

APPENDIX A
PROPOSED RULE AMENDMENTS
(Legislative Format)

ER 1.0. Terminology

NEW COMMENT: A government law office is a “firm” or “law firm” for purposes of these rules.

ER 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

NEW COMMENT: Government lawyers or law offices might, in certain circumstances, have statutory or common-law authority or obligations that are inconsistent with the stated objectives of a government client. This rule does not abrogate or modify such authority or obligations. Reasonably foreseeable limitations on the ability of a government lawyer or law office to pursue the objectives of a government actor or agency should be communicated to the government actor or agency at the earliest opportunity after such limitations become known to the government lawyer or law office. In such an event, alternative counsel should be provided to the government actor or agency within any limitations established by other law. See also ER 1.7(d), 1.10, and 1.13.

ER 1.7. Conflict of Interest: Current Clients

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

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing, and:

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

(c) A lawyer may not represent a party in asserting a claim against another party represented by a firm if the same person or entity holds an ownership interest, directly or indirectly, of 10 percent or more, or has managerial authority comparable to that of a partner, in the lawyer's firm and the other firm.

(d) If facts pertaining to the representation by a government lawyer or law office of a government actor or agency that is a client of the government lawyer or law office would constitute a conflict of interest pursuant to subsection (a), the government lawyer or law office may withdraw from representing the government actor or agency and proceed with the conflicting representation without the consent of the affected client, provided that:

(1) The conflicting representation arises from a reasonable interpretation by the government lawyer or law office of statutory or common-law duties of that lawyer or law office;

(2) The government lawyer or law office has in place an organizational structure that is reasonably calculated to enable separation of lawyers who had represented the government actor or agency in the same or substantially related matter and who have confidential information related thereto from lawyers who will undertake the legal services of the conflicting matter;

(3) The client government actor or agency has been provided general notice of the possibility of such conflicts arising due to statutory or common-law duties of the government lawyer or law office, and of the organizational structure and policies of the government lawyer or law office designed to protect the interests of the government actor or agency to the greatest feasible extent without impeding the ability of the government law or law office to meet statutory and common-law duties;

(4) The client government actor or agency receives specific notice of the conflict of interest of the government lawyer or law office that is as timely as reasonably possible under the circumstances giving rise to the conflict; and

(5) The government lawyer or law office promptly moves to withdraw from representation of the government actor or agency in any pending litigation affected by the conflict, and seeks reasonable protective orders to allow the government actor or agency to retain replacement counsel and/or seek other protective measures.

NEW COMMENT: Government lawyers or law offices may in some circumstances have authority or be legally required to engage in conduct that would be considered a conflict of interest for a lawyer representing private sector clients pursuant to subsection (a). See Preamble, ¶ [18]. The conflicts of interest rules do not abrogate or modify statutory or common-law duties or authority of a government lawyer or law office. In the event of a conflict of interest that arises from the reasonable interpretation by a government lawyer or law office of its statutory or common-law duties, the government lawyer or law office shall give as much advance notice thereof to all affected government clients. The notice should be given as early as reasonably possible after the government lawyer or law office has actual notice of the specific facts and circumstances that give rise to the conflict. The timing and substance of the notice are to be determined under the facts and circumstances giving rise to the conflict of interest. Provided the notice is given under the exercise of the reasonable professional judgment of the government lawyer of law office under the facts and circumstances in existence at the time of such judgment, the timing and substance thereof should not be a subject of disciplinary investigation. The government lawyer or law office is not required to request or obtain a waiver from an affected government actor or agency under such circumstances. A government lawyer or law office, however, should give periodic general notice to all government actors or

agencies who are from time to time clients of the government lawyer or law office. Such general notice should describe possible situations that foreseeably could give rise to a disqualifying conflict of interest. The general notice also should include a description of the organizational structure and policies of the government law office as they relate to screening procedures that will be implemented in the event of a conflict, and the circumstances under which the government client may be entitled to independent representation. (Selection of and payment for alternative counsel are issues of law beyond the scope of these rules.) If a government lawyer or law office is required to withdraw from representation of a government client due to a conflict of interest, the government lawyer or law office shall make reasonable efforts to minimize prejudice to the government client by providing as much advance notice as possible under the circumstances, seeking to continue any judicial procedure or decision that might be affected by the withdrawal to the detriment of the interests of the government client, and facilitating to the extent possible appointment of replacement counsel. In conjunction with the termination of an attorney-client relationship for a particular matter due to a conflict of interest, the government lawyer or law office shall take reasonable screening measures to assure that no confidential information obtained about the subject-matter at issue shall be divulged to or used by any affected lawyers of the government office. A conflict of interest governed under section (d) does not preclude representation of the affected government client by the government lawyer or law office in other unrelated matters as may be required or permitted by other law.

ER 1.9. Duties to Former Clients

NEW COMMENT: Former client conflicts of interest involving a government lawyer and law office and a government client do not require a waiver by the client if the conditions of ER 1.7(d)(1)-(5) are met.

ER 1.10. Imputation of Conflicts of Interest: General Rule

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(e) Disqualification of government lawyers and law offices in respect to representation of a government actor or agency is governed by ER 1.7(d). Government lawyers and law offices are permitted to implement organizational structures and policies allowing for the screening of lawyers. ER 1.7(d), 1.9 cmt. []. General notice to all government clients related to the structures and policies of the law office, and of foreseeable situations in which a screen might be implemented by the office, is sufficient to constitute notice under this rule. Whether a government client has standing to challenge the organization and policies of a government law office is an issue of law beyond the scope of these rules to the extent that resolution of such a challenge requires interpretation of the statutory and common-law duties of the government lawyer or law office. The disqualification of lawyers associated in a non-government firm with former or current government lawyers is governed by ER 1.11.

ER 1.13. Organization as Client

COMMENTS

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context and may be prescribed by other law. See Scope Preamble [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority or be required by statutory or common-law duty to investigate and question such conduct ~~more extensively where than that of~~ a lawyer for a private organization might be prohibited from doing so in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. ~~This Rule does not limit that authority.~~—See Scope Preamble. Government lawyers also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. This Rule does not abrogate or modify any statutory or common-law authority or requirement of government lawyers, nor does it affect the ability of government lawyers to act in accordance with their reasonable interpretation of such authority or requirements.

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[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may ~~also~~ be elected officials, or the employees of elected officials, who have statutory obligations to take formal action against individual ~~constituents~~ government actor or agency clients under certain circumstances. This Rule does not abrogate or modify any statutory or common-law authority or requirement of government lawyers, nor does it affect the ability of government lawyers to act in accordance with their reasonable interpretation of such authority or requirements. The government lawyer ~~, therefore,~~ must make reasonable efforts under the facts and circumstances known at the time to clearly identify

the client and disclose to ~~the~~ individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments; [ER 1.4](#), [ER 1.7](#), [and ER 1.9](#). Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

ER 1.16. Declining or Terminating Representation

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(e) Withdrawal by a government lawyer or law office based on a conflict of interest is governed by ER 1.7(d).

ER 5.1. Responsibilities of Lawyers Who Have Ownership Interests or are Managers or Supervisors

(a) A lawyer who has an ownership interest in a firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a firm, shall make reasonable efforts to ensure that the firm has in effect internal policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to these Rules of Professional Conduct.

(1) Internal policies and procedures include, but are not limited to, those designed to detect and resolve conflicts of interest, maintaining confidentiality, identifying dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(2) Other measures may be ~~required~~ appropriate depending on the firm's structure and the nature of its practice.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the size and nature of the firm, the experience of the person who is being supervised and the amount of work supervised. Whether a lawyer has supervisory authority may vary given the circumstances.

(c) A lawyer shall be personally responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

(2) the lawyer has an ownership interest in or has comparable managerial authority in the firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(i) Appropriate remedial action by an owner or managing lawyer depends on the immediacy of that lawyer's involvement and the seriousness of the misconduct.

(ii) A supervisor must intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.

NEW COMMENT: The structure of a government law office might be affected to some degree by the statutory or common-law requirements applicable to the office. This rule should not be interpreted to modify or impede compliance with such requirements.

ER 5.2. Responsibilities of a Subordinate Lawyer

NEW COMMENT: A lawyer employed by a government law office may rely on the structure of such office in respect to the lawyer's representation of a government client with respect to notification of actual or potential conflicts of interest and screening procedures. See ER 1.7(d), 1.9, and 1.10.

ER 8.4. Misconduct

NEW COMMENT: Government lawyers and law offices may have duties and authority under other law that requires or authorizes them to take certain actions that would be prohibited for private lawyers to undertake. Actions taken based on a reasonable interpretation of those duties should not be a ground for discipline.