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January 19, 2003

PLAINTIFF'S EXHIBIT

TO ALL PRESENT ASBESTOS PERSONAL INJURY CLAIMANTS IN CONNECTION WITH THE PROPOSED CHAPTER 11 PLAN OF REORGANIZATION OF COMBUSTION ENGINEERING, INC.

I have represented asbestos claimants for over twenty years. For the past decade, my representation of asbestos injury claimants has caused me to confront the problem of asbestos defendants who file bankruptcies to avoid payment of asbestos claims. The usual Chapter 11 bankruptcy results in huge amounts of money spent on the bankruptcy process instead of on the asbestos victim where it should go.

One solution to this problem is to negotiate a settlement among the parties before a bankruptcy is filed to avoid the waste of time and money that results in a conventional bankruptcy. Over the last several months, I have negotiated with Combustion Engineering, Inc. and its parent company, ABB, Ltd., to settle Combustion Engineering's asbestos injury claims.[1]

The negotiations have resulted in what I believe is the best solution to a difficult problem. By negotiating a pre-packaged bankruptcy for Combustion Engineering, funded with a contribution in excess of hundreds of millions of dollars by its parent, ABB, Ltd., asbestos

1

JOE RICE

[1] In connection with the negotiations of this major financial transaction, I will be paid a fee by non-debtor, foreign entities for the considerable time and effort which I spent in achieving this settlement. For more detail on this matter, see the Disclosure Statement at Article 6.8(h).

(g) Certain Expenses Necessary to Effectuate the Plan.

In addition to its commitment to pay certain funds for the benefit of the Creditors of Combustion Engineering, ABB and Asea Brown Boveri have agreed to pay certain of the expenses necessary to enable Combustion Engineering to propose and confirm the Plan including, expenses related to the environmental liabilities of Combustion Engineering and a success fee of $20 million to Joseph F. Rice.

6.9 **Retention of Jurisdiction.**

(a) Jurisdiction.

Until the Chapter 11 Case is closed, the Bankruptcy Court shall retain the fullest and most extensive jurisdiction permissible, including all that is necessary to ensure that the purposes and intent of the Plan are carried out. Except as otherwise provided in the Plan, the Bankruptcy Court shall retain jurisdiction to hear and determine all Claims against and Equity Interests in Debtor, and to adjudicate and enforce all other Causes of Action which may exist on behalf of Debtor. Nothing contained herein shall prevent Debtor, Reorganized Debtor or the Asbestos PI Trust from taking such action as may be necessary in the enforcement of any Cause of Action which Debtor has or may have and which may not have been enforced or prosecuted by Debtor, which Cause of Action shall survive confirmation of the Plan and shall not be affected thereby except as specifically provided herein.

(b) General Retention.

Following the entry of the Confirmation Order, the administration of the Chapter 11 Case will continue at least until the completion of the transfers contemplated to be accomplished on the Effective Date. Moreover, the Asbestos PI Trust shall be subject to the continuing jurisdiction of the Bankruptcy Court in accordance with the requirements of Section 468B of the Internal Revenue Code and the United States Treasury regulations issued pursuant thereto. The Bankruptcy Court shall also retain jurisdiction for the purpose of classification of any Claim and the re-examination of Claims which have been Allowed temporarily for purposes of voting, and the determination of such objections as may be filed with the Bankruptcy Court with respect to any Claim. The failure by Debtor to object to, or examine, any Claim for the purposes of voting, shall not be deemed a waiver of the right of Debtor, Reorganized Debtor, or the Asbestos PI Trust to object to or re-examine such Claim in whole or part for any other purpose.

(c) Specific Purposes.

In addition to the foregoing, the Bankruptcy Court shall retain exclusive jurisdiction for the following specific purposes after the Confirmation Date:

(i) to modify the Plan after the Confirmation Date, pursuant to the provisions of the Bankruptcy Code and the Bankruptcy Rules;

(ii) to correct any defect, cure any omission, reconcile any inconsistency, or make any other necessary changes or modifications in or to the Plan, the Asbestos PI Trust Documents or the Confirmation Order as may be necessary to carry out the purposes and intent of the Plan, including the adjustment of the date(s) of performance under the Plan Documents in the event that the Effective Date does not occur as provided herein so that the intended effect of the Plan may be substantially realized thereby;

(iii) to assure the performance by Reorganized Debtor and the Asbestos PI Trust of its respective obligations to make distributions under the Plan and the Plan Documents;

(iv) to enforce and interpret the terms and conditions of the Plan Documents;

(v) to enter such orders or judgments, including, but not limited to, injunctions (i) as are necessary to enforce the title, rights, and powers of Debtor, Reorganized Debtor, and the Asbestos PI Trust and (ii) as are necessary to enable holders of Claims to pursue their rights against any Entity that may be liable therefor pursuant to applicable law or otherwise including, but not limited to, Bankruptcy Court orders;

(vi) to hear and determine any motions or contested matters involving taxes, tax refunds, tax attributes, tax benefits, and similar or related matters with respect to Debtor, Reorganized Debtor, or the Asbestos PI Trust, arising on or prior to the Effective Date, arising on account of transactions contemplated by the Plan Documents, or relating to the period of administration of the Chapter 11 Case;

6.11 Miscellaneous Provisions.

(a) Exemption from Transfer Taxes.

Pursuant to Section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of notes or Equity Interests under the Plan, the creation of any mortgage, deed of trust or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan shall be exempt from all taxes as provided in Section 1146(c).

(b) Compliance with Tax Requirements.

In connection with the Plan, Debtor, Reorganized Debtor and the Asbestos PI Trust, will comply with all withholding and reporting requirements imposed by federal, state, local and foreign taxing authorities, and all distributions thereunder shall be subject to such withholding and reporting requirements. Creditors may be required to provide certain tax information as a condition to receiving distributions pursuant to the Plan. Notwithstanding any other provision of the Plan, each Entity receiving a distribution pursuant to the Plan will have sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed by any Governmental Unit, including income and other tax obligations, on account of that distribution. Reorganized Debtor or the Asbestos PI Trust, as applicable, shall withhold from any assets or property distributed under the Plan any assets or property which must be withheld for foreign, federal, state and local taxes payable with respect thereto or payable by the Entity entitled to such assets or property to the extent required by applicable law.

(c) Effectuating Documents and Further Transactions.

Each of the officers of Debtor and Reorganized Debtor is authorized, in accordance with his or her authority under the resolutions of the Board of Directors and By-Laws of Debtor and Reorganized Debtor, to execute, deliver, file, or record such contracts, instruments, releases, indentures, and other agreements or documents and take such actions as may be necessary or appropriate, for and on behalf of Debtor and Reorganized Debtor, to effectuate and further evidence the terms and conditions of the Plan and any notes or securities issued pursuant to the Plan.

JOE RICE

2 (d) The Claimants' Representative and the Future Claimants' Representative.

The Claimants' Representative and the Future Claimants' Representative shall be paid by Combustion Engineering during the Chapter 11 Case. After the Effective Date, the Claimants' Representative and the Future Claimants' Representative shall continue in existence and will have the rights, duties and responsibilities as set forth in the CE Settlement Trust and the Asbestos PI Trust Documents, respectively. After the Effective Date, all reasonable fees and expenses of the Future Claimants' Representative, the Trust Advisory Committee and their respective counsel and advisors shall be the responsibility of the Asbestos PI Trust, and Reorganized Debtor shall have no liability therefor.

(e) Modification of the Plan.

Debtor, with the consent of the CRC, the ACC, if appointed, and the FCR, may alter, amend, or modify the Plan under Section 1127(a) of the Bankruptcy Code or any other Plan Document at any time prior to the Confirmation Date so long as the Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Bankruptcy Code. After the Confirmation Date, and prior to the Effective Date, Debtor, with the consent of the CRC, if any, the ACC, if appointed, and the FCR, may alter, amend, or modify the Plan in accordance with Section 1127(b) of the Bankruptcy Code.

(f) Revocation and Withdrawal of the Plan.

Debtor reserves the right to revoke and withdraw the Plan prior to the Confirmation Date. If Debtor revokes and withdraws the Plan prior to the Confirmation Date or, if the Plan is not confirmed pursuant to Section 1129 of the Bankruptcy Code, then the Plan shall be deemed null and void. In such event, nothing contained in the Plan or in any of the Plan Documents shall constitute or be deemed a waiver or release of any Claims by or against Debtor or any other Entity or to prejudice in any manner the rights of Debtor or any Entity in any further proceedings involving Debtor.

(g) Binding Effect.

Upon the Effective Date, the Plan shall be binding upon and inure to the benefit of Debtor and its successors and assigns, Reorganized Debtor, and the holders of Claims and Equity Interests and their respective successors and assigns, whether or not they objecting party, the nature and amount of Claims or interests held or asserted by the objectant against Debtor or its property, the basis for the objection and the specific grounds therefor, and must be filed with the Bankruptcy Court by the date and time set forth in the notice of the Confirmation Hearing, and served upon the parties and their counsel, so as to be received no later than the date and time for service of the objections, all as designated in the notice of the Confirmation Hearing.

7.3 **Requirements for Confirmation.**

(a) Consensual Confirmation Under Section 1129(a) of the Bankruptcy Code.

At the Confirmation Hearing, the Bankruptcy Court will determine whether the requirements of Section 1129(a) of the Bankruptcy Code have been satisfied, in which event the Bankruptcy Court will enter the Confirmation Order. Such requirements include, among others:

(i) That the Plan complies with applicable provisions of the Bankruptcy Code.

(ii) That Combustion Engineering has complied with the applicable provisions of the Bankruptcy Code.

(iii) That the Plan has been proposed in good faith and not by any means forbidden by law.

(iv) That any payment made or promised by Combustion Engineering to any Entity for services, costs or expenses in or in connection with its Chapter 11 Case or the Plan has been approved by or is subject to approval by the Bankruptcy Court as reasonable.

(v) That Combustion Engineering has disclosed the identity and affiliations of any individual proposed to serve as a director or an officer of Reorganized Debtor after confirmation of the Plan and that the appointment to, or continuance in, such office by such individual is consistent with the interests of holders of Claims and Equity Interests and with public policy.

(vi) That the Plan is in the best interests of the holders of Claims and Equity Interests; that is, each holder of an Allowed Claim or Allowed Equity Interest either has accepted the Plan or will receive or retain on account of its Claim or Equity Interest property with a value, as of the Effective Date, that is not less than the amount that the holder would receive or retain if Combustion Engineering were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date.

(vii) Each Class of Claims or Equity Interests has either accepted the Plan or is not impaired under the Plan.

(viii) Except to the extent that the holder of a particular Claim has agreed to a different treatment of such Claim, the Plan provides that Allowed Administrative Expense Claims and Allowed Priority Claims will be paid in full on the Effective Date and that Allowed Tax Claims will be either paid in full on the Effective Date or will receive on account of such Claims deferred cash payments, over a period not exceeding six (6) years after the date of assessment of such Claims, of a value, as of the Effective Date, equal to the Allowed Amount of such Claims.

(ix) At least one Impaired Class of Claims has accepted the Plan, without regard to the votes of any insiders.

(x) That the Plan is feasible; that is, confirmation is not likely to be followed by the need for liquidation or further reorganization of Reorganized Debtor.

(xi) All fees payable under Section 1930 of Title 28 of the United States Code, if and to the extent due, have been paid on or prior to the Effective Date.

(xii) The Plan provides for the continuation after the Effective Date of payment of all retiree benefits, as that term is defined in Section 1114 of the Bankruptcy Code, without modification by the Plan, thereby complying with Section 1114 of the Bankruptcy Code.

The Plan is the product of extensive arms-length negotiations and has been proposed in good faith. Combustion Engineering believes that the Plan satisfies all applicable requirements of Section 1129(a) of the Bankruptcy Code. A discussion of the reasons Combustion Engineering believes the Plan satisfies certain of such requirements is set forth below and the satisfaction of the remaining requirements of Section 1129(a) of the Bankruptcy Code is, in Combustion Engineering's belief, self-explanatory:

ANY TERM USED IN CAPITALIZED FORM THAT IS NOT DEFINED HEREIN BUT THAT IS DEFINED IN THE GLOSSARY OF TERMS FOR THE PLAN DOCUMENTS PURSUANT TO THE PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE OF COMBUSTION ENGINEERING, INC., ATTACHED HERETO AS EXHIBIT A, SHALL HAVE THE MEANING ASCRIBED TO SUCH TERM BY SUCH GLOSSARY AND SUCH DEFINITIONS ARE INCORPORATED HEREIN BY REFERENCE.

THIS SOLICITATION (THIS "SOLICITATION") IS BEING CONDUCTED TO OBTAIN SUFFICIENT ACCEPTANCES OF A PLAN OF REORGANIZATION BEFORE THE FILING OF A VOLUNTARY REORGANIZATION CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE. BECAUSE A CHAPTER 11 CASE HAS NOT YET BEEN COMMENCED, THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED BY THE BANKRUPTCY COURT AS CONTAINING ADEQUATE INFORMATION WITHIN THE MEANING OF SECTION 1125(a) OF THE BANKRUPTCY CODE. FOLLOWING THE COMMENCEMENT OF THE CHAPTER 11 CASE, COMBUSTION ENGINEERING EXPECTS TO SEEK PROMPTLY AN ORDER OF THE BANKRUPTCY COURT (A) APPROVING THIS DISCLOSURE STATEMENT AS HAVING CONTAINED ADEQUATE INFORMATION AND THIS SOLICITATION OF VOTES AS HAVING BEEN IN COMPLIANCE WITH SECTION 1126(b) OF THE BANKRUPTCY CODE AND (B) CONFIRMING THE PLAN.

DISCLOSURE STATEMENT

January 19, 2003

PLAINTIFF'S EXHIBIT

Solicitation of Votes
With Respect to the Pre-packaged Plan of Reorganization

of

COMBUSTION ENGINEERING, INC.

COMBUSTION ENGINEERING, INC. ("COMBUSTION ENGINEERING") HAS NOT COMMENCED A CASE UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AT THIS TIME. THIS DISCLOSURE STATEMENT SOLICITS ACCEPTANCES OF THE PLAN AND CONTAINS INFORMATION RELEVANT TO A DECISION TO ACCEPT OR REJECT THE PLAN.

THE VOTING DEADLINE TO ACCEPT OR REJECT THE PLAN IS 5:00 P.M., EASTERN STANDARD TIME, ON FEBRUARY 19, 2003, UNLESS COMBUSTION ENGINEERING, IN ITS SOLE DISCRETION, AND FROM TIME TO TIME, EXTENDS THE VOTING DEADLINE, BY WRITTEN NOTICE TO THE CLAIMANTS' REPRESENTATIVE AND THE FUTURE CLAIMANTS' REPRESENTATIVE, IN WHICH EVENT THE PERIOD DURING WHICH THE BALLOTS WILL BE ACCEPTED WILL TERMINATE AT 5:00 P.M., EASTERN STANDARD TIME, ON SUCH EXTENDED DATE (THE "VOTING DEADLINE"). IN ORDER TO BE COUNTED, BALLOTS MUST BE RECEIVED BY TRUMBULL BANKRUPTCY SERVICES, LLC (THE "VOTING AGENT") AT COMBUSTION ENGINEERING BALLOTS, P.O. BOX 721, WINDSOR, CT 06095-0721 OR COMBUSTION ENGINEERING BALLOTS, C/O TRUMBULL SERVICES, 4 GRIFFIN ROAD NORTH, WINDSOR, CT 06095 ON OR BEFORE THE VOTING DEADLINE.

Combustion Engineering is providing this Disclosure Statement and the Exhibits hereto, the accompanying ballots, and the related materials delivered herewith pursuant to Section 1126(b) of the Bankruptcy Code, in connection with this Solicitation of Votes for the Plan of Reorganization Under Chapter 11 of the Bankruptcy Code of Combustion Engineering (the "Plan"), a copy of which is annexed to this Disclosure Statement as *Exhibit B*.

Combustion Engineering is furnishing this Disclosure Statement to each known holder of Asbestos PI Trust Claims and to any other Entity entitled to vote to accept or reject the Plan. This Disclosure Statement is to be used by each recipient solely in connection with his, her or its evaluation of the Plan and use of this Disclosure Statement for any other purpose is not authorized. This Disclosure Statement may not be reproduced or provided to others (other than to those advisors of any recipient of this Disclosure Statement who may review the information contained herein to assist such recipient in his, her or its evaluation of the Plan), without the prior written consent of Combustion Engineering.

THE PLAN PROVIDES, AMONG OTHER THINGS, FOR THE ISSUANCE OF INJUNCTIONS UNDER SECTIONS 105 AND 524(g) OF THE BANKRUPTCY CODE THAT RESULT IN THE CHANNELING OF ALL ASBESTOS PERSONAL INJURY LIABILITIES OF COMBUSTION ENGINEERING AND CERTAIN OTHER PARTIES

3.2 The Negotiation Process.

During 2002, Combustion Engineering reviewed and discussed with ABB and Asea Brown Boveri the various options available to resolve the asbestos liabilities issues of Combustion Engineering. Representatives from CVCSC also participated in many of the discussions. The parties reviewed historical data and current trends relating to claims asserted against Combustion Engineering relating to alleged asbestos liabilities and also reviewed both Combustion Engineering's and ABB's financial situations, and in particular, liquidity issues.

ABB and Combustion Engineering began discussions and negotiations with the Claimants' Representative in 2002. The negotiations unfolded over an intensive two month period during which the parties engaged in numerous meetings and discussions. The negotiations focused first on the desirability of a possible plan of reorganization and the settlements required to position Combustion Engineering for filing such a plan, and then on the terms of such settlements.

The Claimant's Representative and Combustion Engineering each evaluated the asbestos-related personal injury claims presently asserted against Combustion Engineering. The parties examined historical data for not only Combustion Engineering but also for the industry in general and other similarly situated defendants, including claims, financial business and other data. In addition, CVCSC provided data on the current state of litigation for like cases. The parties then negotiated heavily to determine an appropriate dollar figure for the settlement amounts. Combustion Engineering understands that the Claimants' Representative discussed matters relevant to the settlements with various counsel representing large groups of present Asbestos PI Trust Claimants.

As a result of these negotiations, Combustion Engineering entered into a Master Settlement Agreement, the CE Settlement Trust Agreement, and other related agreements as described more fully in Section 3.7 herein.

Combustion Engineering appointed David Austern as the Future Claimants' Representative. Combustion Engineering, ABB, and certain other Non-Debtor Affiliates, then entered into negotiations with the Claimants' Representative and the Future Claimants' Representative that resulted in the Plan. During the course of those negotiations, the parties engaged in extensive due diligence through their financial advisors and other professionals.

3.3 The Claimants' Representative.

Beginning in 2002, Combustion Engineering contacted numerous candidates to serve as the Claimants' Representative to represent the interests of Asbestos PI Trust Claimants who are presently known. Combustion Engineering sought a candidate with recognized excellence in the field of mass torts and prior experience serving as a legal counsel in asbestos cases. After reviewing the qualifications and potential conflicts of suggested candidates, and following careful deliberation, Combustion Engineering asked Joseph F. Rice to serve as the Claimants' Representative. Mr. Rice's address is the following:

Joseph F. Rice, Esq.
Ness Motley PA
28 Bridgeside Boulevard
Mount Pleasant, SC 29464

3.4 Selection of the Future Claimants' Representative.

Beginning in 2002, Combustion Engineering contacted numerous candidates to serve as the Future Claimants' Representative to represent the interests of Asbestos PI Trust Claimants who are presently unknown (the "Future Claimants"). Combustion Engineering sought a candidate with recognized excellence in the field of mass torts and with complete independence. After reviewing the qualifications and potential conflicts of suggested candidates, and following careful deliberation, and with the consent of the Claimants' Representative, Combustion Engineering asked David Austern to serve as the Future Claimants' Representative.

David Austern is the General Counsel of the Manville Trust and a former Assistant District Attorney in New York, as well as a former Assistant United States Attorney in Washington, D.C. He was in private practice for 13 years, and is the author of three books, including *The Crime Victims Handbook*. Mr. Austern is also President of the National Center for Victims of Crime. As a law professor at Georgetown University, he taught Criminal and Procedural Law. Presently, he teaches as an adjunct professor at American University's Washington College of Law.

David Austern has never represented a current plaintiff, defendant, or insurer in any asbestos litigation against Combustion Engineering, ABB and/or any other Non-Debtor Affiliates and has never had a relationship with, or connection to, Combustion Engineering, ABB and/or any other Non-Debtor Affiliates.

3.5 <u>Retention of Professionals.</u>

Combustion Engineering has retained Kirkpatrick & Lockhart LLP and Pachulski, Stang, Ziehl, Young & Jones P.C. as its bankruptcy counsel to advise on bankruptcy matters and to assist it in the formulation of a pre-packaged reorganization. Kirkpatrick & Lockhart LLP also serves as its insurance coverage counsel, to advise it in connection with the resolution of pending Asbestos PI Trust Claims. Combustion Engineering retained The Blackstone Group, L.P. to assist in the financial analysis in connection with the pre-packaged plan. Combustion Engineering retained CVCSC, as a consultant to assist in the resolution of Asbestos PI Trust Claims. In connection with the negotiation of the Plan and related matters, ABB Ltd, the indirect parent of Combustion Engineering, was represented by the law firm of Kirkland & Ellis. Combustion Engineering also retained Trumbull Bankruptcy Services LLC to serve as its ballot agent.

The Future Claimants' Representative engaged the law firms of Swidler Berlin Shereff Friedman, LLP ("Swidler") and Gilbert Heintz & Randolph LLP. Swidler in turn, retained the financial advisory firms of FTI Consulting, Inc. and CIBC World Markets Corp.

The Claimants' Representative engaged Stutzman, Bromberg, Esserman & Plifka, P.C. as legal counsel.

3.6 <u>Due Diligence Review.</u>

The Claimants' Representative and the Future Claimants' Representative conducted a due diligence review of among other things (a) the business affairs of Combustion Engineering, (b) the value of Combustion Engineering's assets and liabilities, (c) the value of certain consideration to be contributed to the Asbestos PI Trust and (d) the feasibility of a plan of reorganization. The Claimants' Representative and the Future Claimants' Representative due diligence review included an investigation of the past and present business activities of Combustion Engineering and the relationship between Combustion Engineering, ABB and the Non-Debtor Affiliates, including the transactions described in Section 4.6 -- "Certain Transactions." Combustion Engineering cooperated with the Claimants' Representative and the Future Claimants' Representative in their investigations and produced numerous documents in response to the requests of the Claimants' Representative and the Future Claimants' Representative.

3.7 Pre-Petition Payment of Asbestos-Related Personal Injury Claims Pursuant to <u>the Master Settlement Agreement and the CE Settlement Trust Agreement</u>.

As a result of the pre-petition negotiations, Combustion Engineering entered into the following agreements:

(i) a Master Settlement Agreement with counsel for the holders of asbestos-related personal injury claims pursuant to which Combustion Engineering agreed to settle certain existing asbestos-related personal injury claims based on the specific characteristics of those claims and provide payment of those claims pursuant to the CE Settlement Trust Agreement. (*See* Section 3.7(a) for a description of the Master Settlement Agreement);

(ii) the CE Settlement Trust Agreement, pursuant to which Combustion Engineering funded the CE Settlement Trust with certain assets, and provided specific payment terms for the asbestos-related personal injury claims settled under the Master Settlement Agreement (S*ee* Section 3.7(b) below for a description of the CE Settlement Trust Agreement);

(iii) the CE Promissory Note, contributed by Combustion Engineering as part of its funding of the CE Settlement Trust, pursuant to which Combustion Engineering agreed to pay to the CE Settlement Trust $100,607,740.17 in accordance with the terms of such promissory note (the "CE Promissory Note");

In addition, Combustion Engineering, Asea Brown Boveri and ABB entered into the following agreements:

(iv) Combustion Engineering and Asea Brown Boveri entered into an assignment agreement, pursuant to which Combustion Engineering assigned to the CE Settlement Trust, and Asea Brown Boveri consented to such assignment, the Asea Brown Boveri Loan;

(v) Asea Brown Boveri provided a guaranty to the CE Settlement Trust guarantying performance under the CE Promissory Note; and

(vi) ABB provided a guaranty to the CE Settlement Trust guarantying performance under the Asea Brown Boveri Loan and the assignment of that loan to the CE Settlement Trust.

(h) Class 7 - Equity Interests.

(1) Impairment and Voting.

Class 7 is impaired by the Plan. Each holder of a Class 7 Equity Interest is entitled to vote to accept or reject the Plan under Section 1126 of the Bankruptcy Code.

(2) Treatment.

On the Effective Date, Asea Brown Boveri, the sole holder of Equity Interests in Combustion Engineering shall retain such Equity Interests in Combustion Engineering solely to the extent provided in this Plan.

6.5 Means for Execution of the Plan.

(a) Establishment of the Asbestos PI Trust; Continuation of the CE Settlement Trust.

On the Effective Date, the Asbestos PI Trust shall be established in accordance with the Plan Documents and the Asbestos PI Trust Documents. *See* Article 8 -- "ASBESTOS PI TRUST AND ASBESTOS PI TRUST CLAIMS RESOLUTION MATTERS" for a description of the Asbestos PI Trust. In addition, on the Effective Date, the CE Settlement Trust established pursuant to the CE Settlement Trust Agreement shall continue to be responsible for making payments of Settled Asbestos Claims. *See* Section 3.7(b) -- "The CE Settlement Trust" for a description of the CE Settlement Trust.

(b) Plan Distributions.

(1) Distributions by Reorganized Debtor.

Reorganized Debtor shall make all distributions on account of all Allowed Claims (other than Allowed Asbestos PI Trust Claims – Class 5) to the holders of such Allowed Claims as of the Distribution Date at any of the following addresses: (a) the address set forth on the Proof of Claim filed by such holder; or (b) if no proof of claim has been filed, at the address reflected in the list of Creditors filed with the Bankruptcy Court or in the Schedules, if Schedules are filed. At the option of Reorganized Debtor, any payment or distribution of Cash made by Reorganized Debtor pursuant to the Plan shall be made by check or by wire transfer. Unless otherwise provided for in the Plan, any payment or distribution required to be made by Reorganized Debtor shall be made on the Distribution Date.

(2) Distributions by the Asbestos PI Trust.

Distributions to holders of Allowed Asbestos PI Trust Claims shall be made by the Asbestos PI Trust in accordance with the Asbestos PI Trust Agreement, the TDP and such other applicable agreements, documents or instruments relating thereto that are not inconsistent with the terms of the Asbestos PI Trust Agreement. Except as otherwise provided in the Plan, the Bankruptcy Court shall have no jurisdiction over Claims against the Asbestos PI Trust or payments from the Asbestos PI Trust.

(c) Procedures for the Treatment of Disputed Claims.

(1) Prosecution of Objections to Claims (other than Asbestos PI Trust Claims); Prosecution of Disputed Claims (other than Asbestos PI Trust Claims).

Reorganized Debtor shall have the exclusive right to object to the allowance of Claims filed with the Bankruptcy Court (other than Asbestos PI Trust Claims) or any other Claims to be resolved by Reorganized Debtor pursuant to any provisions of the Plan with respect to which Reorganized Debtor disputes liability in whole or in part. All objections that are filed and prosecuted by Reorganized Debtor as provided herein shall be litigated to Final Order by Reorganized Debtor or compromised and settled in accordance with the business judgment of Reorganized Debtor; *provided, however*, that any such settlement or compromise may only be entered into following five (5) business days' written notice to the Asbestos PI Trust of the terms of such proposed settlement or compromise. Notwithstanding the foregoing, after the Effective Date, the Asbestos PI Trust also shall have the right to object to the allowance of Claims (other than Asbestos PI Trust Claims) filed with the Bankruptcy Court or any other Claims (other than Asbestos PI Trust Claims) to be resolved pursuant to the Plan with respect to which the Asbestos PI Trust disputes liability in whole or in part. Unless otherwise provided in the Plan or ordered by the Bankruptcy Court, all objections by Reorganized Debtor or the Asbestos PI Trust to Claims (other than Asbestos PI Trust Claims) shall be served and filed no later than ninety (90) days after the later of the Effective Date or the date the proof of claim was filed, subject to any extensions granted pursuant to a further order of the Bankruptcy Court. Such further order may be obtained by Reorganized Debtor or the Asbestos PI Trust without a hearing or notice. Debtor, in its

(f) Disallowed Claims.

On and after the Effective Date, Debtor shall be fully and finally discharged of any liability or obligation in respect of a Disallowed Claim or a Disallowed Equity Interest, and any order creating a Disallowed Claim or a Disallowed Equity Interest that is not a Final Order as of the Effective Date solely because of an Entity's right to move for reconsideration of such order pursuant to Section 502 of the Bankruptcy Code or Bankruptcy Rule 3008 shall nevertheless become and be deemed to be a Final Order on the Effective Date. The Confirmation Order, except as otherwise provided herein, or unless the Bankruptcy Court orders otherwise, shall constitute an order: (a) disallowing all Claims (other than Asbestos PI Trust Claims) and Equity Interests to the extent such Claims and Equity Interests are not allowable under any provision of Section 502 of the Bankruptcy Code, including time-barred Claims and Equity Interests, and Claims for unmatured interest, and (b) disallowing or subordinating, as the case may be, any Claims, or portions of Claims, for penalties or non compensatory damages.

(g) Exculpation.

The Reorganized Debtor, the Debtor, the ABB Indemnified Parties, the Alstom Protected Parties, the Trustees of the Asbestos PI Trust, each of the Additional Indemnitees, or any of their respective Representatives (i) shall not have or incur any liability to any Entity for any act or omission in connection with or arising out of the negotiation of the Plan, negotiation of the settlement provided in the ABB and Non-Debtor Affiliate Settlement Agreement, negotiation of the settlement provided in the CE Settlement Trust Agreement, negotiation of the settlement provided in the Master Settlement Agreement, the pursuit of confirmation of this Plan, the consummation of the Plan or the settlements provided in the ABB and Non-Debtor Affiliate Settlement Agreement, the CE Settlement Trust Agreement, the Master Settlement Agreement, or the administration of the Plan or the property to be distributed under the Plan, **(including any and all Claims, obligations, rights, suits, damages, causes of action, remedies, and liabilities based on conduct that constituted or may have constituted ordinary or gross negligence or reckless, willful, or wanton misconduct of the Debtor, the ABB Indemnified Parties, the Alstom Indemnified Parties, the Trustees of the Asbestos PI Trust, the Asbestos Claimants' Committee, the Unsecured Creditors' Committee, the Claimants' Representative Committee, the Claimants' Representative, the Future Claimants' Representative, or any of their respective Representatives or any conduct for which any of those Entities may be deemed to have strict liability under any applicable law)**; and (ii) in all respects shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan and the other Plan Documents.

(h) No Liability for Solicitation or Participation.

Pursuant to Section 1125(e) of the Bankruptcy Code, the Confirmation Order shall provide that all of the Entities who have solicited acceptances or rejections of the Plan (including Debtor, Reorganized Debtor, and all of their Representatives, all of the other Released Parties and the Voting Agent) have acted in good faith and in compliance with the applicable provisions of the Bankruptcy Code, and are not liable on account of such Solicitation or participation, for violation of any applicable law, rule, or regulation governing the Solicitation of acceptances or rejections of the Plan or the offer, issuance, sale or purchase of securities.

6.8 Matters Incident to Plan Confirmation.

(a) No Successor Liability; No Liability for Certain Released Claims.

Except as otherwise expressly provided in the Plan, with respect to Debtor, Reorganized Debtor and the Asbestos PI Trust, Debtor, Reorganized Debtor, the other Asbestos Protected Parties, and the Asbestos PI Trust do not, pursuant to the Plan, assume, agree to perform, pay, or indemnify creditors for any liabilities or obligations of Debtor, Basic, or Lummus relating to or arising out of the operations of or assets of Debtor, Basic, or Lummus whether arising prior to, or resulting from actions, events, or circumstances occurring or existing at any time prior to the Confirmation Date. Neither the Asbestos Protected Parties, Reorganized Debtor, nor the Asbestos PI Trust is, or shall be, a successor to Debtor by reason of any theory of law or equity, and none shall have any successor or transferee liability of any kind or character, except that Reorganized Debtor and the Asbestos PI Trust shall assume the obligations specified in the Plan and the Confirmation Order.

Except as otherwise expressly provided in the Plan, effective automatically on the Effective Date, the Released Parties, their respective Representatives and their Additional Indemnitees shall unconditionally and irrevocably be fully released from any and all claims and causes of action arising under Section 544, 545, 547, 548, 549, 550, 551, and 553 of the Bankruptcy Code or similar claims arising under state or any other law, including, as applicable, claims in the nature of fraudulent transfer, successor liability, corporate veil piercing, or alter ego-type claims, as a consequence of transactions, events, or circumstances involving or affecting Debtor (or any of its predecessors) or any of their respective businesses or operations that occurred or existed prior to the Effective Date.

Combustion Engineering does not have sufficient operating income to meet the funding requirements of the Asbestos PI Trust. Combustion Engineering will fund the Asbestos PI Trust with cash contributions from ABB and Asea Brown Boveri. Thus, Combustion Engineering's ability to meet its financial commitments to the Asbestos PI Trust depends significantly on the ability of ABB and Asea Brown Boveri to pay the cash contributions.

10.7 Insurance Coverage for Asbestos PI Trust Claims.

A discussion of the insurance coverage available for Asbestos PI Trust Claims is provided in Section 2.4(b) -- "Combustion Engineering's Historical Liability Insurance Program" above. As described in Section 2.4(b) above, Combustion Engineering has been in discussions with its insurers about insurance coverage for the Asbestos PI Trust Claims for some time. Estimating the insurance recovery is inherently uncertain and depends on a number of factors, including the potential for disputes over coverage issues with the insurance carriers, the principles of law which would be likely to apply in resolving such disputes, the amount which will be received under agreements which settled such disputes in prior periods, the timing and amount of Asbestos PI Trust Claims which may be made in the future, the financial solvency of the underlying insurance providers and the amount which may be paid to settle or otherwise dispose of those claims. These factors are beyond the control of Combustion Engineering and changes in these factors could materially affect Combustion Engineering's insurance recoveries and its ability to fund the Asbestos PI Trust.

10.8 Distributions under the Asbestos PI Trust Distribution Procedures.

Payments that will be made on Allowed Asbestos PI Trust Claims shall be determined under the Asbestos PI Trust Distribution Procedures and shall be based on the one hand, upon estimates of the number, types and amount of present and expected future Asbestos PI Trust Claims and, on the other hand, on the value of the Asbestos PI Trust, the liquidity of the Asbestos PI Trust, the Asbestos PI Trust's expected future expenses and income, as well as other material matters that are reasonable and likely to affect the sufficiency of funds to pay all holders of Allowed Asbestos PI Trust Claims. There can be no certainty as to the precise amounts that will be distributed by the Asbestos PI Trust in any particular time period or when Asbestos PI Trust Claims will be paid by the Asbestos PI Trust. The trust distribution procedures for Basic and Lummus will be developed subsequent to the Effective Date and established by the Trustees of the Asbestos PI Trust.

10.9 Federal Income Tax Consequences of the Plan.

A private letter ruling may be requested from the Internal Revenue Service confirming, among other things, that the Asbestos PI Trust is a QSF pursuant to Section 468B of the Internal Revenue Code and the United States Treasury regulations hereunder, and that Combustion Engineering is a qualified transferor thereto. Pursuant to Section 7.11.11 of the Plan, the Effective Date shall not occur, unless, among other things, Combustion Engineering receives this private letter ruling from the IRS, or, in the alternative, obtains opinions and assurances regarding the tax consequences of the Plan, deemed satisfactory by Combustion Engineering, Reorganized Debtor, the Claimants' Representative and the Future Claimants' Representative. The IRS may decline to rule on some of the federal income tax aspects of the Plan. If the desired rulings or satisfactory opinions and assurances cannot be obtained, the Effective Date of the Plan may not occur.

10.10 Risk of Post-Confirmation Default.

Although no guarantees can be given, Combustion Engineering believes that the cash flow generated by its business and assets will be sufficient to meet Reorganized Debtor's ongoing business obligations and operating requirements and that such cash flow will be sufficient to make the payments to the Asbestos PI Trust required under the Plan. Projected Reorganized Debtor's operating cash flow is set forth in the Financial Projections attached hereto as *Exhibit D*. At the Confirmation Hearing, the Bankruptcy Court will be required to make a judicial determination that the Plan is feasible.

ARTICLE 11

ALTERNATIVES TO CONFIRMATION AND CONSUMMATION OF THE PLAN

If the Plan is not confirmed and consummated, the alternatives to the Plan include (a) liquidation of Combustion Engineering under Chapter 7 of the Bankruptcy Code; and (b) an alternative plan of reorganization.

11.5 Dissolution of the Unsecured Creditors' Committee and the Asbestos Claimants' Committee; Retention of the Future Claimants' Representative; Creation of the Trust Advisory Committee.

On the Effective Date, the Unsecured Creditors' Committee and the Asbestos Claimants' Committee, if any, shall thereupon be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to and arising from and in connection with the Chapter 11 Case, and such committees shall be deemed dissolved; provided, however, that, (i) in the event that the Effective Date occurs prior to the Confirmation Order becoming a Final Order, the Unsecured Creditors' Committee and the Asbestos Claimants' Committee may, at their option, continue to serve and function for the purpose of participating in any appeal of the Confirmation Order until such time as the Confirmation Order becomes a Final Order and (ii) if the Effective Date occurs prior to the conclusion of any outstanding litigation or adversary proceedings in the Chapter 11 Case or prior to the entry of a Final Order with respect to final fee applications of professionals retained by order of the Bankruptcy Court during the Chapter 11 Case, the Unsecured Creditors' Committee and the Asbestos Claimants' Committee may, at their option, continue to serve until a Final Order is entered with respect to such proceedings. On the Effective Date, the Trust Advisory Committee shall be appointed as provided in Section 7.2.3 of this Plan. The Future Claimants' Representative shall continue to serve as provided in the Asbestos PI Trust Agreement in order to perform the functions required by and as set forth in that agreement. Upon termination of the Asbestos PI Trust, (i) the Trust Advisory Committee for the Asbestos PI Trust and the Future Claimants' Representative shall thereupon be released and discharged of and from all further authority, duties, responsibilities, and obligations relating to and arising from and in connection with the Chapter 11 Case, and (ii) the Trust Advisory Committee for the Asbestos PI Trust shall be deemed dissolved and the Future Claimants' Representative's employment shall be deemed terminated. All reasonable and necessary post-Effective Date fees and expenses of the professionals retained by the Trust Advisory Committee for the Asbestos PI Trust and the Future Claimants' Representative shall be paid by the Asbestos PI Trust in accordance with the terms of the Asbestos PI Trust Agreement. If there shall be any dispute regarding the payment of such fees and expenses, the parties shall attempt to resolve such dispute in good faith and if they shall fail to resolve such dispute, they shall submit the dispute to the Bankruptcy Court for resolution.

11.6 Exculpation.

The Reorganized Debtor, the Debtor, the ABB Indemnified Parties, the Alstom Protected Parties, the Trustees of the Asbestos PI Trust, each of the Additional Indemnitees, or any of their respective Representatives (i) shall not have or incur any liability to any Entity for any act or omission in connection with or arising out of the negotiation of this Plan, negotiation of the settlement provided in the ABB and Non-Debtor Affiliate Settlement Agreement, negotiation of the settlement provided in the CE Settlement Trust Agreement, negotiation of the settlement provided in the Master Settlement Agreement, the pursuit of confirmation of this Plan, the consummation of this Plan or the settlements provided in the ABB and Non-Debtor Affiliate Settlement Agreement, the CE Settlement Trust Agreement, the Master Settlement Agreement, or the administration of this Plan or the property to be distributed under the Plan, **(including any**

and all Claims, obligations, rights, suits, damages, causes of action, remedies, and liabilities based on conduct that constituted or may have constituted ordinary or gross negligence or reckless, willful, or wanton misconduct of the Debtor, the ABB Indemnified Parties, the Alstom Protected Parties, the Trustees of the Asbestos PI Trust, the Asbestos Claimants' Committee, the Unsecured Creditors' Committee, the Claimants' Representative Committee, the Claimants' Representative, the Future Claimants' Representative, or any of their respective Representatives or any conduct for which any of those Entities may be deemed to have strict liability under any applicable law); and (ii) in all respects shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under this Plan and the other Plan Documents.

11.7 Releases.

11.7.1 ***Representatives***

11.7.1.1 ***Release of Representatives of the Debtor and Non-Debtor Affiliates***

Except as otherwise specifically provided in this Plan and the other Plan Documents, for good and valuable consideration, the receipt and sufficiency of which is acknowledged in this Plan, all current and former Representatives of the Debtor, and all current and former Representatives of the Non-Debtor Affiliates, on and after the Effective Date, are released from any and all Claims, obligations, rights, suits, damages, causes of action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity, or otherwise, that any Entity would have been legally entitled to assert in its own right (whether individually or collectively) or on behalf of the holder of any Claim or Equity Interest or other Entity, based in whole or in part, upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date for claims or liabilities resulting from their services as officers or directors of the Debtor or, to the extent such claims or liabilities relate to the business, operations, or management of the Debtor prior to the Effective Date or any of the matters referred to in Section 11.6, any of the Non-Debtor Affiliates **(including any and all Claims, obligations, rights, suits, damages, causes of action, remedies, and liabilities based on conduct that constituted or may have constituted ordinary or gross negligence or reckless, willful, or wanton misconduct of any of the persons being released hereby or any conduct for which any of the persons being released hereby may be deemed to have strict liability under any applicable law).**

11.7.1.2 ***Release of CE Settlement Trust***

For good and valuable consideration, the receipt and sufficiency of which is acknowledged in this Plan, the CE Settlement Trust, the trustee(s) of the CE Settlement Trust, the CRC, the Claimants' Representative and the Representatives of each of the foregoing Entities, are released from any and all Claims, Demands, obligations, rights, suits, damages, causes of action, remedies and liabilities whatsoever (including without limitation any avoidance or recovery actions under Sections 544, 545, 547, 548, 549, 550, 551 and 553 of the Bankruptcy Code), whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law

(f) In addition to the other provisions contained in this Asbestos PI Tru: Agreement or in the TDP requiring the consent of the Future Claimants' Representative and th TAC, the Trustees shall be required to obtain the consent of the Future Claimant: Representative and the consent of the TAC to:

(i) amend any provision of this Asbestos PI Trust Agreement;

(ii) terminate the Asbestos PI Trust pursuant to Section 8.2 hereof;

(iii) change the number of Trustees to serve hereunder and appoir successor Trustee(s); provided, however that in no event shall the number of Trustees authorize to serve hereunder exceed five (5);

(iv) settle the liability of any insurer under any Subject Insuranc Policy or settle any Asbestos Insurance Rights;

(v) change the compensation of the Trustees (other than mere cost-o living increases);

(vi) amend or modify the TDP; or

(vii) take any action pursuant to Section 3.1(c)(iii), 3.1(c)(viii 3.1(c)(xxi) or 3.1(c)(xxiii).

(g) The Trustees, upon notice from the Future Claimants' Representative c the TAC requesting consideration of one or more issues, shall at their next regular meeting or, appropriate, at a specially called meeting, place on their agenda and consider such issues.

3.3 **Claims Administration**. On the Effective Date, the Trustees shall promptl implement the CE TDP, and proceed to adopt and implement the Basic TDP and the Lummu TDP. The TDP provides or will provide, as applicable, mechanisms such as structured, periodi or supplemental payments, pro rata distributions, matrices or periodic review of estimates of th numbers and values of present Asbestos PI Trust Claims and future demands, and othe comparable mechanisms, that provide reasonable assurance that the Asbestos PI Trust will valu and be in a financial position to pay Asbestos PI Trust Claims that involve similar claims i substantially the same manner.

3.4 **Indemnification of Trustees and Additional Indemnitees**.

(a) The Asbestos PI Trust shall indemnify and defend the Trustees, th Asbestos PI Trust's officers, and employees to the fullest extent that a corporation or tru: organized under the laws of the State of Delaware is from time to time entitled to indemnify an defend its directors, trustees, officers and employees against any and all liabilities, expense: claims, damages or losses incurred by them in the performance of their duties hereunde Additionally, any of the Additional Indemnitees, who was or is a party, or is threatened to b made a party to any threatened or pending judicial, administrative, or arbitrative action, b reason of any act or omission of such Additional Indemnitees with respect to (i) the Chapter 1 Case and any act or omission undertaken by them prior to the commencement thereof, (ii) th liquidation of any Asbestos PI Trust Claims, (iii) the administration of the Asbestos PI Trust and the implementation of TDP, or (iv) any and all activities in connection with this Asbestos PI Trust Agreement shall be indemnified and defended by the Asbestos PI Trust to the fullest extent that a corporation or trust organized under the laws of the State of Delaware is from time to time entitled to indemnify and defend its officers, directors, Trustees, and employees, against reasonable expenses, costs and fees (including reasonable attorneys' fees and costs), judgments, awards, amounts paid in settlement, and liabilities of all kinds incurred by each Additional Indemnitee in connection with or resulting from such action, suit, or proceeding, if he or she acted in good faith and in a manner such Additional Indemnitee reasonably believed to be in, or not opposed to, the best interests of the holders of Asbestos PI Trust Claims whom the applicable Additional Indemnitee represents. Notwithstanding the foregoing, neither the Trustees nor any officer or employee of the Asbestos PI Trust, nor the Future Claimants' Representative nor any member of the TAC shall be indemnified or defended in any way for any liability, expense, claim, damage, or loss for which they are ultimately liable under Sections 5.4, 6.8 or 7.9, as applicable.

X (b) Reasonable expenses, costs and fees (including reasonable attorneys' fees and costs) incurred by or on behalf of a Trustee or any Additional Indemnitee in connection with any action, suit, or proceeding, whether civil, administrative or arbitrative from which he or she is indemnified by the Asbestos PI Trust pursuant to Section 3.4(a), shall be paid by the Asbestos PI Trust in advance of the final disposition thereof upon receipt of an undertaking, by or on behalf of such Trustee or Additional Indemnitee, to repay such amount in the event that it shall be determined ultimately by Final Order that such Trustee or any Additional Indemnitee is not entitled to be indemnified by the Asbestos PI Trust.

(c) The Trustees shall have the power, generally or in specific cases, to cause the Asbestos PI Trust to indemnify the agents, advisors, or consultants of the Asbestos PI Trust to the same extent as provided in this Section 3.4 with respect to the Trustees.

(d) Any indemnification under Section 3.4(c) of this Asbestos PI Trust Agreement shall be made by the Asbestos PI Trust upon a determination by the Trustees that indemnification of such Entity is proper in the circumstances.

(e) The Trustees may purchase and maintain reasonable amounts and types of insurance on behalf of the Asbestos PI Trust and pay any individual who is or was a Trustee, officer, employee, agent or representative of the Asbestos PI Trust or an Additional Indemnitee against liability asserted against or incurred by such individual in that capacity or arising from his or her status as a Trustee, Future Claimants' Representative, member of the TAC, officer, employee, agent or other representative.

3.5 **Encumbrance**. The Trustees and the Additional Indemnitees shall have an Encumbrance upon the Asbestos PI Trust Assets which shall be prior to any other Encumbrance thereon, and the Asbestos PI Trust hereby grants a security interest in the Asbestos PI Trust Assets, all proceeds thereof and all accounts into which such proceeds or the Asbestos PI Trust Assets are deposited or maintained to each of the Trustees and the Additional Indemnitees, to secure the payment of any amounts payable to them pursuant to Section 3.4, 5.5, 6.5 or 7.6. The Asbestos PI Trust shall take such actions as may be necessary or reasonably requested by any of

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Original Publication Date 1983

RULE 1.7 **CONFLICT** OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

COMMENT

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible **conflict** of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential **conflicts** of interest.

[2] If such a **conflict** arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a **conflict** arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if

it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The **conflict** in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible **conflict** does not itself preclude the representation. The critical questions are the likelihood that a **conflict** will eventuate and, if it does, whether it will 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a **conflict**. However, as indicted in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of **conflict** must be resolved as to each client. Moreover, there may be circumstances where it is 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.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may **conflict**, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible **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 criminal cases as well as civil. The potential for **conflict** of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails **conflict** to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other **Conflict** Situations

[11] **Conflicts** of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual **conflict** will arise and the likely prejudice to the client from the **conflict** if it does arise. The question is often one of proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] **Conflict** questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a **conflict** of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] 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.

Conflict Charged by an Opposing Party

[15] Resolving questions of **conflict** of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the **conflict** is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

MODEL CODE COMPARISON

DR 5-101(A) provided that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his by lawyer's own interests or by lawyer's duties to another current client). See generally Steinberg & Sharp, Attorney **Conflicts** of Interest: The Need for a Coherent Framework, 66 Notre Dame L.Rev. 1 (1990); Patterson, An Analysis of Conflicts of Interest Problems, 37 Mercer L.Rev. 569 (1986); Current Developments in the **Law--Conflicts** of Interest in the Legal Profession, 94 Harv.L.Rev. 1244, 1296- 315 (1981).

For a discussion of the **conflict** provisions of the Restatement (Third) of the Law Governing Lawyers, see Moore, Restating the Law of Lawyer Conflicts, 10 Geo.J. Legal Ethics 541 (1997).

. Withdrawal and Disqualification

When a **conflict** of interest arises during the course of representation, the lawyer must withdraw in accordance with Rule 1.16. The Comment to Rule 1.7 states that resolution of **conflict** issues is the responsibility of the lawyer undertaking the representation. Opposing counsel may properly raise the question when the **conflict** threatens the fair administration of justice. However, such objections are viewed with caution because of the potential for misuse. See British Airways v. Port Auth. of New York and New Jersey, 862 F.Supp. 889 (E.D.N.Y.1994) (court granted opposing lawyer's motion to disqualify plaintiff's firm, which concurrently represented defendant in unrelated litigation); Dawson v. City of Bartlesville, 901 F.Supp. 314 (N.D.Okla.1995) (invocation of Rule 1.7 does not alone provide standing for party to seek disqualification of opposing counsel; purpose of Rules of Professional Conduct subverted when invoked by opposing parties as procedural weapons). Compare Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F.Supp. 1212 (N.D.Cal.1993) (no exception to rules about adverse representation for multinational clients and international law firms; duty of undivided loyalty to client and necessity of informed client consent to adverse representation applies internationally, no matter how difficult the communication problems), with Guillen v. City of Chicago, 956 F.Supp. 1416 (N.D.Ill.1997) (lawyer should not be disqualified if multiple employment likely to affect judgment adversely on behalf of one or more clients or involve lawyer in representing differing interests, unless substantial basis for believing that actual, rather than merely potential, **conflicts** of interest afoot). See also SWS Fin. Fund A v. Saloman Bros. Inc., 790 F.Supp. 1392 (N.D.Ill.1992) (disqualification does not automatically follow finding of **conflict** of interest; "[t]he legal world is changing ... and courts must be sensitive to the complexities and multiplicities of interests that come into play when enormous corporations and monster law firms interact in a dynamic legal community"); Research Corp. Techs., Inc. v. Hewlett-Packard Co., 936 F.Supp. 697 (D.Ariz.1996) (violation of rule prohibiting representation of clients with adverse interests does not require automatic disqualification of lawyer; court must consider facts and circumstances of each case, including specifics of ethical violation; collecting cases); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-384 (1994) (although lawyer usually need not withdraw from ongoing representation just because opponent files grievance against him or her, if lawyer's interest in avoiding discipline could materially limit representation, lawyer must consider whether it is reasonable to believe that representation will not be adversely affected and then must seek client's consent to continued representation). See generally Anderson, Motions to Disqualify Opposing Counsel, 30 Washburn L.J. 238 (1991); Kline, Motions to Disqualify Based on Conflict of Interest, Identifying the Rules of the Game, 25 St. Mary's L.J. 739 (1994).

Subsection (a): Simultaneous Representation of Clients with Directly Conflicting Interests

REPRESENTING OPPOSING PARTIES IN THE SAME LAWSUIT

The situations in which a direct adverse interest might arise vary widely. Representation of opposing parties in the same lawsuit is uniformly prohibited. See, e.g., GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc., 8 F.Supp.2d 1182 (N.D.Cal.1998) (law firm that represents aircraft's owner disqualified from representing company that converted aircraft into cargo airplane, in all actions between company and aircraft owners arising out of alleged inadequacies of redesigned aircraft); Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F.Supp. 1212 (N.D.Cal.1993) (law firm that represents operating division of chemical and film manufacturer cannot represent another client in antitrust litigation against manufacturer without written informed consent of both clients); Alex Munoz Gen. Contractor, Inc. v. MC3D, Inc., No. 98 C 4489, 1998 WL 831806 (N.D.Ill. Nov. 25, 1998) (law firm that represents shareholder in corporation cannot represent corporation in shareholder's suit for civil rights violations and breach of contract); Vanderveer Group Inc. v. Petruny, No. Civ.A. 93-3677, 1994 WL 314257 (E.D.Pa. June 29, 1994) (law firm representing parent company's majority-owned subsidiary disqualified from representing plaintiff in action against parent corporation); Strategem Dev. Corp. v. Heron Int'l N.V., 756 F.Supp. 789 (S.D.N.Y.1991) (law firm per se ineligible to represent real estate joint venturer in action for breach of venture agreement because firm had not clearly terminated representation of defendant's wholly owned subsidiary in labor dispute by time preparations for breach of venture agreement litigation begun); Flatt v. Superior Court, 885 P.2d 950 (Cal.1994) (requirement of undivided loyalty to existing client, who was target of prospective client's contemplated litigation, negated any duty on part of lawyer to inform prospective client of statute of limitations applicable to proposed lawsuit or even of advisability of seeking alternative counsel); Florida Bar v. Sofo, 673 So.2d 1 (Fla.1996) (lawyer suspended for dual representation of two corporations with adverse interests in same matter, and use of information obtained in representation of one corporation without its consent); Peters v. Hyatt Legal Servs., 469 S.E.2d 481 (Ga.Ct.App.1996) (law firm that represented client in divorce action later began representing wife); Capers v. State, 470 S.E.2d 887 (Ga.Ct.App.1996) (even though defendant's lawyer met twice with codefendant charged with drug trafficking before withdrawing from representation, lawyer did not actively represent conflicting interests by cross-examining codefendant at trial, as relationship with codefendant severed before trial); Creggin Group, Ltd. v. Crown Diversifed Indus. Corp., 682 N.E.2d 692 (Ohio Ct.App.1996) (no disqualification of lawyer whose partner was contacted to represent opponent in replevin action; court found lawyer unaware of confidential documents left in partner's office and no taint of potential **conflict** of interest); Lawyer Disciplinary Bd. v. Frame, 479 S.E.2d 676 (W.Va.1996) (improper for lawyer representing plaintiff in divorce case to prepare answer for client's spouse, regardless of how amicable case may appear); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992) concerns an unrelated matter involving clients whose interests, such as competing economic interests, are only generally adverse. See American Bar Association, The Legislative History of the Model Rules of Professional Conduct 56 (1987) ("[Rule 1.7(a)] was intended to allow a lawyer to represent a client in one matter and be engaged in representation adverse to that client in a different matter, if both clients consent"); see also Harrison v. Fisons Corp., 819 F.Supp. 1039 (M.D.Fla.1993) (law firm disqualified from representing defendant in civil action brought by bank serving as minor plaintiff's guardian, because of firm's concurrent representation of bank in unrelated matter); Committee on Legal Ethics v. Frame, 433 S.E.2d 579 (W.Va.1993) (firm representing plaintiff suing corporation for personal injuries should not have represented corporation's manager and controlling shareholder in divorce action; even though personal injury suit did not name manager/shareholder individually, she was cross-examined in it); In re Walsh, 515 N.W.2d 263 (Wis.1994) (lawyer publicly reprimanded for representing county in deputy sheriff's disability appeal, even though firm already defending deputy in civil rights action); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995) (lawyer who represents corporate client may not take on representation of corporate affiliate that is also client and has interests directly adverse to corporate client, unless lawyer reasonably believes no adverse effect on relationship with corporate client and both corporate client and affiliate consent after consultation); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 (1991) (simultaneous representations of partnerships and individual partners, even on basically unrelated matters, may result in lawyer possessing confidences of one client that may not be revealed to another, leading to requirement that lawyer withdraw from one or both representations); Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 95-15 (1996) (no per se prohibition against parent corporation's lawyer representing plaintiff suing subsidiary on matter unrelated to representation of parent); Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 94-21 (1995) (not per se improper for lawyer to represent city as defendant in personal injury suit and to sue same city in zoning case, if both clients consent after full disclosure); Mass. Bar Ass'n Ethics Comm., Op. 92-3 (1992) (law firm may not represent long-term client in matter that is to detriment of current client's interests when firm, against current client's objections, withdrew from current client's ongoing and related representation); cf. Borges v. Our Lady of the Sea Corp., 935 F.2d 436 (1st Cir.1991) (lawyer who represented prospective personal injury plaintiff took statement from principal of defendant corporation that his firm was actively representing in unrelated matter; although lawyer ran afoul of Rule 1.7, court did not disqualify lawyer as no evidence lawyer improperly influenced statement's contents); Alcan Int'l Ltd. v. S.A. Day Mfg. Co., Inc., 176 F.R.D. 75 (W.D.N.Y.1996) (law firm that represented individual employees of subsidiary of defendant corporation in immigration matters not disqualified because it also represented defendant corporation in false representation claim under Lanham Act; court viewed corporation as "vicarious client" and immigration matters unrelated to Lanham Act claims); Reuben H. Donnelley Corp. v. Sprint Publ'g & Adver., Inc., No. 95 C 5825, 1996 WL 99902 (N.D.Ill. Feb. 29, 1996) (law firm representing long-standing corporate client in tax matter not disqualified from representing plaintiff in breach of contract action against parent of corporate client; court found parent and subsidiary not "effectively one company" and should not be treated as single client for purposes of Rule 1.7(a), as they were separate entities, operating in different states, without complete identity of management and directors, and no active management by parent corporation's in-house lawyers of defense of breach of contract case and unrelated tax matter);

Philadelphia Bar Ass'n Professional Guidance Comm., Op. 89-27 (1990) (firm may advocate opposing positions on same legal question in representing unrelated clients in unrelated cases, but if both cases pending in appellate court, firm must determine whether it can adequately represent both clients and, if yes, must secure both clients' consent after full disclosure). See generally Rotunda, **Conflicts** Problems When Representing Members of Corporate Families, 72 Notre Dame L.Rev. 655 (1997); Sacksteder, Formal Opinion 95-390 of the ABA's Ethics Committee: Corporate Clients, **Conflicts** of Interest, and Keeping the Lid on Pandora's Box, 91 Nw.U.L.Rev. 741 (1997).

Subsection (b): **Conflicts** That Affect Quality of Representation

GENERAL

Rule 1.7(b) focuses on the extent to which the quality of the lawyer's representation is likely to be limited by competing interests. The provision is similar to Canon 5 of the predecessor Model Code in its concern with the impairment of a lawyer's exercise of independent professional judgment.

Rule 1.7(b) ensures that a lawyer's range of options is not materially limited by other interests or responsibilities that might impair the lawyer's ability to consider, recommend, or carry out an appropriate course of action. The Comment explains that a possible **conflict** of interest does not itself preclude representation under subsection (b). In addition to the likelihood of a **conflict** eventuating, the appropriate inquiry is whether such a **conflict** will materially interfere with the lawyer's independent judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client. The emphasis on material limitations in Rule 1.7(b) suggests some flexibility. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering 242 (2d ed. 1990) ("Rule 1.7(a) applies to **conflicts** that will occur and will be direct, whereas Rule 1.7(b) applies to **conflicts** that may arise, even if only indirectly"); see also Restatement (Third) of the Law Governing Lawyers § 206 (Proposed Official Draft 1998) (unless affected client consents to representation, lawyer may not represent client if there is substantial risk that lawyer's representation would be materially and adversely affected by lawyer's financial or other personal interests).

LAWYER'S OWN INTERESTS

The Comment notes that it may be difficult or impossible for the lawyer to give detached advice when the probity of the lawyer's own conduct is in serious question. Although the facts underlying such violations vary widely, many cases involve a lawyer with business interests related to the representation. Violations commonly occur when the lawyer has a financial or proprietary interest that may be affected by advice given to the client. See, e.g., Evans v. Jeff D., 475 U.S. 717 (1986) (lawyer should not allow interest in obtaining fee to interfere with evaluation of settlement offer but must abide by client's decision); In re Dresser Indus., Inc., 972 F.2d 540 (5th Cir.1992) (court viewed lawyer's erroneous decision to sue own client in products liability class action as based solely on self-interest); Keller v. Mobil Corp., 55 F.3d 94 (2d Cir.1995) (issue of lawyer **conflict** of interest posed when employment discrimination litigation reached stage at which only impediment to settlement was sanction against plaintiff employee's lawyer); Palumbo v. Tele-Communications, Inc., 157 F.R.D. 129 (D.C.1994) (lawyer who was minority owner of cable franchise affiliate of telecommunications company sued in employment discrimination class action disqualified from representing plaintiff class; lawyer could have been in position to use information gleaned from position as director of affiliate to limit potential involvement in litigation as defendant or witness); Florida Bar v. Maynard, 672 So.2d 530 (Fla.1996) (lawyer retained to establish trust for client's children and to serve as trustee depleted trust assets through "loans" to himself and for payment of personal debts and investments); Bell v. Clark, 653 N.E.2d 483 (Ind.Ct.App.1995) (lawyer breached duty to real estate general partner by investing as limited partner himself, creating adverse financial interest), opinion adopted by 670 N.E.2d 1290 (Ind.1996); In re Baxter, 940 P.2d 37 (Kan.1997) (lawyer agreed with adverse parties in settlement negotiations to forgo more than $6,000 in fees without disclosing compromise to client, then sought full fee from client); In re Charlton, 498 N.W.2d 380 (Wis.) (lawyer improperly advised client to make investments in property and business in which lawyer had financial interest and failed to advise client of extent of personal involvement), reconsideration denied, 505 N.W.2d 142 (Wis.), cert. denied, 510 U.S. 918 (1993); cf. United Food & Commercial Workers v. Darwin Lynch, 781 F.Supp. 1067 (M.D.Pa.1991) (absent showing that lawyer's loyalty to client questionable, no disqualification of lawyer who drafted documents at issue in lawsuit despite possibility lawyer may ultimately be held responsible to client for poor draftsmanship); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-406 (1997) (not necessarily improper for two lawyers to represent adverse interests at same time that one lawyer represents the other; each lawyer must evaluate under Rule 1.7(b) whether client-lawyer relationship with opposing counsel may materially limit or adversely affect representation of third-party client; prudent for lawyers to disclose their client-lawyer relationship to respective third-party clients); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-400 (1996) (lawyer's pursuit of employment with opposing firm or party may materially limit representation of client; lawyer must consult with client and obtain client's consent before discussions reasonably likely to interfere with lawyer's professional judgment; lawyers in firm negotiating with job-seeking lawyer have **conflict** requiring similar action, if association with job-seeking lawyer may materially limit representation of client adverse to job-seeking lawyer); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94- 384 (1994) (filing of complaint against lawyer concerning lawyer's ongoing representation of client may present **conflict** under Rule 17(b), as representation of client may be materially limited by lawyer's own interest in avoiding discipline); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 89-1529 (1989) (lawyer who expects to testify at trial as witness on contested issue may represent party in discovery and pretrial if client consents and lawyer reasonably believes that representation will not be adversely affected by lawyer's interest in expected testimony); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1482 (1982) (lawyer may recommend services of one client to another as long as lawyer fully discloses financial relationship with client whose services lawyer recommends); San Diego County Bar Ass'n Legal Ethics and Unlawful Practice Comm., Op. 1989-4 (1990) (lawyer not required to disclose to client that he was hired by opposing counsel to act as expert witness in unrelated litigation; however, if

INFLUENCE OF A THIRD PARTY

Representation that would be impaired by the influence of a third party must also be declined. See, e.g., United States v. Locascio, 6 F.3d 924 (2d Cir.1993) (acceptance of fee from third party could subject lawyer to undesirable outside influence, particularly in criminal matters), cert. denied, 511 U.S. 1070 (1994); Illinois Mun. League Risk Management Ass'n v. Siebert, 585 N.E.2d 1130 (Ill.App.Ct.1992) (association defending self- insured city and officer sued in civil rights action must pay for officer's independent lawyer because complaint sought punitive damages against officer; association could benefit from defending itself in manner justifying punitive damages award, which was not covered by association); cf. McGlothlin v. Connors, 142 F.R.D. 626 (W.D.Va.1992) (not improper for law firm to represent beneficiaries of miners' benefit plan in class action against plan trustees for continued benefits and increased employer contributions, as well as lobbying group with interests allegedly adverse to plan beneficiaries; lobbying group did not completely finance and control litigation, as only five of twenty-two companies contributing to funding of litigation were members of lobbying group); In re Smith, 614 P.2d 1136 (Or.1980) (lawyer's advice to client to sell interest in property to lawyer's former partner not tainted by improper personal interest); seealso Restatement (Third) of the Law Governing Lawyers § 215 (Proposed Official Draft 1998) (applying general **conflicts** prohibition of § 201 to situations in which third person pays lawyer's fee for representing client or directs lawyer's work for client). See generally Moore, Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm, 16 Rev.Litig. 585 (1997) (exploring ethical dilemmas of third-party representation, including client identification, propriety of joint representation, and role of nonclient third-party payers in seeking information and directing course of representation).

RESPONSIBILITY TO ANOTHER CLIENT

It is also improper for a lawyer to represent a client when such representation would be materially limited by responsibilities to another client. Such concerns often arise in the context of representing multiple clients in a single matter and can involve either litigation or nonlitigation matters. See, e.g., Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC, 663 N.Y.S.2d 499 (Sup.Ct.1997) (law firm that represented subsidiary corporation not disqualified from representing plaintiff suing parent corporation, as work performed for subsidiary was highly specialized and not relevant to present controversy; law firm was highly structured and formal and work for subsidiary performed by geographically isolated firm member, rendering remote and speculative any risk of acquisition of parent corporation's confidential information); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995) (lawyer who represents corporate client may not represent nonclient corporate affiliate in unrelated matter if representation of either entity may be materially limited by lawyer's obligations to other, unless lawyer reasonably believes representation will result in no adverse effect on relationship with either client and client whose representation may be materially limited by lawyer's other duties consents after consultation); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388 (1994) (when two law firms have relationship in which they share profits, highly unlikely that one could represent client whose interests are adverse to clients of other firm, unless lawyer makes good-faith determination that representation will not be adversely affected and secures informed consent of client if representation to go forward); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-365 (1992) (lawyer who represents trade association may represent client who sues individual member of trade association, provided individual member does not stand in client-lawyer relationship with lawyer, and provided representation of litigation client will not be materially limited by lawyer's responsibilities to trade association or individual member and litigation client consents after consultation); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990) (functional analysis should be used to determine whether lawyer may continue representing existing client upon learning from potential client information material to representation of existing client).

Positional or issue **conflicts** can arise when a lawyer's advocacy of a client's legal position in one case could be detrimental to the interests of a second client in another case. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-377 (1993) (law firm may not concurrently represent clients whose matters would require firm to argue directly contrary positions in same jurisdiction, unless neither case likely to lead to precedent harmful to other and each client gives informed consent; if matters pending in different jurisdictions, representations permitted if both clients consent and firm reasonably believes neither representation will be adversely affected by other); State Bar of Cal. Standing Comm. on Professional Responsibility and Conduct, Op. 1989-108 (undated) (lawyer may represent two different clients in separate cases, although lawyer will argue opposite sides of same legal issue before same judge in two cases); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 89-27 (1990) (law firm may represent clients in different cases in which firm must take adverse positions on same issue that, when resolved, will be of material significance to both parties, provided each client consents after consultation and disclosure; such representation not permissible on appellate level because result in one case could negatively impact other case). See generally Dzienkowski, Positional **Conflicts** of Interest, 71 Tex.L.Rev. 457 (1993); Donoghue, Conflicts of Interest: Concurrent Representation, 11 Geo.J. Legal Ethics 319 (1998) (succinct analysis of positional **conflicts** arising in litigation, lobbying, and transactional contexts).

SIMULTANEOUS REPRESENTATION OF COPARTIES IN CRIMINAL CASES

While Rule 1.7(a) governs representation of opposing parties in litigation, subsection (b) addresses the simultaneous representation of coparties. The **conflicts** that beset coparties can arise in both civil and criminal litigation. The Comment to Rule 1.7, however, notes that the potential for a **conflict** of interest in representing multiple defendants in criminal cases is so grave that ordinarily a lawyer should decline to represent more than one codefendant.

In this context, constitutional considerations are paramount. See Holloway v. Arkansas, 435 U.S. 475 (1978) (lawyer's request for appointment of separate counsel based on representation of conflicting interests, even without identifying **conflict**, should be granted; lawyer in best position, professionally and ethically, to discern impermissible **conflicts**); Glasser v. United States, 315 U.S. 60 (court cannot order joint representation if such representation creates **conflict**

SIMULTANEOUS REPRESENTATION OF COPARTIES IN CIVIL LITIGATION

Multiple representation of clients by a single lawyer can also create problems in the context of civil litigation. See, e.g., Bell Atl. v. Bolger, 2 F.3d 1304 (3d Cir.1993) (in shareholder derivative suit, lawyer may represent both corporation and directors if derivative claims frivolous; if claims involve serious charges of wrongdoing by those in control of corporation, **conflict** may arise between lawyer's duty to corporation and relationship with board; independent counsel not required when complaint alleges breach of directors' fiduciary duty of care); Acushnet Co. v. Coaters, 972 F.Supp. 41 (D.Mass.1997) (lawyers allowed to represent plaintiffs in CERCLA contribution action on liability issues barred from representation on allocation issues because of **conflict** among plaintiffs' positions); Coaker v. Geon Co., 890 F.Supp. 693 (N.D.Ohio 1995) (**conflict** of interest required lawyer who represented two corporate defendants in age discrimination litigation to withdraw from representing either--despite waiver, defendants must secure independent counsel; first defendant was division of second, but became separate entity and suit raised issue of successor liability); Musheno v. Gensmer, 897 F.Supp. 833 (M.D.Pa.1995) (joint representation improper when derivative complaint alleges fraud, self-dealing, and willful misconduct by directors); Davis v. Southern Bell Tel. & Tel. Co., 149 F.R.D. 666 (S.D.Fla.1993) (lawyer's dual representation of state and private plaintiffs in class action not precluded by potential **conflict** arising from their access to state's investigative resources; using public resources for private benefit permissible when consistent with public interest); In re Leslie Fay Cos., Inc., 175 B.R. 525 (Bankr.S.D.N.Y.1994) (monetary sanctions to, rather than disqualification of, law firm appointed to represent company in bankruptcy proceedings without disclosing to bankruptcy court that it represented creditors of company); In re Shannon, 876 P.2d 548 (Ariz.1994) (lawyer improperly represented two defendants with conflicting interests in civil litigation, telling one it was to "our" obvious advantage to keep other as friendly as possible); Florida Bar v. Mastrilli, 614 So.2d 1081 (Fla.1993) (lawyer improperly represented driver and passenger in auto accident and sued driver on behalf of passenger); Henry Filters, Inc. v. Peabody Barnes, Inc., 611 N.E.2d 873 (Ohio Ct.App.1992) (firm that represented each of two joint patent applicants could not represent one applicant in contract action against second, even though client did not pay firm directly and did not intend firm to keep information from second applicant); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 97-407 (1997) (Rule 1.7(b) may bar lawyer who serves as testifying expert from concurrently representing client adverse to party for whom lawyer serves as expert; when material confidential information of party retaining lawyer as expert would be useful in representation of adverse party, lawyer could not reasonably believe representation of client would not be adversely affected); cf. Rodick v. City of Schenectady, 1 F.3d 1341 (2d. Cir.1991) (not improper for single lawyer to represent police officers and city in malicious prosecution action, even though city's only liability under respondeat superior; both city and officers argued that officers acting in their official capacities, and lawyer advanced all possible defenses available to officers); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 371 (1993) (lawyer may not settle mass tort litigation on behalf of coplaintiffs unless **conflicts** among individuals who wish to settle and those who wish to proceed with litigation waived, or independent counsel procured for plaintiffs whose interests differ from group wishing to participate in global settlement); Colo. Bar Ass'n Ethics Comm., Op. 58 (revised) (1995)

. Other Circumstances in Which Multiple Representation Can Create a **Conflict**

In addition, there are other circumstances outside litigation in which multiple representation can give rise to a **conflict** of interest. See, e.g., Berry v. Saline Mem'l Hosp., 907 S.W.2d 736 (Ark.1995) (improper for lawyer who formerly served on hospital's board of directors to represent patient in medical malpractice action against hospital in which patient sought hospital records under state Freedom of Information Act, even though no lawyer-client relationship between hospital and lawyer; as former member of hospital board, lawyer owed fiduciary duty not to take action to detriment of hospital); Buehler v. Sbardellati, 41 Cal.Rptr.2d 104 (Ct.App.1995) (lawyer for partnership consisting of partners who were also lawyer's clients did not have **conflict** of interest when arrangement clearly manifested that lawyer represented partnership in limited capacity and lawyer did not represent partners in connection with partnership activities); Florida Bar v. Crabtree, 595 So.2d 935 (Fla.1992) (lawyer improperly represented two different people in same complex fiscal transactions without informing one of his representation of other); In re Morris, 953 P.2d 387 (Or.1998) (improper for lawyer to represent personal representative of estate and former personal representative in claim for fees against estate); In re Samuels and Weiner, 674 P.2d 1166 (Or.1983) (representation of both parties in sale of partnership's interest in property did not create **conflict** when transaction amounted to mere assignment of contract); Eriks v. Denver, 824 P.2d 1207 (Wash.1992) (lawyer who represented both promoters and investors in risky tax shelter scheme, knowing that **conflict** likely to arise but not advising clients of potential for **conflict**, ordered to disgorge fees paid by investors); In re Ratzel, 578 N.W.2d 194 (Wis.1998) (improper to represent personal representative of decedent's estate and claimants against estate); cf. Astarte, Inc. v. Pacific Indus. Sys., Inc., 865 F.Supp. 693 (D.Colo.1994) (lawyer serving as director of company, who also served as one shareholder's lawyer, did not violate ethical obligations concerning representation of conflicting interests because no conflicting lawyer-client relationships involved and lawyer fully disclosed multiple roles to company); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 87- 1523 (1987) (lawyer may not ethically represent both adoptive parents and biological parents in private adoption proceeding). See generally Moore, Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee, 39 S.Tex.L.Rev. 497 (1998); Axe, **Conflicts** of Interest Involving Bond Lawyers, 27 Urb.Law. 991 (1995); Fegyveresi, **Conflicts** of Interests in Trust & Estate Practice, 8 Geo.J. Legal Ethics 987 (1995); Button, The District of Columbia **Conflict** of Interest Rules and Lawyer-Lobbyists: A Troubled Marriage, 8 Geo.J. Legal Ethics 961 (1995).

As for a lawyer for a corporation who is also a member of the corporation's board of directors, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 98-410 (1998) (discussing problems lawyer faces when serving as director of client corporation and suggesting measures lawyer should take to minimize risk of ethical violations); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 589 (1988) (lawyer representing corporation may also serve as one of its directors, provided responsibilities of two roles do not **conflict**).

LAWYERS EMPLOYED BY GOVERNMENT ENTITIES

position); Restatement (Third) of the Law Governing Lawyers § 216 (Proposed Official Draft 1998) (unless affected client consents to representation, lawyer may not represent client in any matter for which lawyer has fiduciary or other legal obligation to another, if substantial risk that lawyer's representation would be materially and adversely affected by lawyer's obligation; included in scope of this section are lawyers in private office who function simultaneously in public offices).

CLIENT CONSENT

. General

Although Rule 1.7 generally prohibits a lawyer from undertaking representation that results in a **conflict** of interest, each subsection of the Rule provides for the possibility of client consent.

Otherwise impermissibly conflicting interests may be represented if two general conditions are met: (1) the lawyer must reasonably believe that the client will not be adversely affected, and (2) the client must consent after consultation. See generally Restatement (Third) of the Law Governing Lawyers § 202 (Proposed Official Draft 1998) (informed consent requires that client have reasonably adequate information about material risks of representation to client).

Lawyer Must Reasonably Believe That Client Will Not Be Adversely Affected

Regarding the first condition--that the lawyer reasonably believe the client will not be adversely affected--the Comment sets forth the standard for determining whether it is proper for a lawyer to obtain a client's consent to otherwise impermissible representations: "[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Comment, paragraph [5]. See Burger v. Kemp, 474 U.S. 806 (1987) (Blackmun, J., concurring) (consent of criminal defendant prerequisite to joint representation); British Airways v. Port Auth. of New York and New Jersey, 862 F.Supp. 889 (E.D.N.Y.1994) (burden on client's lawyer to inform fully and obtain consent before beginning or continuing suit against client; court rejected waiver and implied consent defenses when motion to disqualify brought two years into litigation but when no attempt at disclosure and consent); In re Schaeffer, 824 S.W.2d 1 (Mo.1992) (en banc) (lawyer disciplined for representing client's girlfriend in "friendly suit" against client to conceal from client's children his transfer of money to girlfriend; client's consent ineffective when lawyer knew client obsessed with girlfriend and under psychiatric care); Wendell's, Inc. v. Malmkar, 405 N.W.2d 562 (Neb.1987) (rule that client consent may be inadequate under certain circumstances ensures that courts not left to sort out confusing fact issues without benefits of true advocacy); Booth v. Continental Ins. Co., 634 N.Y.S.2d 650 (Sup.Ct.1995) ("dubious proposition" to find full consent after disclosure when insured agrees to representation by insurer's law firm in former employee's declaratory judgment action against insurer and insured); State ex rel. Oklahoma State Bar Ass'n v. McNaughton, 719 P.2d 1279 (Okla.1986) (when **conflict** actual and apparent rather than potential and recondite, representation improper, regardless of consent; improper representation of criminal defendant charged with lewd molestation); In re Hockett, 734 P.2d 877 (Or.1987) (consent cannot be valid when lawyer seeks to represent husbands, sole shareholders of corporation, in bankruptcy matter, and wives in divorce matter; wives would be creditors); In re Walsh, 515 N.W.2d 263 (Wis.1994) (lawyer knowingly disregarded warnings of **conflict** of interest in representation of county in deputy sheriff's disability appeal, even though firm already defending deputy in civil rights action); see also Restatement (Third) of the Law Governing Lawyers § 202 (Proposed Official Draft 1998) (notwithstanding informed consent of clients, lawyer may not represent client if not reasonably likely that lawyer can provide adequate representation to one or more clients). But see Wellman v. Willis, 509 N.E.2d 1185 (Mass.1987) (interpreting predecessor Model Code; lawyer's view of permissibility of **conflict** cannot override client's informed consent).

Client Must Consent After Consultation

The second condition necessary for curing an otherwise impermissible **conflict** is that the client must consent after consultation. "Consultation" is defined in the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Model Rules of Professional Conduct, Terminology (1999). The consultation requirement ensures that the client is reasonably informed. Thus, the lawyer must disclose that multiple representation is sought and the implications of common representation, including its risks and advantages. See, e.g., Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F.Supp. 1212 (1993) (duty to disclose representation adverse to interests of client cannot be fulfilled by mentioning "in passing" participation in brief contrary to interests of client, without stating details of why interests contrary); Fleming v. Sagan, 218 B.R. 494 (Bankr.W.D.Mo.1998) (children's informed oral consent that lawyer who represented father on workers' compensation claim could also participate in children's wrongful death action against father and his employer, which arose out of same accident, held sufficient to waive lawyer's **conflict** of interest); Griva v. Davison, 637 A.2d 830 (D.C.1994) (when dual representation creates potential **conflict** of interest, burden on lawyer involved in dual representation to approach both clients with affirmative disclosure so each can evaluate potential **conflict** and decide whether to consent to continued dual employment); Conrad Chevrolet, Inc. v. Rood, 862 S.W.2d 312 (Ky.1993) (written agreement between corporate seller and corporate buyer of automobile franchise purporting to waive any **conflict** of interest in joint representation of seller and buyer by lawyer married to buyer's principal held to be ineffective waiver; consent impossible when disclosure of lawyer's information about buyer's financial condition essential to seller, but equally essential to buyer that it not be revealed); In re Eisenhauer, 689 N.E.2d 783 (Mass.) (clauses in trust agreement naming lawyer as trustee and giving lawyer veto power over successor trustee, and allowing revocation of trust only through revocation of previously executed power of attorney, created **conflict** of interest requiring consent of client after full disclosure), cert denied, 118 S.Ct. 2303 (1998); In re H. Children, 608 N.Y.S.2d 784 (Fam.Ct.1994) (in some circumstances adult may be permitted to waive lawyer's **conflict**; as matter of law, minor must be presumed to lack ability to make waiver knowingly); Toledo Bar Ass'n v. Tolliver, 584 N.E.2d 670 (Ohio 1992) (lawyer represented plaintiff suing organization while lawyer's firm bidding to become organization's counsel and, after bid accepted, lawyer did not give full and meaningful disclosure of **conflict** to either party); In re Anonymous Member of South Carolina Bar, 432 S.E.2d 467 (S.C.1993) (no misconduct when lawyer who undertook to represent clients with adverse interests explained **conflict** to one client and dismissed by other client before having chance to advise him of **conflict**); Fullmer v. State Farm Ins. Co., 514 N.W.2d 861 (S.D.1994) (defendant must be advised by independent counsel and informed that her proposed new counsel served as witness for codefendant in earlier trial before her consent to representation deemed valid); Gustafson v. City of Seattle, 941 P.2d 701 (Wash.Ct.App.1997) (before representing both driver and passenger in auto accident case, lawyer must obtain consent of clients after full disclosure if it reasonably appears that other parties might claim driver's negligence contributed to passenger's injuries). See generally Zacharias, Waiving Conflicts of Interest, 108 Yale L.J. 407 (1998); Jarvis & Tellam, When Waiver Should Not Be Good Enough: An Analysis of Current Client **Conflicts** Law, 33 Williamette L.Rev. 145 (1997).

As for prospective waivers, compare Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F.Supp.2d 1356 (N.D.Ga.1998) (law firm disqualified from representing new client in tort case directly adverse to existing client in tax matters, despite firm's claim that existing client prospectively waived **conflicts** through standing consent in engagement letter five years earlier; court ruled that adverse litigation against existing client so serious that standing consent to **conflict** of interest must be "exceedingly explicit"), with ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-372 (1993) (lawyer may obtain advance waiver from client allowing lawyer to represent unidentified future clients with interests potentially adverse to existing client's interests, but client must be given enough information to make intelligent decision, and lawyer must reasonably believe new representation will not adversely affect original client's representation; unlikely that client can appreciate consequences of prospective waiver that does not identify potential party, class of potentially conflicting clients, or nature of likely matter); N.Y. County Lawyers Ass'n Comm. on Professional Ethics, Op. 724 (1998) (lawyer may seek prospective waiver from clients or potential clients, as long as lawyer's disclosure of **conflicts** that may arise is adequate under circumstances to allow informed consent; at very least client must be advised of types of possible future adverse representations envisioned by lawyer, types of clients or matters that may present such **conflicts**, and measures lawyer will take to protect client if **conflict** arises); Los Angeles County Bar Ass'n Professional Responsibility and Ethics Comm., Op. 471 (1992) (law firm that represents corporation and its former employee, whom corporation agreed to defend, in suit brought against both of them may ask advance written consent to withdraw from employee's representation and continue to represent corporation if corporation asserts claim against employee, provided consultation appropriate and firm concludes it can represent each client competently).

The jurisdictions differ about whether a government entity's consent can cure a **conflict** of interest in the same way that a private client's consent can do so. Some jurisdictions, reasoning that a government lawyer may use, or suggest an ability to use, his or her position with the government entity to secure consent improperly or to gain an improper advantage for a private client (and noting that the public interest is involved), adhere to a per se "government cannot consent" rule. See, e.g., State ex rel. Morgan Stanley & Co. v. MacQueen, 416 S.E.2d 55

American Bar Association
Annotated Model Rules of Professional Conduct
Original Publication Date 1983

RULE 1.8 **CONFLICT** OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client consents in writing thereto.
(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.
(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.
(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a

client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.
(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.
(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT

Transactions between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.
[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a **conflict** between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Paragraph (d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Paragraph (e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remains ultimately liable for such expenses."

Paragraph (e)(2) has no counterpart in the Model Code.

Paragraph (f) is substantially identical to DR 5-107(A)(1).

Paragraph (g) is substantially identical to DR 5-106.

The first clause of paragraph (h) is similar to DR 6-102(A). There was no counterpart in the Model Code to the second clause of paragraph (h).

Paragraph (i) has no counterpart in the Model Code.

Paragraph (j) is substantially identical to DR 5-103(A).

LEGAL BACKGROUND

GENERAL

The principle of loyalty to the client is fundamental to the lawyer-client relationship and underlies the **conflict**-of-interest provisions of the Model Rules. The subsections of Rule 1.8, which generally amplify Rule 1.7(b), highlight situations in which the lawyer's self-interest may adversely affect representation of a client.

Rule 1.8 addresses two types of **conflicts**: those plainly within Rule 1.7, but arise so often that they warrant exact rules to simplify application, and those that present dangers of self-dealing, but arguably may not violate Rule 1.7. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering 261 (2d ed. 1990). See generally Report of the Commission on Professionalism, 112 F.R.D. 244 (1986) (Stanley Report) (identifying areas of special concern for legal profession--including lawyers investing in clients' businesses and transactions--and recommending further analysis by bar); ABA Section on Litigation, Task Force on Independent Lawyer, The Lawyer-Director: Implications for Independence (1998) (cautioning lawyers about serving on clients' boards of directors because of potential compromise of independent professional judgment).

Subsection (a): Business Transactions with Clients

THE GENERAL APPROACH

Although business transactions between a lawyer and client are not prohibited altogether, Rule 1.8 provides mandatory safeguards directed at protecting the client. The Rule requires that transactions between a lawyer and client be objectively fair to the client, and that the client be given a written explanation of the terms, have an opportunity to consult independent counsel, and consent to the arrangement in writing. See In re Cordova-Gonzalez, 996 F.2d 1334 (1st Cir.) ("[s]tanding alone, [improper business dealings with client] would warrant significant punishment"), cert. denied, 510 U.S. 992 (1993); In re lawyer-client relationship existed regarding business arrangements with them; lawyer had not been expected to exercise independent professional judgment on clients' behalf in negotiating contract); In re McGlothlen, 663 P.2d 1330 (Wash.1983) (lawyer's prior lawyer-client relationship influenced bargaining process regarding purchase of former client's home; disciplinary rules applicable); cf. Fanaras Enters., Inc. v. Doane, 666 N.E.2d 1003 (Mass.1996) (retainer paid by corporation to lawyer for right to prompt legal advice on request does not establish, absent other factors, lawyer-client relationship in connection with unrelated loan made by corporation to lawyer; lawyer not acting as lawyer, but participating in arms- length transaction unrelated to lawyer-client relationship under retainer agreement).

DUTY TO DISCLOSE TERMS

Although many cases address the fairness of the lawyer-client transaction, discipline is most often based on the lawyer's failure to make the necessary disclosures and obtain the required consent, regardless of whether the transaction was objectively fair. See, e.g., Koenig v. Grotrian (In re Grotrian), 217 B.R. 1017 (Bankr.N.D.Ind.1997) (lawyer advised client to place farm sales proceeds in trust, but persuaded client to let him use funds for own ventures without explaining **conflicts** or risks involved or suggesting that client consult independent counsel); In re Charfoos, 183 B.R. 131 (Bankr.E.D.Mich.1994) (when lawyer obtains and guarantees repayment of unsecured loan from client, disclosure obligations not ameliorated by client's financial sophistication or independent knowledge of financial condition of business entity that received loan; full disclosure requires what is reasonably expected to be disclosed in connection with arms-length commercial loan transaction); Passante v. McWilliam, 62 Cal.Rptr.2d 298 (Ct.App.1997) (corporation's promise to pay lawyer stock shares for lawyer's procurement of loan for corporation unenforceable; lawyer violated ethical rules by not advising board of directors to consult independent lawyer before making promise); Gersten v. Statewide Grievance Comm., No. CV 960565949, 1997 WL 339123 (Conn.Super.Ct. June 10, 1997) (lawyer's taking note and mortgage to secure fee falls within scope of Rule 1.8(a) and requires written notification of **conflict** to client); In re Jones-Terrell, 712 A.2d 496 (D.C.1998) (lawyer convinced elderly, bedridden, incapacitated woman to execute agreement changing living arrangements and allowing lawyer and husband to move into woman's home rent-free; lawyer subsequently began representing woman without full disclosure of **conflict**); Florida Bar v. Crabtree, 595 So.2d 935 (Fla.1992) (lawyer collected fees and interest in form of transactions without full explanation to clients, and wrote false letters designed to mislead anyone looking into transactions); In re Horine, 661 N.E.2d 1206 (Ind.1996) (lawyer violated Rule 1.8(a) by negotiating and entering contract with client for purchase of 1983 Oldsmobile without having fully disclosed and transmitted in writing to client all aspects of transaction, without informing client to seek advice of independent counsel, and without obtaining client's written consent to arrangement); Committee on Prof'l Ethics and Conduct of Iowa State Bar Ass'n v. Carty, 515 N.W.2d 32 (Iowa 1994) ("full disclosure" within meaning of DR 5-104(A) means more than making client aware of nature and terms of transaction; lawyer must give client type of advice client would have received in transaction with stranger); In re Ober, 714 A.2d 856 (Md.1998) (no exception to requirements of Rule 1.8

when client is personal friend and sophisticated in business matters; improper for lawyer to borrow from client's escrow account unless lawyer advises client to seek independent counsel); In re Stern, 683 N.E.2d 867 (Mass.1997) (lawyer disbarred for improperly transferring funds from revocable family trust while acting as settlors' trustee and financial advisor of trust, and for failing to advise settlors to retain independent counsel); In re Harper, 485 S.E.2d 376 (S.C.1997) (improper for lawyer to obtain loan on property deeded by client to lawyer without advising client to seek advice of independent counsel); Committee on Legal Ethics v. Cometti, 430 S.E.2d 320 (W.Va.1993) (improper for lawyer to enter lease/purchase agreement with client in attempt to help client with financial difficulties; violation of Rule 1.8(a) to neither make adequate disclosure nor advise client to obtain independent counsel); see also Conn. Bar Ass'n Comm. on Professional Ethics, Op. 99-1 (1998) (lawyer may receive fee for referring clients to investment advisory firm only upon strict compliance with Rule 1.8(a)); Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 98-03 (1999) (patent law firm may not charge "finder's fee" for referring inventor-clients to promoter-clients, and vice versa, unless clients give written consent; firm can rebut presumption of undue influence); Ill. State Bar Ass'n Comm. on Professional Ethics, Op. 97-04 (1998) (lawyer may not take referral fee from investment advisor for referring client to advisor unless lawyer rebuts presumption of undue influence by showing transaction fair, client had opportunity of independent advice, and client consented after full disclosure); N.J. Advisory Comm. on Professional Ethics, Op. 657 (1992) (lawyer may refer clients to affiliated businesses owned by lawyer, such as medical-legal consulting business or divorce mediation service, only if clients understand relationship and their options, consent in writing, and are given opportunity to seek independent counsel before deciding); R.I.Sup.Ct. Ethics Advisory Panel, Op. 96-26 (1996) (lawyer may not sell insurance to estate planning clients and may not provide estate planning legal services to insurance customers; as practical matter, consultation and disclosure--properly and fully carried out--will not result in client consent, in most cases); Utah State Bar Ethics Comm., Op. 98-13 (1998) (law firm accepting stock of client's company in payment of legal fees or buying stock in client with funds paid to client for stock purchase earmarked for payment of legal fees must comply with Rule 1.8(a)).

PROHIBITED LOAN TRANSACTIONS

A common illustration of an improper direct business transaction is an ill- advised loan between a lawyer and a client. See, e.g., In re Cordova- Gonzalez, 996 F.2d 1334 (1st Cir.1993) (lawyer disbarred for borrowing money from client without disclosing ownership of property pledged as collateral and bankruptcy court's jurisdiction over collateral); In re McLain, 671 A.2d 951 (D.C.1996) (lawyer suspended for borrowing money and purchasing house from clients); Florida Bar v. Maynard, 672 So.2d 530 (Fla.1996) (lawyer solicited and received loan from client for real estate investment by corporation of which lawyer was co-owner and officer, but used funds for payment of personal debts, without disclosure and without advising client to seek independent counsel); In re Radford, 698 N.E.2d 98 (Ind.1998) (improper to obtain loan from client without full disclosure and reasonable opportunity for client to seek advice of independent counsel); In re Schambach, No. 98-B-2432, 1999 WL 41749 (La. Jan. 29,

PROHIBITED SALES TRANSACTIONS

Also within the reach of Rule 1.8 are sales transactions between a lawyer and client that improperly favor the lawyer, or that involve the lawyer's failure to provide adequate disclosure of all terms and **conflicts**. See, e.g., Florida Bar v. Rue, 643 So.2d 1080 (Fla.1994) (lawyer made improper automobile sales to clients without written disclosure and transmittal to client and without client consent); Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987) (lawyer selling motel to client failed to disclose important financial information that would have revealed questionable income potential of enterprise); Attorney Grievance Comm'n v. Collins, 457 A.2d 1134 (Md.1983) (lawyer representing both sides to liquor license purchase failed to disclose ownership interest in seller-partnership and improperly advised client that noncompetition clause unnecessary); In re Hartke, 529 N.W.2d 678 (Minn.1995) (lawyer sold wife's used car to client without requisite disclosure and opportunity to consult independent counsel); In re Dato, 614 A.2d 1344 (N.J.1992) (lawyer purchased property from client at unfairly low price and resold immediately at "huge profit").

SOLICITATION OF INVESTMENTS

Soliciting investment funds from a client is another example of an improper business transaction. See, e.g., In re Smyzer, 527 A.2d 857 (N.J.1987) (lawyer inadequately disclosed interest in holding company in which lawyer recommended that client invest); In re Dietrich, 600 N.Y.S.2d 550 (App.Div.1993) (lawyer did not advise clients who invested in real estate development corporation owned and controlled by lawyer to seek other counsel for independent advice); In re Harris, 741 P.2d 890 (Or.1987) (lawyer improperly persuaded client to invest in purchase and rental of property without disclosing that property was to be managed by lawyer's corporation).

ACQUIRING AN INTEREST ADVERSE TO THAT OF A CLIENT

Rule 1.8 also prohibits a lawyer from knowingly acquiring an interest adverse to that of a client without satisfying the Rule's requirements. See, e.g., In re Tigue, 82 B.R. 724 (Bankr.E.D.Pa.1988) (notwithstanding client's consent, improper for lawyer to substitute himself for client's creditors by purchasing their interests at foreclosure sale); Committee on Prof'l Ethics v. Humphreys, 524 N.W.2d 396 (Iowa 1994) (lawyer improperly accepted corporate stock as payment for legal services rendered in organizing corporation and drafted by-laws to protect his position as officer and director); In re Bengston, 342 N.W.2d 744 (Wis.1984) (after failing to prosecute claim timely, lawyer misrepresented that settlement with client's adversary reached, and forwarded to client funds from lawyer's own account; in this context, funds actually undisclosed settlement offer of potential malpractice claims and thus constituted improper business transaction).

Subsection (b): Using Information Relating to the Representation

USING INFORMATION TO THE CLIENT'S DISADVANTAGE

Rule 1.8(b) generally prohibits a lawyer from using information relating to the representation of a client to that client's disadvantage. See, e.g., Harold Williams Dev. Co. v. U.S. Trustee, 977 F.2d 906 (4th Cir.1992) (dual employment by debtor in bankruptcy proceeding of one person as both accountant and lawyer disallowed due to concern about problems of disclosure of confidential information protected by attorney-client privilege, but no analogous accountant-client privilege; potential for **conflicts** presents unacceptable risk of subsequent disqualification); Iowa Supreme Court Bd. of Prof'l Ethics Conduct v. Miller, 568 N.W.2d 665 (Iowa 1997) (lawyer formerly employed by limited liability company threatened to report information regarding company's fraudulent practices to Securities and Exchange Commission unless company repurchased, at a premium, lawyer's shares in company); State of Oklahoma ex rel. Oklahoma Bar Ass'n v. Berry, 969 P.2d 975 (Okla.1998) (no violation of Rule 1.8(b) when lawyer represents both bankruptcy petitioner and one of her creditors and convinces petitioner to convert bankruptcy filing to one more favorable to creditor-client; lawyer gave advice before bankruptcy petitioner retained him and information ultimately not used against her); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992) (Rule 1.8(b), which prohibits using information relating to client's representation to client's detriment, pertinent to issue of **conflict** that arises when lawyer examines client as adverse witness or conducts third-party discovery of client); Md. State Bar Ass'n, Inc., Comm. on Ethics, Op. 99-7 (1998) (law firm hired by insurer to defend insured clients not authorized to release client information to outside audit agency hired by insurer to review firm's invoices); Restatement (Third) of the Law Governing Lawyers § 112 (Proposed Official Draft 1998) (during and after representation of client, lawyer may not use or disclose confidential client information if there is reasonable prospect that doing so will adversely affect material interest of client, or if client has instructed lawyer not to use or disclose such information; lawyer who uses confidential information of client for lawyer's pecuniary gain other than in practice of law must account to client for any profits made).

SEXUAL RELATIONS WITH CLIENT

A lawyer's sexual relations with clients can violate Rule 1.8(b). See, e.g., In re Rinella, 677 N.E.2d 909 (Ill.1997) (lawyer engaged in sexual relations with three clients while representing them in matrimonial matters; court found that lawyer took advantage of his position and overreached by use of position of influence to pressure clients to engage in sexual relations); In re Berg, 955 P.2d 1240 (Kan.1998) (lawyer's sexual relations with vulnerable divorce clients held to warrant disbarment; notwithstanding lack of express rule prohibiting such behavior, court found conduct violated several ethics rules, including Rule 1.8(b)); Otis's Case, 609 A.2d 1199 (N.H.1992) (lawyer disbarred for violating Rule 1.8(b) by using information about divorced client's vulnerability to pursue sexual relationship with client); Musick v. Musick, 453 S.E.2d 361 (W.Va.1994) (remand in post- divorce proceeding to determine whether wife's lawyer, who engaged in sexual relations with wife, would be necessary material witness and had **conflict** justifying disqualification under Rule 1.8(b) and other rules); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-364 (1992) (fundamental principle of lawyer's fiduciary obligation to client, recognized in Rule 1.8(b), implies that lawyer adverse effect on representation of client manifestly present when lawyer's salary paid by client's employer and matter is one in which employer also has interest, regardless of whether employer is co- client or mere third-party payer).

INSURANCE COMPANY'S PAYMENT OF INSURED'S FEES

Although the circumstances in which a third party might offer to compensate a lawyer for services rendered to another vary widely, the most prevalent example is an insurance contract. See, e.g., Vigilant Ins. Co. v. Behrenhausen, 889 F.Supp. 1130 (W.D.Mo.1995) (duty of lawyer hired by liability insurer to defend insured against third-party claim is to defend insured, who is lawyer's client; lawyer has no duty to advocate rights of insurer); Church v. Hofer, Inc., 844 P.2d 887 (Okla.Ct.App.1992) (though insured becomes client of lawyer hired by insurer to defend, with all ethical considerations that are part of lawyer-client relationship, insured not obligated to pay for lawyer's services when insurer becomes insolvent); see also Fla. Bar Professional Ethics Comm., Op. 98-2 (1998) (lawyer may accept set fee per case from insurance company to defend all insurer's third-party insurance defense work, unless lawyer concludes that her independent professional judgment will be affected by arrangement); Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 97-119 (1997) (law firm paid by insurer to defend insureds may not send client work product to insurer's outside auditing agency as support of firm's billing statements; release of information would compromise firm's independent judgment and would require release of information protected by Rule 1.6); Utah State Bar Ethics Comm., Op. 98-03 (1998) (lawyer retained by insurer to represent insured must obtain insured's consent before complying with insurer's request to send bill to outside audit service; even though insured's consent usually included in agreement between insured client and insurer, Rule 1.8(f) requires consultation with client to ensure that client understands and renews consent). See generally Barker, Insurance Defense Ethics and the Liability Insurance Bargain, 4 Conn.Ins.L.J. 75 (1997-1998); Moore, The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?, 4 Conn.Ins.L.J. 259 (1997-1998); Silver & Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke L.J. 255 (1995).

THIRD-PARTY PAYMENT OF FEES IN CRIMINAL CASES

Regarding criminal cases involving third-party payment of legal fees, courts increasingly recognize that the court's interest in maintaining the integrity of the criminal justice system can outweigh client consent to payments by third parties. See Wood v. Georgia, 450 U.S. 261, 269 (1981) ("[c]ourts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party, particularly when the third party is the operator of the alleged criminal enterprise") (footnote omitted); United States v. Locascio, 6 F.3d 924 (2d Cir.1993) (criminal defense lawyer who represented alleged member of organized-crime family disqualified because answerable to codefendant, alleged leader of crime, who "assigned" lawyer and may have been paying his fee), cert. denied, 511 U.S. 1070 (1994); Quintero v. United States, 33 F.3d 1133 (9th Cir.1994) (requiring trial judges, especially in drug cases, to determine whether third parties paying fees of retained counsel when defendant indigent and, if so, whether defendant understands potential **conflict** of interest that may exist in such arrangement and voluntarily waives **conflict**); United States v. Rodriguez, 929 F.2d 747 (1st Cir.1991) (addressing issue that lawyer under fee-payment scheme may inhibit client from offering testimony or taking other action contrary to fee payer's interest); In re Grand Jury Subpoena, 759 F.2d 968, 977, 984 n. 9 (2d Cir.1985) (Timbers, J., dissenting) ("[a] ccepting payment of clients' fees from a third party may subject an attorney to undesirable outside influence, particularly where the attorney is representing clients in criminal matters and the third party is the head of a criminal enterprise"). But see United States v. Corona, 108 F.3d 565 (5th Cir.1997) (mere fact that defendant's lawyer paid by codefendant who had separate counsel not alone sufficient to establish actual **conflict**); United States v. Kouri Perez, 985 F.Supp. 23 (D.P.R.1997) (government's allegation that criminal defendants' counsel paid by friend of main codefendant not sufficient, by itself, to constitute automatic **conflict** of interest under Rule 1.8(f)). See generally Roszkewycz, Third-Party Payment of Criminal Defense Fees: What Lawyers Should Tell Potential Clients and Their Benefactors pursuant to (an Amended) Model Rule 1.8(f), 7 Geo.J. Legal Ethics 573 (1993).

Subsection (g): Settlement of Aggregate Claims

REQUIREMENT OF EACH CLIENT'S CONSENT AFTER CONSULTATION

Rule 1.8(g) continues the requirement under DR 5-106 of the predecessor Model Code that a lawyer participating in the aggregate settlement of clients' claims must obtain the consent of each client after consultation.
Consultation must include a disclosure of the existence and nature of all claims involved, and the participation of each person in the settlement. See In re Jaeger, 213 B.R. 578 (Bankr.C.D.Cal.1997) (law firm that represented Chapter 7 debtors and nondebtor defendants in state court action to avoid fraudulent transfers failed to obtain informed written consent of each client about **conflicts**, including potential of aggregate settlement of clients' claims); In re Sonnier, 157 B.R. 976 (Bankr.E.D.La.1993) (lawyer settled claims of heirs without their approval or authority); Baugh v. Baugh, No. 78,633, 1999 WL 45177 (Kan.Ct.App. Jan. 29, 1999) (not improper for lawyer to procure settlement in wrongful death action on behalf of all decedents' heirs and divide proceeds according to heirs' independent agreement when all heirs advised of potential **conflict** regarding division of recovery and signed waiver of **conflict**); State ex rel. Oklahoma Bar Ass'n v. Watson, 897 P.2d 246 (Okla.1994) (lawyer who represented multiple parties as plaintiffs in wrongful death and personal injury litigation made aggregate settlement without obtaining each client's consent or advising each client about proposed settlement and distribution); see also In re Oracle Sec. Litig., 829 F.Supp. 1176 (N.D.Cal.1993) (court rejected proposed global settlement of consolidated class and derivative actions arising out of alleged securities fraud claims because of disparate treatment of class and derivative plaintiffs and absence of disinterested legal advice to corporation's special settlement committee; general counsel providing advice to settlement committee strongly conflicted because of dual role as corporate employee and subordinate of individual defendants in derivative action); Restatement (Third) of the Law Governing Lawyers § 209 cmt. d(i) (Proposed Official Draft 1998) (before any settlement accepted on behalf of

multiple clients, lawyer must inform each client about all terms of settlement, including amounts that each of other claimants will receive if settlement accepted). See generally Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering 277 (2d ed. 1990) (subsection (g) is obvious application of Rule 1.7(b) and corollary to Rule 1.2(a), which protects client's decision regarding settlement); Silver & Baker, Mass Lawsuits and the Aggregate Settlement Rule, 32 Wake Forest L.Rev. 733 (1997); Menkel- Meadow, Ethics and the Settlements of Mass Torts: When the Rules Meet the Road, 80 Cornell L.Rev. 1159 (1995); Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 Nw.U.L.Rev. 469 (1994).

Subsection (h): Agreements to Limit Liability

PROSPECTIVE AGREEMENTS LIMITING LIABILITY

Rule 1.8(h) prohibits a lawyer from prospectively limiting his or her liability to a client for malpractice, unless the client has independent representation and the agreement is permitted by law. See, e.g., People v. Foster, 716 P.2d 1069 (Colo.1986) (while assisting in resolution of dispute between two corporate owners, lawyer drafted share purchase agreement, improperly inserting release from personal liability); In re Lawandus, 476 N.Y.S.2d 225 (App.Div.1984) (lawyer improperly included hold-harmless clause in retainer agreement); Committee on Legal Ethics v. Cometti, 430 S.E.2d 320 (W.Va.1993) (lawyer's negotiation of prospective waiver of malpractice without advising client to retain independent counsel in connection with waiver violates Rule 1.8(h)); State Bar of Ariz. Comm. on Rules of Professional Conduct, Op. 95-08 (1995) (criminal defense lawyer's advice that client should sign plea agreement waiving client's right to assert ineffective assistance of counsel claim does not violate ethics rule against agreements prospectively limiting lawyer's liability for malpractice); Conn. Bar Ass'n Comm. on Professional Ethics, Op. 94-2 (1994) (no violation of Rule 1.8(h) when lawyers practice as limited partnership, as long as lawyers remain liable to clients for their own actions and for those of lawyers under their direct supervision); State Bar of Mich. Comm. on Professional and Judicial Ethics, Op. R-17 (1994) (Rule 1.8(h)'s prohibition of prospective agreement limiting lawyer's malpractice liability does not prohibit lawyers from practicing in form of limited liability company, as long as statutory requirements met); see also Restatement (Third) of the Law Governing Lawyers § 76(1) (Proposed Official Draft 1998) (agreement prospectively limiting lawyer's malpractice liability is unenforceable).

SETTLEMENT OF EXISTING CLAIMS WITH CLIENT

Rule 1.8(h) prohibits a lawyer from attempting to negotiate a settlement of an existing malpractice claim or compensate a client for the lawyer's malpractice without first advising the client in writing that independent counsel should be sought. See, e.g., In re Mizel, 703 A.2d 1249 (D.C.1997) (lawyer who failed to file client's personal injury claim within limitations period attempted to settle with client for $1,000); Florida Bar v. Jordan, 705 So.2d 1387 (Fla.1998) (lawyer allowed client's case to be dismissed for want of prosecution and attempted to settle with client without advising her to seek independent counsel regarding claim for malpractice); In re Blackwelder, 615 N.E.2d 106 (Ind.1993) (lawyer missed filing date for appeal and procured agreement from clients limiting liability for malpractice without adequate prior advice to clients to seek independent counsel); In re Elbert, 698 So.2d 949 (La.1997) (lawyer attempted to settle malpractice claim without advising client to seek independent counsel); Office of Disciplinary Counsel v. Clavner, 674 N.E.2d 1369 (Ohio 1997) (lawyer obtained release of liability from clients without first informing them of right to independent counsel); see also Restatement (Third) of the Law Governing Lawyers § 76(2) (Proposed Official Draft 1998) (limiting enforceability of agreements to settle existing malpractice claims to those in which (1) client separately represented and no improper pressure applied by settling lawyer, or (2) client not represented but lawyer demonstrates that settlement fair and reasonable).

Subsection (i): Lawyer Relatives

GENERAL PROHIBITION

Absent informed client consent, Rule 1.8(i) prohibits a lawyer from representing a client in a matter directly adverse to another person whose retained counsel is closely related to the lawyer. Subsection (i) reflects the perception that representation of opposing interests by closely related lawyers risks the inadvertent breach of client confidences.
The focus of the Rule is on direct **conflicts**, as governed by Rule 1.7(a), rather than on **conflicts** that might materially limit the lawyer's representation. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering 283 (2d ed. 1990) (if Rule were not limited to direct **conflicts**, would be impossible for related lawyers to practice in same field of law without client consent in virtually every instance); Charles W. Wolfram, Modern Legal Ethics § 7.6.6 (1986) (unclear why subsection should be limited to simultaneous representations when former-client **conflicts** pose identical concerns). See generally Word, Risk and Knowledge in Interspousal **Conflicts** of Interest: The Search for Competent Counsel through Model Rule 1.8(i), 7 Whittier L.Rev. 943 (1985); Note, Ethical Concerns of Lawyers Who Are Related by Kinship or Marriage, 60 Or.L.Rev. 399 (1981); Note, Ethical Issues Facing Lawyer-Spouses and Their Employers, 34 Vand.L.Rev. 1435 (1981).

Subsection (j): Proprietary Interest in Cause of Action

With the exceptions of contingent-fee agreements and attorneys' liens, Rule 1.8(j) continues the broad common-law prohibition against acquiring an interest in the client's cause of action or the subject matter of litigation. DR 5- 103(A) of the predecessor Model Code contained a provision substantially identical to Rule 1.8(j).
Like subsection 1.8(e), the prohibition of Rule 1.8(j) is rooted in the common-law doctrines of maintenance and champerty. See Charles W. Wolfram, Modern Legal Ethics § 8.13, at 491 (1986) (critical for lawyer to distinguish between arrangement that is acquisition of interest in litigation and one that is merely business dealing with client, for latter arrangement, and not former, permitted with informed client consent); see also Restatement (Third) of the Law Governing Lawyers § 48(1) (Proposed Official Draft

1998) (lawyer may not acquire proprietary interest in cause of action or subject matter of litigation that lawyer is conducting for client, except that lawyer may acquire lien to secure lawyer's fee or expenses and contract with client for contingent fee in civil case, except when prohibited).

The Rules are intended to prevent **conflicts** of interest that might interfere with the lawyer's exercise of independent judgment on the client's behalf. See, e.g., United States ex rel. Taxpayers against Fraud v. General Elec. Co., 41 F.3d 1032 (6th Cir.1994) (in awarding attorneys' fees in False Claims Act qui tam suit, court needed to determine whether nonprofit organization's involvement as coplaintiff in suit was tantamount to participation by corelator's law firm as plaintiff in case, implicating Rule 1.8(j)'s prohibition on lawyer's acquiring proprietary interest in subject matter of litigation); Peggy Walz, Inc. v. Liz Wain, Inc., No. 94 CIV. 1579, 1996 WL 88556 (S.D.N.Y. Mar. 1, 1996) (disqualification of lawyer who was co-owner of plaintiff corporation, due to lawyer's significant proprietary interest in copyright infringement litigation); In re Rivera-Arvelo, 830 F.Supp. 665 (D.P.R.1993) (lawyer disbarred indefinitely for acquiring property interest in subject matter of client's lawsuit); In re Mason, 938 P.2d 133 (Colo.1997) (en banc) (lawyer acquired property from client as payment for past fees with knowledge that ownership of property was in dispute and likely to become subject of litigation); People v. Franco, 698 P.2d 230 (Colo.1985) (to secure note for legal fees, lawyer demanded deed of trust in property that was subject of representation; use of sale proceeds in excess of client's equity interest constituted acquisition of interest in litigation); Weiss v. Statewide Grievance Comm., 633 A.2d 282 (Conn.1993) (lawyer's acceptance of percentage interest in clients' hotel project as payment for legal services caused divergence with clients' interests and compromised lawyer's judgment and loyalty); In re Pajerowski, 721 A.2d 992 (N.J.1998) (lawyer violated Rule 1.8(j) by advancing to clients sums of money up to amounts of contemplated net settlement of claims); Lee v. Aiu, 936 P.2d 655 (Haw.1997) (court referred to disciplinary counsel for review under Rule 1.8(j) lawyer's purchase of client's putative interest in real estate); Commonwealth v. Eskridge, 604 A.2d 700 (Pa.1992) (district attorney whose private law partners represented victims of auto accident in civil suit should have removed himself completely from criminal prosecution of civil-suit defendant; conviction reversed due to prosecutor's "direct financial interest" in defendant's case); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 98-18 (1998) (law firm's agreement with client, under which firm's payment to settle malpractice claim would be repaid to firm out of settlement or judgment of separate matter for which firm would continue representation, would create proprietary interest in client's case).

Several other decisions should be compared with this line of cases. See, e.g., LaBrum & Doak, LLP v. Ashdale (In re LaBrum & Doak, LLP), 227 B.R. 391 (Bankr.E.D.Pa.1998) (Rule 1.8(j) not applicable in action by unsecured creditors of dissolved law firm/debtor to collect from debtor's former partners proceeds generated by hourly fee cases in progress at time of dissolution); Skarecky & Horenstein, P.A. v. 3605 N. 36th Street Co., 825 P.2d 949 (Ariz.Ct.App.1991) (client's assignment to lawyer of beneficial interest in deed of trust to secure payment of lawyer's fees does not violate Rule 1.8(j); assignment not absolute and did not create proprietary interest in property); Blackwell v. Board of Offender Rehabilitation, 609 F.Supp. 772 (S.D.Ga.1985) (including lawyer's fees in negotiation for settlement offer does not constitute acquisition of personal interest in

litigation); Eikelberger v. Tolotti, 611 P.2d 1086 (Nev.1980) (purchase of client's judgment not improper; no possibility of adverse effect on lawyer's professional independent judgment when representation had ended and litigation had been reduced to final judgment). See generally Canterbury, What May an Attorney Purchase from a Client?, 19 J. Legal Prof. 387 (1994); D'Ascenzo, Federal Objective or Common Law Champerty?: Ethical Issues regarding Lawyers Acquiring an Interest in a Patent, 3 Tex.Intell.Prop.L.J. 255 (1995).
ABA-AMRPC Rule 1.8
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