - that it “conflicts with the trustee’s fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries.” *Id.*

IV. Practical Application for Administering Delaware Trusts

1. As of this time, the fiduciary exception does apply in Delaware. Given the fact intensive analysis required under *Riggs* and *Mennen*, it is important for trustees of Delaware trusts to be aware of the parameters of the exception, and to position themselves to address its impact.
2. Trustees should clearly document all outside counsel engagements. Consider including an explicit statement as to the identity of the client, as well as a clear delineation as to the scope and purpose of the engagement. As provided in DLRPC 1.2(c), a lawyer may “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” However, as noted in the ACTEC commentary to Rule 1.2, the duties owed by a lawyer to the beneficiaries should not be diminished without first giving notice to the beneficiaries if the lawyer represents the trustee generally. ACTEC Commentaries at 39.
3. Consideration should be given to retaining separate counsel for advice regarding general administration versus advice regarding potentially contentious / actual litigation matters. This will allow for a clear delineation between advice sought for the protection of the trustee, and advice sought during the course of routine trust administration.
4. Carefully consider whether to pay counsel fees from the trust. Despite the protections afforded by 12 Del. C. § 3333, in complicated situations clarity may be gained by having the trustee bear the costs personally. The fees to be charged, and who will bear the fees, should be spelled out in an engagement letter or other document in accordance with DLRPC 1.5, which provides that “the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing.” Delaware Lawyers’ R. Prof’l Conduct 1.5.
5. Be cognizant of the possibility of production when preparing written documents during the course of administration – do not be disparaging of beneficiaries, maintain a cordial and professional tone. It is prudent to consider all communications discoverable, especially if there is no active litigation against the trustee.
6. If corresponding with in-house counsel on a legal issue, mark the document as “Confidential” and “Privileged”. There will rarely be a documented engagement or clearly defined scope when advice is sought from in-house counsel. Therefore, all actions possible should be taken to

document that the communications are confidential and intended to be privileged.

7. Be very cautious when sharing counsel communications with third parties, such as accountants and outside financial advisors. Be especially vigilant with e-mails, and ensure that long strings do not include potentially privileged communications. Communications shared with third parties are not confidential, and therefore are not afforded protection under the privilege rules.

V. Case Study

Benjamin Chambers (“Ben”) died and was survived by his wife of 20 years, Carol. Ben’s marriage to Carol was a second marriage, and Carol was 15 years Ben’s junior. Ben was also survived by two adult children from his first marriage, and their children. Prior to Ben’s death, he created an irrevocable trust for the benefit of Carol during her lifetime (the “Trust”). Pursuant to the terms of the Trust, upon Ben’s death, Carol was entitled to receive all of the income of the Trust during the remainder of her lifetime, and the trustee had the discretion to distribute principal for Carol’s essential needs, taking into account other resources available to her. Upon Carol’s death, the trust fund was directed to be held for the benefit of Ben’s children for their respective lifetimes, before being distributed outright to Ben’s grandchildren upon each of their deaths.

Ben funded the Trust with an interest in Chambers Technologies, Inc. (the “Company”), a small technology firm founded by Ben. The interest in the Company was worth \$3,000,000 when the Trust was funded. Ben created other trusts funded with interest in the Company for the benefit of his children and issue at the same time he created the Trust. Shortly before Ben’s death, the value of the interest in the Company increased significantly due to the development of an innovative communication technology component. There had been some talk of a future sale of the Company, but Ben refused to consider such a sale as he wished to keep ownership and management of the Company within the family and a few longtime friends and employees.

Corporate Trustee was named as the sole trustee of the Trust. Ben’s longtime friend, Arthur, who was also the President of the Company, was named as the Investment Advisor, who directed the Corporate Trustee as to all investment decisions and actions. Upon Arthur’s death or inability to serve, the Trust provided that the Corporate Trustee would then be vested with full investment authority. Upon Ben’s death, Arthur immediately issued a standing direction to the trustee to retain the interest in the Company, even though it resulted in a lack of diversification and a relatively small stream of income to Carol. The Trust expressly permitted such action and Arthur believed that it was Ben’s intention for the trust to retain its interest in the Company. Several years after Ben’s death, Arthur died. The Trust still held only its interest in the Company, which had not yet been sold despite increasing talks about doing so by the Company’s management and other family members.

Upon taking over investment responsibility for the Trust assets, the Corporate Trustee had its in house counsel review whether the Corporate Trustee had a duty to diversify the Trust's holdings, despite the language in the Trust authorizing retention of the interest in the Company. The Corporate Trustee was particularly concerned about its duty of impartiality given the negligible amount of income produced by the investment in the Company. Carol was becoming increasingly vocal in her calls for the Corporate Trustee to diversify so as to provide her an income stream as her substantial non-trust assets precluded her from receiving principal distributions from the Trust. The children, however, were equally vocal in their position that the Trust should retain the interest in the Company in its entirety, especially in light of the possibility of a sale of the Company. Over the following months, Carol and the children's relationship deteriorated as Carol became increasingly insistent that something be done to provide her with more income.

While deciding to retain the interest in the Company for the time being, the Corporate Trustee engaged outside counsel to advise as to the possibility of converting the trust to a unitrust, or, if such a conversion could not be accomplished, what actions the Corporate Trustee should take to protect itself if Carol should decide to bring suit for the failure to diversify. During the same period of time, the Corporate Trustee decided to increase the fees it was charging the Trust, partially on account of the higher than usual costs the difficult relationship was generating. At one point, a trust administrator assigned to the Trust relationship sent an e-mail to the Corporate Trustee's in house counsel regarding the new fee structure, and stating, "Carol and her lawyers are completely impossible to deal with and call constantly crying that she doesn't have enough money (like we believe that). Thought you might be interested to know." The in-house lawyer responded "OK, I leave the business decisions up to you guys, but it might be easier for every one if we just start to sell the shares in the company. Thanks for keeping me in the loop."

Over the course of the following years, the Corporate Trustee ultimately did begin a program of diversification, reducing the interest in the Company by 40%, and investing the proceeds in a diversified portfolio which produced more income. About a year later, the Company was sold for a large multiple. 3 months after the sale, due to a global financial crisis, the stock market suffered severe losses and the value of the Trust plummeted. Ben's children and grandchildren brought a surcharge action against the Corporate Trustee. Carol, whose health had begun to deteriorate, did not join in the suit. The Plaintiff children and grandchildren have served the Corporate Trustee with a request for production regarding all documents related to the Corporate Trustee's administration of the trust, including all documents related to the Corporate Trustee's decision to diversify the assets of the Trust and to divest a portion of the Trust's interest in the Company.

APPENDIX

Excerpts from the Delaware Lawyers' Rules of Professional Conduct

THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

[Effective July 1, 2003 and current through most recent amendment effective Mar. 1, 2013]

Preamble: A lawyer's responsibilities.

Rule

- 1.0. Terminology.
- 1.1. Competence.
- 1.2. Scope of representation.
- 1.3. Diligence.
- 1.4. Communication.
- 1.5. Fees.
- 1.6. Confidentiality of information.
- 1.7. Conflict of interest: Current clients.
- 1.8. Conflict of interest: Current clients: Specific rules.
- 1.9. Duties to former clients.
- 1.10. Imputation of conflicts of interest: General rule.
- 1.11. Special conflicts of interest for former and current government officers and employees.
- 1.12. Former judge, arbitrator, mediator or other third-party neutral.
- 1.13. Organization as client.
- 1.14. Client with diminished capacity.
- 1.15. Safekeeping property.
- 1.15A. Trust account overdraft notification.
- 1.16. Declining or terminating representation.

- 1.17. Sale of law practice.
- 1.17A. Dissolution of law firm.
- 1.18. Duties to prospective client.
- 2.1. Advisor.
- 2.2. [Deleted].
- 2.3. Evaluation for use by third persons.
- 2.4. Lawyer serving as third-party neutral.
- 3.1. Meritorious claims and contentions.
- 3.2. Expediting litigation.
- 3.3. Candor toward the tribunal.
- 3.4. Fairness to opposing party and counsel.
- 3.5. Impartiality and decorum of the tribunal.
- 3.6. Trial publicity.
- 3.7. Lawyer as witness.
- 3.8. Special responsibilities of a prosecutor.
- 3.9. Advocate in nonadjudicative proceedings.
- 3.10. [Deleted].
- 4.1. Truthfulness in statements to others.
- 4.2. Communication with person represented by counsel.
- 4.3. Dealing with unrepresented person.
- 4.4. Respect for rights of third persons.
- 5.1. Responsibilities of partners, managers, and supervisory lawyers.
- 5.2. Responsibilities of a subordinate lawyer.
- 5.3. Responsibilities regarding non-lawyer assistance.
- 5.4. Professional independence of a lawyer.
- 5.5. Unauthorized practice of law; multijurisdictional practice of law.

- 5.6. Restrictions on right to practice.
- 5.7. Responsibilities regarding law-related services.
- 6.1. Voluntary pro bono publico service.
- 6.2. Accepting appointments.
- 6.3. Membership in legal services organization.
- 6.4. Law reform activities affecting client interests.
- 6.5. Non-profit and court-annexed limited legal-service programs.
- 7.1. Communications concerning a lawyer's services.
- 7.2. Advertising.
- 7.3. Solicitation of clients.
- 7.4. Communication of fields of practice and specialization.
- 7.5. Firm names and letterheads.
- 7.6. Political contributions to obtain government legal engagements or appointments by judges.
- 8.1. Bar admission and disciplinary matters.
- 8.2. Judicial and legal officials.
- 8.3. Reporting professional misconduct.
- 8.4. Misconduct.
- 8.5. Disciplinary authority; choice of law.

Forms

Index follows Rules.

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. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement 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.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each rule is authoritative.

Rule 1.2. Scope of representation.

(a) Subject to paragraphs (c) and (d), 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's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political,

economic, social or moral views or activities.

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

(d) 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.

COMMENT

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

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

disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

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

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

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

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

when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

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

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

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental

authorities.

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

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered 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.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) 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 alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

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

(1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

COMMENT

[1] *Reasonableness of fee and expenses.* — Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] *Basis or rate of fee.* — When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of

contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] *Terms of payment.* — A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money maybe subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] *Prohibited contingent fees.* — Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

[7] *Division of fee.* — A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in

which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee without regard to whether the division is in proportion to the services each lawyer renders or whether each lawyer assumes responsibility for the representation as a whole, so long as the client is advised in writing and does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

[9] *Advance fees.* — A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] Some smaller fees—such as those less than \$2500.00—may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter or the attorney's appearance on the record. However, a fee considered to be “earned upon commencement of the attorney's work on the matter” is not the same as a fee “earned upon receipt.” The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee—such as a fee under \$2500.00—may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). Nevertheless, all fees must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[11] As a general rule, larger advance fees—such as those over \$2500.00—will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner’s hearing, pre-trial conference, and judge’s hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney’s initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client’s creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter—in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney

trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

[14] *Disputes over fees.* — If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

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 prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is

permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] *Authorized disclosure.* — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] *Disclosure adverse to client.* — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may

not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client.

Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

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

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., [29 DEL. CODE ANN. § 9007A\(c\)](#) (which provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the “duty of confidentiality to the child unless the disclosure is necessary to protect the child’s best interests”).

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client’s representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client’s representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order.

[14] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[15] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to

persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[18] *Acting competently to preserve confidentiality.* — Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software

excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or it may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[20] *Former client.* — The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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 knows 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, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) 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.

(e) 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.

COMMENT

[1] *The Entity as the Client.* — An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary

for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[5] *Relation to Other Rules.* — The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

[6] *Government Agency.* — The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a

different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

[7] *Clarifying the Lawyer's Role.* — There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

[9] *Dual Representation.* — Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

[10] *Derivative Actions.* — Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.