

## AVOID ETHICAL PITFALLS IN COLLECTIONS

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It should be noted that Attorneys are subject to the FDCPA. Originally, attorneys were exempted from the FDCA is they were “collecting a debt as an attorney on behalf of and in the name of a client.”<sup>1</sup> In 1986, Congress determined that “attorneys have increasingly entered the debt collection business and used the exemption to evade compliance with the Act,” and accordingly deleted the attorney exemption.<sup>2</sup> So Since 1986, attorneys have not been exempt from the provisions of the Fair Debt Collection Practices Act(“FDCPA”).

Attorneys, like all other persons, are subject to the provisions and penalties of the FDCPA when they meet the definition of “debt collector.” A Debt Collector includes a person “who regularly collects or attempts to collect, directly or indirectly, debts owed or due another.”<sup>3</sup> Attorneys engaged in collecting their own fees, however, are not “debt collectors” under the statutory definition.<sup>4</sup> Neither are attorneys who are engaged in the collection of commercial debts, as the FDCPA only applies to the collection of consumer debts.<sup>5</sup> An attorney’s client in a collection matter may be held vicariously liable for an attorney’s violations of the FDCPA, so long as that client also meets the definition of “debt collector.”<sup>6</sup>

Courts generally make no distinction between pre- and post-petition collection efforts, so long as the attorney and his or her actions meet the definition of debt collector.<sup>7</sup> Moreover, the Supreme Court of the United States has specifically held that the FDCPA applies to qualifying attorneys who attempt to collect consumer debt through litigation.<sup>8</sup>

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<sup>1</sup> 15 U.S.C. § 1692a(6)(F)(repealed 1986).

<sup>2</sup> H.Rep. No. 405, 99th Cong., 1st Sess. 1-2(1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1752

<sup>3</sup> 15 U.S.C. § 1692a(6). *See also Fox v Citicorp Credit Services, Inc.*, 15 F3d 1507, 1514(9th Cir. 1994).

<sup>4</sup> *See, e.g., Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 66(E.D.N.Y. 1994).

<sup>5</sup> 15 U.S.C. § 1692a(5).

<sup>6</sup> *See Fox*, 15 F.3d at 1516.

<sup>7</sup> *See, e.g., Id.* at 1512(stating, “There is simply no mention of attorneys in the current definition of ‘debt collector’ or its exceptions; nor is there any distinction drawn between legal and non-legal activities.”).

<sup>8</sup> *See Heintz v. Jenkins*, 514 U.S. 291,299(1995)(stating that “the Act applies to attorneys who ‘regularly’ engage in consumer-debt- collection activity, even when that activity consists of litigation.”).

Whether an attorney qualifies as a “debt collector” under the FDCPA depends directly on a court’s interpretation of the statutory definition, *i e.*, how “regularly” an attorney collects or attempts to collect debts. Courts are not uniform in interpreting the scope of the definition, particularly as to the meaning of “regularly.” The discussion that follows explores the cases in which various courts have defined the definition’s parameters.

### *1. The Definition*

“Attorneys, like all other persons, are subject to the definition of ‘debt collector’ in 15 U.S.C. §1692a(6).”<sup>9</sup> The FDCPA defines “debt collector” as:

Any person who uses any instrumentality of interstate commerce or the mails in any business the principle purpose of which is the collection of any debts, or who regularly collects or who attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.<sup>10</sup>

Under this definition, an attorney is not a “debt collector” when he or she is collecting his or her own fees.<sup>11</sup> Likewise, an in-house attorney is not a debt collector if collecting debts in the name of the employer and not in his own name or as if independent from the employer.<sup>12</sup>

An attorney engaged in the collection of commercial debts(as opposed to consumer debts) is not precluded by the definition of “debt collector.” Debts, as stated in the definition of “debt collector,” are those obligations incurred by consumers “primarily for personal, family, or household purposes.”<sup>13</sup>

Moreover, attorneys representing creditors in collection matters, who do not send demand letters to debtors but merely provide information the debtors request from the creditor, are not

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<sup>9</sup> *Fox v Citicorp Credit Services, Inc.*, 15 F3d 1507, 1514(9th Cir. 1994).

<sup>10</sup> 15 U.S.C. § 1692a(6)

<sup>11</sup> *See, e.g., Teng v. Metropolitan Retail Recovery, Inc.*, 851 F. Supp. 61, 66(E.D.N.Y. 1994)(stressing that the statutory definition of “debt collector” only applies to “debts ... owed or due another.”).

<sup>12</sup> *Dorsey v. Morgan*, 760 F. Supp 509, 514(E.D. Mich. 1991).

<sup>13</sup> 15 U.S.C. § 1692a(5).

“debt collectors” under the FDCPA.<sup>14</sup> Such contact or communication with debtors is not for the purpose of collecting debt but rather to accommodate requests by the debtor.<sup>15</sup>

## *2. No Distinction Between Traditional Collection Methods and Collection Through Litigation*

In 1995, the Supreme Court of the United States conclusively determined that attorneys engaged in collection matters for others may be considered debt collectors under the FDCPA without regard to whether the collection was effectuated through litigation or other traditional means.<sup>16</sup>

In *Heintz*, the plaintiff defaulted on an automobile loan.<sup>17</sup> The bank’s law firm sued the plaintiff to recover the balance due and an attorney for that law firm engaged in correspondence that the plaintiff argued was in violation of the FDCPA.<sup>18</sup> The district court dismissed the case pursuant to Rule 12(b)(6), holding that the FDCPA did not apply to attorneys attempting to collect the debts owed to another by means of litigation.<sup>19</sup> On appeal, the Seventh Circuit reversed, holding that the FDCPA applied to litigating attorneys.<sup>20</sup>

The Supreme Court, on certiorari, followed the Seventh Circuit and stated that “[t]he Act does apply to lawyers engaged in litigation.”<sup>21</sup> More specifically, the court held that “the Act applies to attorneys who ‘regularly’ engage in consumer-debt- collection activity, even when that activity consists of litigation.”<sup>22</sup>

The Supreme Court cited two major reasons for its holding. First, it cited the FDCPA’s definition of debt collector which includes those who “regularly collect or attempt to collect ...

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<sup>14</sup> *Williams v. Trott*, 822 F. Supp. 1266, 1269(E.D. Mich. 1993).

<sup>15</sup> *Id.*

<sup>16</sup> *Heintz v. Jenkins*, 514 U.S. 291, 298(1995).

<sup>17</sup> *Id.* at 293.

<sup>18</sup> *Id.* at 293-94.

<sup>19</sup> *Id.* at 294.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 298.

debts owed or due another” and concluded that the definition applied directly to attorneys.<sup>23</sup> Citing Black’s Law Dictionary the court stated, “In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly ‘attempts’ to ‘collect’ those consumer debts.”<sup>24</sup> Second, the court noted that the 1986 amendment to the FDCPA, which deleted any exemption relating to attorneys, did not create “a narrower, litigation- related, exemption to fill the void.”<sup>25</sup>

In a decision one year prior to *Heintz*, the Ninth Circuit ruled on a virtually identical issue.<sup>26</sup> While decided prior to *Heintz*, *Fox* substantially complies with *Heintz*. The *Fox* court stated, “There is simply no mention of attorneys in the current definition of ‘debt collector’ or its exceptions; nor is there any distinction drawn between legal and non- legal activities.”<sup>27</sup>

### 3. The Scope of “Regularly” Collecting Debts

While *Heintz* conclusively established that an attorney who “regularly” collects debts owed another, regardless of the means of collection, the ease is silent as to the meaning and/or scope of the term “regularly.” Indeed, not all attorneys engaged in collection activities will qualify as “debt collectors” under the statutory definition. Rather, only attorneys who regularly engage in debt collection will be deemed debt collectors under the FDCPA.<sup>28</sup>

Courts are not uniform on this issue, but there are generally two factors involved: (1) the frequency of collection and(2) its substantiality.<sup>29</sup> The following are the most common circumstances that courts have looked in determining whether an attorney or firm “regularly” engages in collection activities, thus qualifying them as “debt collectors” under the FDCPA:

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<sup>23</sup> Id. at 294.

<sup>24</sup> Id.

<sup>25</sup> Id. at 294-95.

<sup>26</sup> See *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507(9th Cir. 1994).

<sup>27</sup> Id. at 1512

<sup>28</sup> See *Argentieri v. Fisher Landscapes, Inc.*, 15 F. Supp. 2d 55, 59(D. Mass. 1998)(citing *Fox*, 15 F.3d at 1513).

<sup>29</sup> See generally Chad M. Knight, *Note: Attorney Liability Under the Fair Debt Collection Practices Act*, 85 Ky. L. J. 463, 467(Winter 1996-97)(and accompanying footnotes).

- Percentage of practice devoted to debt collection and nature of practice.<sup>30</sup>
- Ongoing relationship with collection agency.<sup>31</sup>
- Volume of collection work(as opposed to the percentage of practice devoted to collection).<sup>32</sup>
- Frequency of use of a collection letter.<sup>33</sup>
- Number of suits filed to collect debts.<sup>34</sup>

#### 4. Vicarious Liability

While the FDCPA is silent on the issue of vicarious liability, courts within the Ninth Circuit hold that the attorney's client in debt collection matters may be liable for the "attorney's violations if both the attorney and the client are debt collectors within the meaning of the statute."<sup>35</sup>

*Fox* appears to be the seminal case on vicarious liability for violations of the FDCPA by attorneys. There, the Ninth Circuit held an attorney's client liable for the attorney's violations of

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<sup>30</sup> See *Fox*, 15 F.3d at 1513 n.5 (recognizing attorney as "debt collector" when 80% of his practice dedicated to collection); *Scott v. Jones*, 964 F.2d 314, 316 (1992) (qualifying attorney as "debt collector" where 70-80% of attorney's legal fees generated from collection); *Ditty v. Checkrite, Ltd., Inc.*, 973 F. Supp. 1320, 1336 (D. Utah 1997) (attorney debt collector where one third to one half of firm's practice consisted collection activities). See also *Taylor v. Mount Oak Manor Homeowners Ass'n Inc.*, 11 F. Supp. 2d 753, 755 (denying plaintiff's motion for summary judgment on attorney's status as "debt collector" because of inadequate discovery into nature of attorney's practice). But see *Mertes v. Devitt*, 734 F. Supp. 872, 873-84 (W.D. Wis. 1990) (attorney not debt collector where collection less than 1% of overall practice and attorney averaged less than two collection cases per year).

<sup>31</sup> See, e.g., *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319, 322 (1992) (holding attorney as debt collector when relationship with large corporation indicated sufficient volume of collection work despite attorney dedicating less than 4% of its total business to collections). See also *Crossley v. Lieberman*, 868 F.2d 566, 570 (3d Cir. 1989) (listing an ongoing relationship as one factor the court looked to in determining attorney's status as "debt collector"); *Cacace v. Lucas*, 775 F. Supp. 502, 1990 U.S. Dist. LEXIS 20960, 3-4 (D. Conn. 1990).

<sup>32</sup> *Stojanovski*, 783 F. Supp. at 322 (stating, "It is the volume of the attorney's debt collection efforts that is dispositive, not the percentage such efforts amount to in the attorney's practice."). See also *Crossley*, 868 F.2d at 570 (listing volume of work as one factor the court looked to in determining attorney's status as "debt collector"); *Cacace v. Lucas*, 775 F. Supp. 502, 1990 U.S. Dist. LEXIS 20960 at 3-4. But see *Nance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223, 225 (W.D. Wa. 1994) (holding that attorneys were not debt collectors where 0.61% of partner's and only 1.07% of firm's cases involved collections).

<sup>33</sup> See *Cacace v. Lucas*, 775 F. Supp. 502, 1990 U.S. Dist. LEXIS 20960 at 3-4 (deeming attorney a "debt collector" when during 14 months, the attorney had used the same collection letter 125 to 150 times). See also *Crossley*, 868 F.2d at 570 (multiple use of collection letter to different debtors).

<sup>34</sup> See *Cacace v. Lucas*, 775 F. Supp. 502, 1990 U.S. Dist. LEXIS 20960 at 3-4 (where attorney had filed up to 154 collection actions during 1986-1987); *Blalcmore v. Pc/cay*, 895 F. Supp. 972, 977 n.2 (ND. Ill. 1995) (attorney had filed over 1,200 collection actions in one year).

<sup>35</sup> *Caron v. Charles E. Maxwell, P.C.*, 48 F. Supp. 2d 932, 936 (D. Ariz. 1999) (citing *First Interstate Bank v. Soucie*, 924 P.2d 1200, 1202 (Cob. Ct. App. 1996)).

the FDCPA where both the attorney and his client qualified as “debt collectors” under the statutory definition.<sup>36</sup> *Fox* has been heavily relied on in subsequent Ninth Circuit cases addressing the same issue.<sup>37</sup>

These decisions are in accord with the rule that attorneys(or other debt collectors) engaged in collecting debts owed directly to them are not subject to the FDCPA. One court noted:

[A] debt collector does not include the consumer’s creditors or an assignee of a debt so long as the debt was not in default at the time it was assigned. The federal decisions are based on the rationale that, under these circumstances, Congress did not intend to hold a company that is “a non-debt collector” vicariously liable for the filing of a collection suit that violates the FDCPA only because the filing attorney is a debt collector.<sup>38</sup>

#### *5. Firm Member Liability for Individual Attorney Violations*

Whether partners within a firm may be liable for each other’s FDCPA violations is not clear. What is clear, however, is that under the vicarious liability standard announced in *Fox*, a person or company must qualify as a “debt collector” under the statutory definition.<sup>39</sup> Thus, if liability is to be imputed to the firm itself, or to another attorney, they must be “debt collectors.”<sup>40</sup> Indeed, most of the cases cited above address suits against attorneys as *individuals*, and not against their employers or partners.<sup>41</sup> Nonetheless, there are some cases in which the firm the attorney works for has been named in FDCPA suits.<sup>42</sup>

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<sup>36</sup> *Fox*, 15 F.3d at 1516.

<sup>37</sup> *See Caron*, 48 F. Supp. at 936(refusing to impose vicarious liability on a company that did not qualify as a “debt collector” under the FDCPA); *Campion v. Credit Bureau Services, Inc.*, 2000 U.S. Dist. LEXIS 20233(D. Wash. 2000)(holding attorney’s client liable for FDCPA violations of its attorneys where both attorneys and client qualified as “debt collectors”).

<sup>38</sup> *First Interstate Bank of Fort Collins v. Soucie*, 924 P.2d 1200, 1202(Cob. Ct. App. 1996).

<sup>39</sup> *Fox*, 15 F.3d at 1516.

<sup>40</sup> *Id.*

<sup>41</sup> *See, e.g., id.* at 1510.

<sup>42</sup> *See, e.g., Caron*, 48 F. Supp. 2d at 933.

## RULES OF PROFESSIONAL CONDUCT

Rule 1.3. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication.

(a) A lawyer shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;
- (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) Keep the client reasonably informed about the status of the matter;
- (4) Promptly comply with reasonable requests for information; and
- (5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. Fees.

(a) 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 a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The amount involved and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph(d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall state, in boldface type that is at least as large as the largest type used in the contingent fee agreement:

- (1) The method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal;
- (2) Whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;
- (3) Whether the client is liable for expenses regardless of outcome;

- (4) That, in the event of a loss, the client may be liable for the opposing party's attorney fees, and will be liable for the opposing party's costs as required by law; and
- (5) That a suit brought solely to harass or to coerce a settlement may result in liability for malicious prosecution or abuse of process.

Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
  - (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
  - (2) A contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) Reserved;
  - (2) The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
  - (3) The total fee is reasonable.

#### Rule 1.6. Confidentiality of Information.

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs(b) and(c).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) To prevent reasonably certain death or substantial bodily harm;
  - (2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;
  - (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 have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;
  - (4) To secure legal advice about the lawyer's compliance with these Rules;
  - (5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (6) To comply with other law or a court order.
- (c) 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.

#### Rule 1.8. Conflict of Interest: Current Clients: Specific Rules.

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

- (2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  - (3) The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
  - (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
  - (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
  - (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
    - (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
    - (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
  - (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
    - (1) The client gives informed consent;
    - (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
    - (3) Information relating to representation of a client is protected as required by Rule 1.6.
  - (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
  - (h) A lawyer shall not:
    - (1) Make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
    - (2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
      - (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
        - (1) Acquire a lien authorized by law to secure the lawyer's fee or expenses; and
        - (2) Contract with a client for a reasonable contingent fee in a civil case.
  - (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. This paragraph does not apply when the client is an organization.

- (k) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon informed consent by the client after consultation regarding the relationship.
- (l) A lawyer shall not stand as security for costs or as surety on any appearance, appeal, or other bond or surety in any case in which the lawyer is counsel.
- (m) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs, with the exception of paragraph(j), that applies to any one of them shall apply to all of them.

Rule 1.13. Organization as Client.

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (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 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. 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 organization as determined by applicable law.
- (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 law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
- (d) Reserved.
- (e) Reserved.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) 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 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.

Rule 1.15. Safekeeping Property.

- (a) A lawyer shall hold funds or other property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All

funds received or held for the benefit of clients by a lawyer or firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts designated as a trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property in which clients or third persons hold an interest shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

Rule 2.1. Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule 3.1. Meritorious Claims and Contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

- (a) A lawyer shall not knowingly:
  - (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

- (c) The duties stated in paragraphs(a) and(b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness to Opposing Party and Counsel. A lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) The person is a relative or an employee or other agent of a client; and
  - (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1. Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. Communication With Person Represented by Counsel. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3. Dealing With Unrepresented Person. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4. Respect for Rights of Third Persons.

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (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.
- (c) A lawyer shall be 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 is a partner or has comparable managerial authority in the law 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.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants. With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4. Professional Independence of a Lawyer.

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
  - (1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

- (2) A lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
  - (3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;
  - (4) A lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter; and
  - (5) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
  - (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
  - (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
    - (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
    - (2) A nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
    - (3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

**Rule 5.5. Unauthorized Practice of Law.**

- (a) **General rule.** A lawyer shall not:
  - (1) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
  - (2) Assist another person in the unauthorized practice of law.
- (b) **Exceptions.** A lawyer who is not admitted in this jurisdiction, but who is admitted and in good standing in another jurisdiction of the United States, does not engage in the unauthorized practice of law in this jurisdiction when:
  - (1) The lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized;
  - (2) The lawyer participates in this jurisdiction in investigation and discovery incident to litigation that is pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;
  - (3) The lawyer is an employee of a client and is acting on behalf of the client or, in connection with the client's matters, on behalf of the client's other employees, or its commonly owned organizational affiliates in matters related to the business of the employer, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction;
  - (4) The lawyer is acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction;
  - (5) The lawyer is engaged in the occasional representation of a client in association with a lawyer who is admitted in this jurisdiction and who has actual responsibility for the

- representation and actively participates in the representation, provided that the out-of-state lawyer's representation of the client is not part of a regular or repetitive course of practice in this jurisdiction;
- (6) The lawyer is representing a client, on an occasional basis and not as part of a regular or repetitive course of practice in this jurisdiction, in areas governed primarily by federal law, international law, or the law of a foreign nation; or
  - (7) The lawyer is acting as an arbitrator, mediator, or impartial third party in an alternative dispute resolution proceeding.
- (c) **Interaction with Supreme Court Rule 42.** Notwithstanding the provisions of paragraph(b) of this Rule, a lawyer who is not admitted to practice in this jurisdiction shall not represent a client in this state in an action or proceeding governed by Supreme Court Rule 42 unless the lawyer has been authorized to appear under Supreme Court Rule 42 or reasonably expects to be so authorized.
- (d) **Limitations.**
- (1) No lawyer is authorized to provide legal services under this Rule if the lawyer:
    - (i) Is an inactive or suspended member of the State Bar of Nevada, or has been disbarred or has received a disciplinary resignation from the State Bar of Nevada; or
    - (ii) Has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted under this Rule.
  - (2) A lawyer who is not admitted to practice in this jurisdiction shall not:
    - (i) Establish an office or other regular presence in this jurisdiction for the practice of law;
    - (ii) Solicit clients in this jurisdiction; or
    - (iii) Represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction.
- (e) **Conduct and discipline.** A lawyer admitted to practice in another jurisdiction of the United States who acts in this jurisdiction pursuant to paragraph(b) of this Rule shall be subject to the Nevada Rules of Professional Conduct and the disciplinary jurisdiction of the Supreme Court of Nevada and the State Bar of Nevada as provided in Supreme Court Rule 99.