

CHAPTER I • INTRODUCTION

EDITOR'S NOTES

The following symbols are used throughout this document:

 **Frequently tested topics**


 **Exam tips**

 **Definitions**

AUTHORITIES

The following authorities are tested on the Multistate Professional Responsibility Exam (MPRE):

- Model Rules of Professional Conduct (Model Rules or MRPC)
- Model Code of Judicial Conduct (CJC)
- State and federal law (e.g., Sarbanes-Oxley Act)
- Inherent judicial authority of courts to regulate the conduct of attorneys and judicial officers

 If a question involves procedural or evidentiary issues, assume the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE) apply unless otherwise stated. If a question involves a constitutional issue, assume that the U.S. Constitution governs.

CHAPTER II • REGULATION OF THE LEGAL PROFESSION

INHERENT POWERS OF COURTS TO REGULATE LAWYERS

State courts regulate *all* aspects of the practice of law within their jurisdiction. Each state has its own rules of professional conduct, which are typically based on the MRPC. In contrast, each federal court has its own bar to which a lawyer practicing before that court must be admitted.

ADMISSION TO THE PROFESSION

Requirements for admission



Education Most states require graduation from an ABA-accredited law school.



Knowledge Most states require applicants to pass a bar examination.



Character Past conduct may be considered when assessing an applicant's good character and general fitness to practice law. False statements made to the bar examiners, violations of the MRPC, and convictions involving a crime of moral turpitude may prevent admission.



Residency No residency requirements.

Application process

Applicants are prohibited from **knowingly making a false statement** of material fact, **failing to disclose** a material fact, or **knowingly failing to respond** to lawful demand by an admissions authority

regarding the application. Applicants can invoke the Fifth Amendment privilege against self-incrimination. However, they must do so openly—they cannot simply omit information.

REGULATION AFTER ADMISSION

Grounds of misconduct

- Violating or attempting to violate the MRPC, or knowingly assisting or inducing another to do so.
- Committing a criminal act that adversely reflects on one's honesty, trustworthiness, or fitness as lawyer.
- Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- Engaging in conduct that is prejudicial to the administration of justice.
- Stating or implying an ability to improperly influence a government agency or official.
- Knowingly assisting a judge or a judicial officer in a violation of judicial conduct rules or other law.
- Engaging in conduct that one knows or reasonably should know is harassment or discrimination.

Misconduct by others associated with law firm

Duties and Responsibilities for Other Lawyers and Nonlawyers in the Law Firm		
Duty to supervise	Partner (or comparable managerial authority)	Must make reasonable efforts to ensure that the firm has measures in place to give reasonable assurance that all employees conform to the MRPC
	Supervising attorney	Must make reasonable efforts to ensure that the conduct of supervised lawyers and nonlawyers conforms to the MRPC
Responsibility for another's violation	Partner (or comparable managerial authority)	Responsible if the partner or the supervising attorney knew about the misconduct when the consequences of the misconduct could have been avoided or mitigated but failed to take reasonable remedial action
	Supervising attorney	
	All lawyers	Responsible if the lawyer orders or ratifies the misconduct

Remember that a lawyer who is practicing law as a partner in a partnership may have **civil liability** for the conduct of another lawyer-partner.



Partners' ethical duties are tested frequently in the context of **paralegals** or other nonlawyers violating a Model Rule **without the lawyer's knowledge**. The outcome depends on whether the firm had procedures in place to prevent such violations at the time the violation occurred.

If a question indicates that a subordinate engaged in misconduct without the lawyer's knowledge, check if any **preventive measures** (e.g., employee training) were taken.

Duties of subordinate lawyers

Subordinate lawyers must conform to the MRPC—even when acting under the direction of a supervising lawyer. However, a subordinate lawyer will not be liable for violating the MRPC if the subordinate lawyer acted in accordance with the supervising lawyer's **reasonable resolution of an arguable question of professional duty**.

Misconduct outside admitted jurisdiction

A lawyer is subject to discipline for misconduct in the jurisdiction where misconduct occurred *and* any jurisdiction where the lawyer is admitted to practice.

PEER RESPONSIBILITY TO REPORT MISCONDUCT

A lawyer has a **duty to report misconduct** by other lawyers (even those outside the lawyer's firm) and judges if:

- The matter raises a substantial question about the lawyer's **honesty, trustworthiness, or professional fitness** *and*
- The lawyer has **actual knowledge** of the misconduct (may be inferred).

UNAUTHORIZED PRACTICE OF LAW

Not admitted to practice in a jurisdiction

A lawyer cannot practice law in a jurisdiction where the lawyer is not admitted *except* in certain circumstances, including:

- **Temporary practice** – when the lawyer is appearing pro hac vice (i.e., for this turn only), in association with a local lawyer, or other temporary practice of law
- **Permanent practice** – (1) when the provision of legal services is limited to the lawyer's employer or its organizational affiliates and the forum does not require pro hac vice admission *or* (2) when the services rendered are permitted by federal or local law

However, the above exceptions do not apply when the lawyer is disbarred or suspended in any jurisdiction.





Assisting nonlawyers in the unauthorized practice of law

A lawyer must *not* assist others in the unauthorized practice of law. However, a lawyer may:

- Provide professional guidance to nonlawyers whose employment requires legal knowledge (e.g., accountants, social workers, claims adjusters)
- Delegate legal work to a paraprofessional, but the lawyer must supervise and retain responsibility for the delegated work
- Assist individuals who wish to proceed pro se

FEE DIVISION WITH NONLAWYERS

Fee sharing or splitting with lawyers in the same law firm is permitted. However, **fee sharing with nonlawyers is prohibited** *except* in limited circumstances (see table below).

Permissible Fee Sharing with Nonlawyers	
	Fees are paid as a death benefit
	A lawyer purchases the law practice of a deceased, disabled, or disappeared lawyer
	Fees are shared via a compensation or retirement plan (even if based on a profit-sharing arrangement)
	A lawyer shares court-awarded fees with a nonprofit organization that employed or retained the lawyer

THE LAW FIRM AND OTHER FORMS OF PRACTICE

Law firm

“Law firm” refers to any of the following:

- Lawyer(s) in a partnership, professional corporation, sole proprietorship, or other association authorized to practice law
- Lawyers employed in a legal services organization or the legal department of an organization

Limitations on associations with nonlawyers

A lawyer cannot form a **partnership** with a nonlawyer if any of the partnership’s activities consist of the practice of law.

A lawyer cannot practice with—or as—a **professional corporation** (or association) authorized to practice law for a profit if a **nonlawyer** (1) **owns any interest** therein, (2) is a corporate **director or officer**, or (3) has the right to **direct or control** a lawyer’s professional judgment.

Law-related services



“Law-related services” are those reasonably related to legal services but not prohibited as unauthorized practice of law when provided by nonlawyer (e.g., accounting, tax prep).

A lawyer is subject to the MRPC if such services are indistinct from the provision of legal services to clients. And a lawyer must take reasonable measures to assure that a person obtaining law-related services knows that the protections of a client-lawyer relationship do not exist.

Sale of law practice (including goodwill)

Compensation for the reasonable value of a law practice is permitted if the following **requirements** are met:

- The seller **ceases to practice** in the area of practice sold or the law entirely, within a geographic area or everywhere.
- Clients receive **written notice** of the proposed sale, the right to seek other counsel, and the fact that consent to the transfer is presumed if no action is taken within 90 days.
- The practice is **sold to one or more lawyers** or law firms.
- **Client fees are not increased** due to the sale.

The **purchaser** is obligated to undertake all client matters, subject to **client consent** and **conflict-of-interest constraints**.

CONTRACTUAL RESTRICTIONS ON PRACTICE

A lawyer must not offer (or agree) to restrict a lawyer’s right to practice after termination of a partnership, shareholder, or **employment** agreement (except for retirement benefits). And a lawyer must not offer (or agree) to restrict a lawyer’s right to practice as part of a settlement agreement. Most courts treat this rule as a **per se ban** on **noncompete agreements** and **forfeiture-for-competition clauses** that restrict a lawyer’s ability to practice law.

CHAPTER III ▪ THE CLIENT-LAWYER RELATIONSHIP

ACCEPTANCE AND REJECTION OF CLIENTS

A lawyer has no duty to accept the representation of any client *except* for **court appointments**, which must be accepted absent good cause. Good cause exists when:

- The representation is likely to result in a violation of the MRPC
- The client or the cause is so repugnant to the lawyer, it would likely impair the lawyer's ability to represent the client *or*
- The representation would likely result in an unreasonable financial burden on the lawyer.

An appointed lawyer has the **same duties to the client** as retained counsel. The client-lawyer relationship begins when **the client reasonably believes** the relationship exists—an explicit agreement is not required.

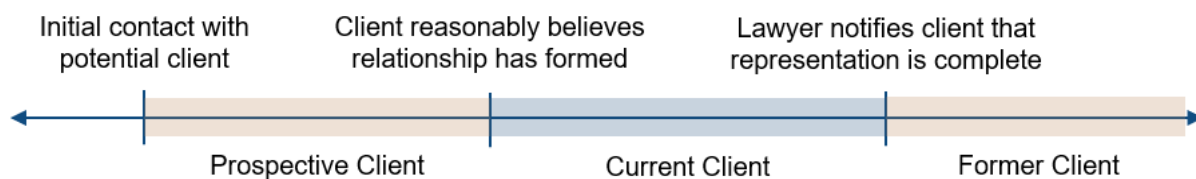


Figure 3.A Active Client-Lawyer Relationships

SCOPE, OBJECTIVES, AND MEANS OF REPRESENTATION

Clients decide the **objectives and goals of the representation**. **Lawyers** generally control the means of achieving a client's objectives after reasonably consulting with the client—including most decisions relating to **strategy and methods** for achieving the client's goals. However, lawyers must reasonably consult with clients about their objectives and keep them reasonably informed.

Lawyers may limit the **scope of representation**—including the duration and subject matter of the representation—if the limitation is **reasonable** under the circumstances and the client provides **informed consent**. However, an agreement that might induce the lawyer to **curtail services** or cause the lawyer to perform duties contrary to the client's interest is **prohibited**.

Client with diminished capacity

The lawyer must maintain an ordinary lawyer-client relationship to the extent possible. However, the lawyer may take **reasonably necessary protective action** (e.g., appoint a guardian or conservator) and, **in an emergency** when the client is threatened with **imminent and irreparable harm**, legal action to the extent necessary to avoid such harm. Emergency legal action is permitted, even if the person is unable to establish a client-lawyer relationship.

Prohibition on counseling crimes or fraud

A lawyer is subject to discipline—as well as civil and criminal liability—for **knowingly** counseling or assisting the client in criminal or fraudulent conduct. However, a lawyer can discuss the legal consequences of a proposed course of conduct and make a good-faith effort to determine the validity, scope, and application of the law.

Apparent authority

A lawyer's act is the client's act in proceedings before a tribunal or in dealings with a third person if the tribunal or third person **reasonably assumes** that the client has authorized the lawyer to act.

By retaining the lawyer, a client confers on the lawyer broad apparent authority to act for the client in matters relating to and reasonably appropriate under the representation. But this authority does not extend to matters reserved for client decision (e.g., accepting a settlement).

WITHDRAWAL OR TERMINATION OF REPRESENTATION

Mandatory withdrawal

A lawyer **must** withdraw when:

- The representation **violates the MRPC or other law**
- The lawyer's **physical or mental condition** materially impairs representation *or*
- The lawyer is **discharged by the client** (unless ordered by the court to continue representation).

Permissive withdrawal ☆

A lawyer **may** generally withdraw for any reason if there is **no material harm** to the client. But even if material harm would result, withdrawal is permitted when:

- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is **criminal or fraudulent**
- The lawyer learns that the lawyer's previous services have been used by the client to **perpetrate a crime or fraud**
- The client insists on a course of action that the lawyer finds **repugnant or with which the lawyer fundamentally disagrees**
- The client fails substantially to **fulfill an obligation to the lawyer** regarding the lawyer's services (e.g., paying reasonable legal fees)
- The representation will result in **unreasonable financial burden** on the lawyer
- The client makes representation **unreasonably difficult**
- Other good cause exists

Note: Court permission must be obtained before withdrawing if the lawyer was appointed to represent the client or the lawyer is required by statute or rule to do so.

Duties upon termination

The lawyer must take reasonable steps to protect the client's interests—even if the lawyer is unfairly discharged. Such steps include:

- Providing reasonable notice to the client
- Allowing time to employ other counsel
- Returning the client's papers and property
- Refunding unearned fees

Authority upon termination

The lawyer's **actual authority** terminates once any of the following events occurs:

- The client discharges the lawyer

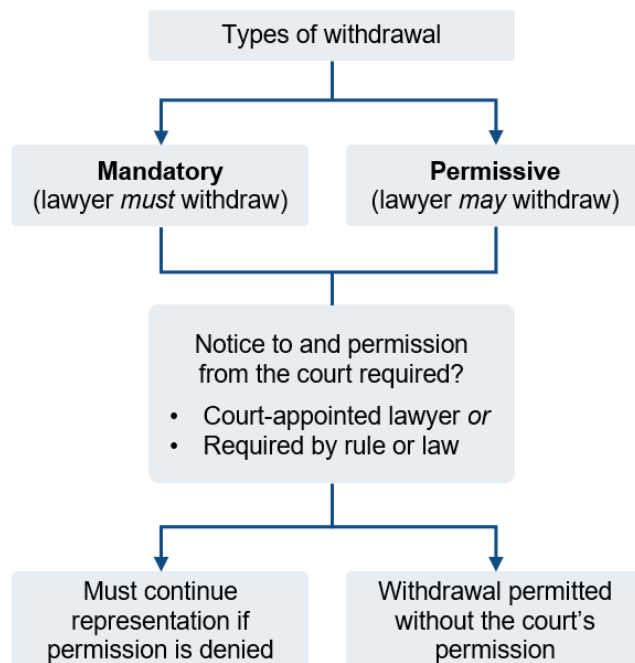


Figure 3.B Withdrawal from Legal Representation

- The client dies or loses the capacity to function as an entity
- The lawyer withdraws or is ordered by a tribunal to cease representing a client
- The lawyer dies, becomes incapacitated, or is disbarred or suspended from practicing law
- The representation ends via contract or because contemplated services are complete

In contrast, the lawyer's **apparent authority** continues until an affected third person has enough information to put a reasonable person on notice that inquiry into the lawyer's authority is appropriate.

FEES AND EXPENSES

Unreasonable fees or expenses

A lawyer is prohibited from charging unreasonable fees or expenses. **Reasonableness factors** include the difficulty of a case, preclusion of other employment, the nature of lawyer-client relationship, the fee arrangement (e.g., contingent, hourly, prepaid), the amount at issue and results obtained, the lawyer's expertise, and customary fee charged locally.

Contingent fees

Lawyers may charge a **reasonable** fee that is contingent on the outcome of the case if that agreement is **in a writing** that contains:

- The client's signature
- The calculation methodology
- The calculation of expense deductions, including whether expenses are deducted before or after calculating the contingency fee *and*
- A clear description of any expenses for which the client will be liable regardless of the outcome.

However, contingency fees are **prohibited in criminal cases** and **domestic relations cases** (except those involving the recovery of post-judgment balances due for support).



This concept is often relevant to incorrect answer choices.

Terms of payment

Payment in advance is permitted so long as any unearned portion is returned when the representation is terminated. Note that refund of a **retainer fee**—i.e., money paid solely to ensure the availability of the lawyer—is generally not required.

Fee splitting

Fee splitting is **permitted** among members of the **same law firm**, including retired members. It is also permitted among members of **different firms** if:

- The fee is **proportionate** to the services rendered by each lawyer *or* all lawyers assume joint responsibility for the representation
- The **client agrees** to the fee splitting arrangement (confirmed in writing) *and*
- The total fee is **reasonable**.

Referral fees are generally **prohibited**, but the referring lawyer is entitled to a fee for work completed before the referral.

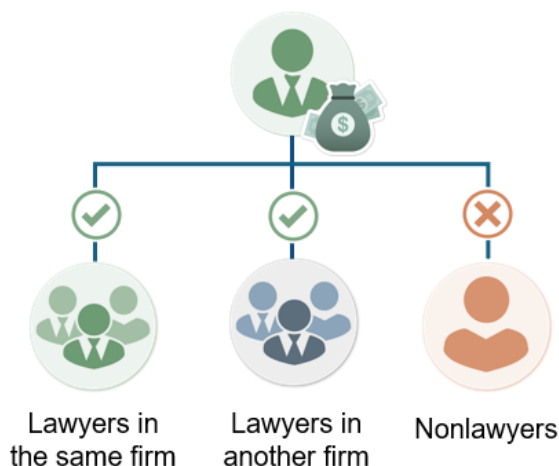


Figure 3.C Broad Overview of Fee Splitting

Modification of fee agreement

A fee agreement may be modified if it is *reasonable* at the time of the modification. A change in the basic nature of a fee arrangement or a significant increase in the lawyer's compensation is unreasonable absent an unanticipated change in circumstances.

Communication with client

The lawyer must communicate to the client the basis and rate of the lawyer's fee within a reasonable time after representation begins. Written communication about fees is advised but not required (except for contingency fees).

Fee disputes

If a **mandatory** procedure has been established to resolve fee disputes (e.g., an arbitration or mediation procedure established by the bar), then the lawyer **must comply** with that procedure. But even if such a procedure is **voluntary**, a lawyer should conscientiously **consider complying** with the procedure.

A lawyer must promptly distribute all *undisputed* funds to the client but **can retain disputed funds in a trust account** pending dispute resolution.

CHAPTER IV • PRIVILEGE AND CONFIDENTIALITY

DUTY VERSUS PRIVILEGE IN GENERAL

The **duty of confidentiality** is an ethical duty that prohibits general disclosure of *all* information gained from **any source** relating to the representation of the client. In contrast, the **attorney-client privilege** (also known as the client-lawyer privilege) is an evidentiary rule that prevents compelled disclosure of information communicated in confidence by **the client** to the attorney.



This distinction is important. The attorney-client privilege covers only client-driven confidential communications, while the duty of confidentiality more broadly covers all information related to representation.

ATTORNEY-CLIENT PRIVILEGE

General rule

The client may prevent court-compelled disclosures of **confidential communication** made to the lawyer—even after the termination of the representation or the death of the client. The communication must be for the purpose of **obtaining or providing legal advice** or representation, and it must be **intended to be confidential** to be privileged.

The client—as the privilege holder—may **waive** this privilege directly or by **intentionally disclosing** the information communicated. Note that an **inadvertent disclosure** does not waive the privilege if **reasonable steps** were taken to prevent disclosure and are promptly taken to rectify the error.

Exceptions

Confidential communications are *not* protected by the privilege if they are:

- Made to enable or aid crime or fraud
- Relevant to a dispute between the client (or former client) and the lawyer
- Relevant to a dispute between parties who claim through the same deceased client *or*
- Relevant to a dispute between former co-clients who are now adverse to each other.

Work product doctrine

The work product doctrine protects documents prepared by or for a party or the party's lawyer in **anticipation of litigation**.

Types of work product		
	Definition	Discovery
Opinion work product	A lawyer's mental impressions, conclusion, and trial tactics	Almost never discoverable
Ordinary work product	All materials created in anticipation of litigation that contain facts related to the case	Discoverable if the party seeking disclosure shows a substantial need and undue hardship

PROFESSIONAL DUTY OF CONFIDENTIALITY

General rule

Under the MRPC, a lawyer is prohibited from disclosing *any* information relating to the representation of a client unless:

- The client gives **informed consent**
- The disclosure is **impliedly authorized** to carry out representation (e.g., lawyers in a firm may disclose information to each other unless the client instructs otherwise) *or*
- Another **specific exception** applies (see below).

This duty **extends to prospective clients and former clients**. And a lawyer must **act to preserve confidentiality** by taking reasonable precautions to safeguard against disclosures by others participating in the representation or subject to the lawyer's supervision.

Exceptions

- Reasonably certain **death or substantial bodily harm**—to the extent that the lawyer reasonably believes necessary to prevent such harm. Note that the harm does not need to be imminent.
- Substantial **financial harm** to another—to the extent that the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that (1) is reasonably certain to result in substantial injury to another's financial or property interests and (2) has been or will be furthered by the lawyer's services.
- Securing legal advice about the lawyer's **compliance with the MRPC**
- **Controversy between lawyer and client**—to the extent that the lawyer reasonably believes necessary to (1) establish a claim or defense on the lawyer's behalf, (2) establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or (3) respond to allegations in any proceeding concerning the lawyer's representation of the client
- Compliance with **other law or court order**—to the extent reasonably necessary
- Detecting/resolving **conflicts of interest** arising from a change of employment—unless the disclosure will compromise the lawyer-client privilege or otherwise prejudice the client



The above exceptions to the duty of confidentiality are **discretionary**. But if the lawyer can avoid assisting a client's crime or fraud only by disclosing information that is within the lawyer's discretion to disclose, then the lawyer **must** do so.

A lawyer may also be required to disclose confidential client communications to comply with the **duty of candor** to a tribunal.

CHAPTER V • CONFLICTS OF INTEREST

AS AFFECTED BY LAWYER'S PERSONAL INTEREST

Lawyers owe clients a basic duty of loyalty and independent professional judgment. Therefore, a lawyer must not represent a client if the representation may be materially limited by the lawyer's personal interest *unless*:

- The lawyer reasonably believes that the lawyer can provide competent and diligent representation to the affected client
- The representation is not prohibited by law *and*
- The client gives informed consent, confirmed in writing.



Remember that the **lawyer's subjective belief** *and* a **disinterested lawyer's reasonable belief** are required in the analysis of whether the representation is materially limited by the lawyer's own interests.

Related lawyers

A lawyer may not represent a client in a matter in which the lawyer is related to the opposing lawyer unless each client gives informed consent.

Sexual relations with client

Such conduct is prohibited unless a consensual sexual relationship *predated* the commencement of the lawyer-client relationship. Note that this disqualification *cannot* be waived by informed consent.

LAWYER AS WITNESS

A lawyer may not represent a client if the lawyer is likely to be a necessary witness unless:

- The testimony relates to an uncontested issue
- The testimony relates to the nature and value of the legal services rendered in the case *or*
- The disqualification of the lawyer would cause substantial hardship for the client.

However, a lawyer may represent a client in a trial in which another lawyer in the lawyer's firm is likely to be a necessary witness (unless an imputed conflict of interest applies).

ACQUIRING AN INTEREST IN LITIGATION

Proprietary interest

A lawyer must not obtain a **proprietary interest** in the client's cause of action *except* when the lawyer acquires a lien to secure payment of a fee *or* contracts for a reasonable contingent fee.

Financial assistance to client

Financial assistance to a client is prohibited with respect to pending or planned litigation *except* in the following circumstances:

- A lawyer may **advance litigation costs** to a client, even if repayment is made contingent on the outcome (note that repayment need not be required for indigent clients)
- A lawyer representing indigent clients pro bono may give **modest gifts for basic living expenses** but may not (1) promise or imply availability of such gifts before retention, (2) seek or accept reimbursement for such gifts, *or* (3) publicize a willingness to provide such gifts to prospective clients.

ENTERING INTO TRANSACTIONS WITH CLIENT

Business transactions

A lawyer must not enter into a business transaction with a client or knowingly acquire any interest adverse to a client *unless*:

- The terms are **fair and reasonable** to client
- The client is **advised in writing** of the desirability of seeking independent counsel (and given an opportunity to seek such counsel) *and*
- The client **consents in writing** after full written disclosure of the transaction's terms and the lawyer's role.

Note that this rule does *not* apply to standard commercial transactions for products or services that the client generally markets to others.

Limiting Liability for Malpractice Claims	
Before malpractice occurs	A lawyer may not: <ul style="list-style-type: none">• Enter into a prospective agreement with the client that limits malpractice liability unless the client is independently represented in making the agreement <i>or</i>• Agree to submit a future malpractice dispute to arbitration unless the client is informed of the scope and effect of the arbitration clause
After malpractice occurs	A lawyer may not settle a claim or potential claim for malpractice with an unrepresented or former client <i>unless</i> that person is: <ul style="list-style-type: none">• Advised in writing of the desirability of seeking independent legal counsel regarding settlement <i>and</i>• Given a reasonable opportunity to seek such advice

Soliciting gifts

A lawyer is prohibited from soliciting a gift or preparing an instrument that gives a *substantial* gift to the lawyer or a person related to the lawyer *unless* the client is related to the lawyer (or the lawyer's relative).

A substantial unsolicited gift may be voidable under the doctrine of undue influence.

CONFLICTING INTERESTS AMONG CLIENTS



Current clients

A lawyer must not represent a client if the representation involves a **concurrent conflict of interest**, which exists if:

- Representation of one client would be **directly adverse** to the interests of another client *or*
- There is a significant risk that the representation will be **materially limited** by the lawyer's personal interests or responsibilities to another client, a former client, or a third person.

However, a lawyer may represent a client despite a concurrent conflict of interest if:

- The lawyer reasonably believes that the lawyer can provide competent and diligent representation to each affected client
- The representation is not prohibited by law
- The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding *and*
- Each affected client gives informed consent, confirmed in writing

Under no circumstances may a lawyer represent **opposing parties** in the same lawsuit. And a lawyer representing co-parties may make an **aggregate settlement** only if each client consents in writing after full consultation and disclosure by the lawyer.

Conflicts between current and former clients

A lawyer who has previously represented a client in a matter must not subsequently represent another person in the **same or a substantially related matter** in which that person's interests are **materially adverse** to the former client's interests. However, the **former client can waive** this conflict by giving **informed consent, confirmed in writing**.

A lawyer (including the lawyer's present and former firm) must not reveal **information relating to the representation of a former client** or use such information to the former client's disadvantage *except*:

- When required or permitted by the MRPC
- When the information has become generally known *or*
- When the former client has given informed consent, confirmed in writing.

When Lawyer Changes Private Firms	
Lawyer who switches firms	<p><i>Cannot</i> knowingly represent a person in the same or a substantially related matter in which the lawyer's prior firm previously represented a client if:</p> <ul style="list-style-type: none"> • the client's interests are materially adverse to that person <i>and</i> • the lawyer acquired material confidential information about the client
Lawyer's former firm	<p><i>May</i> subsequently represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm <i>unless</i>:</p> <ul style="list-style-type: none"> • the client's interests are materially adverse to that person <i>and</i> • the lawyer acquired material confidential information about the client
Exception	The client may give informed consent, confirmed in writing , to overcome the lawyer's or the former firm's disqualifications

The conflict rules regarding current and former clients apply to **current government lawyers**. However, a **former government lawyer** cannot represent a client in *any* matter (adverse or not) in which the lawyer participated **personally and substantially** as a government lawyer *unless* the government agency gives informed consent, confirmed in writing. And the former government lawyer's current firm may not knowingly undertake or continue representation in the matter *unless*:

- The former government lawyer is timely screened from participation in, and receives no fee from, the matter *and*
- Written notice is promptly provided to the government agency.

Conflicts involving prospective clients

A lawyer cannot represent a client with interests **materially adverse** to those of a prospective client in the **same or a substantially related matter** if the lawyer received information from the prospective client that could be significantly harmful to the client. However, such representation is permissible if:

- Both the affected client and the prospective client give informed consent, confirmed in writing *or*
- Reasonable measures are taken to avoid further exposure to disqualifying information, the disqualified lawyer is timely screened and receives no fee, and the prospective client is promptly given written notice.

Conflicts involving prospective clients are imputed to the lawyer's firm.

INFLUENCE BY PERSON OTHER THAN CLIENT

Third parties

A lawyer must not represent a client if there is a significant risk that the representation of the client will be materially limited by the lawyer's responsibilities to a third party *unless*:

- The lawyer reasonably believes that the lawyer can provide competent and diligent representation
- The representation is not prohibited by law *and*
- The client gives consent after consultation, confirmed in writing.

A lawyer may not accept referrals or compensation from a third party *unless*:

- The client gives informed consent
- There is no interference with lawyer's professional judgment *and*
- The lawyer-client confidentiality is preserved.



A common exam question involves a **parent paying for a lawyer's representation** of a child. Remember that a **competent child**, not the parent, is the client whose expressed interests govern.

Organization as client

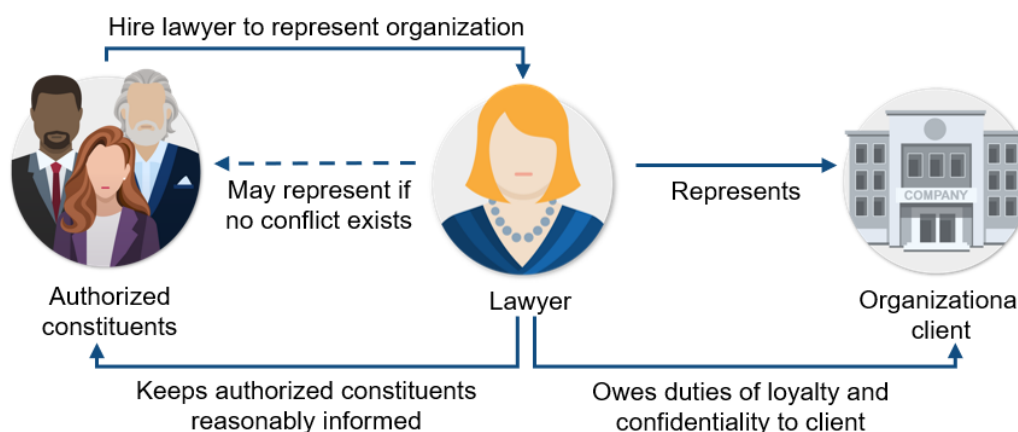


Figure 5.A Representation of Organizational Clients

A lawyer may represent the organization and its constituents (e.g., employees, officers, directors). But upon learning of a constituent's action (or intent or refusal to act) that will likely cause **substantial injury** to the organization, the lawyer must act in the organization's best interests.

IMPUTED DISQUALIFICATION



"Impute" means to assign a conflict of interest to all lawyers in a law firm based on the conflict of one lawyer in the law firm.

If one lawyer in a law firm is prohibited by conflict-of-interest rules from representing a client, then no lawyer in the firm can represent the client. However, there are some notable **exceptions**:

- The affected client may **waive the conflict** (same rule as a conflict between current clients).
- A **nonlawyer's disqualification** does not extend to lawyers in the firm if the nonlawyer is screened.

- A conflict arising from a lawyer who **switched firms** is not imputed to the new firm if (1) the disqualified lawyer is timely screened and receives no fee *and* (2) the former client is given prompt written notice and follow-up certifications of compliance.

A lawyer's prohibition is not imputed to the firm if the prohibition is based on the lawyer's **personal interest** and does not present a significant risk of materially limiting the representation of the client by other lawyers in the firm.

CHAPTER VI ▪ COMPETENCE, LEGAL MALPRACTICE, AND OTHER LIABILITY

PROFESSIONAL COMPETENCE

Competent representation requires **legal knowledge, skill, thoroughness, and preparation**. A lawyer who **lacks competence** must decline or withdraw from representation *unless* competence is achievable **without unreasonable delay** or by **association with competent counsel**.

DILIGENCE

A lawyer must act with reasonable diligence and promptness, which requires:

- Dedication to the client's interests—but a lawyer does not need to press for every possible advantage
- A controllable workload—illness, subordinates, personal animosity, or inability to balance other work do not justify lack of diligence
- Reasonable promptness—but a lawyer may agree to a postponement that will not prejudice the client
- Pursuing a matter to completion
- For sole practitioners, creating a plan that designates a competent lawyer to handle matters—e.g., review client files, notify each client of the lawyer's death or disability, determine whether there is a need for immediate protective action—upon the sole practitioner's disability or death

MALPRACTICE

Professional discipline is a penalty imposed on the lawyer by the state disciplinary authority for violating the MRPC. In contrast, malpractice is civil action for damages to compensate a client or third party for injury caused by a lawyer.

Professional Discipline vs. Legal Malpractice		
	Violation of MRPC required?	Harm to client required?
Professional Discipline	Yes	No
Legal Malpractice	No, but it may serve as evidence of malpractice	Yes



Pay attention to whether the question asks if a lawyer is subject to discipline or civil liability. "Subject to discipline" asks whether the conduct violates the MRPC. In contrast, "subject to civil liability" asks whether the facts support a civil cause of action (e.g., malpractice, breach of fiduciary duty).

Malpractice theories

Malpractice theories include breach of contract, breach of fiduciary duty, intentional tort, and negligence. A law firm may be **vicariously liable** for compensatory damages caused by a principal or an employee acting in the ordinary course of the firm's business or with actual/apparent authority.

Negligence

Negligence—the most common malpractice theory—requires proof of duty, breach, causation, and damages. A violation of a rule of professional responsibility can be evidence that the lawyer violated a duty of care.

Under the **attorney-judgment rule**, mere errors in judgment by an attorney are generally not grounds for a malpractice action where the attorney acts in **good faith** and exercises **reasonable care, skill, and diligence**.

CIVIL LIABILITY TO NONCLIENTS

Duties of care owed to nonclients

The general rule (i.e., the privity rule) is that a lawyer's only duty of care is to the lawyer's client. However, a lawyer may also owe a professional duty of care to certain nonclients in the following circumstances:

- When the nonclient has been invited to rely on the lawyer's opinion or legal services
- When the lawyer knows that a client intends the lawyer's services to benefit the nonclient
- When the lawyer represents a client in the client's capacity as fiduciary—in which case, the lawyer may be liable to the beneficiary for failure to use care to protect that beneficiary.

Defenses to specific tort actions

Under the litigation privilege, a lawyer has an **absolute defense to a defamation action** for the publication of a matter relating to a nonclient if:

- The publication occurs in communications made during or prior to legal proceedings or a reasonably anticipated legal proceeding
- The lawyer participates as counsel in the proceedings
- The matter is published to someone who may be involved in the proceedings *and*
- The publication is related to the proceedings.

A lawyer is not subject to liability for **wrongful use of civil proceedings** or for **malicious prosecution** if the lawyer has probable cause for acting *or* acts primarily to help the client obtain a proper adjudication.

A lawyer is not subject to liability for **interference with a contractual or prospective contractual relationship** if the lawyer acts to advance the client's objectives without using wrongful means.

Liability for contracts entered on client's behalf

- **Undisclosed principal** – The lawyer is subject to liability unless the client's existence or identity was disclaimed at the time of contracting.
- **Contracts for goods and services normally provided to lawyers** – The lawyer is subject to liability unless such liability was disclaimed at the time of contracting.
- **Unauthorized acts** – The lawyer is subject to liability if the lawyer tortuously misrepresents to a third person that the lawyer had the general authority to act on the client's behalf.







CRIMINAL LIABILITY

A lawyer is guilty of a crime committed in the course of representing a client to the same extent and on the same basis as a nonlawyer acting in a similar manner.



The lawyer's compliance (or noncompliance) with applicable rules of professional conduct is relevant to determining whether the lawyer's conduct constitutes a crime.

FIDUCIARY DUTY

Lawyer's Fiduciary Duties to Client			
	Safeguard the client's confidences and property		Avoid impermissible conflicts of interest
	Obey the client's instructions		Deal honestly with the client
	Not misuse powers arising from the client-lawyer relationship		Keep the client adequately informed about the client's matter

CHAPTER VII ▪ LITIGATION AND OTHER FORMS OF ADVOCACY

CONDUCT IN THE COURSE OF LITIGATION



Duty to avoid frivolous claims



"Frivolous" means lacking a good-faith argument for an extension, modification, or reversal of existing law.

A lawyer representing a defendant in a **criminal proceeding** can defend by requiring sufficient proof of every element of the case—even if there is no other factual or legal basis for challenging the element.

However, claims brought to embarrass, delay, or burden a third party are *not* permitted. And because lawyers have a **duty expedite litigation** consistent with the client's interests, a lawyer must not routinely delay litigation for the lawyer's own convenience, to frustrate the opposing party's attempt to obtain rightful redress, or for a financial or other benefit.

Duty of candor to tribunal

The duty of candor (i.e., honesty) applies in proceedings before a tribunal as well as ancillary proceedings conducted pursuant to the tribunal's authority (e.g., depositions). This duty requires that a lawyer:

- Not knowingly make a false statement of law or fact (the lawyer must correct false statements)
- Disclose controlling adverse legal authority *and*
- Disclose unfavorable facts—but only (1) to avoid assisting the client in a criminal or fraudulent act, (2) to correct a misrepresentation, or (3) in ex parte proceedings



Remember that the duty of candor applies even if compliance requires disclosure of information otherwise protected by the ethical duty of confidentiality.

Duty of fairness to opposing party and counsel

A lawyer must not unlawfully **obstruct access to evidence** or unlawfully alter/destroy/conceal a document or other material with potential evidentiary value. And a lawyer must not **undermine evidentiary rules** by alluding to inadmissible evidence.

A lawyer must not offer **inducements to witnesses** that are prohibited by law but may reimburse any witness's reasonable expenses incurred by testifying. A lawyer may also pay (i) nonexpert witnesses any *statutory fee* permitted by law and (ii) expert witnesses a *reasonable fee* for professional services.

Additionally, a lawyer must not knowingly **disobey the rules of a tribunal**, but a lawyer may test the validity of those rules.

CLIENT FRAUD AND PERJURY BY CLIENT OR WITNESS

Use of false evidence ☆

A lawyer must not falsify evidence or assist a witness in testifying falsely. And a lawyer must not **knowingly** offer or use false evidence, but a lawyer may refuse to admit evidence that the lawyer reasonably believes false.



This subtle distinction is frequently tested on the MPRE. The prohibition against offering false evidence only applies if the lawyer **knows** that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.

If the client is a **criminal defendant**, then the lawyer must honor the client's decision to testify unless the lawyer **knows** that the testimony will be false (a reasonable belief is not enough). If a criminal defendant cannot be dissuaded from testifying falsely, then the lawyer must seek the court's permission to withdraw. If the court refuses, the lawyer must disclose false testimony to the tribunal.

COMMUNICATION IN COURSE OF REPRESENTATION

Communicating with client

A lawyer must keep the client informed of the status of the matter and respond to client's *reasonable* requests for information. However, a lawyer may withhold information from the client to protect the client or to comply with a local rule or court order.

Ex parte communications ☆

Ex parte communications include any form of communication that:

- Concerns the legal proceeding at issue
- Is between a lawyer representing a client and a person serving in an official capacity (e.g., judge, juror) in the proceeding *and*
- Occurs outside of the presence and without the consent of other parties to the litigation or their representatives.



Figure 7.A Persons with Whom Ex Parte Communications Are Prohibited

Ex parte communications in knowing anticipation of and during adversarial proceedings are **generally prohibited** with any of the individuals shown above. This is true regardless of who initiates the communication and even if the communication does not involve the merits of the case.



Look for questions placing a lawyer with good intentions in ex parte communication situations. The lawyer is subject to discipline, even if no harm is intended or results.

There is **no exception for housekeeping matters and emergencies under the MRPC**. However, such exceptions may exist under a jurisdiction's court rules, civil procedure rules, or case law. And a lawyer may talk to a juror after that **juror has been discharged**.



Although there is no exception permitting housekeeping ex parte communications under the **MRPC**, remember that ex parte communications for scheduling, administrative, or emergency purposes that do not address substantive matters are permitted under the **CJC**.

Truthfulness in statements to others

In representing a client, a lawyer must not *knowingly* make a false statement of material fact or law to a third person. And a lawyer must disclose a material fact to a third person when necessary to avoid assisting a client in committing a crime or fraud *unless* the disclosure is prohibited by the duty of confidentiality.

Communication with person known to be represented by counsel

Communication about the subject of the representation with someone known to be represented by counsel is prohibited *unless*:

- The other lawyer has consented *or*
- Such communication is authorized by law or court order (e.g., to serve process).

This rule applies even if the represented person initiates or consents to the communication. This rule also applies to communication with a constituent (e.g., a current employee—not a former employee) of a represented organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter.

However, a lawyer may advise a client to communicate with a represented party, and the parties may communicate directly with each other.

Dealing with persons unrepresented by counsel

A lawyer may not state or imply to a person unrepresented by counsel that the lawyer is disinterested. **But the lawyer can negotiate** the terms of a transaction or settle a dispute with an unrepresented person so long as the lawyer has explained that the lawyer represents the adverse party—not the unrepresented person.

Respects for rights of third parties

When representing a client, a lawyer:

- Must not use means that have no **substantial purpose** other than to embarrass, delay, or burden a third person
- Must not use methods of obtaining evidence that violate a **third person's legal rights** *and*
- Must promptly notify the sender of an inadvertently sent document or information if the lawyer **knows or reasonably should know** of the mistake.

Trial publicity

A lawyer cannot make an extrajudicial statement that the lawyer **knows or reasonably should know** will be disseminated by means of public communication and have a substantial likelihood of **materially prejudicing** the proceeding.

However, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the **substantial undue prejudicial effect** of recent publicity that was not initiated by the lawyer or client. This rule also applies to any lawyer associated with an investigating or litigating lawyer.



The nature of the proceeding involved is a key factor in determining whether a statement may have a material prejudicial effect on the proceeding. A criminal jury trial will be more sensitive to extrajudicial speech, while a civil trial may be less sensitive. A nonjury hearing or arbitration proceeding may be even less sensitive.

CHAPTER VIII ▪ DIFFERENT ROLES OF LAWYER

Overview of the Different Attorney Roles	
Adviser	<ul style="list-style-type: none"> Must exercise independent professional judgment and render candid advice
Evaluator	<ul style="list-style-type: none"> May provide an evaluation of a matter affecting a client for use by someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client
Negotiator	<ul style="list-style-type: none"> Must not make a false statement of material fact
Third-party neutral	<ul style="list-style-type: none"> Must inform unrepresented parties that the third-party neutral (e.g., arbitrator, mediator) is not representing them <i>and</i> explain the role if the third-party neutral knows or reasonably should know that the parties do not understand the role Cannot subsequently serve as a lawyer representing a client in the same matter <i>unless</i> all parties give their informed consent, confirmed in writing

Special obligations of prosecutors

- Must avoid **representation of a private client** if it would result in a conflict with the prosecutor's obligation to seek justice.
- Must not prosecute without **probable cause**.
- Must make *reasonable* efforts to assure an **unrepresented defendant** is advised of the right to counsel and given reasonable opportunity to obtain counsel.
- Must not seek **waiver of an unrepresented defendant's pretrial rights** *unless* the defendant appears pro se with tribunal's approval.
- Must **disclose any evidence** that may help a defendant.
- Must not **subpoena a lawyer** in a grand jury proceeding *unless* the prosecutor reasonable believes that (1) the evidence is not privileged, (2) it is essential, and (3) there is no feasible alternative.
- Must refrain from making extrajudicial comments that have a **substantial likelihood of heightening public condemnation** of the accused unless those statements serve a legitimate law enforcement purpose or are necessary to inform the public.
- Must disclose to the appropriate authority any **new, credible, and material evidence** creating a reasonable likelihood that a convicted defendant did not commit the offense.
 - If the defendant was convicted in the prosecutor's jurisdiction, the prosecutor must also:
 - Promptly disclose* to the defendant unless otherwise instructed by the court
 - Investigate* to determine whether the defendant committed offense *and*
 - If new exculpatory evidence is clear and convincing, *seek to remedy* the conviction.
 - The **safe-harbor exception** applies if the prosecutor makes a good-faith, independent judgment that the evidence does not require action.

CHAPTER IX ▪ SAFEKEEPING PROPERTY OF CLIENTS AND OTHERS

- **Client's funds** – A lawyer must not commingle his own funds with a client's funds, and the client's funds must be kept in a separate client trust account (IOLTA).
- **Advance payment** – A lawyer must deposit legal fees and expenses paid in advance by a client into the trust account. The lawyer can withdraw from that account only as fees are earned or expenses are incurred.
- **Disputed property** – Such property must be kept separate until the dispute is resolved. Property not in dispute must be promptly distributed.

CHAPTER X ▪ COMMUNICATION ABOUT LEGAL SERVICES

PUBLIC COMMUNICATIONS

A lawyer must not make a **false or misleading communication** about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law.

Advertising

"Advertising" refers to widely distributed public statements about a lawyer's services. Advertisements are generally permitted so long as they:

- Are not false or misleading *and*
- Include the name and contact information of at least one lawyer responsible for the content.

An advertisement may include the names of regularly represented clients *if* the clients consent. They may also communicate that the lawyer practices or "specializes" in a particular area of law. But the lawyer can state or imply that the lawyer is **certified as a specialist** in a particular area if the lawyer has been certified as such and identifies the certifying organization.

Firm names and letterheads

A firm cannot use a **false or misleading name**.

A trade name may be used so long as (1) it does not imply a connection with a government agency or a charitable/public legal services organization and (2) is otherwise not false or misleading. A firm may be designated by the name of all or some of its current members as well as the names of deceased members when there has been a succession in the firm's identity.

Lawyers may not imply or hold themselves out as practicing together in one firm when they do not.

RESTRICTIONS ON PAYMENT FOR RECOMMENDING A LAWYER

A lawyer generally cannot give or promise anything of value to a person for recommending the lawyer's services. However, payment for advertising is allowed. And the rule against payment for recommending a lawyer's services does not prevent a lawyer from paying the usual charges of a:

- **Not-for-profit**
- **Legal service plan**—i.e., a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation—or
- **Qualified lawyer referral service**—i.e., consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections.

A **reciprocal referral arrangement**—i.e., an arrangement in which a lawyer agrees to refer clients to another lawyer or a nonlawyer professional and in return, that person agrees to refer clients to the lawyer—is permitted if it is not exclusive, the client is informed, and the duration is limited.

GROUP LEGAL SERVICES

A lawyer may provide legal services through a prepaid or group legal service plan that uses in-person, telephone, or real-time electronic contact to solicit memberships or subscriptions for the plan so long as the plan is not owned or operated by the lawyer.

SOLICITATION OF CLIENTS



A “solicitation” is a communication initiated by a lawyer that (1) is directed to a specific person the lawyer knows, or reasonably should know, needs legal services in a particular matter *and* (2) offers to provide, or can reasonably be understood as offering to provide, legal services.

Note that a communication does *not* constitute solicitation if it is directed to the general public (e.g., billboard, television commercial), prepared in response to a request for information, or automatically generated in response to internet searches.

Prohibited solicitation

Solicitation of professional employment by **live person-to-person contact** is prohibited *unless* the person contacted:

- Is a lawyer
- Has a close family, personal, or prior professional relationship with the lawyer *or*
- Routinely uses the type of legal services offered by the lawyer for business purposes.

Even if these conditions are met, a lawyer is not permitted to solicit professional employment if:

- The target of the solicitation has made known to the lawyer a desire not to be solicited *or*
- The solicitation involves coercion, duress, or harassment.

CHAPTER XI • LAWYERS AND THE LEGAL SYSTEM

LAWYER ACTIVITY IN IMPROVING THE LEGAL SYSTEM

- **Pro bono service** – Lawyers are encouraged, not required, to provide at least 50 hours annually.
- **Legal service organizations** – Participation is permitted, but a lawyer must not knowingly participate in decisions or actions that would be incompatible with or have a material adverse effect on a client.
- **Law reform activities** – Participation is permitted, but the lawyer must (1) avoid conflicts of interest and other MRPC violations and (2) disclose when a client’s interests may materially benefit.
- **Non-profit and court-annexed limited legal services programs** – A client must give *informed consent* to the lawyer’s short-term limited representation in these programs. The lawyer is responsible for conflicts of interest of which the lawyer has *actual knowledge*. The lawyer’s participation will not preclude the lawyer’s firm from representing a client with adverse interests.

IMPROPRIETY INCIDENT TO PUBLIC SERVICE

- **Political contributions** – A lawyer is not permitted to accept government legal engagement or an appointment by judge if the lawyer or law firm makes or solicits political contributions for the purpose of obtaining engagement.

- **Judicial and legal officials** – A lawyer must not *knowingly or recklessly* make a false statement about the qualifications or integrity of a judge.

CHAPTER XII ▪ JUDICIAL ETHICS

All full-time judges are bound by special rules of professional conduct—namely, the Code of Judicial Conduct (CJC).

A judge must uphold and promote the **independence, integrity, and impartiality** of the judiciary. This means that judges must comply with the law and follow legal precedent and other mandatory authority.

A judge must also **avoid impropriety** (i.e., inappropriate behavior) or the appearance of impropriety (based on what reasonable minds would perceive). Accordingly, a judge must not use the judicial office to advance the personal or economic interests of the judge or others.



When answering questions related to a judge's behavior, keep in mind that most judges are also lawyers and are therefore bound by the rules of professional conduct that apply to lawyers.

DUTIES OF IMPARTIALITY, COMPETENCE, AND DILIGENCE

A judge is required to perform the duties of judicial office impartially, competently, and diligently. These duties include, but are not limited to, the following responsibilities:

- Generally must avoid **ex parte communications** except for (i) scheduling, administrative, or emergency communications; (ii) written advice from disinterested legal experts; (iii) consultations with other judges or court staff; (iv) settlement efforts; and (v) communications authorized by law
- Avoid making **public statements** that might reasonably be expected to affect the outcome or impair fairness of a case
- Require **court staff** to act in a manner that is consistent with the judge's obligations under CJC
- Take **appropriate action** if the judge has received information indicating a substantial likelihood of a lawyer's violation of the MRPC.



A judge must disqualify (i.e., recuse) herself from a proceeding in which the judge's "impartiality might reasonably be questioned." But as long as the disqualification is not based on personal bias or prejudice concerning a party or a party's lawyer, the judge may ask the parties to waive the disqualification.

EXTRAJUDICIAL ACTIVITIES

General rule

Judges cannot engage in activities that **undermine the integrity** of the judge or of the court and must conduct personal and extrajudicial activities to **minimize risk of conflict** with the obligations of judicial office.

Prohibited activities

Prohibited extrajudicial activities include, but are not limited to:

- Testifying as a **character witness** except when duly summoned
- Accepting appointment to serve in a **fiduciary position** (e.g., executor, trustee, guardian) *except* for a family member, and only if it will not interfere with judicial duties
- Serving as **arbitrator, mediator, or lawyer** while serving as a **full-time judge**, *unless* expressly authorized by law, acting pro se, or providing uncompensated legal services to family members *and*

- **Accepting gifts**, benefits, and other things of value if it is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.
 - A judge may accept—but must report—gifts incident to a public testimonial, invitations to attend an event without charge, and things of value from someone likely to come before the judge

Permitted activities

Permitted extrajudicial activities include, but are not limited to:

- Participating in activities sponsored by **nonprofit** organizations or organizations or governmental entities concerned with the **law, the legal system, or the administration of justice**
- Receiving reasonable **compensation for extrajudicial activities**
- Accepting **reimbursement** for (or waivers of) necessary and reasonable expenses associated with a judge's participation in extrajudicial activities—unless otherwise prohibited by law or the CJC—and
- **Holding and managing investments** of the judge and members of the judge's family.
 - However, the judge must not serve as an officer, adviser, or employee of an entity that is not a closely held family business. And the judge must divest investment or financial interests that might require frequent disqualification or violate the CJC.

POLITICAL AND CAMPAIGN ACTIVITIES OF JUDGES

Prohibited activities

Prohibited political activities include, but are not limited to:

- **Soliciting funds** for or **making contributions** to political organizations or candidates, except as permitted by law
- Personally soliciting or accepting campaign contributions other than through a **campaign committee**
- Serving as a **leader or officer** of a political organization
- Publicly **endorsing or opposing** a candidate for any political office *and*
- Seeking, accepting, or using endorsements from a political organization (except in partisan elections)

A judge or judicial candidate must take reasonable measures to ensure that **other persons** do not undertake prohibited activities on behalf of the judge or judicial candidate.

Permitted activities

Permitted political activities include, but are not limited to:

- Participating in **caucuses** and **voting** in elections
- **Responding** to false, misleading, or unfair allegations
- Seeking, accepting, or using **endorsements** from any person or organization other than a partisan political organization
- Establishing a **campaign committee** to manage and conduct the candidate's campaign
- For **partisan judicial elections**, identifying oneself as a candidate of the political organization and seeking, accepting, or using endorsements of the political organization
- For **candidates for the appointment to a judicial office**, communicating with the appointing or confirming authority and seeking endorsements from any person or organization other than a partisan political organization

Judges who become candidates for nonjudicial office

A judge who becomes a candidate for an *elective* nonjudicial office *must resign* unless permitted by law. However, a judge who becomes a candidate for an *appointed* nonjudicial office *need not* resign.

