WALKING THE ETHICAL LINE

A. Ethical Standards and Civil Liability

1. Your tool best designed to make effective ethical and professional decisions is *not* your "gut" nor your brain, but both, and both sides of that brain. Your "ethics" bar examination tutor probably admonished you that legal ethics are "counterintuitive," as indeed they are in many respects. But another veteran business transactions attorney admonishes:

> "The framework here is decision-making. At the heart of decision-making is the appreciation of significance—the ability to sort out what is significant from what is unimportant or irrelevant. You can't make good decisions by simply lining up the factors and striking an arithmetic balance—the weighing process is critical to sound judgment. Most bad decisions are the product of giving too much weight to a factor that didn't deserve it, or failing to appreciate the significance of a factor at the heart of things. . . . Unless you instincts are really flawed, [your] initial response has to deserve a lot of weight. So, whatever happens, don't lose sight of your first uncluttered reaction. A lot of what ensues is rationalizing, sugaring over, self-interest, and such."

Freund, J. C., Smell Test (© 2008 American Bar Association) at 44-45. (The ten tales in this book take place during 1977-1979 when Mr. Freund, like me, was "in the thick" of his New York City practice. He explains, "There won't be any cell phones or emails or faxes. [Hold on now, James: I remember faxes, though rare,. . . and mimeographs. I even remember a fledgling air courier called Federal Express Corporation that threatened to deprive me of my boondoggle—sorry, this is the ethics segment--travel to Washington, D.C. to file registration statements with the Securities and Exchange Commission.] It was a time when there were relatively few women lawyers [I was the then most senior one of three in my large New York City firm], and even fewer women partners of law firms [none in my firm]. . . .But I believe that most of the essential situations facing business lawyers back then weren't dissimilar to what they fact now. The issues that give rise to ethical problems or client concerns or negotiations impasses or internal firm

squabbles still ring true today. . . . You don't need to be old-fashioned, bereft of business, and shunted to an auxiliary floor to [be the 'ethics guru' of your law firm, confronted] with considerations of personal interest. . . .")

2. The American Bar Association ("ABA") Model Rules of Professional Conduct ("MRPC"), adopted by the ABA in 1983, were most recently amended in August 2005. A copy of the current version of the ABA MRPC, including commentary, is available free of charge, linked at the top of the left-hand menu to the ABA's website:
http://www.americanbar.org/groups/professional_responsibility/publications/

California currently is the only state that has not amended its legal ethics rules to conform to the format of the ABA MRPC; about half of the states, including Delaware, have not amended their ethics rules since the most recent amendments to ABA MRPC in August 2005. The effective dates on which certain stated amended their Rules of Professional Conduct are the following:

Florida -- May 22, 2006: http://www.floridabar.org
New York -- April 1, 2009: http://www.nyprr.com/
Illinois—January 1,1010: http://www.state.il.us/court/supremecourt/rules/art_viii/
Tennessee -- January 1, 2011: http://www.tba.org/ethics/index.html

The judicial or other authority adopting these rules is different in each state. In Florida and Tennessee, that authority currently is the respective state's Supreme Court, but may be changed in Florida to the Florida Legislature or an agency of the Florida administrative branch. In New York, that authority currently is the Appellate Division of the New York State Supreme Court. References to the Preamble and Rules in the following materials refer to the Preamble and Rules of the ABA MRPC unless otherwise stated.

3. Rule 1.16 and Rule 4-1.16 of the Florida Rules of Professional Conduct (the "Florida Rules") generally requires a lawyer not to represent a client or, if representation has commenced, to withdraw from representation of a client, if, among other circumstances, the representation will result in violation of the Rules

or other law, even if "the client demands that the lawyer engage in conduct that is illegal or violates the Rules. . . or other law." The commentary to that Rule adds, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."

4. The consequences of violating the rules in effect in a state in which an attorney practices law may include disciplinary proceedings, including suspension or disbarment (see Preamble, paras. 16 and 19, *e.g.*, The Florida Bar v. Ticktin, 14 So. 3d 928 (2009) and The Florida Bar v. Reed, 644 So. 2d 1355(1944)), disqualification of the attorney from representation a particular client or clients (see Lincoln Associates & Construction, Inc. v. Wentworth Construction Company, Inc., 26 So. 3d 638, 639 (Fla. 1st DCA 2010) and Sonderby, S. P. and McQuire, K. M., "A Gray Area in the Law? Recent Developments Relating to Conflicts of Interest and the Retention of Attorneys in Bankruptcy Cases," 105 Commercial Law Journal 237 (Fall 2000)), and, to the limited extent described below, civil liability:

a. Paragraph 20 of the Preamble to the ABA MRPC states,

"Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. *Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.* [*emphasis supplied*]"

The Preamble to the Florida Rules adds to the text quoted above, "Accordingly, nothing in the rules should be deemed to augment any substantive

legal duty of lawyers or the extra-disciplinary consequences of violating such duty."

b. In New York, disciplinary rules or ethical violations alone, including among others conflicts of interest, do not, without more, constitute legal malpractice. See Shapiro v. McNeill d/b/a McNeill Realty and Property Management Co., 92 N.Y. 2d 91, 699 N.E. 2d 407, 677 N.Y.S. 2d (1998)("an ethical violation will not, in and of itself, create a duty that gives rise to a cause of action that would not otherwise exist at law," citing Drago v. Buonagurio, 46 N.Y. 2d 778-780 ("the courts have not recognized any liability of the lawyer to third parties [based on ethical violation] where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability")). See Benaquista v. Burke, 74 A.D. 3d 1514, 902 N.Y.S. 2d 235 (3d Dept. 2010); Kaminsky v. Herrick, Feinstein LLP, 59 A.D. 3d 1, 870 N.Y.S. 2d 1, 9 (1st Dept. 2008), *appeal denied* 12 N.Y.3d 715, 384 N.Y.S. 2d 690 (2009), citing Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C., et al., 278 A.D. 2d 169, 170-171, 719 N.Y.S. 2d 223 (1st Dept. 2000); Trautenberg v. Paul, Weiss, Rifkind, Wharton & Garrison LLP, 629 F. Supp. 2d 259 (S.D.N.Y. 2007); Guiles v. Simser, 35 A.D. 3d 1054, 1056, 826 N.Y.S. 2d 484, 486 (3d Dept. 2006); Schafrann v. N.V. Famka, Inc., 14 A.D. 3d 363, 787 N.Y.S. 2d 315 (1st Dept. 2005); Schwartz v. Olshan Grundman Frome & Rosenzweig, 302 A.D. 2d 193, 199, 753 N.Y.S. 2d 482, 487 (1st Dept. 2003); Lavanant et al. v. General Accident Insurance Company of America et al., 212 A.D. 2d 450, 622 N.Y.S. 2d 726 (1st Dept. 1995).

(1) A client that can demonstrate *actual damages* resulting *from an alleged violation of a disciplinary rule may establish a cause of action* for that violation, however. See Kaminsky v. Herrick, Feinstein LLP, *supra*, citing Tabner v. Drake, 9 A.D. 3d 606, 609-611, 780 N.Y.S. 2d 85 (3d Dept. 2004); Country Club Partners, LLC v. Goldman, 79 A.D. 3d 1389, 913 N.Y.S. 2d 803 (3rd Dept. 2010); Boone v. Bender, 74 A.D. 3d 1111, 904 N.Y.S. 2d 467 (2nd Dept. 2010); Waggoner v. Caruso et al., 14 N.Y. 3d 874, 929 N.E. 2d 396, 903 N.Y.S. 2d 333 (2010); William Kaufman Organization Ltd. v. Graham James,

LLP, 269 A.D. 2d 171, 173, 703 N.Y.S. 2d 439 (1st Dept. 2000); Unger v. Paul Weiss Rifkind Wharton & Garrison, 265 A.D. 2d 156, 157, 696 N.Y.S. 2d 36 (1st Dept. 1999); Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C., 304 A.D. 2d 925, 758 N.Y.S. 2d 195 (3d Dept. 2003).

(2) The *alleged misconduct* violating a disciplinary rule *may be admissible and constitute evidence of and support a claim of legal malpractice/negligence or breach of contract by the attorney*. See G,D. Searle & Co., Inc. et al. v. Pennie & Edmonds LLP, 7 Misc. 3d 1010(A), 801 N.Y.S. 2d 233, 2004 Slip. Op. 51874(u) (N.Y.Supp. 2004), citing William Kaufman Organization, Ltd. v. Graham & James, LLP, *supra* (evidence of *conflict of interest*, although inadmissible as a disciplinary violation, was *admissible to support a claim of breach of contract against the law firm*); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc. et al., 10 A.D. 3d 267, 272, 780 N.Y.S. 2d 593, 596 (1st Dept. 2004) (involving alleged conflict of interest); Romano v. Ficchi, 23 Misc. 3d 1130(A), 889 N.Y.S. 2d 507, 2009 WL 1460781 (N.Y. Supp. 2009). Under these authorities, a *plaintiff alleging breach of legal malpractice must prove proximate cause and injury resulting from that malpractice and, through expert testimony, that the attorney departed from acceptable legal standards in the community.* But see Russo v. Feder Kaszovitz Isaacson Weber Skala Bass LLP, 301 A.D. 2d 63 (1st Dept. 2002), distinguishing expert testimony regarding acceptable legal standards in the community from testimony on what constitutes legal malpractice, as the existence of legal malpractice is an issue to be determined by the finder of fact:

"We do not rely on an attorney's affidavits to tell us what constitutes malpractice. Moreover, the affidavit offered here raises an additional concern. It is tinged with the sense that since the affiant would have done things differently, therefore the attorney being challenged was incompetent. Such a contest of strategies is easily reduced to a malpractice standard that impermissible compares the defendant-attorney's choice of strategies with the afterthoughts later offered by plaintiff's now-favored attorney, for whom bias is a necessary concern, rather than measuring counsel's performance against the much more objective standard of the profession's commonly prevailing practices."

(3) *Breach of an attorney's fiduciary duty to his or her client, including among others the duties of confidentiality and undivided loyalty,* is recognized in New York as a separate cause of action. See Ulico Casualty Company v Wilson, Elser, Moskowitz, Edelman & Dicker et al., 56 A.D. 3d 1, 21, 865 N.Y.S. 2d 14 (1st Dept. 2008), citing Matter of Cooperman, 83 N.Y. 2d 465, 611 N.Y.S. 2d 465 (1994). In the context of attorney liability, New York courts have held that claims of legal malpractice and breach of fiduciary duty are governed by the same standard of recovery. See Weil, Gotshal & Manges v. Fashion Boutique of Short Hills, Inc., *supra* (involving conflicts of interest and holding that an attorney is charged with a "high degree of undivided loyalty to his client"); Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon, 13 F. 3d 537 (2nd Cir. 1994)(involving conflicts of interest); Macnish-Lenox, LLC v. Simpson, 17 Misc. 3d 1118, 851 N.Y.S. 2d 64 (N.Y. Cty. Sup. Ct. 2007); All Star Carts and Vehicles, Inc. et al. v. BFI Canada Income Fund et al., 2010 WL 2243351 (E.D.N.Y. 2010); Matter of Hof, 102 A.D. 2d 591, 478 N.Y.S. 2d 39 (1984), citing Matter of Kelly, 23 N.Y. 2d 368, 296 N.Y.S. 2d 937 (1968). A *plaintiff alleging breach of fiduciary duty must prove (a) proximate cause and injury resulting from that breach that is separate and distinct from the injury resulting from the negligence-based legal malpractice claim and (b) operative facts giving rise to that breach that are separate and distinct from the operative facts giving rise to the legal malpractice claim.* See Weil, Gotshal & Manges v. Fashion Boutique of Short Hills, Inc., *supra;* Town of North Hempstead et al. v. Winston & Strawn, LLP, 28 A.D. 3d 746, 749, 814 N.Y.S. 2d 237 (2d Dept. 2006); AmBase Corporation v. Davis Polk & Wardwell et al., 30 A.D. 3d 171, 816 N.Y.S. 2d 438 (1st Dept. 2006), *aff'd* 8 N.Y. 3d 428, 866 N.E. 2d 1033, 834 N.Y.S. 2d 705 (2007); Kvetnaya v. Tylo, 49 A.D. 3d 608, 609, 854 N.Y.S. 2d 425 (2d Dept. 2008)(affirming dismissal by lower court of a causes of action alleging breach of contract and fiduciary duty by an attorney that arose from the same facts as the legal malpractice cause of action, did not allege distinct damages, and thus duplicated the legal malpractice cause of action); Boone v. Bender, *supra.*.

c. Claims of legal malpractice and breach of fiduciary duty often arise as counterclaims to claims, or otherwise in the context, of the attorney's seeking collection of fees and other amounts due from clients. See Weil, Gotshal & Manges v. Fashion Boutique of Short Hills, Inc., *supra;* Schwartz v. Olshan Grundman Frome & Rosenzweig, *supra*.

d. In addition, at least in Florida, an attorney is not entitled to legal fees from a purported client after the attorney realizes or should have realized that the attorney cannot ethically represent that purported client, *e.g.*, as a result of a conflict of interest between the attorney and the client or between the attorney's representing that client and another client. See Adams v. Montgomery, Searcy & Denney, P.A., 555 So. 2d 957, 958 (Fla. 4th DCA 1990)("An attorney's right to a fee terminates when the attorney realizes or should realize that he or she cannot ethically represent his or her client."); Hill v. Douglass, 271 So. 2d 1 (1972)("absent bad faith and . . . any indication of the coloring of testimony. . ., that counsel who has earlier earned a fee in matters later turned over to other counsel. . . because of the original attorney having to become a material witness, would be entitled to such reasonable fee as he may have earned prior to learning in good faith, or at such point as he should in good faith have learned, that he would probably become a witness in the matter precluding continuing representation, and not to share in any portion of fee thereafter . . . ."; White v. Roundtree Transport, Inc., 386 So. 2d 1287, 1289 (Fla. 3d DCA 1980) (citing Hill v. Douglass, *supra*, for the proposition, "An attorney's right to a fee terminates when the attorney realizes or should realize that he cannot ethically represent his client's interests"); James T. Butler, P.A. v. Walker *et al.*, 932 So. 2d 1218 (Fla. 5th DCA 2006)(following all of the other opinions cited in this paragraph). See Woods v. City National Bank & Trust Co. of Chicago, 312 U.S. 262, 268 (1941); Athans v. Athans, 2003 WL 22244690 (Cal. App. 2 Dist. 2003)(unpublished); Sonderby, S. P. and McQuire, K. M., *supra*.

B. The Role of the Attorney as Advisor in LLC Formation

1. Commencing an attorney-client relationship in connection with formation of an LLC implicates a number of ethics Rules. Conflicts of interest and Confidentiality are discussed separately later.

2. For the purposes of all of the Rules in the ABA MRPC, under Rule 1.0 and the related commentary, as well as for the purposes of the Florida Rules, under the Preamble to the Florida Rules:

a. "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true, which may be inferred from the circumstances.

b. "Confirmed in writing" denotes informed consent given in writing by the consenting person *or a writing that a lawyer promptly transmits to that person confirming an oral informed consent*, at the time of the informed consent or within a reasonable time thereafter.

c. "Informed consent" denotes the agreement by a person to a proposed course of conduct *after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct*. The comment to this definition in paras. 6-7 explains that "reasonably adequate" information satisfies this requirement:

"The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information *reasonably adequate to make an informed decision*. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. *In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel*. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a

lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, *relevant facts include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved*, and *whether the client or other person is independently represented by other counsel in giving the consent*. Normally, such persons need less information and explanation than others, and *generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent*. . . .Obtaining informed consent will usually require an affirmative response by the client or other person. *In general, a lawyer may not assume consent from a client's or other person's silence*. *Consent may be inferred*, however, *from the conduct of a client or other person who has reasonably adequate information* about the matter [*emphasis supplied*]."

d. "Know" and derivations of that term denote actual knowledge, which may be inferred from circumstances.

e. "Reasonable" and derivations of that term denote the conduct of a *reasonably prudent and competent lawyer*.

f. "Reasonable belief" denotes actual belief and circumstances being such that the belief is reasonable.

g. "Reasonably show know" denotes that a lawyer of reasonable prudence and competence would ascertain the matter.

h. "Screened" denotes isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under the Rules or other law. Suggested procedures are described in the comment, paras. 9 and 10.

i. "Substantial" denotes a material matter of clear and weighty importance.

j. "Writing" and derivations of that term denote a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail, and "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

3. Duties to Prospective Client under Rule 1.18

a. A "prospective client" is any person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a certain matter or nature of matter. A person who communicates information unilaterally to the lawyer without any reasonable expectation that the lawyer is willing to discuss a potential client-lawyer relationship is not a "prospective client."

b. *Even if the client-lawyer relationship is not formed, the client's confidential information must be preserved* except to the extent Rule 1.9 would permit disclosure of information of a former client (*i.e.*, that information has become generally known or the prospective client has given informed consent to that disclosure, confirmed in writing), and neither the lawyer who received that confidential information ("contact lawyer") nor any other lawyer in the firm with which the contact lawyer is associated may represent a client with interests materially adverse to those of the prospective client in the same or a substantially related matter if that confidential information "could be significantly harmful to that [prospective client] in the matter," unless

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) (a) the contact lawyer and all otherwise disqualified lawyers take reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and are timely screened from any participation in the matter and is apportioned no part of the fee from the affected client directly related to the matter in which they are disqualified, and (b) written notice of the general description of the subject matter of the consultation and the screening procedures employed is promptly (the comment explains "as soon as practicable") given to the prospective client.

c. The intake information received by the lawyer and other staff of his or her firm should be limited to information necessary to determine whether the lawyer is willing and able to handle the matter and there are no conflicts of interest, including the following information:

(1) Name, physical and mailing address, and contact telephone number, facsimile number and email of the client and any entities related to the client;

(2) Date of intake;

(3) General nature of prospective representation (*not* all of the detailed terms and conditions of the proposed transaction or relationship among organizers of the LLC);

(4) Terms and conditions of prospective engagement (*e.g.*, formula for legal fees based upon a fixed amount, hourly rate, hourly rate with floor, cap or both, or a hybrid, advanced retainer, billing frequency and time and circumstances on which each payment is due);

(5) Identity and authority (*e.g.*, office or other relationship to the client, such as an LLC to be formed) of the person or persons proposing to enter into the engagement in the name and on behalf of the prospective client;

(6) Name, physical and mailing address, and contact telephone number, facsimile number and email of each other anticipated party to the proposed transaction or having any relationship to the proposed client, either as prospective additional clients of the lawyer or for the purposes of a conflicts search; and

(7) Name, physical and mailing address, and contact telephone number, facsimile number and email of each other professional serving each prospective client and each entity proposed to be organized or represented by the lawyer to the extent relevant to that prospective representation (*e.g.*, accountant, bookkeeper, business manager, investment or financial adviser, and human resources manager).

A checklist or questionnaire can avert excessive, unnecessary questioning by paralegals and other staff of prospective clients, and encourage that staff to cut off communications by prospective clients, with grace and respect, before they become excessive. The lawyer may, in the writing signed by the prospective client before the intake interview, condition conversations with the prospective client on that person's informed consent that no information disclosure by that person will

preclude the lawyer from representing a different client in the same matter or from using that information.

d. If a *conflict of interest* or other reason for non-representation exists, the lawyer should so inform the prospective client, preferably in writing.

e. Although a *conflict of interest* may be waivable by the prospective client and the lawyer's other client or clients under some circumstances, *some conflicts are of a nature that no waiver is possible, e.g., engagement of an attorney by multiple parties to the same incident* (LaRusso v. Katz, 30 A.D. 3d 240, 818 N.Y.S. 2d 17 (1st Dept. 2006)) *or to the same agreement.* If the circumstances at the time of engagement indicate that any conflict of interest among the prospective clients (*e.g.*, organizers of an LLC) is prospective only, the engagement letter between the lawyer and those clients should provide the disclosures regarding the potential conflict of interest sufficient that, by signing the engagement letter, the prospective clients will have granted informed consent, confirmed in writing. The extent constituting "full disclosure" depends on the sophistication of the prospective or existing client. American Bar Association Formal Opinion 372 (1993). At a minimum, written disclosure of the potential conflict of interest should include any risk that the lawyer believes may cause the prospective or existing client not to consent, as well as each of the following:

(1) Identity of each prospective or existing client involved;

(2) Identification of the proposed legal services and any limitations or restrictions to that work;

(3) Factual basis for the prospective or existing conflict of interest, without disclosure of the secrets or confidences of any potential or existing client;

(4) Discussion of whether the conflict might cause the lawyer to be less zealous on behalf of any prospective or existing client;

(5) Discussion of how the secrets or confidences of each potential or existing client will be maintained;

(6) Discussion of extent to which it is anticipated that the conflict could become more significant than it is at the time of initial proposed engagement of the lawyer and the consequence of this occurrence;

(7) Request that each prospective or existing client consider the issues raised carefully before reaching a decision and advice to each prospective or existing client, if appropriate, to seek the advice of independent counsel regarding whether to proceed to engage the lawyer in view of the potential or existing conflict;

(8) Advice to each prospective or existing client of the freedom of that person to ask any additional questions that may assist their decision-making process, without charge.

f. Attached as exhibits to this article are three sample texts for inclusion in the engagement letter, after each prospective or existing client has confirmed in writing receipt of the disclosures outline above.

4. Duties of an Advisor under Rule 2.1

a. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice, which may refer not only to law but to other considerations such as moral, ethical, economic (cost), social (effects on other person) and political factors that may be relevant to the client's situation, even if unpalatable by the client, in order to put the legal advice in context.

b. A lawyer should recommend that the client consult with other professionals when appropriate and assist the client in reconciling inconsistent advice by those experts.

c. Although a lawyer is not expected to give legal advice until asked or to investigate the client's affairs, the lawyer's duty under Rule 1.4 (Communications) is to give advice when the lawyer knows that the client proposes a course of action related to the legal representation is likely to result in substantial adverse legal consequences to the client.

C. Avoiding Conflicts of Interest.

Conflicts of interest are a primary source of legal malpractice claims, as discussed earlier. Consider Rules 1.7, 1,8, 1.10 and 1.13 and the related as well as the suggested disclosures and texts for an engagement letter with a client set forth above in connection with forming an entity among two or more equity holders, particularly if they differ as to the nature and amount of their contributions to and interests in profit, gain, loss, and distributions of the entity but all of whom seek representation from the same lawyer for that matter, including the effect on the lawyer's fulfilling his or her duty of confidentiality and the attorney-client privilege and whether an informed consent to a conflict of interest is possible under this circumstance.

1. Rule 1.7 provides, in relevant part (*i.e.*, outside litigation context), as follows:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if . . .:
>
> (1) the representation of one client will be *directly adverse to another client*; *or*
> (2) there is a significant [not defined in the ABA MRPC Preamble or Rules; Florida Rule 4-1.7 says "substantial"] risk that the *representation of one or more clients will be materially limited by the lawyer's responsibilities to another client,* a former client or a third person or by a personal interest of the lawyer.
>
> "(b) Notwithstanding the existence of a . . . conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> * * * *and*
> (4) each affected client gives *informed consent, confirmed in writing* [Florida Rule 4-1.7 adds "*or clearly stated on the record at a hearing"*].

[Florida Rule 4-1.7 adds subdivision "(c) **Explanation to Clients.** *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.* ***"

[Emphasis supplied.]"

2. The commentary to ABA MRPC Rule 1.7 and to Florida 4-1.7 is not identical, though similar:

a. The comment to ABA MRPC Rule 1.7 states:

"Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. . . . On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. . . . ***Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client****. . . . Even where there is no direct adverseness,* ***a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others****. The conflict in effect forecloses alternatives that would otherwise be available to the client. . . . The critical questions are the likelihood that a difference in interests 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. . . . Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b),* ***some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client****. . . . Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1),*

representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. . . .Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests. . . . *Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.* ***The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.*** *Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case,* ***advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).*** . . . ***Relevant factors*** in determining whether there is significant potential for material limitation [upon the lawyer's representation of one or more clients for the purposes of paragraph (b)] ***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 disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. . . .Whether a conflict is consentable depends on the circumstances. 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 in interest among them. ***Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, [or] working out the financial reorganization of an enterprise in which two or more clients have an interest . . . . The lawyer seeks to resolve potentially adverse interests by***

developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them. *[Emphasis supplied.]"*

"[With regard to the lawyer's obtaining] the informed consent of the client, confirmed in writing. . . . [s]uch a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. . . . If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. . . . *The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. [Emphasis supplied.]"*

"In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. ***In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious . . . negotiations between them are imminent or contemplated.*** Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. *Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.* ***Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties***. . . . ***A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege***. With regard to the attorney-client privilege, ***the prevailing rule is that, as between commonly represented clients, the privilege does not attach***. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised. . . ***As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation***. . . . because the lawyer has

an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. . . . ***The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.*** In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. ***For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients***. . . . *When seeking to establish or adjust a relationship between clients,* ***the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances*** *and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. [Emphasis supplied.]*"

"A lawyer . . . for an organization [such as a limited liability company, "LLC"] is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client."

"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 [organization] 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 [organization's] obtaining legal advice from another lawyer in such situations. *If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the [organization's] lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege* and that conflict of interest considerations might *require the lawyer's recusal* as a

director or *might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter. [Emphasis supplied.]*"

b. The comment to Florida Rule 4-1.7 states:

"As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. . . . 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. *Subdivision (a)(1) applies*. . . when the representation of 1 client would be directly adverse to the other and *where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised. 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. . . . 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. *. . . However, ...* ***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 1 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 1 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. . . . 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. 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. *[Emphasis supplied."*

"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 2 roles may conflict. The lawyer may be called on to advise the corporation in matters

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

The commentary to the Florida Rules omits the comments in the ABA MRPC regarding the following: representing individuals in forming joint ventures or organizing a business; contentious negotiations; creating or terminating a relationship among the clients; attorney-client privilege; confidentiality; a director/lawyer's ceasing to act as the corporation's lawyer when conflicts of interest arise; a director/lawyer's advising the other members of the board regarding the effect of the director/lawyer's presence at meetings on the attorney-client privilege; and a director/lawyer's conflict of interest possibly requiring recusal as a director or withdrawal from representation of the corporation in a matter.

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

3. The Florida Bar has issued the following Ethics Opinions on conflicts:

a. Opinion 87-1, dated May 1, 1987 and revised June 23, 2009, states that a Florida attorney may not represent three parties to a single litigation if each of them could be responsible to the others for contribution unless all of the requirements of Rule 4-1.7(b) and (c) of the Florida Rules are satisfied.

b. Opinion 97-2, dated May 1, 1997 and revised June 23, 2009, states that a Florida attorney may not represent both buyer and seller as "closing agent" for the closing of the sale of a business in Florida, including preparing all required closing documents and other instruments and negotiating on behalf of both buyer and seller such terms as interest rate, payment terms, the extent of security given to seller for financing and terms and conditions imposed upon buyer in the event of buyer's default, for fees and expenses paid 50% by each of buyer and seller. The authors of this Ethics Opinion found that the comment to Rule 4-1.7, "*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 . . . [and] , a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other" [emphasis supplied]* applied to the transaction described in the Ethics Opinion, citing, among other authorities, the opinion of the Florida Supreme Court in The Florida Bar v. Reed, 644 So. 2d 1355 (1994)(attorney suspended for representing both parties to a sale of the same property and assuming multiple roles in the transaction). The Ethics Opinion also cited The Florida Bar v. Belleville, 591 So. 2d 170 (1991) and The Florida Bar v. Teitelman, 261 So. 2d 140 (1972) regarding conflicts arising in the context of an attorney charging legal fees to parties other than the attorney's client in the transaction. The authors of this Ethics Opinion distinguished this transaction from one for which buyer and seller, both longstanding clients of the attorney, had already agreed to all critical terms of financing and security agreements (*e.g.*, prior agreement of the parties to price, time, manner of payment

and security) and to dual representation by the attorney before the attorney became involved, explaining:

"It is an unavoidable fact that the sale of a business, even in the friendliest of circumstances, is by its very nature an adversarial process. The buyer is relying upon sales and profit figures produced by the seller as well as projections of future profits based upon those figures. Security and financing are critical issues in any business purchase and, particularly in the case of smaller businesses, such transactions are often financed by the seller. The closing often includes the transfer of licenses or applications by the new owners for special licenses, zoning changes, and so forth. Such closings often include assumption of existing debts of the selling corporation and representations by the seller as to other actual and potential claims against the seller. Such transactions are fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals. . . . Where there is disagreement or material terms of an agreement have not been addressed between buyer and seller as to financing, security, consulting agreements with the seller, title defects, or any other material matter relating to the sale, conflicts may exist or develop . . . . [and] it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. *A member of The Florida Bar may not be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the sale. Under the foregoing circumstances, such representation presents a nonwaivable conflict under Rule 4-1.7 (a) and (b) and is ethically prohibited. [Emphasis supplied.]"*

c. The principles stated in these Ethics Opinions apply to representation of multiple parties in the formation of an LLC or other business entity as well as in litigation or sale of a business or assets. See the comment to ABA MRPC Rule 1.7, *supra*.

4. Rule 1.8 concerns (a) interested transactions between a lawyer and, or an ownership, possessory, security or other pecuniary interest of a lawyer adverse to, the lawyer's client, *including fee agreements involving the lawyer's accepting an interest in the client's business or other nonmonetary property as payment of all or part of a fee, and not only those transactions in which the lawyer also represents the client* [Florida Rule 4-1.8 expressly permits "a lien granted by law to secure a lawyer's fee or expenses"], (b) use by a lawyer of information relating

to representation of the client to the disadvantage of the client without the client's informed consent, (c) gifts to a lawyer from a client, (d) literary or media rights granted by a client to a lawyer, (e) financial assistance by a lawyer to a client in connection with pending or contemplated litigation, (f) acceptance by a lawyer of compensation for representing a client from one other than the client without the client's informed consent, (g) settlement on behalf of two or more clients represented by the same lawyer, (h) waiver or restriction by the client of the client's malpractice claim, (i) the lawyer's acquiring a proprietary interest in the cause of action or subject of litigation that the lawyer is conducting for a client, and (j) sexual relations with a client. [Florida Rule 4-1.8 omits the restriction of sexual relations with a client, but adds a lengthy provision regarding representation by a lawyer of an insured other than a governmental entity, at the expense of the insurance company, in regard to an action or claim for personal injury, property damages, death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims.]

5. Rule 1.10 concerns imputation of conflicts of interest among lawyers associated with a firm, and circumstances in which a firm is not prohibited from representing a person with interests materially adverse to those of a client represented by a lawyer after that lawyer terminates his or her association with the firm. Rule 1.10 and Florida Rule 4-1.0 differ regarding the requirements for a firm's representation of a client in a matter adverse to the matter in which a lawyer of that firm previously represented another client while associated with another firm.

6. Rule 1.13 (the comment regarding which states that it is concurrent with and neither limits nor expands the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1 but supplements Rule 1.6(b) by providing an additional basis upon which a lawyer may reveal confidential information) clarifies that a *lawyer whose client is an organization* owes primary allegiance to and *must act in the best interests of, to avoid injury to, that organization as distinguished from any officer,*

employee or other person associated with the organization, must, if warranted, refer any concerns to the "highest authority that can act on behalf of the organization as determined by applicable law," and may, in order to do so, reveal information relating to the representation of the organization client regardless whether Rule 1.6 would permit that disclosure.

a. The ABA MRPC and the Florida Rules prescribe different procedures to satisfy this requirement.

(1) Under the ABA MRPC, (a) the consequence of the organization's action or refusal to act that is "clearly a violation of law [that] the *lawyer reasonable believes . . . is reasonably certain to result in substantial injury to the organization [emphasis supplied]*" is the lawyer's *permitted disclosures* notwithstanding Rule 1.6, except with respect to information relating to a lawyer's representation of an organization to investigate, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of, an alleged violation of law, and (b) a lawyer reasonably believing that he or she has been discharged because of actions taken by the lawyer under Rule 1.13 or who withdraws under circumstances that require or permit the lawyer to take action under that Rule must proceed as the lawyer reasonably believes necessary to assure that the organization's "highest authority is informed of the lawyer's discharge or withdrawal."

(2) Under Florida Rule 4-1.13, the consequence of the organization's action or refusal to act that is "clearly a violation of law [that] *is likely to result in substantial injury to the organization*" is the lawyer's *permitted resignation* in accordance with Rule 4-1.16.

b. Subject to Rule 1.7 and Florida Rule 4-1.7 discussed above, a lawyer also may represent any of the organization's directors, officers, employees, members, shareholders or positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations, such as LLCs. If the organization's informed consent to this dual representation is required under Rule 1.7 or Florida Rule 4-1.7, an appropriate official of the organization other than the individual to be represented

by the lawyer, or the shareholders, can give that consent. But, unless the organization requests or authorizes the lawyer to represent those other persons or entities, those other persons or entities are not clients of the lawyer solely because the lawyer communicates with them in their capacities as agents of the organization. A lawyer may not disclose to those constituents of an organization confidential information relating to the representation of the organization except for disclosures authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

c. The organization's "highest authority" to which a matter may be referred ordinarily will be its board of directors or similar governing body, but applicable law may prescribe that, under certain conditions, the "highest authority" is, *e.g.*, the independent directors of a corporation.

D. Confidentiality – Information Derived From an Earlier Representation

1. Rule 1.6 provides as follows:

> "(a) A lawyer shall *not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).*
>
> "(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based

upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order. *[Emphasis supplied.]* "

[Florida Rule 4-1.6 does not expressly permit disclosure of information relating to representation of a client based solely upon implied authorization in order to carry out the representation, but that permission is stated in the comment to that Florida Rule. The Florida Rule also does not limit the "prevention of a crime" justification for that disclosure to a crime "that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." The Florida Rule permits that disclosure "to serve the client's interest unless it is information the client specifically requires not to be disclosed," permits that disclosure to comply with the Florida Rules, and, unlike ABA MRPC Rule 1.6, *mandates that disclosure* "to the extent that the lawyer reasonably believes necessary. . . to prevent a client from committing a crime; or . . . to prevent a death or substantial bodily harm to another." The Florida Rule adds, "When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule." In contrast, Tennessee Rules of Professional Conduct Rule 1.6(b)(1) permits disclosure to the extent necessary to prevent a client *or another person* from committing a crime and, similar to the Florida Rules, mandates disclosure to the extent necessary "to prevent reasonably certain death or substantial bodily harm."]

2. The commentary to ABA MRPC Rule 1.6 and to Florida 4-1.6 is not identical, though similar:

"[This] fundamental principle in the client-lawyer relationship . . . contributes to the trust that is the hallmark of the client-lawyer relationship. . . . [and] is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to

produce evidence concerning a client [*i.e.*, they are rules of evidence]. *The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. . . . This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.* The lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. . . . *Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation*. . . .[Rule 1.6(b)(5)] expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. . . . Paragraph (b) permits [but does not mandate] disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. *Where practical, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.* . . . In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclosure as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. . . .*A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. [Evidence supplied.]"*

The comment to Florida Rule 1.6 substitutes "none of the foregoing limits the requirement of disclosure in subdivision (b) [which is] required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client" for "A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule." That comment also adds "After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8 nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether

contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b)."

3. Under the comment to Rule 1.6, and under Rule 1.9, the duty of confidentiality continues after the client-lawyer relationship has terminated. Rule 1.9 provides as follows:

> "(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the *same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client *unless the former client gives informed consent, confirmed in writing*.
>
> "(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are *materially adverse* to that person; *and*
> (2) *about whom the lawyer had acquired information* protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client gives informed consent, confirmed in writing.
>
> "(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) *use information relating to the representation* to the disadvantage of the former client *except as these Rules would permit or require with respect to a client*, *or when the information has become generally known*; or
> (2) *reveal information relating to the representation except as these Rules would permit or require with respect to a client. [Emphasis supplied.]*
>
> [Florida Rule 4-1.9 omits "or whose present or former firm has formerly represented a client in a matter. . . ."]*[Emphasis supplied.]*"

4. The commentary to ABA MRPC Rule 1.9 and to Florida 4-1.9 is not identical, though similar:

"Under this Rule, for example, *a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client*. . . . *Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent.* . . . The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a *lawyer has been directly involved in a specific transaction*, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. . . . The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. . . .knowledge of *specific facts* gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. *[Emphasis supplied.]*"

The comment to Florida Rule 4-1.9 omits the sentence concerning a lawyer who has represented multiple clients in a matter.

WALKING THE ETHICAL LINE
SAMPLE PROVISIONS FOR ENGAGEMENT LETTERS

Exhibit A

"We are currently representing Company Y on matters unrelated to you and the transaction for which this engagement covers. To the extent that we provide advice to you relative to your rights or obligations in respect of Company Y, or advise or assist in your dealings with Company Y, we would be adverse to Company Y and can [proceed only] with a waiver from you and from Company Y. We have obtained a conflict waiver from Company Y which will cover our work for you on this engagement. We believe that such waivers permit us to represent you in all respects in connection with this engagement, except that we have agreed not to participate in litigation where Company Y is an adverse party. Similarly, you have agreed to waive any conflict that might otherwise arise in connection with our simultaneous representation of you and of Company Y on matters unrelated to this engagement."

Keyko, D.G., "Practicing Ethics: Effectively Waiving Conflicts of Interest," New York Law Journal, September 23, 2005.

Exhibit B

"Joint Representation. The [Rules] of Professional Conduct, as adopted in [_____], [permit] the joint representation of multiple clients where a lawyer can adequately represent the interests of each client and each client knowingly consents to that joint representation. At this point, I believe that we can represent both Clients adequately in this [matter]. Based on the information available to us, there currently appear to be no conflicts of interest among Clients that would prevent us from undertaking their joint representation. However, although the interests of Clients may be similar in many respects, they may not be identical in all respects, and a conflict may develop at some later date. Any time an attorney represents several parties [in the same transaction], certain conflicts of interest may arise among the parties. There are times when strategic decisions differ with respect to different parties. For example, a dispute could arise between Clients as to whether [_____.] If at any time any of the Clients becomes aware of any conflict or potential conflict between their interests and those of other of the Clients, I ask that they immediately call that to my attention so that we can consider whether we can continue to represent any of the Clients in this [matter].

"In the ordinary one-lawyer/one-client relationship, information given to the lawyer by the client in confidence as part of the representation may be considered privileged or confidential information (i.e., the lawyer may not disclose that information to any other person without the client's consent or as required by law). That privilege

also exists in the context of a joint representation, but there is an added factor. The privilege extends to protect the confidences of the entire group from disclosure to any person who is not a member of the group. However, information that any of the Clients provide us in connection with this joint representation is available to all of the other Clients. There will be no confidences among us regarding the work we do for Clients. In other words, if we receive information from or about one of the Clients that we believe the others should have in order to make decisions regarding the subject of our representation, we will share that information with them or with the whole group.

"In order to assure that we represent their interests in a coordinated manner, and so long as no conflict develops between and among the interests of the Clients, we will take our direction from the group as a whole as it reaches its consensus on various issues. If Clients disagree on an issue, we will ask that the members of the group resolve their differences among themselves without our assistance. Although we perceive it to be unlikely, in the event circumstances arise that make it impossible for us to continue to simultaneously represent one of the Clients, we trust that they understand that we might have to withdraw from our representation of all Clients. In the event a dispute does arise between any of the Clients, the Firm may only be able to represent one of the parties in the dispute, and, under certain circumstances, we may be precluded from representing any party to the dispute. Consequently, we must ask that Clients' agreement to our engagement encompass that situation as well.

"Representation of Other Client. As we have discussed, the Firm has represented and continues to represent Other Client on unrelated matters. Because our ethical duty to all of our clients requires us to avoid acting in a manner that is prejudicial to the interests of any other client, you must understand that we are not permitted to allow our role in this [matter] to involve the rendering of advice or other services that appear to us to be prejudicial to the interests of Other Client. Based on the information available to us, we do not think it likely that such a situation will arise, but you must recognize this possible limitation on our ability to represent Clients. Moreover, we must ask that you agree that if such a situation should eventuate, we may refuse to undertake a particular service or may withdraw from our representation of Clients in the matter. At this point, based on the information available to us, we reasonably believe that our representation of Clients will not be materially limited by our responsibilities to Other Client nor anyone else. [*Comment: Self-serving attribution of "reasonableness" to the Firm's "belief" is not binding on any authority administering or applying the Rules of Professional Conduct.]*

"Advance Waiver of Conflicts. As we have discussed, the Firm represents many other companies and individuals. It is possible, if not probable, that some of our present or future clients could have disputes or transactions with Clients. Therefore, as a condition to our undertaking this matter, Clients must agree that the Firm may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for Clients, even if the interests of such entities in those other matters are directly adverse to Clients. We agree, however, that Clients' prospective consent to conflicting representation contained in this paragraph shall not apply in any instances where, as a result of our representation of Clients, we

have obtained privileged, proprietary or other confidential information of a nonpublic nature that, if known to such other entity, could be used in any such other matter by such entity to Clients' material disadvantage.

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"Termination of Engagement and Post-Engagement Matters. Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to applicable rules of professional conduct. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect Clients' interests in this matter and, if you so request, we will suggest to you possible successor counsel and provide successor counsel of your choosing with whatever papers you have provided to us. Unless previously terminated, our representation of Clients will terminate upon our sending our final statement for services rendered. Clients are engaging the Firm to provide legal services in connection with a specific matter. After completion of the matter, changes may occur in laws or regulations that are applicable to Clients that could have an impact upon their future rights and liabilities. Unless Clients continue to engage us to provide additional advice, this Firm will assume that it has no continuing obligation to advise Clients with respect to future legal developments."

"Feature: Sample Fee Agreement," 38 Arizona Attorney 34 (January 2002).

Exhibit C

(2) "Conflicts and Confidential Information. The Firm is a full service law firm that frequently introduces existing clients to other clients or potential clients. Inevitably, other present or future clients of the Firm will have contacts with the Client. Accordingly, to prevent any future misunderstanding and to preserve the Firm's ability to represent the Client and the Firm's other clients, the Firm confirms the following understanding about certain conflicts of interest issues:

> "a) The Firm will not represent any other client in any matter in which the Firm is also representing the Client unless the Firm has the Client's express agreement that the Firm may do so. Nor will the Firm represent any other client in a matter in which the Firm's other client is substantially and adversely related to the Client in a matter that the Firm is handling for the Client unless the Client expressly agrees that the Firm may do so. *In the event that the Firm determines that a conflict of interest may exist or arise between or among any person or entity defined in this letter as the Client, on one hand, and any other person or entity defined in this letter as the Client or the Firm's other client, if any, on the other hand, the Firm will discuss that current or potential conflict with each of the Client, and each person or entity defined in this letter as the Client, and with the other client, if any, decide in the Firm's sole and absolute discretion which of them the Firm will continue*

to represent at the request of the respective Client, client or clients, and advise the other Client, client or clients that he, she, it or they should retain separate counsel, all to the extent required and in accordance with the applicable Rules of Professional Conduct.

"b) In the absence of a conflict as described in subparagraph (a) above, the Client hereby acknowledges that the Firm will be free to represent each Client and any other client either generally or in any specific matter in which the Client may have an interest.

"c) The effect of subparagraph (b) above is that the Firm may represent another client on any issue or matter in which the Client might have an interest, including, but not limited to:

"(i) Preparation and negotiation of agreements; licenses; mergers and acquisitions; joint ventures; loans and financings; securities offerings; bankruptcy or insolvency; patents, copyrights, trademarks, trade secrets or other intellectual property; real estate; government contracts; the protection of rights; representation before regulatory authorities; and

"(ii) Representation and advocacy with respect to legislative issues, policy issues, administrative proceedings, or rulemakings.

"d) The Firm does not view this advance consent to permit unauthorized disclosure or use of any client confidences. Under applicable Rules of Professional Conduct, the Firm is obligated to and shall preserve the confidentiality of any confidential information that the Client, and each person or entity defined in this letter as the Client, provides to the Firm. In this connection, the Firm may obtain nonpublic personal information about the Client, or any person or entity defined in this letter as the Client, in the course of the Firm's representation. *The Firm will share information about each person or entity defined in this letter as the Client with each one or more persons or entities defined in this letter as the Client; the Firm will withdraw as the attorney for one or more persons or entities defined in this letter as the Client, in the manner described in paragraph a) above, if any such person or entity instructs the Firm that some matter material to the Firm's representation of the Client, or representation of any person or entity defined in this letter as the Client, under this letter should be kept from any other person or entity defined in this letter as the Client.* The Firm restricts access to the Client's nonpublic personal information to Firm personnel who need to know that information

in connection with the Firm's representation and, as appropriate, third parties assisting in that representation. The Firm maintains appropriate physical, electronic, and procedural safeguards to protect the Client's nonpublic personal information. The Firm does not disclose nonpublic personal information about its clients or former clients to anyone, except as permitted by law and applicable Rules of Professional Conduct.

"e) The Firm will not disclose to any of the Client or use on behalf of any of the Client any documents or information with respect to which the Firm owes a duty of confidentiality to another client or person.

"f) The fact the Firm may have the Client's documents or information, which may be relevant to another matter in which the Firm is representing another of the Client or another client, will not prevent the Firm from representing that other Client or client in that matter without any further consent from any of the Client. In such a case, however, the Firm will put in place screening or other arrangements to ensure that the confidentiality of the Client's documents or information is maintained."