

STATE OF WISCONSIN

IN SUPREME COURT

In the Matter of the Amendment of
Supreme Court Rules Chapter 20
Rules of Professional Conduct for Attorneys

SUPPLEMENT TO PETITION

Wisconsin Ethics 2000 Committee petitioned the Wisconsin Supreme Court to revise the Rules of Professional Conduct for Attorneys (Chapter 20, Supreme Court Rules) as recommended in the committee's Proposed Amendments to Supreme Court Rules Chapter 20 which were submitted with the Petition. The committee submits this Supplement to Petition in order to (1) correct certain technical errors contained in the Proposed Amendments and (2) provide information sought by the court concerning the extent to which other jurisdictions recently have amended their rules in ways that vary from the Model Rules as amended by Ethics 2000.

TECHNICAL CORRECTIONS

The committee submits the following corrections to technical errors in its 141-page submission, Proposed Amendments To Supreme Court Rules Chapter 20 Rules Of Professional Conduct For Attorneys, and respectfully requests that the court accept these corrections to its proposal:

SCR 20:1.0(j) (page 6, line 19): should end with a period not a semicolon.

SCR 20:1.4(a)(1) (page 16, line 11): should refer to "Rule 1.0(f)" not "Rule 1.0(e)."

SCR 20:1.4 Wisconsin Committee Comment (page 16, lines 31-32): should insert "are" after the phrase "by the client."

SCR 20:1.5 Wisconsin Committee Comment (page 20, line 24): should replace "\$500" with "\$1000."

SCR 20:3.5(b) (page 91, line 21): "ex parte" should not be hyphenated.

SCR 20:3.8(a) (page 98, line 21): should end with a period not a semicolon.

SCR 20:3.8 (e)(3) (page 99, line 17): should end with a period not a semicolon.

SCR 20:4.1 Wisconsin Committee Comment (page 102, lines 18-19): the sentence should read, "When the lawyer personally participates in the deception, however, serious questions arise."

SCR 20:6.1 Wisconsin Committee Comment (page 116, line 14): add the sentence, "Because of differences in content and numbering between the Wisconsin Rule and the Model Rule, care should be used in consulting the ABA Comment."

SCR 20:7.3 Wisconsin Comment (page 128, line 16): add the sentence, "Because of differences in content and numbering between the Wisconsin Rule and the Model Rule, care should be used in consulting the ABA Comment."

The committee apologizes for any inconvenience these technical corrections may cause.

ETHICS 2000 ADOPTIONS IN OTHER STATES

The committee contacted the American Bar Association Joint Committee on Lawyer Regulation, which monitors implementation of the recommendations of the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000). The ABA committee provided an informative, pertinent, and current report that is attached as Appendix 1. At the conclusion of that report, an email update with respect to state action concerning Rule 1.13 is reproduced. In addition, a chart prepared by the American Bar Association outlining state-by-state variations in Rule 1.6 (confidentiality) is attached as Appendix 2.

CONCLUSION

The committee hopes that this submission is helpful and expresses its gratitude to the court for this opportunity to be of service.

Respectfully submitted this __ day of _____, 2005.

WISCONSIN ETHICS 2000 COMMITTEE

By: Daniel W. Hildebrand, Chairperson
DeWitt, Ross & Stevens
Two East Mifflin St., #600
Madison, WI 53703-2885

APPENDIX 1

State Committees Review and Respond to Model Rules Amendments

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Updated January 14, 2005

Charlotte K. Stretch

Forty-seven states and the District of Columbia have indicated that they have committees reviewing their professional conduct rules in light of the changes to the ABA Model Rules of Professional Conduct that were enacted in February 2002 pursuant to the recommendations of the Ethics 2000 Commission.¹ As of January 14, 2005, twelve state supreme courts have adopted new rules in response to review committee reports,² and an additional fifteen state review committees have published revised rules for consideration.³ This paper provides a comparison of the state proposed or newly adopted rules with the ABA Model Rules in several important areas. References to “all states” mean all states that have proposed or adopted new rules since the ABA House action.

Rule 1.0: Terminology

The Terminology section has been moved from the introductory portion of the Model Rules to a new Rule 1.0 to give the defined terms greater prominence and to permit the use of Comments to further explicate the provisions. All states except Florida, Mississippi and Virginia have followed this new format. The rule is still under consideration in New Hampshire.

Several new terms are defined in this new rule, including “confirmed in writing,” “informed consent,” “screened,” and “tribunal.” All states except Virginia have proposed changes that are substantially similar to the Model Rules. Variations include definitions of additional terms and changes to some already defined terms.⁴ All except Missouri and Virginia have included the new term, “informed consent.” Missouri and Virginia retain the definition of “consultation” from the old Model Rules and continue to use the phrase “consent after consultation” throughout the rules instead of “informed consent.”

¹ Alabama, Georgia, and Maine do not currently have committees that are reviewing the Ethics 2000 amendments.

² New rules have been enacted in North Carolina (effective 3/1/03), Delaware (effective 7/1/03), Arizona (effective 12/1/03), New Jersey (effective 9/10/03), and South Dakota (effective 1/1/04), Virginia (effective 1/1/04), Louisiana (effective 3/1/04), Montana (effective 4/1/04), Idaho (effective 7/1/04), Indiana (effective 1/1/05), Oregon (effective 1/1/05), and Pennsylvania (effective 1/1/05).

³ The Joint Committee on Lawyer Regulation, chaired by Delaware Supreme Court Justice Randy J. Holland, is responsible for assisting states as they review the new rules and for collecting information about implementation efforts. As of 1/14/05, the Joint Committee had received reports from Arkansas, Colorado, Florida, Illinois, Iowa, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, South Carolina, Washington and Wisconsin.

⁴ For example, Montana includes a definition of “bona fide;” New Jersey defines “primary responsibility;” Oregon defines “electronic communication,” “financial institution,” and “information relating to the representation;” South Carolina defines “client,” “fee,” and “representation” and Wisconsin retains the definition of “consult” and defines “misrepresentation” and “prosecutor.”

Mississippi has included the new term but also continues to use “consents after consultation.”

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Model Rule 1.2(a) was amended to clarify the allocation of authority between client and lawyer. Rule 1.2(c) permits limiting the scope of a representation to enable lawyers to provide limited legal services to low and moderate-income persons. All of the states except Mississippi and Virginia have proposed changes substantially similar to these new provisions.⁵ Unlike the Model Rule, North Carolina does not require the client to give informed consent in 1.2(c).

Rule 1.4: Communication

Twenty-two states have proposed rules that are the same as new paragraph (a), which added detail about a lawyer’s duty to communicate with the client, specifically identifying five different aspects of the duty to communicate. Two of those states added an additional requirement that the lawyer promptly notify the client of all proffered plea agreements (Arizona) or all settlement offers, case evaluations or plea bargains (Michigan).

Three other states proposed rules that are similar but slightly different: Maryland does not include (a)(2) (consultation about the means by which the client’s objectives are to be accomplished); Missouri and New Jersey do not include either (a)(1) (promptly informing the client whenever the client’s informed consent is required by the Rules) or (a)(2).

Mississippi, Oregon and Virginia follow the former version of the Model Rule.

Rule 1.5: Fees

Model Rule 1.5(a) was changed from “A lawyer’s fee shall be reasonable,” to a requirement that “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” The factors to be considered in determining the reasonableness of the fee were not changed in the Ethics 2000 amendments. Twenty states (Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, South Carolina, South Dakota, Washington and Wisconsin) follow the amendments in paragraph (a). Of those states, three vary the list of factors slightly: Arizona lists “the degree of risk assumed by the lawyer” as (a)(8); South Carolina deletes “if apparent to the client” in (a)(2); Washington adds the “terms of the fee agreement” as a factor.

Three states (North Carolina, Oregon and Pennsylvania) use the same list of factors as the Model Rule but use the language from the old Code in the introductory phrase and prohibit a lawyer from entering into, charging or collecting a fee that is “illegal or clearly excessive.” Florida refers to a fee that is “illegal, prohibited, or clearly excessive or a fee generated by employment that was obtained through advertising or

⁵ Virginia retains the old Model Rule language without the changes proposed by Ethics 2000; Mississippi used the old Model Rule language but does change “consents after consultation” to “informed consent,” the only place where “informed consent is used in the Mississippi proposed rules.

solicitation not in compliance with the rules regulating The Florida Bar.” The list of factors in Florida also varies considerably from the Model Rule.

Three states (Mississippi, New Jersey and Virginia) retained the old Model Rule language in the introduction.

In paragraph (b), the scope of the representation and the expenses for which the client will be responsible were added as matters that must be communicated to the client before or within a reasonable time after commencing the representation. The new rule also requires that changes in the basis or rate of the fee or expenses shall also be communicated to the client. Most states have made changes that are the same or substantially similar to the amendments in paragraph (b). North Carolina deleted any reference to changes in the basis or rate. Three states, Mississippi, Pennsylvania and Virginia, follow the old Model Rule language in paragraph (b). Oregon has no provision similar to paragraph (b). The rule is still under consideration in New Hampshire.

Eight states (Arizona, Colorado, Montana, Nebraska, New Jersey, Pennsylvania, South Carolina and Wisconsin) require the fee agreements to be in writing, as the Ethics 2000 Commission had originally proposed.⁶

New Model Rule 1.5(c) provides that the contingent fee agreement must be signed by the client and requires that the agreement notify the client of any expenses for which the client will be responsible. Seventeen states agreed with these amendments. Florida’s rule is substantively similar but significantly more detailed. Three states (Mississippi, Pennsylvania, and Virginia) follow the old Model Rule. Oregon has no provision similar to paragraph (c).

Rule 1.7: Conflict of Interest: Current Clients

All states, except Mississippi, have followed the new format and essentially the new language of Model Rule 1.7, which was significantly changed in format but not in substance. The Rule does include a new requirement that the client’s informed consent be “confirmed in writing.” One state, Indiana, requires the writing to be signed by the client, whereas Illinois, Pennsylvania and Virginia do not require the consent to be confirmed in writing at all.

Florida, New Jersey and South Carolina add provisions relating to common representation. Oregon adds a provision regarding related lawyers. Iowa adds a provision related to dissolution of marriage proceedings.

Rule 1.8(j): Prohibition regarding sexual relationships with clients

Twenty-two states have proposed adding the new provision prohibiting a lawyer from having sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced, or a substantially similar provision. Seven of those states added further provisions to their rules. Minnesota, North Carolina, Oregon and Wisconsin add a definition of “sexual relations”; Minnesota, North Carolina, Oregon and Washington include provisions relating to lawyers in a firm who do not work on a client matter; Minnesota, Nevada and Wisconsin include provisions relating to organizational clients. Iowa, Oregon and Washington also refer to sexual

⁶ Prior to January 1, 2003, ten states had provisions regarding written fee agreements: Alaska, California, Colorado, Connecticut, District of Columbia, New Jersey, New York, Pennsylvania, Rhode Island, and Utah.

relations with a representative of a current client of the lawyer if the sexual relations would, or would likely, damage or prejudice the client in the representation.

Six states (Florida, Louisiana, Maryland, Michigan, Mississippi and Virginia) did not add this new provision. Florida adds in Rule 8.4(i) that it is misconduct for a lawyer to “engage in sexual conduct with a client that exploits the lawyer-client relationship.”

Rule 1.10: Imputation of Conflicts of Interest: General Rule

Model Rule 1.10(a) includes a new provision that eliminates imputation of personal interest conflicts (conflicts between a lawyer’s own personal interest and the interest of the client), in situations where there is no significant risk that the personal interest conflict will affect others in the lawyer’s firm. All states except Mississippi and Virginia have added this new exception to the general rule regarding imputation of conflicts of interest. New Hampshire is still reviewing Rule 1.10.

The Ethics 2000 Commission recommended that Rule 1.10 include a provision for screening of lateral hires. While that recommendation was not adopted by the ABA House of Delegates, sixteen states (Arizona, Delaware, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, Washington and Wisconsin) include screening provisions in their rules or proposals. These vary in several respects but most require some kind of notice and most require that the screened lawyer be apportioned no part of the fee from the representation. Minnesota, North Carolina and Oregon do not include provisions relating to the apportionment of the fee. Illinois, Iowa and Maryland do not require notice to the client regarding the screen.

Rule 1.18: Duties to Prospective Clients

All states except Florida, Mississippi and Virginia have proposed adding this new rule regarding duties to prospective clients. Rule 1.18, as adopted by the ABA House of Delegates, permits screening of the lawyer who received the disqualifying information only if the lawyer took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. An earlier draft of the Ethics 2000 Commission did not include this requirement.

Nineteen states (Arkansas, Colorado, Delaware, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Pennsylvania, South Dakota, South Carolina, Washington and Wisconsin) have included the new Model Rule requirement in their proposals. Six states (Arizona, Idaho, Montana, North Carolina, Oregon, and New Jersey) follow the earlier Commission draft. Idaho and South Carolina do not include the screening option.

As with the screening provisions that many states have proposed or adopted in Rule 1.10, some states do not require the client to be notified of the screen (Maryland, Illinois, and Iowa) and some states do not prohibit the disqualified lawyer from receiving part of the fee from the representation (North Carolina and Oregon).

Rule 2.4: Lawyer Serving as Third-Party Neutral

New Model Rule 2.4 requires lawyers who serve as third-party neutrals to inform unrepresented parties that the lawyer is not representing them. It further requires the

lawyer to explain the difference between the lawyer's role as a neutral and a lawyer's role as one who represents a client whenever the lawyer knows or reasonably should know that a party does not understand the lawyer's role as neutral.

All states except Virginia proposed adding this new Rule. Only three vary the language from the new Model Rule. Montana adds a reference to "settlement masters" in paragraph (a), and requires in paragraph (b) that all parties be informed of the lawyer's focused role. Illinois requires that all unrepresented parties be informed of the lawyer's role. Oregon's rule only refers to mediators and includes more detail regarding permissible activities of the mediator.

Rule 4.2: Communication with Person Represented by Counsel

The 2002 amendments clarified that a lawyer may communicate with a represented person pursuant to a court order. Five states (Arizona, Arkansas, Florida, Mississippi and Virginia) did not add this amendment to their rules. In a prior amendment of Rule 4.2, the term "party" was changed to "person" to clarify that the rule does not only apply in the context of litigation. All states except Arizona and Mississippi have agreed with this change.

A number of states include in the text of the rule matters that are covered in the comment in the Model Rules. Two states (Louisiana and Maryland) include provisions relating to organizational clients, and two (Maryland and North Carolina) include provisions regarding public officials. North Carolina adds a statement that it is not a violation to encourage a client to discuss the subject of the representation with the opposing party.

Florida refers to communications pursuant to a statute or contract requiring notice or service of process directly on an adverse party. New Jersey requires reasonable diligence in determining whether a person is represented by a lawyer.

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs

This new rule is applicable where a lawyer provides short-term, limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court. All states except Florida, Mississippi and Nevada have proposed adding this new Rule. Washington adds a screening mechanism to the rule. Wisconsin's proposed rule adds programs sponsored by bar associations. The rule is under consideration in New Hampshire.

Conclusion

One of the goals of the Ethics 2000 Commission was to take a position of leadership in proposing rules that had the potential to bring greater uniformity among the jurisdictions. It was the Commission's hope that through the current review process, each jurisdiction would recognize the extent to which its rules differ from the Model Rules and address the differences. Consistent with that goal, in a June 25, 2003 memorandum to the Members of the Conference of Chief Justices (CCJ), Chief Justices E. Norman Veasey (Delaware) and Randall T. Shepard (Indiana), co-chairs of the CCJ Committee on Professionalism and Competence of the Bar, made the following observation about uniformity:

Absolute uniformity is not likely, but it is desirable that there be as much uniformity as possible. We encourage each jurisdiction to adopt the format of the Model Rules and to have your review committees identify those areas that differ from the Model Rules, providing an analysis of the basis for the variation. Where only minor differences exist, there may be an opportunity to reconsider adopting the language of the Model Rules. Where significant differences exist, there will be an opportunity for the ABA and other review committees to learn from your committee's experience and analysis.

Additionally, greater uniformity would reinforce the judicial branch's regulation of the profession, particularly in light of the increase in multijurisdictional practice and the number of lawyers with multiple licenses.

This article has been a comparison of just a few of the amendments to the Model Rules of Professional Conduct, concentrating on some of the most significant changes and the new areas addressed by the Rules. All review committee proposals are subject to change until approved by the highest court in the jurisdiction. For more information about the work of the state review committees or for other questions about the new Model Rules, please visit http://www.abanet.org/cpr/jclr/jclr_home.html, or contact the Joint Committee on Lawyer Regulation's paralegal Susan Campbell, at suecampbell@staff.abanet.org.

Many thanks to Susan Campbell for her assistance in preparing this article.

Supplemental Update on Model Rule 1.13

(email from Charlotte Stretch to Michael McChrystal, sent January 27, 2005; reformatted to improve appearance)

Charlotte (Becky) Stretch
Associate Director
ABA Center for Professional Responsibility
312/988-5297
312/988-5491 fax
541 N. Fairbanks Court
Chicago, IL 60611

Of those who have written reports or adopted new rules (see list in my article) here are the ones that have made or proposed no change from the pre-Cheek rule 1.13: AZ, AR, DE, FL, KS, MO, MT, PA, SC, SD

The ones that have actually proposed or adopted new 1.13 are:

Colorado

Idaho (new rule effective 7/1/04)

Illinois proposed rule -- but see differences below

Indiana (new rule effective 1/1/05)

Iowa proposed rule

Louisiana (new rule effective 3/1/04)

Nebraska proposed rule

Nevada proposed rule -- but see differences below

New York proposed rule -- but see attached proposal below

Ohio proposed rule -- but see differences below

Oregon (new rule effective 1/1/05)

same as new MR except last sentence of (g): consent “may only” rather than “shall” be given by appropriate official of organization

Washington proposed rule - see differences below

Wisconsin proposed rule - see differences below

MN, NJ, MI, MD are different from old Model Rule but always have been. No changes are proposed.

Illinois Here is IL's proposal. Same as new MR except:

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a crime, fraud or other violation of law that reasonably might be imputed to the organization ...

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a crime or fraud violation of law, and

(2) the lawyer reasonably believes that the crime or fraud violation is reasonably certain to result in substantial injury to the organization,

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged crime, fraud or other violation of law, or to defend the organization or an officer, employee or other

constituent associated with the organization against a claim arising out of an alleged crime, fraud or other violation of law.

Maryland is like old MR except MD's (c) is different from MR, but they don't seem to be proposing a change:

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of the authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

Same with **Michigan** - like old MR except for (a) and (c):

(a) A lawyer employed or retained by an organization represents the organization as distinct from its directors, officers, employees, members, shareholders, or other constituents.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of a legal obligation to the organization or of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16, and may disclose information either:

(1) when permitted by Rule 1.6, or

(2) when the lawyer reasonably believes that:

(i) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(ii) revealing the information is necessary in the best interests of the organization.

Minnesota also has a different provision for (c) but is otherwise like Old MR.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), a violation of law appears likely, the lawyer may resign in accordance with Rule 1.16 and, if the violation is criminal or fraudulent, may reveal it in accordance with the Rules of Professional Conduct.

Nevada

2. If a lawyer for an organization knows facts from which a reasonable lawyer, under the circumstances, would conclude that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. At a minimum, if the lawyer knows of violations of the law or breach of fiduciary duty by the organization or its constituents, the lawyer shall refer the matter to the organization's chief legal officer. If the chief legal officer does not take appropriate action, the lawyer shall refer the matter to higher managerial decision makers in the organization. If these decision makers do not take appropriate action, the lawyers shall refer the matter to an appropriate committee of the Board composed of a majority of independent directors or to the Board itself. If the Board does not take appropriate action, the attorney shall resign. In the course of reporting illegal or improper activity by the organization to officers or directors of the organization, the lawyer may reveal information relating to the representations irrespective of whether Rule 156 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

4. A lawyer who reasonably believes that he or she has been discharged because of the lawyer's action taken pursuant to paragraphs 3 or 4 above, may take whatever legal action would be available to a nonlawyer employee under such circumstances.

New Jersey RPC 1.13 - ORGANIZATION AS THE CLIENT (existing RPC)

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other

than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organizations as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

- (1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and
- (2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(f) For purposes of this rule, "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Ohio (redlined to Model Rule)

(a) A lawyer employed or retained by an organization represents the organization acting through its ~~duly authorized~~ officers, directors, employees, shareholders, and other constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization.

(b) If a lawyer for an organization knows that ~~an officer, employee or other person associated with the organization is engaged in its constituent's action, intends to act~~ intended action, or refuses refusal to act in a matter related to the representation that is a violation of (i) violates a legal obligation to the organization, or (ii) is a violation of law that reasonably might be imputed to the organization; and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law~~ When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(Model Rule (c), (d) and (e) deleted)

(c) A lawyer for an organization who is permitted by Rule 1.6(b)(1) or (2) to disclose information relating to the representation may discharge that obligation

by disclosure to a tribunal or other authority empowered to investigate or act upon such information.

~~(f)~~ (d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

~~(g)~~ (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's written consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.

Washington - adds new (h):

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

Wisconsin - adds new (h)

(h) Notwithstanding other provisions of this Rule, a lawyer shall comply with the disclosure requirements of Rule 1.6(b).

APPENDIX 2

Copyright © 2003 American Bar Association. All rights reserved. Nothing contained in these charts is to be considered the rendering of legal advice. The charts are intended for educational and informational purposes only. Information regarding variations from the ABA Model Rules should not be construed as representing policy of the American Bar Association. The charts are current as of the date shown on each. A jurisdiction may have amended its rules or proposals since the time its chart was created.

	Rule 1.6
	<p>Variations from ABA model rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see http://www.abanet.org/cpr/jclr/jclr_home.html.</p> <p>January 13, 2005</p>
AZ Rules effective 12/1/03	<p>(a): adds at the end reference to “paragraphs (c) or (d), or ER 3.3(a)(3).” add (b) and (c):</p> <p>(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.</p> <p>(c) A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime.</p> <p>(d)(1): same as MR (b)(2)</p> <p>(d)(2): same as MR (b)(3) except does not include prevent</p> <p>(d)(3): same as MR (b)(4)</p> <p>(d)(4): same as MR (b)(5)</p> <p>(d)(5): <u>to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.</u></p>
AR	<p>(b)(1): to prevent the commission of a criminal act. Does not have (b)(2) and (3) as amended 8/03 adds as (c): Neither this Rule nor Rule 1.8(b), nor Rule 1.6(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.</p>
CO	same as MR
DE Rules effective 7/1/03	same as MR
FL	<p>(a): does not include “unless the disclosure is impliedly authorized in order to carry out the representation.”</p> <p>(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:</p> <p>(1) to prevent a client from committing a crime; or</p> <p>(2) to prevent a death or substantial bodily harm to another.</p>

	<p>(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:</p> <p>(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;</p> <p>(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;</p> <p>(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;</p> <p>(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or</p> <p>(5) to comply with the Rules of Professional Conduct.</p> <p>(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.</p> <p>(e) Limitation on Amount of Disclosure. 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.</p>
ID Rules effective 7/1/04	<p>(b)(1): to prevent the client from preventing a crime, including disclosure of the intention to commit a crime;</p> <p>(b)(2): same as MR (b)(1)</p> <p>(b)(3): same as MR but does not include fraud</p>
IL	<p>(a) adds "or required by paragraph (c)" to the end</p> <p>(b)(1): to prevent the client from committing a crime in circumstances other than those specified in paragraph (c)</p> <p>(b)(2): deletes "crime"</p> <p>adds (c) and (d)</p> <p>(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.</p> <p>(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers assistance program shall be considered information relating to the representation of a client for purposes of these Rules.</p>
IN Rules effective 1/1/05	<p>Adds (c)</p> <p>In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.</p>
IA	<p>Adds to end of (a): or required by paragraph (c).</p> <p>Adds (c)</p> <p>a lawyer shall reveal information relating to the representation of a client to the extent the lawyer believes necessary to prevent imminent death or substantial bodily harm.</p>
KS	<p>(a) and (b) are pre-E2000</p> <p>(b)(1) to prevent the client from committing a crime; or</p> <p>(b)(2) to comply with requirements of law or orders of any tribunal; or</p>

	(b)(3) same as MR (b)(5)
LA Rules effective 3/1/04	Same as MR
MD	(b)(5) adds after “civil claim,” “or disciplinary complaint” (b)(6) like MR but states: to comply with these Rules, a court order or other law.
MI	(b) A lawyer may reveal information relating to the representation of a client: (1) when permitted or required by these rules, or when required by law or by court order; (2) to the extent reasonably necessary to rectify the consequences of a client’s illegal or fraudulent act in the furtherance of which the lawyer’s services have been used; (3) regarding the intention of a client to commit a crime to the extent necessary to prevent the crime; (4) necessary to establish or collect a fee, or to defend the lawyer or the lawyer’s employees or associates against an accusation of wrongful conduct; and (5) to secure legal advice about the lawyer’s compliance with these rules.
MN	(a) <u>Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.</u> <u>(b) A lawyer may reveal information relating to the representation of a client if:</u> <u>(1) the client gives informed consent;</u> <u>(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;</u> <u>(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;</u> <u>(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a crime;</u> <u>(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services were used;</u> <u>(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;</u> <u>(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer’s compliance with these Rules;</u> <u>(8) the lawyer reasonably believes the disclosure is necessary to establish a claim</u>

	<p>or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a criminal or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;</p> <p>(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order; or</p> <p>(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.</p>
MO	<p>(a) substitutes "consents after consultation" with "gives informed consent"</p> <p>(b)(1) to prevent death or substantial bodily harm that is reasonably certain to occur as a result of criminal conduct;</p> <p>no (b)(2) or (3)</p>
MT Rules effective 4/1/04	No (b)(2) or (3)
NE	<p>(b)(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;</p> <p>No (b)(2) or (3)</p>
NV	<p>End of 1 (equivalent to MR (a)): disclosure is permitted by subsections 2 or 3.</p> <p>2. A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.</p> <p>No (b)(2).</p> <p>3(a) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action</p>
NH	<p>(b)(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or</p> <p>no (b)(2) or (3)</p>
NJ Rules effective 1/1/04	<p>(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), and (c), <u>and</u> (d).</p> <p>(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client <u>or another person</u></p> <p>(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or</p>

	<p>substantial injury to the financial interest or property of another;</p> <p>(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.</p> <p>(c) <u>If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury or substantial property loss</u></p> <p>(d) lawyer may reveal such information to the extent the lawyer reasonably believes necessary:</p> <p>(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;</p> <p>(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or</p> <p>(3) to comply with other law.</p> <p>(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).</p>
NY	<p>(a) A lawyer shall not reveal <i>confidential information</i> as defined in this Rule or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:</p> <p style="padding-left: 40px;">(1) the client gives <i>informed consent</i> as defined in Rule 1.0(e),</p> <p style="padding-left: 40px;">(2) the disclosure is impliedly authorized to carry out the representation, or</p> <p style="padding-left: 40px;">(3) the disclosure is permitted by paragraph (b).</p> <p><i>Confidential information</i> consists of information gained during and relating to the representation of a client whatever its source, except that it does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, endeavor or profession to which the information relates.</p> <p>(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:</p> <p style="padding-left: 40px;">[(1) to prevent reasonably certain death or substantial bodily harm;] (Cmte is divided on whether to include this provision)</p> <p style="padding-left: 40px;">(2) to prevent the client from committing a crime;</p> <p style="padding-left: 40px;">(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.</p>

	<p>(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;</p> <p>(5) (i) to respond to an accusation of wrongful conduct by any person concerning the lawyer's representation of the client made in a proceeding that has been brought or that the lawyer reasonably believes will be brought; or (ii) to establish or collect a fee.</p> <p>(6) when permitted or required under these Rules or required by law or court order.</p> <p>(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.</p>
<p>NC Rules effective 3/1/03</p>	<p>(a): in place of "information related to the representation of a client" uses "information acquired during the professional relationship with a client"</p> <p>(b): "protected from disclosure by paragraph (a)" replaces "relating to the representation of a client"</p> <p>(b)(1): similar to MR (b)(6) but reads ". . . Rules of Professional Conduct, the law or court order"</p> <p>(b)(2): to prevent the commission of a crime by the client;</p> <p>(b)(3): same as MR (b)(1) but deletes "substantial"</p> <p>(b)(4): to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;</p> <p>(b)(5): same as MR (b)(4)</p> <p>(b)(6): same as MR (b)(5)</p> <p>(b)(7): "to comply with the rules of a lawyers' or judges' assistance program approved by the NCSB or the NC Supreme Court." added (c): The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court."</p>
<p>OH</p>	<p>(a) A lawyer shall not reveal information relating to the representation of a client, <u>including information protected by the attorney-client privilege under applicable law</u>, unless the client gives <i>informed consent</i>, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by <u>paragraph division (b) or required by division (c) of this rule.</u></p> <p>(b) A lawyer may reveal information relating to the representation of a client,</p>

	<p><u>including information protected by the attorney-client privilege under applicable law, to the extent the lawyer <i>reasonably believes</i> any of the following is necessary:</u></p> <p>(1) <u>to prevent reasonably certain death or substantial bodily harm to reveal the intention of the client or other person to commit a crime and the information necessary to prevent the crime;</u></p> <p>no MR (b)(2) or (3) (b)(2) – same as (b)(4) (b)(3) – same as (b)(5) but adds “including any disciplinary matter” after “between the lawyer and the client” (b)(4) – same as (b)(6) adds (c): A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer <i>reasonably believes</i> necessary to comply with Rule 1.2, 3.3, or 4.1.</p>
OR Rules effective 1/1/05	<p>(a) same as MR add as (b)(1): to disclose the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime; (b)(2) is the same as MR (b)(1) no MR (b)(2) or (3) (b)(3) - (5) are the same as MR (b)(4) – (6), adds “or as permitted by these Rules” to the end of (5) add as (b)(6): to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.</p>
PA Rules effective 1/1/05	<p>(a) adds to end “and (c)” (b) provides that "A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3." (c)(1) – same as (b)(1) (c)(2) - to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another (c)(3) - to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used. (c)(4) - same as MR (b)(5) (c)(5) - same as MR (b)(4) (c)(6) - to effectuate the sale of a law practice consistent with Rule 1.17. (d) - The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.</p>
SC	<p>inserts as (b)(1): to prevent the client from committing a crime no MR (b)(2) and (3)</p>

<p>SD Rules effective 1/1/04</p>	<p>(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by, and except as stated in paragraph (b).</p> <p>(b) (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm</p> <p>(b)(2) same as MR (b)(4)</p> <p>(b)(3) same as MR (b)(5)</p> <p>(b)(4) to the extent that revelation appears to be necessary to rectify the consequences of a client=s criminal or fraudulent act in which the lawyer=s services had been used</p> <p>(b)(5) same as MR (b)(6)</p>
<p>VA Rules effective 1/1/04</p>	<p>(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).</p> <p>(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:</p> <p>(1) such information to comply with law or a court order;</p> <p>(2) such information 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;</p> <p>(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;</p> <p>(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;</p> <p>(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;</p> <p>(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.</p> <p>(c) A lawyer shall promptly reveal:</p> <p>(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;</p> <p>(2) information which clearly establishes that the client has, in the course of the</p>

	<p>representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or</p> <p>(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. Where the information necessary to report the misconduct is protected under this rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.</p>
WA	<p>(2) to prevent the client from committing a crime;</p> <p>(3) to prevent the client from committing a 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;</p> <p>no MR (b)(3)</p> <p>adds (b)(7) to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.</p>
WI	<p>(a) A lawyer shall not reveal information relating to the representation of a client unless the client <u>gives informed consent</u>, consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b); <u>and</u> (c) and (d).</p> <p>(b) A lawyer shall reveal such information <u>relating to the representation of a client</u> to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.</p> <p>(c)(1) and (2) – same as MR (b)(1) and (3)</p> <p>(c)(3) – same as MR (b)(4) but replaces “with” with “under”</p> <p>(c)(4) and (5) – same as MR (b)(5) and (6)</p>