

# Can I Get a Witness (To Talk to Me)?

Employees of Represented Organizations, RPC 4.2, and Practical Realities



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“You Talking 4.2 to Me?”

Was our alternate but discarded title ...

- More thorough version on the PDF in your materials, but the gist:
- Injured plaintiff (bedsores) who was treated at three separate facilities
- Condition heals at the third facility
- Plaintiff's counsel only sues the first facility

**Our factual scenario**

- Facility #1 raises potential comparative fault of Facility #2 in answer
- Plaintiff's counsel has reason to believe Facility #2 has photos from Plaintiff's arrival that show Plaintiff's condition upon arrival
- Plaintiff's counsel subpoenas records from Facility #2 but efforts initially opposed

**Our factual scenario**

- Plaintiff's counsel send PI out to see which current and former employees of Facility #1 and Facility #2 will talk with her about what they know about the bedsores and any photos of bedsores
- Then along comes two email(s)

**Our factual scenario**

- Email from lawyer for Facility #2 (potential party) – seeks confirmation that PI is working as Plaintiff's counsel's agent
- Also says that the people PI is contacting at Facility #2 are represented by counsel and that no further contact is allowed ...

**Facility #2 weighs in**

- Counsel for Facility #1 sends a bit more nuanced of an email
- Acknowledges that 4.2 permits contact with former employees
- Insists no contact with current employees without Counsel for Facility #1's consent
- And says Plaintiff's counsel should assume all staff involved in case are still current until Counsel for Facility #1 is asked to ID the former employees

**Facility #1 weighs in**



Now for an array of questions...

- Is there a default rule for whether an attorney for a corporation is assumed to represent individual employees as well?
- Is it potentially dangerous for Plaintiff's counsel to disregard the instructions of either the lawyer for Facility #1 or the lawyer for Facility #2
- Is it potentially dangerous for the defense lawyers to make the broad assertion of representation of former employees/all current employees?

**Let's knock out the simpler ones**

- What should counsel for Facility #2 do before being in a position to claim representation of these employees/former employees?
- Can counsel for Facility #1 do anything less than that before making the claim s/he made?
- Can Plaintiff's counsel do anything to try to confirm any of that was done?

**Now the less simple**

- If the goal is to control/know about dissemination of information, then isn't there a safer way for defense counsel to manage that?
- Hint, hint: Yes but only as to current employees
- RPC 3.4(f)

**Speaking of less simple**

- What is the proper way for the PI working for Plaintiff's counsel to go about conducting the investigation? (Assume we are talking about before the emails)
  - Does it differ in terms of current employees v. former employees as to initial questions?
  - What role should Plaintiff's counsel play in advising about this?

**More of the less simple**

- A known current employee of Facility #2, post email receipt, quits. Plaintiff's counsel learns this. Plaintiff suspects Facility #2's counsel never really represented this person. Can Plaintiff's counsel ask now-former employee about discussions with Facility #2's counsel?
  - Does it matter if asked during a deposition or informally?
  - Who owns (can waive) any privilege?

**Even more of the less simple**

Tennessee Bar Association/TennBarU Webcast

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RPC 4.2, and Practical Realities

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## **TODAY'S FACTUAL SCENARIO**

Elderly Plaintiff obtains Stage IV bedsore at Facility #1. Plaintiff then transfers to Facility #2 and then later leaves and goes to Facility #3 which is managed by the same parent company that manages Facility #1. Wound eventually heals at Facility #3.

Plaintiff brings healthcare liability lawsuit. Facility #1 is the only entity sued. Facility #1 files an Answer asserting a Comparative Fault defense against Facility #2 indicating that charting at Facility #1 does not demonstrate that bedsore is anywhere close to Stage IV at time of departure from Facility #1.

Plaintiff's family has communicated to Plaintiff's counsel that they were shown pictures of the status of the bedsores taken at Facility #2 shortly after arrival of Plaintiff at Facility #2. Plaintiff's counsel issues subpoena to Facility #2 seeking records that would include those photos but Facility #2 initially opposes the subpoena.

Because of looming deadlines for deciding whether to amend to add claims against Facility #2, Plaintiff's counsel also deploys Private Investigator to not only talk to Facility #1's current and former employees but also to Facility #2's current and former employees to discuss a variety of different topics including: 1) Size of bedsore at time Plaintiff leaves Facility #1; 2) Size of bedsore at time Plaintiff arrives at Facility #2; 3) Whether photographs of bedsore were created at Facility #2 to help treat bedsore; and 4) Obtain statements from employees at Facility #2 confirming that indeed they showed wound care photographs taken at Facility #2 to the family of Plaintiff.

Emails are received by Plaintiff's counsel shortly thereafter:

Email #1 – (sent to Plaintiff's counsel by lawyer for Facility #2; copying lawyer for Facility #1 as well):

“Dear Plaintiff's counsel: I'm advised that [Plaintiff's Private Investigator] has been making contact with my clients. Please confirm that she was retained by you and is acting as your agent. Also make note that the individuals she is contacting are represented by counsel and no further contact should be made in violation of the rules of ethics.”

Email #2 – (sent to Plaintiff’s counsel by lawyer for Facility #1 in reply to and copying lawyer for Facility #2):

“Plaintiff’s Private Investigator is also attempting to contact Defendant’s current employees. I realize that RPC 4.2 permits communication with former employees of a represented party, but obviously lawyers and their agents are prohibited from communicating with current employees unless they first obtain opposing counsel’s consent, and the practice of contacting current employees through any medium needs to cease, immediately. Respectfully, I do not think it is appropriate to contact any of the staff involved in this case without first asking me (or, if appropriate, lawyer for Facility #2) to specifically identify the former employees. Once those former staff are identified, or if we refuse the opportunity to specifically identify them, I think you or your agents may contact them as you wish, with or without our consent. If you mistakenly contact current employees at that point, the communication must cease.

Advisory Comment 8 to Rule 4.2 states that actual notice that a party (and its employees, by extension) is represented by counsel may be inferred from the circumstances. You are obviously aware that Facility #1 and its current employees are represented in this case. I submit that counsel should assume all staff listed in the records are current employees, until proven otherwise, and that those circumstances do not support a practice of contacting anyone and everyone, even if the first question upon contact is simply to see whether the staff member is a current or former employee. There is just too much potential for inappropriate conduct in that instance, regardless of a person’s motives or intentions.

I will be happy to identify former employees, if that request is made. Until then, please refrain from contacting any of Facility #1’s staff unless you first have actual knowledge that they are no longer employed. If it was ever unclear, you and anyone acting on your behalf do not have my consent to contact current employees of Facility #1.

Thank you.”

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**SELECTED TENNESSEE RULES  
OF PROFESSIONAL CONDUCT**

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

\* \* \*

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

\* \* \*

**Comment**

\* \* \*

**Agreements Limiting the Scope of the Representation**

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to 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* RPC 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.*, RPCs 1.1, 1.8, and 5.6.

\* \* \*

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

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

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

(2) the representation is not prohibited by law;

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

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

\* \* \*

### **Comment**

## General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see RPC 1.9. For conflicts of interest involving prospective clients, see RPC 1.18. For definitions of "confirmed in writing" and "informed consent," see RPC 1.0(b) and (e). When a lawyer is representing two or more clients in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them, then RPC 2.2 and not this Rule governs.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. *See also* Comment to RPC 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment [4] to RPC 1.3 and paragraph [18] of Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). *See* RPC 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. *See* RPC 1.9; *see also* Comments [5] and [29] to this RPC (1.7).

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* RPC 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* RPC 1.9(c).

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### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adversity between clients, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are: what is the likelihood that a difference in interests will eventuate and, if it does, will it materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?

\* \* \*

### **Interest of Person Paying for a Lawyer's Service**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. *See* RPC 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, obtaining informed consent, confirmed in writing, from the client.

## **Prohibited Representations**

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. *See* RPC 1.1 (competence) and RPC 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a tribunal" under RPC 1.0(m)), such representation may be precluded by paragraph (b)(1).

## **Informed Consent**

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. *See* RPC 1.0(e) (definition of informed consent). The information required to be provided to the client from whom consent is sought depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information provided must include the implications of the common representation, including possible

effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. *See* Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[19a] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

### **Informed Consent Confirmed in Writing**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. The required writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. *See* RPC 1.0(b); *see also* RPC 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. *See* RPC 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

### **Revoking Consent**

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in

circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result. *See also* RPC 1.9.

### **Consent to Future Conflict**

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is also governed by paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation provided to the client of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. Nevertheless, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent to a future conflict is more likely to be effective, particularly if, *e.g.*, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

### **Conflicts in Litigation**

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of consentability. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in both civil and criminal cases.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one

client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending; whether the issue is substantive or procedural; the temporal relationship between the matters; the significance of the issue to the immediate and long-term interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then, absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a) of this Rule. Thus, for example, with respect to RPC 1.7(a)(1), the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

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### **Special Considerations in Common Representation**

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, complication, or even litigation. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that common representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule

is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* RPC 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of RPC 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in RPC 1.16.

### **Organizational Clients**

[33] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* RPC 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[34] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving

actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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### **RULE 1.13: ORGANIZATIONAL CLIENTS**

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

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(e) 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.

(f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of RPCs 1.7 and 2.2. If the organization's consent to the dual representation is required by RPC 1.7 or RPC 2.2, 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**

##### **The Entity as the Client**

[1] 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 RPC 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 RPC 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 RPC 1.6.

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### **Government Agency**

[8] 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, Comment [19]. 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.

### **Clarifying the Lawyer's Role**

[9] There are times when the organization's interest may be or become adverse to the interest 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.

[10] 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.

### **Dual Representation**

[11] Paragraph (f) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

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## **RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

\* \* \*

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

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

### **Comment**

\* \* \*

[3] Although paragraph (f) broadly prohibits lawyers from taking extrajudicial action to impede informal fact-gathering, it does permit the lawyer to request that the lawyer's client, and relatives, employees, or agents of the client, refrain from voluntarily giving information to another party. This principle follows because such relatives and employees will normally identify their interests with those of the client. *See also* RPC 4.2.

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### **RULE 4.2: COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

### **Comment**

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. *See* RPC 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, by applicable judicial precedent, or by court order. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances. By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Consent of the organization's lawyer is not required for communication with a former agent or employee. *See* RPC 4.4 (regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work-product of the organization's lawyer). In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. *See* RPC 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. *See* RPC 1.0(f).

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to RPC 4.3.

### **RULE 4.3: DEALING WITH AN UNREPRESENTED PERSON**

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

that the interests of such a person are, or have a reasonable possibility of being, in conflict with the interests of the client.

## **Comment**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see RPC 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

#### **RULE 4.4: RESPECT FOR THE RIGHTS OF THIRD PERSONS**

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

\* \* \*

#### **Comment**

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of RPC 4.1 or RPC 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either RPC 8.4(c) (prohibition against dishonest or deceitful conduct) or RPC 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)

\* \* \*

#### **RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

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

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

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

(c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## **Comment**

[1] Lawyers generally employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyer assistants should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. *See* RPC 5.1, Comment [1]. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

### **RULE 7.3: SOLICITATION OF POTENTIAL CLIENTS**

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

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

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

- (1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence; or
- (3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, divorce or legal separation, worker's compensation, wrongful death, or otherwise relates to an accident, filing of divorce or legal separation, or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident, filing of divorce or legal separation, or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family, close personal, or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send a written, recorded, or electronic communication soliciting professional employment from a specifically identified recipient who is not a person specified in paragraphs (a)(1) or (a)(2) or (a)(3), unless the communication complies with the following requirements:

(1) The words “Advertising Material” appear on the outside of the envelope, if any, in which a communication is sent and at the beginning and ending of any written, recorded or electronic communication.

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or the Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked “SAMPLE” and the words “DO NOT SIGN” shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to potential clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific potential client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, “IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE.”

(7) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule shall be retained by the lawyer for two years after its last dissemination along with a record of when, and to whom, it was sent.

\* \* \*

## **Comment**

[1] There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a potential client known to need legal services. These forms of contact between a lawyer and a potential client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The potential client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching. The restrictions set forth in this Rule, however, do not apply to efforts by a lawyer to get hired as an in-house counsel by a potential client.

[2] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of potential clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under this Rule offer alternative means of conveying necessary information to potential clients who may be in need of legal services. Advertising and written and recorded communications which may be mailed or electronically transmitted make it possible for a potential client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the potential client to direct in-person, live telephone, or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to potential client, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a potential client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family, close personal, or prior professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in RPC 7.3(a) and the requirements of RPC 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose

purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information which is false or misleading within the meaning of RPC 7.1, which involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence, which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer, or which occurs within thirty (30) days after an accident or disaster involving the individual or a member of the individual's family, is prohibited by RPC 7.3(b). Moreover, if after sending a letter or other communication to a client as permitted by RPC 7.2 the lawyer receives no response, any further effort to communicate with the potential client may violate the provisions of RPC 7.3(b)(1). Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

[5A] RPC 7.3(b)(3) includes a prohibition against any solicitation of a prospective client within thirty (30) days of the filing of a complaint for divorce or legal separation involving that person, if a significant motive for the solicitation is the lawyer's pecuniary gain. Some divorce or legal separation cases involve either an alleged history of domestic violence or a potential for domestic violence. In such cases, a defendant spouse's receipt of a lawyer's solicitation prior to being served with the complaint can increase the risk of a violent confrontation between the parties before the statutory injunctions take effect. *See* Tenn. Code Ann. § 36-4-106(d) (2014) (imposing specified temporary injunctions, including "[a]n injunction restraining both parties from harassing, threatening, assaulting or abusing the other," that take effect "[u]pon the filing of a petition for divorce or legal separation, *and upon personal service of the complaint and summons on the respondent* or upon waiver and acceptance of service by the respondent") (emphasis added). The prohibition in RPC 7.3(b)(3) against any solicitation within thirty (30) days of the filing of a complaint for divorce or legal separation is intended to reduce any such risk and to allow the plaintiff spouse in such cases to take appropriate steps to seek shelter, an order of protection, and/or any other relief that might be available.

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[8] Paragraph (c)(6) requires that a lawyer retain a copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule for two years after its last dissemination along with a record of the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by retaining a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent.

### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

\* \* \*

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

\* \* \*

#### **Comment**

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those

characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice – such as a minor assault – may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

\* \* \*

[5] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[6] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* RPC 4.4.

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