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Two Lawyers, One Client, and the Duty to Communicate: A Gap in Rules 1.2 and 1.4

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Two Lawyers, One Client, and the Duty to Communicate:
A Gap in Rules 1.2 and 1.4

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I. INTRODUCTION

There may have been a day in which most American legal matters involved one client and one lawyer, but that day has surely passed. People today travel widely, businesses sell their goods and services across the country, and activity of all sorts—both legal and illegal—can be carried out in cyberspace. In such a society the laws of multiple jurisdictions can be relevant to the broad range of client circumstances. At the same time, legal issues have become increasingly complex, forcing lawyers to make referrals to outside specialists. In addition, some transactions or litigation matters may simply be too large for one attorney or even one law firm to handle. The result of these and other forces is that it is quite common for a lawyer to represent a client in concert with lawyers from other firms. Unfortunately, the rules of ethics pay scant attention to these multiple-lawyer, multi-firm situations.¹

Among the most basic issues facing lawyers who share a representation is the question of who is responsible for maintaining communications with the client. Much of the time, no doubt, little thought is given to the ethical requirements of communication, and the lawyers and client informally develop a group dynamic that successfully manages the flow of information. Nevertheless, in those instances in which problems arise, it may be necessary to ask which attorney has or had the responsibility to keep the client apprised of developments in the legal matter. This article will address that question.

Before we begin the analysis, it is useful to define and limit our subject matter. First, and as the title of this article indicates, for the sake of simplicity we will analyze situations involving two lawyers in different firms representing a single client.² We recognize that many situations are more complex than that, and the analysis offered in this article will be relevant to circumstances involving more than two lawyers (or firms) jointly representing one or more clients. Second, we will use the label “L1” to refer to the attorney who has the initial relationship with the client. “L2” will describe the second attorney to enter into the matter.³ Third, the focus here is the lawyers’ obligation to communicate with the client, a duty primarily governed by Rules 1.2 and 1.4 of the Model Rules of Professional Conduct (the “Rules” or “MRPC”).⁴ Attorneys in a multiple-lawyer relationship are subject to the

1. In an analysis of multiple-lawyer situations George M. Cohen refers to a “blind spot in the ethics rule architecture.” George M. Cohen, *The Multilayered Problems of Professional Responsibility*, 2003 U. ILL. L. REV. 1409, 1411 (2003); see also 1 Robert E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 5.9 (2006 ed.); Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?* 98 KY. L.J. 461, 462 (2010).

2. To limit our use of pronouns, we will also assume that the client is human. In real life, the client could also be an entity with legal personality.

3. Cohen, *supra* note 1, at 1414 (suggesting the labels L1 and L2).

4. MODEL RULES OF PROF’L CONDUCT (1983) [hereinafter MRPC R.].

entirety of the Rules, just as they are in a one-lawyer, one-client situation. This article may refer to other duties such as maintaining confidentiality and avoiding conflict of interest,⁵ but we will view such duties only to the extent that they interact with Rules 1.2 and 1.4.⁶ Finally, we will generally limit our analysis to the MRPC. Principles such as the law of agency may be relevant to the attorney-client relationship,⁷ but they are generally beyond the scope of our analysis.

Part II of this article will describe the various ways that L2 may be brought into a client matter being handled by L1. In Part III we will examine how the current Rules and certain ABA Formal Opinions deal with two-lawyer arrangements, the general duty to communicate, and scope of representation. The heart of this article is Part IV, which focuses on the duty to communicate with the client in two-lawyer situations. Part IV(A) examines the question of whether there is an obligation to inform the client when L2 is brought into L1's existing representation, and, if such an obligation exists, which lawyer has the duty to inform. The second inquiry, examined in Part IV(B), is which of the two attorneys has an ongoing obligation to communicate the lawyers' activities to the client, particularly with regard to the services being performed by L2. That analysis leads to Part IV(C) and the question of whether L2 may have a duty to communicate directly with the client even if the parties have previously assigned the communication responsibilities to L1. Finally, in Part V we will summarize the shortcomings of the Rules in their current form, and we will consider whether the Rules can be improved upon to give better guidance for two-lawyer situations.

II. TYPES OF TWO-LAWYER SITUATIONS

A. *L2 Contributes to L1's Representation of Client*

There are numerous ways in which L1 and L2 may affiliate on a client's matter, and if additional lawyers, clients and matters are added to the mix, the variations are seemingly infinite. This analysis will approach the possibilities from a functional point of view, identifying five situations in which L2 is engaged in relation to L1's representation of the client.⁸ For ease of

5. For analysis of other duties, see Cohen, *supra* note 1, at 1428–46 (competence), 1446–54 (confidentiality), 1454–61 (conflicts of interest); Richmond, *supra* note 2, at 463–80 (lawyer liability to co-counsel), 480–500 (co-counsel referral liability and joint or vicarious liability), 500–05 (duty to inform the client of co-counsel's misconduct), 505–07 (lawyer's supervisory duties), 507–14 (fee splitting).

6. MRPC R. 1.2 (1983); *Id.* at 1.4 (1983).

7. A lawyer serves as an agent for the client, who is the lawyer's principal. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, topic 4, intro. note (2000).

8. In contrast to the simplicity sought here, Cohen offers a more complex "structural taxonomy" that approaches the roles of L1 and L2—and their relationships with the client—both spatially (horizontal vs.

reference in later sections of this article, each type of relationship will be described as a “scenario” and will be assigned a number.

1. Scenario 1 – Co-Counsel. *L2 is engaged as co-counsel to share responsibility with L1 in a matter because of its size or complexity.*

The two lawyers may be retained simultaneously by the client at the outset of a matter, or L2 may be brought in after L1 has begun his or her work. The task of arranging for L2’s services may be handled by the client or left to L1. As co-counsel, both lawyers have direct responsibilities to the client.

2. Scenario 2 – Temporary Assistant. *L2 is engaged on a temporary basis to assist L1 in staffing a matter.*

Although a temporarily engaged lawyer may serve as co-counsel to the client, to distinguish this scenario from Scenario 1 we will characterize L2 as a lawyer who provides services to L1 rather than undertaking direct responsibility to the client. Furthermore, we assume that L2 is an independent contract attorney as opposed to a temporary employee of L1. For some tasks, such as legal research, it is conceivable that L2 will not know the identity of the client or receive client confidential information.

3. Scenario 3 – Expert Consultant. *L2 is engaged as an expert consultant to strategize and advise on a matter.*

The need for L2 will most often arise because of L1’s desire to tap into L2’s experience or expertise, but other factors such as the geographical or jurisdictional setting may also be involved. In most instances L2 will be brought in by L1. This scenario contemplates a limited, but formally established and active role by L2 in assisting L1’s activities on behalf of the client.⁹

4. Scenario 4 – Informal Consultant. *L2 serves as an informal consultant to L1.*

There are times when L1 may wish to tap into L2’s knowledge and expertise without formally affiliating L2 into the matter being handled by L1. This type of consultation may range from a single chat to a more extended

vertical) and temporally (concurrent vs. successive), and from a perspective of contract, agency and joint ownership. Cohen, *supra* note 1, at 1416–28.

9. An expert consultant is different from an expert witness in a litigation matter. See discussion *infra* Part III (A)(2)(b).

discussion. In this scenario L2 does not play an active role in L1's client matter, and in most cases L2 will not know the client's identity.

5. Scenario 5 – Local Counsel. *L2 is engaged as local counsel in a matter being handled by L1.*

The most common use of local counsel is when L1 is not licensed in a jurisdiction and it is necessary or useful to have a local attorney as part of the team. This practice can also occur within a state when it is convenient to use a local attorney in a city where L1 does not have an office. Use of local counsel is common practice in both transactions and litigation.

B. *L2 is Consulted Separately for the Benefit of Client or L1*

It is important to recognize that L2 may be brought into a matter for reasons other than assisting L1 in representing the client. In some instances the client may seek independent advice from L2, and in others L1 may retain L2 for L1's personal benefit.

1. Client's Benefit

Examples of the client seeking independent advice include:

(a) *Client retains L2 to monitor L1's work.* This scenario describes the role of in-house counsel who monitors the work of an outside attorney, but it may also include the client's retention of an outside firm to monitor and coordinate the efforts of other outside firms.

(b) *Client retains L2 to advise client in giving informed consent on a matter being handled by L1.* The Rules often require a lawyer (L1) to obtain the client's "informed consent" to a course of action,¹⁰ and such consent may involve the client's consultation with L2 for independent advice on whether to grant such consent.¹¹

10. Informed consent is defined in MRCP R. 1.0 (1983) (Terminology) and required by MRPC R. 1.2 (1983) (limiting scope of representation), MRPC R.1.6 (1983) (revealing confidential information), MRPC R. 1.7 (1983) (waiving conflict of interest), MRPC R.1.8 (1983) (business transaction with client; using confidential information to client's disadvantage; payment of attorney fees by third party; settlements by multiple clients), MRPC R.1.9 (1983) (conflict waiver by former client), MRPC R. 1.11 (1983) (conflict waiver re government attorneys), MRPC R. 1.12 (1983) (conflict waiver by judge or third party neutral), MRPC R. 1.18 (1983) (use of disqualifying information received from prospective client), and MRPC R. 2.2 (1983) (providing evaluation to third party of matter affecting client).

11. MRPC R. 1.0 cmt. 6 (1983).

(c) *Client retains L2 to advise client whether to prospectively limit L1's malpractice liability.* Rule 1.8(h)(1) does permit the client and L1 to enter into an agreement prospectively limiting L1's malpractice liability, but the Rule requires that the client be "independently represented in making the agreement."¹²

(d) *Client retains L2 for advice regarding a prospective business transaction between client and L1.* Rule 1.8(a) prohibits lawyer-client business transactions unless several conditions are met, one of which is that the lawyer must advise the client in writing of the desirability of having independent legal counsel. The client must also be given a reasonable opportunity to obtain independent counsel.¹³

(e) *Client retains L2 to represent client in a fee dispute with L1 or a malpractice claim against L1.* At some point in the client's relationship with L1, the client may obtain the services of a second lawyer to defend against L1's claim for fees or to affirmatively seek redress against L1.

2. L1's Benefit

In a similar fashion L1 may seek advice from L2 in connection with L1's representation of the client, but in such a way that L2 will act on behalf of L1 and not the client. Examples include:

(a) *L1 consults with L2 for ethics advice relating to L1's representation of client.*¹⁴ Such consultation may be informal or may include L1's retention of L2 and payment of fees to L2.

(b) *L1 retains L2 to represent L1 in a fee dispute with client or to defend a malpractice action brought by client.*¹⁵ In this situation L2's client is solely L1. L2 will owe no duties to L1's client.

3. L2's Ethical Obligations

When L2 is separately engaged by the client or L1, as in the foregoing examples, L2's ethical obligations—including the duty to communicate—are relatively clear for purposes of this article. When retained independently by

12. See also *id.* at 1.8 cmt. 14.

13. See also *id.* at 1.8 cmts. 1-4.

14. Such consultation is permitted under MRPC R. 1.6(b)(4) (1983) and MRPC R. 1.6 cmt. 9 (1983).

15. Such engagement is contemplated under MRPC R. 1.6(b)(5) (1983) and MRPC R. 1.6 cmt. 10 (1983).

the client, L2's duties are to the client; when consulted or retained personally by L1, L2's duties are to L1.¹⁶ The focus of this article is on Scenarios 1–5, in which both L1 and L2 are providing services of benefit to L1's client, and both lawyers may have ethical responsibilities to that client.

III. GOVERNING PRINCIPLES UNDER THE CURRENT RULES

A. *Recognition of Two-Lawyer Arrangements*

The MRPC do not take an organized or deliberate approach to two-lawyer situations. Principles must be gleaned from just a few references in the Rules and Comments, and by implication. In addition there are three relevant Opinions that have been issued by the American Bar Association.

1. Rules of Professional Conduct

Our five scenarios illustrate how it can be necessary or desirable to add a second attorney to certain matters, and the first thing to note about the Rules of Professional Conduct is that they do not prohibit or discourage the practice. To the contrary, several affirmative references and suggestions may be found in the Rules and Comments.

(a) *Rule 1.1 – Competence*

The first substantive provision in the MRPC is Rule 1.1, which requires a lawyer to provide “competent representation to a client.” Comment 1 to the Rule states that relevant factors to determine a lawyer's competence include “whether it is feasible to . . . associate or consult with a lawyer of established competence in the field in question.” Comment 2 underscores the point by stating “Competent representation can . . . be provided through the association of a lawyer of established competence in the field in question.”¹⁷ These concepts are directly applicable to our two-lawyer scenarios:

(i) Scenario 1. *L2 is engaged as co-counsel to share responsibility with L1 in a matter because of its size or complexity.* Lacking the assistance of L2, L1 would not be able to competently represent the client, and so the engagement of L2 is consistent with Rule 1.1 and its Comments.

16. There has been debate as to whether L1 must inform the client that L1 is consulting with L2 for ethics advice, and whether L2 in such a circumstance has any duty to L1's client. See Drew L. Kershen, *The Ethics of Ethics Consultation*, 6 THE PROF. LAW. 1 (1995) [hereinafter Kershen I]; Drew L. Kershen, *Further Thoughts on the Ethics of Ethics Consultation*, 1997 PROF. LAW: SYMP. Issue 7; Lee A. Pizzimenti, *Ethical Consultation from a Client Perspective*, 1997 PROF. LAW: SYMP. Issue 21.

17. MRPC R. 1.1 cmt. 1–2 (1983).

(ii) Scenario 2. *L2 is engaged on a temporary basis to assist L1 in staffing a matter.* The hiring of L2 as a temporary lawyer to provide services to L1 is consistent with the concept of association in Comments 1 and 2 to Rule 1.1.

(iii) Scenario 3. *L2 is engaged as an expert consultant to strategize and advise on the matter.* The process of formal consultation is consistent with the “associate or consult with” language of Comment 1 to Rule 1.1 and the “association” language of Comment 2.

(iv) Scenario 4. *L2 serves as an informal consultant to L1.* A less formal arrangement than Scenario 3, this scenario’s lawyer-to-lawyer discussion is nevertheless consistent with the “consult with” concept in Comment 1 to Rule 1.1.

(v) Scenario 5. *L2 is engaged as local counsel in a matter being handled by L1.* When L2 is retained as local counsel, the situation may at first blush be seen as a matter in which L1 wishes to avoid carrying out the unauthorized practice of law in L2’s jurisdiction.¹⁸ However, it will also be likely that L2 has better knowledge of local law and procedure, and the competence of L1 may be enhanced by associating L2.

(b) *Rule 1.6 – Confidentiality*

A measure of support for affiliation of a second lawyer can be found in Rule 1.6, which states an attorney’s basic obligation to maintain the confidentiality of client information. As an exception to the general duty, Rule 1.6(a) allows a lawyer to reveal information if the client gives informed consent, and it also permits the attorney to reveal confidential information—without the client’s consent—“when the disclosure is impliedly authorized in order to carry out the representation.”¹⁹ Comment 4 adds: “A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”²⁰ Let us see how these principles may apply to our scenarios:

18. The unauthorized practice of law is generally covered by MRPC R. 5.5 (1983).

19. MRPC R. 1.6(a) (1983) also permits disclosure under paragraph (b), which lists six instances in which a lawyer may reveal otherwise confidential information.

20. MRPC R. 1.6 cmt. 4 (1983).

(i) Scenario 1. *L2 is engaged as co-counsel to share responsibility with L1 in a matter because of its size or complexity.* There are two stages to the affiliation of L2. First, if L1 is responsible for finding a second attorney, L1 must approach L2 to discuss a possible association. If agreement is reached, L2 will then provide the requested services. As to the pre-association stage, L1's discussions with L2 will likely be undertaken with the client's consent, but the exchange of information could also be seen as something "impliedly authorized" in L1's role as attorney for the client. Under Comment 4 to Rule 1.6, L1 may discuss the matter with L2 on a hypothetical basis without violating the duty of confidentiality. Once L2 has been associated as co-counsel for the client, unless the client specifically instructs L1 to withhold certain information from L2, the sharing of information with L2 will not violate Rule 1.6.²¹ As an attorney for the client, L2 will of course be bound by Rule 1.6 to the same extent that L1 is bound.

(ii) Scenario 2. *L2 is engaged on a temporary basis to assist L1 in staffing a matter.* As we have defined this scenario, L2 does not undertake direct responsibility to the client, but merely provides services to L1 as an independent contractor. To the extent that the client approves, L1 will be able to share confidential information with L2. It can also be argued that L1's disclosure of certain confidential information to an independent contractor is impliedly authorized, in particular because L2, as an attorney, is bound to keep the information confidential. If the information conveyed to L2 is merely hypothetical—but sufficient for research purposes, for example—then L1's communications with L2 would be permissible under Rule 1.6, Comment 4.

(iii) Scenario 3. *L2 is engaged as an expert consultant to strategize and advise on the matter.* The formal affiliation of L2 as an expert consultant is, for purposes of Rule 1.6, similar in character to the association of co-counsel in Scenario 1.

(iv) Scenario 4. *L2 serves as an informal consultant to L1.* In contrast to Scenario 3, a limited and informal consultation between L1 and L2—assuming that L1 does not wish to obtain the client's informed consent—would most appropriately fall within the terms of Comment 4 to Rule 1.6, and L1 would be advised to keep the discussion hypothetical. If L1 wishes to have a more in-depth consultation, L1 should make a conscious choice be-

21. MRPC R. 1.6 cmt. 5 (1983) generally permits lawyers within a firm to share client information with each other, although such sharing can be limited if "the client has instructed that particular information be confined to specific lawyers." This concept would seem to apply as well to co-counsel in different firms.

tween a formal affiliation on one hand and a hypothetical discussion on the other. L2 will also wish to avoid the uncertainty of a middle ground between the two extremes because L2 could be placed into an unintended conflict of interest if confidential information is conveyed without affording L2 the opportunity to first run a conflicts check.

(v) Scenario 5. L2 is engaged as local counsel in a matter being handled by L1. This analysis tracks the analysis in Scenario 1, both as to the initial discussion stage and the period in which L2 actively serves as local counsel. Rule 1.6 poses no barrier to use of local counsel.

The significance of this discussion is that if L1 finds it necessary or useful to affiliate L2 in a client matter, Rule 1.6 need not stand in the way. One of the bedrocks of the attorney-client relationship, Rule 1.6 is flexible enough to accommodate the activities of a second lawyer.

(c) *Other Rules*

Rule 1.5 contains various provisions on lawyer fees. Rule 1.5(e)(1) states that lawyers in different firms may divide a fee only if “the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.”²² In addition, the client must consent in writing to the fee split, and the total fee must be reasonable.²³ Comment 7 adds: “A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well”²⁴ Thus, Rule 1.5 and its Comment recognize the legitimacy of L1-L2 arrangements, and fee sharing would be feasible in Scenario 1 (Co-Counsel), Scenario 3 (Expert Consultant) and Scenario 5 (Local Counsel). In Scenario 2 (Temporary Lawyer) we have defined L2 as not being co-counsel, and a fee split seems inappropriate. Likewise, the informal consultation in Scenario 4 is too far removed from the client to contemplate the division of L1’s fee.

Rule 5.1 deals primarily with the responsibility of a supervisory attorney in a law firm to ensure that lawyers within the firm comply with the MRPC. However, Rule 5.1(b) assigns a similar obligation to any lawyer “having direct supervisory authority over another lawyer” whether in the same firm or not, while Rule 5.1(c)(2) creates the possibility that the supervisory lawyer will be responsible for a subordinate lawyer’s violation of the Rules.²⁵ Comment 5 to Rule 5.1 states that whether a lawyer has such authority is a

22. MRPC R. 1.5 (1983).

23. *Id.* at 1.5(e)(2)–(3).

24. *Id.* at 1.5 cmt. 7.

25. *Id.* at 5.1.

“question of fact.”²⁶ Rule 5.2 addresses the supervisory situation from the point of view of the subordinate lawyer.²⁷ For purposes of this article, we see in Rules 5.1 and 5.2 an acknowledgement that two lawyers in different firms may work together, with one of them being in a lead position. This concept would apply most logically to Scenario 1 (Co-Counsel), Scenario 2 (Temporary Lawyer) and Scenario 5 (Local Counsel), although in those situations L2 should normally be assumed to be more independent than a subordinate attorney within L1’s firm. In Scenario 3 (Expert Consultant) and Scenario 4 (Informal Consultant), L2 is a consulted expert and would be unlikely to submit to L1’s authority.

Rule 5.5 addresses the unauthorized practice of law and the multijurisdictional practice of law. There are several instances described in Rule 5.5(c) in which an attorney licensed in another U.S. jurisdiction may provide legal services on a temporary basis in “this” jurisdiction. One such situation is if the services “are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.”²⁸ Comment 8 adds that in the “local association” alternative, the local lawyer “must actively participate in and share responsibility for the representation of the client.”²⁹ The Rule and Comment apply squarely to the two-jurisdiction, local counsel arrangement in Scenario 5.

2. Relevant ABA Formal Opinions

The American Bar Association Committee on Ethics and Professional Responsibility (the “Committee”) occasionally issues Formal Opinions to assist lawyers in applying the Rules of Professional Conduct.³⁰ Several past Opinions have addressed multiple-lawyer situations.

(a) *ABA Formal Opinion 88-356 – Temporary Lawyers*³¹

This 1988 Opinion addresses a wide range of ethical issues involved when a firm engages a temporary lawyer. In the introductory paragraphs the Committee notes that temporary lawyers may work on one or more matters to meet a firm’s general staffing needs, or they may be brought on to provide special expertise needed for a particular matter.³² The temporary lawyers

26. *Id.* at 5.1 cmt. 5.

27. *Id.* at 5.2.

28. MRPC R. 5.5 (1983).

29. *Id.* at 5.5 cmt. 8.

30. Earlier Opinions offered interpretations of the predecessor to the Model Rules, the Code of Professional Responsibility. See MODEL CODE OF PROF’L RESPONSIBILITY (1980).

31. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 88-356 (1988) [hereinafter Opinion 88-356].

32. *Id.*

may work at the firm's offices or elsewhere, and they may work exclusively for the firm or simultaneously for other firms. In the body of the Opinion, sections are devoted to conflicts of interest³³, confidentiality³⁴ and the use of lawyer placement agencies.³⁵ As discussed in Part IV(A) of this article, the Opinion also addresses whether the firm must disclose the temporary engagement to the firm's client.

The engagement of a temporary lawyer is described in Scenario 2. Opinion 88-356 does not question the propriety of such affiliation. Rather, it blesses the practice and offers practical guidance as to how such the engagement can be carried out consistent with the Rules.

(b) *ABA Formal Opinion 97-407 – Lawyer as Expert Witness or Expert Consultant*³⁶

This Opinion, issued in 1997, focuses primarily on whether a lawyer serving as an expert witness in a matter is subject to conflict of interest limitations with respect to the party on whose behalf the expert is engaged.³⁷ In analyzing this issue and others, the Committee draws a distinction between an expert witness and an expert consultant.

An expert witness must maintain a measure of objectivity and frankness that is different from the loyalty owed by a lawyer for the client. Even if the expert witness discusses with the client's attorney how the expert's testimony can best be used in the case, the requirement of objectivity means that the expert does not establish an attorney-client relationship and in fact is not providing "law-related services" within the meaning of Rule 5.7.³⁸ The Committee finds support for these conclusions in the fact that the expert witness may be deposed by opposing counsel, and communications between the expert (L2) and the attorney who engages the expert (L1) are *ble*.³⁹ In contrast to an expert witness, an expert consultant (L2 in our Scenario 3) is expected to participate in "protection of client confidences, in-depth strategic and tactical involvement in shaping the issues, assistance in developing facts that are favorable, and zealous partisan advocacy."⁴⁰ Further-

33. *Id.*

34. *Id.*

35. *Id.* at 124-27.

36. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-407 (1997) [hereinafter Opinion 97-407].

37. In theory, the expert witness might have a concurrent conflict of interest that would prevent the expert from undertaking a representation adverse to the party on whose behalf he or she will testify. MRPC R. 1.7 (1983). After the expert's services have concluded, he or she might also be seen as having such a conflict with a former client. MRPC R. 1.9 (1983).

38. MRPC R. 5.7 (1983).

39. Opinion 97-407, *supra* note 36; Opinion 88-356, *supra* note 31.

40. Opinion 88-356, *supra* note 31.

more, the consultant will not testify on behalf of the client, and the attorney engaging the consultant need not disclose to opposing counsel the consultant's involvement in the case or the consultant's communications with the client and attorney.⁴¹ The Committee concludes: "In sum, the lawyer as expert consultant occupies the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the Model Rules of Professional Conduct."⁴²

The Opinion cautions that "the distinction between expert witness and expert consultant can . . . become blurred," especially if an expert witness becomes involved in tactical discussions or becomes privy to confidential information.⁴³ In such a case the Committee believes that the expert witness may be deemed an expert consultant. Without intending so, the strategizing expert witness may become co-counsel to the client, and his or her testimony may be compromised. It may become necessary to disclose confidential information, and the witness's objectivity may be challenged.⁴⁴

The role of a formally engaged expert consultant, as described in Scenario 3, is clearly recognized in Formal Opinion 97-407 as consistent with the Rules. The Committee's apparent purpose is to clarify the proper use of such a consultant.

(c) *ABA Formal Opinion 98-411 – Ethical Issues in Lawyer-to-Lawyer Consultation*⁴⁵

This 1998 Opinion addresses situations in which one attorney (the "consulting lawyer") seeks advice on a point of law or practice from a lawyer in another firm (the "consulted lawyer") with no intent to engage the consulted lawyer to work on the consulting lawyer's client matter. The Opinion focuses primarily on ethical issues such as confidentiality and conflict of interest that might arise for both lawyers in such consultations. The Committee cautions the consulting lawyer to avoid disclosing confidential information by discussing the matter hypothetically, or, if disclosure is necessary, to obtain the client's consent in advance.⁴⁶ The Committee also advises the consulting lawyer to consider potential conflicts of interest in approaching the second lawyer.⁴⁷ As to the consulted lawyer, the Opinion assumes that he or she will have a relatively low level of involvement in the client matter, and the Com-

41. *Id.*

42. *Id.*

43. *Id.*

44. Opinion 97-407, *supra* note 36.

45. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998) [hereinafter Opinion 98-411].

46. *Id.*; *see also infra* Part IV (B) (discussing disclosure to the client).

47. Opinion 98-411, *supra* note 45.

mittee endorses a lower standard of confidentiality and conflict of interest than that normally imposed on an attorney. Nevertheless, the consulted lawyer is advised to consider such concerns before offering advice to the consulting lawyer.⁴⁸

Lawyer-to-lawyer consultations—those without the intent to engage the second attorney in the client matter—are described in Scenario 4 as “informal” consultations, with L1 being the consulting lawyer and L2 the consulted lawyer. In the scenario and in Opinion 98-411 the assumption is that L2 will not become co-counsel with L1, in contrast to the expert consultant in Scenario 3 who is engaged as co-counsel. The Opinion clearly finds lawyer-to-lawyer consultations to be appropriate, and in fact the Committee observes: “Seeking advice from knowledgeable colleagues is an important, informal component of a lawyer’s ongoing professional development.”⁴⁹ The Committee adds: “Testing ideas about complex or vexing cases can be beneficial to a lawyer’s client.”⁵⁰

B. *Communication and Scope of Representation*

The MRPC make clear a lawyer’s obligation to maintain communication with the client, but they also address the scope of a lawyer’s representation. Both subjects are relevant to the engagement of a second lawyer in a client matter.

1. The Duty to Communicate

Communication is mentioned throughout the Rules,⁵¹ but the primary expression of an attorney’s duty is in Rule 1.4:

48. *Id.*

49. *Id.*

50. *Id.*

51. In addition to MRPC R. 1.4 (1983) and MRPC R. 1.2(a) (1983), which are discussed in this section, the Rules contain the following references to a lawyer’s duty to communicate: (1) MRPC pmb. (1983) (stating in paragraph 4 that along with competence, diligence and maintaining confidentiality, a lawyer “should maintain communication with a client concerning the representation.”) (2) MRPC R. 1.0(e) (1983) (stating that when a lawyer obtains a client’s “informed consent” to a course of action, such consent can take place “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”) MRPC R. 1.0 cmt. 6 (1983) elaborates on the communication necessary to assure that the client’s consent is indeed informed. For a list of those instances in which the Rules require informed consent, *see supra* note 10. (3) MRPC R. 1.5(b) (1983) states that a lawyer must communicate the scope of representation and his or her fee requirements, and that such communication is preferably done in writing. Contingent fee arrangements must be in writing and must contain certain details. MRPC R. 1.5(c) (1983). (4) MRPC R. 1.8(a)(1) (1983) requires a lawyer to fully disclose in writing the details of a proposed business deal between the lawyer and a client. This duty of communication is elaborated upon in MRPC R. 1.8 cmt. 2 (1983). (5) MRPC R. 1.14 cmt. 2 (1983), requires a lawyer representing a client with diminished capacity to try to maintain communications with the client. (6) MRPC R. 5.7 cmts. 6–7 (1983) require a lawyer to communicate

Rule 1.4 – Communication⁵²

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), 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.

Comment 1 to Rule 1.4 states that good communication is necessary “for the client effectively to participate in the representation.”⁵³ Comment 5 elaborates on that point: “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.”⁵⁴ Comment 7 states: “A lawyer may not withhold information to serve the lawyer’s own interest or convenience or the interests or convenience of another person.”⁵⁵ The Illinois Supreme Court has described a two-part duty under Rule 1.4(a). First, the lawyer has an “affirmative duty” to keep the client informed. Second, the lawyer must “promptly comply” with requests for information.⁵⁶ The Oregon Supreme Court has equated failure to communicate with lack of diligence on the part of the lawyer.⁵⁷

clearly the nature of “law-related services” being provided to a person, in particular whether the parties will or will not have a lawyer-client relationship.

52. MRPC R. 1.4 (1983).

53. *Id.* at 1.4 cmt. 1.

54. *Id.* at 1.4 cmt. 5.

55. *Id.* at 1.4 cmt. 7.

56. *In re Smith*, 659 N.E.2d 896, 902 (Ill. 1995).

57. *In re Conduct of Groom*, 249 P.3d 976, 983 (Ore. 2011). Although considering Rule 1.4, in its analysis the court looked back to the earlier Code of Professional Responsibility and Disciplinary Rule 6-101(B). Under the Model Rules, lack of diligence is a violation of MRPC R. 1.3 (1983).

A significant reference to Rule 1.4 is found in Rule 1.2(a). It states that subject to certain limitations, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”⁵⁸ If the consultation requirement has been fulfilled, the means or tactics to be employed are presumably left to the lawyer – Rule 1.2(a) states: “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”⁵⁹ However, the Rule requires that in any event certain decisions such as settlement, entering a plea, waiving a jury trial and client testimony be left to the client.⁶⁰

2. Limiting the Scope of Representation

Although consultation is an important feature of Rule 1.2(a), the actual title of the Rule is “Scope of Representation and Allocation of Authority Between Client and Lawyer,” and the key provision for this analysis is Rule 1.2(c): “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”⁶¹ An important question is whether this Rule permits a lawyer to limit how he or she will fulfill the duty to communicate with the client under Rule 1.4. The text of Rule 1.2(c) does not provide an answer, but the Rule’s Comments offer some perspective.

Comment 6 to Rule 1.2(c) contemplates limiting the subjects of a lawyer’s representation, and it permits the exclusion of “specific means that might otherwise be used to accomplish the client’s objectives.”⁶² Cost may be one reason for such limitation. It is important to note that the thrust is the scope of the services the lawyer provides to the client, and not the underlying attorney-client relationship. Comment 7 seems to be much broader, stating that a lawyer and client have “substantial latitude to limit the representation.”⁶³ However, the example provided in Comment 7 is of a lawyer who offers general advice in a brief telephone consultation. As in Comment 6, the focus is on the scope of services and not on basic attorney-client issues such as confidentiality, conflict of interest or communication.

Comment 8 provides additional perspective, but it is confusing. It states: “All agreements concerning a lawyer’s representation of a client must accord

58. MRPC R. 1.2 (1983). MRPC R. 1.2(a) cmt. 1 (1983) refers specifically to MRPC R. 1.4(a)(2) (1983) with regard to consultation on “the means by which the client’s objectives are to be pursued.”

59. MRPC R. 1.2 (1983).

60. MRPC R. 1.2(a) cmt.1 (1983) makes specific reference to Rule 1.4(a)(1) with regard to client decisions on major matters such as settlement.

61. MRPC R. 1.2 (1983).

62. *Id.* at 1.2 cmt. 6.

63. MRPC R. 1.2 cmt. 7 (1983).

with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8, and 5.6.⁶⁴ Rule 1.1 deals with competence, Rule 1.8 with specific conflicts of interest, and Rule 5.6 with restrictions on a lawyer's right to practice. An initial observation is that Comment 8 refers to "agreements" being in accord with the MRPC. It does not address the services that will be carried out under the agreements. Rule 1.2(c) itself states that the client must give "informed consent" to a limited representation, so perhaps Comment 8 is simply intended to reinforce the precept that for the representation agreement to comply with the MRPC, it must be made with informed consent as defined in Rule 1.0.⁶⁵ But if that were the case, why doesn't the Comment reference Rule 1.0? Why does it use Rule 1.1 as an example? The requirement of competence surely goes to the services being provided, rather than to the lawyer's entering into a limited-representation agreement.

It is curious that Comment 8 mentions only three Rules. Does this suggest, under the principle of *inclusio unius est exclusio alterius*,⁶⁶ that these are the only Rules to be complied with? The use of "e.g." before the reference does not permit such a conclusion, but is there yet an implication that Rules 1.1, 1.8 and 5.6 are more important than the others? Comment 7 suggests otherwise. After observing that a brief telephone consultation may be permissible, Comment 7 states:

Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.⁶⁷

Comment 8 identifies Rule 1.1 as one that must be complied with despite an agreement to limit the scope of representation, and yet Comment 7 provides for a more relaxed standard to determine competence. In this light it is reasonable to conclude that the Rules not mentioned in Comment 8 should also be interpreted less strictly if the client has agreed to a limitation. More to the point, even though a lawyer always has some duty to communicate under Rule 1.4, it is reasonable to conclude that the lawyer and client can decide how that duty is to be fulfilled. Whether such an agreement is consid-

64. *Id.* at 1.2 cmt. 8.

65. *Id.* at 1.2(c). MRPC R. 1.0(e) (1983) states: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

66. BLACK'S LAW DICTIONARY 831 (9th ed. 2009) ("A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.")

67. MRPC R. 1.2 cmt. 7 (1983).

ered as one to “limit the scope of representation” under Rule 1.2(c) is not clear. If so, then the client’s agreement must meet the criteria of “informed consent.”⁶⁸ If not, then a different and presumably less strict standard for consent would apply.

3. The Standard of Reasonableness

In the end, our most useful guidance comes from the actual language of Rule 1.4 and Rule 1.2. Rule 1.4(a) requires a lawyer to “reasonably consult” and “keep the client reasonably informed.”⁶⁹ Rule 1.4(b) requires the attorney to explain things “to the extent reasonably necessary” for the client to make informed decisions.⁷⁰ Rule 1.2(c) permits limiting the scope of representation if “reasonable under the circumstances.”⁷¹ Taken together, a fair interpretation is that a lawyer’s duty to communicate is never absolute, and a lawyer and client have a certain amount of flexibility in setting the means, frequency and detail of such communication.

IV. COMMUNICATING WITH THE CLIENT IN TWO-LAWYER SITUATIONS

A. *Communicating the Decision to Engage L2*

In each of our five scenarios a decision is made to engage or consult with L2 in a client matter being handled by L1. In Scenario 1 (Co-Counsel), Scenario 3 (Expert Consultant) and Scenario 5 (Local Counsel) it is conceivable that the client will identify and engage L2, presumably with L1’s concurrence. On the other hand, in each of these three scenarios it is more likely that L1 (having a clearer picture of the matter’s staffing needs and being more familiar with the talents of other lawyers) will arrange for L2’s services. Furthermore, in Scenario 2 (Temporary Lawyer) and Scenario 4 (Informal Consultant) it is almost certainly L1 who will engage L2. When L1 makes the decision to affiliate L2, several questions arise:

- i. Must the client be informed?
- ii. Is it L1’s responsibility to inform the client?
- iii. Does L2 have a separate responsibility to inform the client?
- iv. Must the client’s consent be obtained, and if so, in what form?

68. *Id.* at 1.2(c).

69. *Id.* at 1.4(a).

70. *Id.* at 1.4(b).

71. *Id.* at 1.2(c).

We will address these questions for each of the five scenarios. We note that the critical issue in each instance is the Rule 1.4 duty to inform the client about the engagement of L2. In Part IV(B) we will discuss the application of Rule 1.4 after L2 has been affiliated, including how the parties may define and limit the scope of communication pursuant to Rule 1.2(c).

1. Scenario 1. *L2 is engaged as co-counsel to share responsibility with L1 in a matter because of its size or complexity.*

At first blush it seems inconceivable that co-counsel could be engaged without informing the client. After all, L2 will have at least some authority to act on behalf of the client. L2 will have a professional relationship with the client and will be subject to the Rules in any activities carried out on behalf of the client.

Rule 1.4(a)(1) requires a lawyer to “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent . . . is required by these Rules.”⁷² None of the instances in which informed consent is required relates to the association of co-counsel.⁷³ On the other hand, Rule 1.4(a)(2) requires an attorney to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” while Rule 1.4(a)(3) requires the lawyer to “keep the client reasonably informed about the status of the matter.”⁷⁴ The consulting requirement is also referred to in Rule 1.2(a).⁷⁵ While there are many minor steps that any lawyer may undertake without consulting with the client,⁷⁶ the engagement of co-counsel easily falls within the spirit of Rule 1.4(a) and 1.2(a).

If the client must be informed that L2 will become co-counsel, Rule 1.4(a)(2) suggests that L1 has the obligation to do the informing. “A lawyer . . . shall reasonably consult about the means” surely refers to the client’s existing lawyer, L1. The same is true for the Rule 1.4(a)(3) duty to “keep the client reasonably informed.” If L1 wishes to bring L2 into a matter, then that is a tactical decision being made by L1, and he or she has the responsibility to “reasonably consult” with the client and keep the client “reasonably informed.”⁷⁷ There is no suggestion in Rule 1.4 that L2 must inform the client. Nevertheless, it would be imprudent for L2 to undertake the role of co-counsel without receiving assurance that the client has assented. More to the

72. *Id.* at 1.4(a).

73. See *supra* note 10 (listing all of the references in the Rules to “informed consent”).

74. MRPC R. 1.4(a)(2)–(3) (1983).

75. MRPC R. 1.2(a) (1983) states: “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”

76. MRPC R. 1.2(a) (1983) permits a lawyer to take action that is “impliedly authorized.”

77. MRPC R. 1.4 (1983).

point, L2 would be best protected by insisting on an engagement letter signed by the client.

Another statement of the duty to inform may be found in Rule 1.5(b):

The scope of 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 representation⁷⁸

Note that Rule 1.5(b), like Rule 1.4, does not address multiple-lawyer situations. Nevertheless, L2 will provide “representation,” and under 1.5(b) the terms of the engagement must be made clear to the client.⁷⁹ But by whom? There is some difference in communicating the need for a second lawyer and communicating the terms on which the second lawyer will be retained. Where it is most logical for L1 to inform the client of the desirability of affiliating co-counsel, the burden would seem to fall at least as heavily on L2 to confirm that the client understands “the scope of [L2’s] representation and the basis or rate of the fee and expenses [to be charged by L2] for which the client will be responsible.” Furthermore, if L1 and L2 intend to work out a division of fees, under Rule 1.5(e)(2) the client must consent to the arrangement in writing, and both lawyers would have an equal interest in making certain that the written consent is obtained.⁸⁰

The conclusion thus far is that L1 should inform the client before engaging co-counsel, and that both L1 and L2 should ensure that the terms of L2’s engagement are understood and approved by the client. Nevertheless, a measure of flexibility is offered by Rule 1.2(a), which states: “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”⁸¹ If L1 has previously represented the client, and if the client has permitted L1 to retain co-counsel, then the relationship between L1 and the client may now include the implied authorization for L1 to again retain a second attorney when necessary. Furthermore, regardless of whether L1 has represented the client in the past, Comment 3 to Rule 1.2 states: “At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation.”⁸² Surely such authorization can take place during the representation as well, and it is conceivable that L1 would say to the client, “At some point I will need to associate co-counsel to handle X aspects of the case. Will you authorize me

78. *Id.* at 1.5(b).

79. MRPC R. 1.5 cmt. 2 (1983), which emphasizes the need to avoid misunderstandings in an engagement, is similarly silent as to the affiliation of co-counsel.

80. MRPC R. 1.5(e) (1983).

81. *Id.* at 1.2(a).

82. *Id.* at 1.2 cmt. 3.

to engage someone at the appropriate time?” Thus, under Rule 1.2 L1 may have the authority to engage L2 without further client consultation, but it would still be prudent under Rule 1.5(b) for L2 to require proof of such authority.⁸³ The best evidence of such would be the client’s signature on an engagement letter specifying L2’s services and fee arrangements, and if there is to be a division of fees, such written consent is absolutely required under Rule 1.5(e)(2).⁸⁴

As the above analysis has suggested, both L1 and L2 would be well advised to obtain the client’s consent to the engagement of co-counsel. The Rules do not require such consent to be in writing unless a division of fees takes place, but retaining L2 should be treated no differently than any engagement of any attorney. Required or not, the prudent lawyer will use a written engagement letter, countersigned by the client.

2. Scenario 2. *L2 is engaged on a temporary basis to assist L1 in staffing a matter.*

This scenario is described in terms that distinguish it from Scenario 1 (co-counsel). In this situation L2 is providing services for the benefit of the client, but no formal relationship is established between L2 and the client. Nevertheless, it is still important to ask whether the client must be informed about L2’s engagement, who must do the informing, and whether the client’s consent is necessary.

Even assuming that L2 is not co-counsel in Scenario 2, the analysis of Scenario 1 is relevant. Briefly, L1’s engagement of L2 does not require the client’s “informed consent” under Rule 1.4(a)(1), but it could be argued that under Rule 1.2(a) and Rule 1.4(a)(2) L1 must “reasonably consult” with the client on this aspect of how L1 is handling the client’s matter. Similarly, under Rule 1.4(a)(3) the engagement of L2 is arguably an aspect of the matter on which L1 must “keep the client reasonably informed.” On the other hand, since L2 is providing services to L1, it could be argued that the engagement is not significant enough to merit informing the client or is impliedly authorized under Rule 1.2(a). Of course, if L2’s fees are being passed along to the client, the client may well feel that information and consent are required, and if a division of fees between L1 and L2 is agreed to (an unlikely event when L2 is not co-counsel), then Rule 1.5(e) would require the client’s written consent on the fee arrangement. As to which lawyer should inform the client about the engagement of L2, L2 does not have a direct relationship with the client, and so it is obvious that L1 should do the informing. Further, L2 should be willing to accept an engagement letter from L1 alone,

83. *Id.* at 1.5(b).

84. *Id.* at 1.5(e).

especially if L2 does not know the client's identity. Beyond informing the client, it would seem prudent for L1 to obtain the client's consent, especially when L2's fees are being paid or reimbursed by the client. Nevertheless, Rule 1.2 and its Comment 3 would permit the client to authorize L1 in advance to retain a second lawyer as L1 deems necessary.

The use of temporary lawyers is the subject of ABA Formal Opinion 88-356 as introduced in Part III(A)(2) above.⁸⁵ The Committee does not use the terms L1 and L2, but we will employ them here for consistency. In addition, although the Opinion describes the retaining lawyer as a firm, where possible, we will continue to describe L1 as an individual.

As to the disclosure of an arrangement between the original lawyer (L1) and a temporary attorney (L2), the Committee begins with the idea that Rule 7.5(d) reflects a policy that "a client is entitled to know who or what entity is representing the client."⁸⁶ Then, after referring to the consulting requirements of Rule 1.2(a) and Rule 1.4, the Opinion states:

[W]here the temporary lawyer [L2] is performing independent work for a client without the close supervision of a lawyer associated with the law firm [L1], the client must be advised . . . and the consent of the client must be obtained On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client.⁸⁷

The Committee bases these conclusions on the fact that clients expect a firm's services to be provided by "personnel closely supervised by the [L1] firm."⁸⁸ It then extrapolates from that point to state that "[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm."⁸⁹ In other words, the Committee sees a closely supervised L2 as a quasi-employee, akin to actual personnel of the L1 firm.⁹⁰

85. Opinion 88-356, *supra* note 31.

86. *Id.*; see also MRPC R. 7.5(d) (1983) ("Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.").

87. *Id.*

88. *Id.*

89. *Id.*

90. The employee analogy is extended in footnote 10 to the Opinion, which refers to Comment 5 of Rule 1.6. Opinion 88-356, *supra* note 31, at 123. The footnote quotes the following sentence from Comment 5 of Rule 1.6: "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to the representation of the client of the firm unless the client has instructed that particular information be confined to specified lawyers." *Id.* In the current version of the Rules, the words "the representation of" have been deleted from Rule 1.6 Cmt. 5. MRPC R. 1.6 cmt. 5 (1983).

Opinion 88-356 goes on to state that if L2's fees are not charged by L1 to the client as a disbursement, the compensation arrangement with L2 need not be disclosed.⁹¹ The contrary implication is that if L2's fees will be passed along to the client, L2's fee arrangements (and thus the engagement of L2) must be disclosed. The Committee adds that if L1 and L2 have an arrangement to divide the fee, "then Rule 1.5(e)(1) requires the consent of the client and satisfaction of the other requirements of the Rule regardless of the extent of the supervision [of L2 by L1]."⁹² Rule 1.5(e)(2) mandates that the client's consent be in writing.⁹³

The upshot of Opinion 88-356 is that L1's engagement of L2 as temporary counsel need not be disclosed to L1's client if: (1) L1 maintains direct supervision over L2's work; (2) L1 does not pass L2's fees along to the client; and (3) L1 does not split the fee with L2.⁹⁴ The risk to L1 is that what is arranged with L2 at the outset might inadvertently change over time. An unintended change in fee arrangements is unlikely, but the extent of L1's supervision over L2 could easily evolve. As a matter develops, L1 might become too busy to deal closely with L2. Alternatively, it might develop that L2 provides excellent work, and L1 becomes confident enough to allow L2 to work more independently. In any event, if L1 decides not to inform the client about L2's work, L1 must remain vigilant in his or her supervision of L2.

Even if L1 may have the option not to tell the client about the temporary engagement of L2, there seems to be no reason to withhold the information. With the technology available in modern law practice, communication with a client is easy, and most clients prefer more, rather than less, contact from their attorneys. A good lawyer should not wish to hide any significant fact from the client, and the engagement of a second lawyer for any purpose should be seen as significant. Along with providing information, there seems to be no valid reason why L1 would not ask for the client's consent to affiliating L2. If L1 is embarrassed to tell the client that outside help is needed, then L1 needs to rethink what kind of relationship he or she has with the client. This is even more pointed if L1 feels it necessary to pay L2 out of L1's own pocket for work that benefits the client.⁹⁵ As a final thought, L1 would

91. Opinion 88-356, *supra* note 31.

92. *Id.* at 123-24.

93. MRPC.R. 1.5(e)(2) (1983). See discussion, *supra* in Parts III(A) and IV(A) of this article (discussing the other Rule 1.5(e) requirements).

94. Opinion 88-356 limits its interpretation to Rules 1.2 and 1.4. Opinion 88-356, *supra* note 31. Under the prior Code of Professional Responsibility, the duty of L1 to inform the client of a consultation or association was more forcefully stated. See Pizzimenti, *supra* note 17, at 25-27; see also Kershen I, *supra* note 17.

95. Bear in mind that if L1 is working for a flat fee or percentage fee, any payment by L1 to L2 might be deemed a "division of a fee" for which the client's written consent is required by Rule 1.5(e)(2). MRPC R. 1.5 (e)(2) (1983).

do well to recall the statement in Comment 7 to Rule 1.4: “A lawyer may not withhold information to serve the lawyer’s own interest or convenience”⁹⁶

3. Scenario 3. *L2 is engaged as an expert consultant to strategize and advise on a matter.*

As we have defined the scenario, the engagement of an expert consultant contemplates a limited, but formally established and active, role by L2 in assisting L1’s activities on behalf of the client. The expert consultant is more specialized than co-counsel in Scenario 1 and more formally engaged than a temporary lawyer in Scenario 2.

The position of an expert consultant is analyzed in ABA Formal Opinion 97-407 as introduced in Part III(A)(2) above.⁹⁷ According to the 1997 Opinion, whereas an expert witness occupies an independent position and must remain objective, an expert consultant is an advocate for the client.⁹⁸ The expert consultant “occupies the role of co-counsel in the matter as to the area upon which she is consulted.”⁹⁹

With L2 considered as co-counsel, we can apply the analysis used for Scenario 1 to this section. L1’s engagement of the expert consultant (L2) is significant enough to require L1 to disclose the affiliation to the client and seek the client’s consent.¹⁰⁰ Furthermore, L2 would be prudent to ask for an engagement letter signed by the client. On the other hand, it would be legitimate for the client to give L1 advance authority to engage an expert consultant without further client consent.

As Scenario 3 is characterized, the situation would not include the Scenario 2 factors (direct supervision, fees paid by L1, and no fee split with L2) that would permit L1 to forgo disclosure to the client.

4. Scenario 4. *L2 serves as an informal consultant to L1.*

This scenario contemplates limited contact between L1 and L2. Often there will be a single, informal discussion in which L1 does not disclose the client’s identity. The exchange could be somewhat more elaborate, but we

96. *Id.* at 1.4 cmt. 7.

97. Opinion 97-407, *supra* note 36.

98. *Id.*

99. *Id.*

100. One commentator has discussed whether a lawyer must disclose to the client the level of the lawyer’s expertise on the subject at hand. Pizzimenti, *supra* note 17, at 26-27. Although a Florida court has stated that a lawyer must communicate any concerns about his or her competence, the Rules contain no such obligation. *Id.* (citing *Easley v. State*, 334 So. 2d 630, 631 (Fla. Dist. Ct. App. 1976)). The contention in this article that L1 must disclose the engagement of co-counsel (Scenario 1) or an expert consultant (Scenario 3) is based on Rules 1.2 and 1.4. MRPC R. 1.2, 1.4 (1983).

will still assume that L2 need not know the client's identity. For purposes of this analysis, we will maintain a distinction between this scenario and Scenarios 1–3. In Scenario 4, L2 is neither active co-counsel as in Scenario 1, nor is L2 formally engaged to carry out specific work as an expert consultant as in Scenario 3. To distinguish Scenario 4 from Scenario 2, we will assume that in Scenario 2, the temporary lawyer provides work product like research memos, draft documents, or document review summaries. In contrast, in Scenario 4, the consulted lawyer will simply provide knowledge or perspective to L1. If the lawyers agree that L1 must pay L2 for the informal consultation, we will assume that L1 will not pass the cost along to L1's client.

The process of informal consultation is certainly contemplated in Comment 1 to Rule 1.1, but whether the consulting lawyer (L1) must advise the client is not addressed in the Rules or Comments.¹⁰¹ As a result, we must turn to broader principles. The consultation does not require the client's informed consent under any of the Rules, and thus, disclosure is not required under Rule 1.4(a)(1). Likewise, a consultation is certainly not going to entail a division of fees, and thus, the requirement to obtain the client's consent under Rule 1.5(e) will not apply. It could be argued that the lawyer-to-lawyer discussion falls within the general communication obligations of Rule 1.4(a)(2), Rule 1.4(a)(3), and Rule 1.2(a), but it could also be the case that the discussion is impliedly authorized under Rule 1.2(a). Also, under Comment 3 to Rule 1.2, L1 could obtain prior authorization from the client to engage in informal consultation from time to time. Comment 4 to Rule 1.6 actually contemplates a hypothetical consultation, but the focus of the Rule is maintenance of client confidentiality and not whether the client must be informed about the discussion.¹⁰² Finally, the warning in Comment 7 to Rule 1.4 that a lawyer may not withhold information for his or her own interest, while applicable to the engaging of a temporary lawyer in Scenario 2, would not seem relevant to the brief and informal consultation contemplated in Scenario 4.

In Part III(A)(2) of this article, we discussed Formal Opinion 98-411, which deals with "lawyer-to-lawyer" consultation.¹⁰³ The 1998 Opinion addresses confidentiality and conflict of interest—from the point of view of L1 and L2—but it broadly endorses informal consultations as a component of a lawyer's professional development and notes that the client can benefit from the lawyer-to-lawyer discussion.¹⁰⁴ As to informing the client of such a dis-

101. A lawyer's competence is determined, among other things, by "whether it is feasible to . . . consult with, a lawyer of established competence in the field in question." MRPC R. 1.1 cmt. 1 (1983).

102. Comment 4 to Rule 1.6 states that "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved." *Id.* at 1.6 cmt. 4.

103. Opinion 98-411, *supra* note 45.

104. *Id.*

cussion, the Opinion states: “A consultation that is general in nature and does not involve disclosure of client information does not implicate Rule 1.6 [confidentiality] and does not require client consent.”¹⁰⁵ The Committee does not specifically say that L1 need not *inform* the client, but that is a reasonable implication if consent is not required. On the other hand, the Committee takes the “informed consent” language of Rule 1.6(a)¹⁰⁶ and states:

When the consulting lawyer [L1] determines that the consultation requires disclosure of client information protected by the attorney-client privilege or that foreseeably might harm the client if disclosed, the lawyer must assure that the client is made aware of the potential consequences of the disclosure and that the client grants permission to consult the other lawyer [L2].¹⁰⁷

To avoid violations of Rule 1.6, and to avoid conflicts of interest for L1 and L2, the Committee advises that it is better to keep the consultation “anonymous or hypothetical without reference to a real client or a real situation.”¹⁰⁸ As noted earlier, the Committee believes that a consultation that “is general in nature and does not involve disclosure of client information does not implicate Rule 1.6 and does not require client consent.”¹⁰⁹

Compared to Scenario 1 (Co-Counsel), Scenario 2 (Temporary Lawyer), and Scenario 3 (Expert Consultant), the informal lawyer-to-lawyer consultation described in Scenario 4 is least likely to require either L1 or L2 to disclose anything to the client. Nevertheless, both L1 and L2 are well-advised to keep the discussion anonymous or hypothetical. Both lawyers should also be aware of the risk that: (1) L1 might violate Rule 1.6; (2) L2 may be bound by Rule 1.6; and (3) both attorneys face the potential of creating an unintended conflict of interest. From a functional point of view, lack of vigilance on the part of either attorney might cause L2 to morph from an informal consultant into a temporary lawyer, an expert consultant, or even co-counsel.

5. Scenario 5. *L2 is engaged as local counsel in a matter being handled by L1.*

In this situation, there is a geographical (and usually jurisdictional) separation between L1 and L2. In all other respects, L2 could bear the characteristics of L2 in Scenario 1 (Co-Counsel), Scenario 2 (Temporary Lawyer),

105. *Id.*

106. Rule 1.6(a) states: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent” MRPC R. 1.6(a) (1983).

107. Opinion 98-411, *supra* note 45.

108. *Id.*

109. *Id.*

Scenario 3 (Expert Consultant), or Scenario 4 (Informal Consultant). Thus, the appropriate analysis for L2 will be found in the prior scenarios and will depend on the functional role filled by L2. As to the duty to communicate L2's affiliation, there is nothing in any of those analyses that is affected by the geographical distance between L1 and L2.

B. *Communicating the Activities of L2*

Having dealt with the step of affiliating L2, we turn to the ensuing representation and the ongoing responsibility to communicate with the client. To keep this analysis manageable, we need to make several assumptions.

First, we assume that L1 will retain an active role in the representation; in other words, L1 will not simply turn the matter over to L2 and withdraw. Second, as between L1 and L2, we assume that L1 will remain as lead attorney, providing services and monitoring L2's work. The lead role for L1 is natural in Scenario 2 (L2 as temporary lawyer), Scenario 3 (L2 as expert consultant), and Scenario 4 (L2 as informal consultant). On the other hand, in Scenario 1 (L2 as co-counsel) and Scenario 5 (L2 as local counsel), it might be feasible for the initial lawyer (L1) to transfer primary responsibility in the client matter to L2. But, our analysis is based on L1's continuing to serve as lead counsel to the client.

Our third assumption flows from the second. As lead attorney who is monitoring L2's services, L1 will be well-positioned to report to the client on L2's activities. We do not suggest that it would be difficult for L2 to communicate with the client but simply that L1 has sufficient information on L2's activities to do so.

With these assumptions in mind, we will address the following questions for each of our five scenarios:

- i. Is it ever legitimate for L1 alone to communicate L2's activities to the client, or does L2 always have a duty to separately report?
- ii. Must L1 and L2 obtain the client's consent as to how communications will be handled?

In our analysis, we will make regular references to Part IV(A) of this article.

1. Scenario 1. *L2 is engaged as co-counsel to share responsibility with L1 in a matter because of its size or complexity.*

In Part IV(A), Scenario 1, we strongly suggested that bringing in L2 as co-counsel will require L1 to inform the client and obtain the client's consent.

As to the working phase, Rule 1.4 requires a lawyer to do all of the following:

- i. “promptly inform the client” when informed consent is required;¹¹⁰
- ii. “reasonably consult” as to how the client’s objectives are to be accomplished;¹¹¹
- iii. “keep the client reasonably informed about the status of the matter;”¹¹²
- iv. “promptly comply with reasonable requests for information;”¹¹³
- v. “consult with the client” regarding ethical limitations on the lawyer’s activities;¹¹⁴ and
- vi. explain the matter sufficiently for the client to make “informed decisions regarding the representation.”¹¹⁵

As worded, Rule 1.4 imposes these obligations on both L1 and L2 because each of them is counsel to the client.¹¹⁶ Neither the Rule nor any of its Comments specifically provides for either lawyer to report on behalf of the other. It could be argued that the reasonableness standard of Rule 1.4, particularly as expressed in Rule 1.4(a)(3), would be met if L2 were to rely on L1 to keep the client informed about L2’s activities. On the other hand, the reasonableness standard may simply be descriptive of the character and frequency of the information conveyed, with each lawyer always being responsible for keeping the client “reasonably informed.” In the end, Rule 1.4 does not prohibit L2 from allowing L1 to do the communicating, but it provides little concrete support for the practice.

Another basis for specifically assigning the lawyers’ reporting responsibilities may be Rule 1.2, which addresses the “scope of representation.”¹¹⁷ Rule 1.2(a) states: “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”¹¹⁸ If, for example, previous representation of the client by L1 involved L1’s reporting on the activities of another co-counsel, then L1 may justifiably believe that there is implied authorization to do so again. Beyond such implication, Comment 3

110. MRPC 1.4 (a)(1) (1983).

111. Such consultation under Rule 1.4 is referred to in Rule 1.2(a). MRPC R. 1.4 (a)(2) (1983); *Id.* at 1.2(a).

112. MRPC R. 1.4(a)(3) (1983).

113. *Id.* at 1.4(a)(4).

114. *Id.* at 1.4(a)(5).

115. *Id.* at 1.4(b).

116. *Id.* 1.4.

117. *Id.* at 1.2.

118. MRPC R. 1.2(a) (1983).

to Rule 1.2 states: “At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation.”¹¹⁹ This might well include specific authorization to L1 to handle all communications for both L1 and L2. The challenge to these arguments is that both Rule 1.2(a) and Comment 3 deal with action taken on behalf of the client, rather than on behalf of another attorney. To apply, the Rule and Comment would have to be interpreted broadly to include any action taken in managing the client’s matter. Furthermore, L2 may want written verification from the client of L1’s reporting authority, rather than accepting L1’s word that such authority is implied or has been explicitly given to L1.

A somewhat more persuasive authority for delegation of L2’s responsibilities under Rule 1.4 is found in Rule 1.2(c), which permits a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹²⁰ Arguably, the client can simply agree that the services to be provided by L2 do not include reporting directly to the client, but rather communicating through L1. Practically speaking, this makes eminent sense, and many clients would likely prefer to have all communications directed to them through a single person—their lead counsel, L1. Nevertheless, it is important to recognize that Rule 1.2(c) refers to the “scope of the representation” and not to the scope of a lawyer’s ethical duties.¹²¹ Comment 6 to the Rule supports this cautionary note, as it focuses on limiting the subject matter of the representation and the means employed by the lawyer.¹²² Comment 7 is even more on-point, stating that a brief consultation is nevertheless subject to the lawyer’s duty of competence; however, the Comment adds that limiting the scope of representation “is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”¹²³

119. *Id.* at 1.2 cmt. 3.

120. *Id.* at 1.2(c).

121. *Id.*

122. Rule 1.2 cmt. 6 states:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Id. at 1.2 cmt. 6.

123. Rule 1.2 cmt. 7 states the following:

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client’s objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer’s services will be limited to a brief telephone consultation.

In the end, Rules 1.4 and 1.2 do not prohibit L2 from allowing L1 to communicate to the client on L2's behalf. Rule 1.2(c) arguably requires the means of fulfilling L2's duties under Rule 1.4 to be reasonable, and Rule 1.2(c) also requires the client's informed consent.¹²⁴ The Rule does not mandate that such consent be in writing, but both lawyers—and especially L2—would be well-advised to obtain written consent.

2. Scenario 2. *L2 is engaged on a temporary basis to assist L1 in staffing a matter.*

The analysis of Scenario 2 in Part IV(A), primarily based on ABA Formal Opinion 88-356,¹²⁵ concluded that L1's engagement of L2 as temporary counsel need not be disclosed to L1's client if: (1) L1 maintains direct supervision over L2's work; (2) L1 does not pass L2's fees along to the client; and (3) L1 does not split the fee with L2. If any of these factors is absent, L1 should disclose the arrangement and obtain the client's consent. A fee-split will require written consent under Rule 1.5(e)(2). With regard to Rule 1.4 communication duties during the representation, the analysis of Scenario 1 in Part IV(B) is generally applicable, but Scenario 2 offers additional considerations.

From the perspective of L1, the decision not to disclose the engagement of L2 leads to two necessary conclusions. First, and consistent with Opinion 88-356, L1 may view L2 as a quasi-employee, and since L1 is paying for L2's services, L1 will simply adopt L2's work product as L1's. Second, L1 will bear the full responsibility to inform the client of the results of all the lawyers' activities, regardless of who has carried them out. Nevertheless, as Scenario 2 is analyzed in Part IV(A), complications may arise for L1 if he or she decides to relax the supervision of L2, charge the client for L2's fees, or split fees with L2. If L1 finds it necessary to disclose the engagement of L2 to the client, then after such disclosure, the Part IV(B), Scenario 1 analysis of Rule 1.4 communication responsibilities will be applicable.

For L2 the perspective is different, and L2's duty to communicate with the client will first depend on whether L2 knows the client's identity. If L2 does not know who the underlying client is, then L2's client is effectively L1, and L2 should be entitled to communicate only with L1. A lawyer cannot pro-

Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Id. at 1.2 cmt. 7.

124. *Id.* at 1.2(c).

125. Opinion 88-356, *supra* note 33.

vide information to an unknown person, and the burden should be entirely on L1 to meet the requirements of Rule 1.4 as to L1's client.

On the other hand, if L2 knows who the client is, then L2 would be well-advised to analyze the situation under Opinion 88-356. The reason for such analysis is that L2 will want to avoid being implicated in a violation of the Opinion by L1. At the outset, L2 should ask whether L1 has informed the client of L2's engagement and whether the client has consented. This inquiry may elicit one of several responses. First, if L1 has not informed the client, L2 should ask L1 for assurances that the requirements of the Opinion will be met as to direct supervision, charging L2's fees to the client, and fee-splitting. Second, if the client has been informed and has consented (in writing, if a fee-split is involved) then L2 can be satisfied that L1 has complied with the disclosure requirements of the Opinion. Third, in the unlikely event that L1 tells L2 that the client has been informed and does not consent, then obviously neither L2 nor L1 should proceed.

If L2 knows the client's identity and has determined that L1 has properly handled the matter of disclosure to the client, then L2 would do well to ask for further assurances as to L2's ensuing responsibilities under Rule 1.4. For example, if no disclosure has been made to the client, then L2 could appropriately ask for a written instruction from L1 to communicate solely with L1, along with L1's undertaking to keep the client informed as required by Rule 1.4. If, on the other hand, L1 has obtained the client's approval to the limited engagement of L2, then it would seem reasonable for L2 to ask for the client's further consent that L2 be permitted to direct all communications to and through L1. The client's response to such a request will either establish that L2 must in fact communicate directly with the client, or it will relieve L2 of direct reporting responsibilities. If L2's duty under Rule 1.4 is to be partially or fully relieved, the deviation from the Rule must be consistent with the analysis in Part IV(B), Scenario 1.

The foregoing analysis reflects a reasonable reading of Opinion 88-356 and a lawyer's duties under Rule 1.4. At the same time, the conclusions seem unrealistic. In actual practice, how many lawyers who provide temporary services on a contract basis will have the moxie to ask the hiring lawyer for assurances that the engagement complies with Opinion 88-356? How many temporary lawyers will hold out for a consent letter from the underlying client? At best, L2 may wish to develop a brief engagement letter to be signed by L1 and containing undertakings by L1 to: (1) disclose the engagement to the client if L1 determines disclosure to be necessary; and (2) carry out all ensuing communications with the client.

3. Scenario 3. *L2 is engaged as an expert consultant to strategize and advise on a matter.*

In Part IV(A), our analysis of Scenario 3 describes an expert consultant as an attorney who is retained to assist L1 on a limited basis by giving specialized advice on the client's matter. Regardless of the limited role played by the expert consultant, ABA Formal Opinion 97-407 concludes that he or she is an advocate for the client and "occupies the role of co-counsel" to the client.¹²⁶

As a type of co-counsel, expert consultant L2 will have ongoing Rule 1.4 communication duties similar to those of co-counsel in Scenario 1 of this Part IV(B). As described in Scenario 1, Rules 1.4 and 1.2 can be interpreted to permit L2 to communicate through L1, rather than directly to the client. If such channeling of communications is reasonable for co-counsel in general, then the more limited role of the expert consultant would seem to make it even more reasonable to allow L2 to communicate through L1. Even so, L1 and L2 must bear in mind that under Rule 1.2(c), a limitation in the scope of representation requires the client's informed consent.¹²⁷

4. Scenario 4. *L2 serves as an informal consultant to L1.*

The analysis of Scenario 4 in Part IV(A) describes the contact between L1 and L2 as brief and informal, with L2 simply providing knowledge and perspective to L1. L2 is unlikely to be paid, but if so, we assumed that L1 will not pass the cost along to L1's client. The beneficiary of L2's activity is primarily L1, whose competence may be enhanced by the advice received. The client does benefit, but only because L1 is better able to handle the client matter. We noted that ABA Formal Opinion 98-411 specifically endorses such consultation as part of L1's professional development.¹²⁸ The Opinion also suggests that informal consultations be done on a hypothetical basis to avoid problems of confidentiality and conflict of interest, and to further avoid any need to obtain the client's consent for the consultation.¹²⁹ Overall, we concluded that the client need not be informed about the informal consultation.

If the client need not be informed that consultation will take place, then L1 should not be required to communicate the advice he or she receives from L2. This assumes that the consultation will be brief, informal, and hypothetical, and that L2 will not receive confidential information or even learn the

126. Opinion 97-407, *supra* note 36.

127. MRPC. R. 1.2(c) (1983).

128. Opinion 98-411, *supra* note 45.

129. *Id.*

client's identity. If, of course, the initial discussion leads to more sharing of information with L2 and a more active role for L2, then the analysis of Scenario 3 (Expert Consultant) might well be applicable. Under certain circumstances, the analyses of Scenario 1 (Co-Counsel) or Scenario 2 (Temporary Assistant) may also be relevant.

5. Scenario 5. *L2 is engaged as local counsel in a matter being handled by L1.*

As noted in Part IV(A), in Scenario 5, the attorney engaged as local counsel could assume responsibilities like those of L2 in any of Scenarios 1–4. As a result, analysis of the ongoing communication duties of both L1 and L2 may be found in the preceding four sections of Part IV(B).

C. *When Must L2 Communicate with the Client Despite an Arrangement to the Contrary?*

In Part IV(B) we concluded that the Rules do not prohibit an arrangement in which L2 reports his or her activities to L1, with L1 assuming the responsibility to handle all communications with the client. Let us now assume that L2 has in fact been engaged and that both L1 and L2 understand that L2 will communicate only with L1. The next question for analysis is whether there may be a situation in which L2 has an obligation to deviate from the arrangement and contact the client directly.

What might happen to make it unreasonable for L2 to continue communicating through L1? Obviously, if the client has consented to the arrangement, the client may revoke the consent.¹³⁰ A more challenging situation will be one in which the client has not rescinded previous approval and has not indicated dissatisfaction with the existing reporting arrangements. What if, in that case, L2 independently determines that L1 is improperly representing the client? May L2 then “go around” L1 and make direct contact with the client? Must L2 do so? Some guidance can be found in the Rules and in case law.

1. The Fluid Concept of Reasonableness Under the Model Rules

As we observed in Part IV(B), Scenario 1, the Rules do not explicitly permit L2 to communicate through L1. However, some justification for the practice may be found in Rule 1.2(c), which permits a lawyer to limit the scope of representation if “reasonable under the circumstances and the client

130. MRPC R. 1.2 cmt. 3 (1983).

gives informed consent.”¹³¹ Comment 3 to Rule 1.2 offers the following perspective:

At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a *material change in circumstances* and subject to Rule 1.4, a lawyer may rely on such an advance authorization.¹³²

To the extent that the lawyers have determined (with or without client approval) that an L2-to-L1 chain of communication is appropriate, it is entirely possible that later developments may require a reassessment of the arrangement. Comment 3 to Rule 1.2 suggests that both L1 and L2 should consider from time to time whether the delegation of reporting responsibilities to L1 continues to be appropriate. If L2 determines that L1 is not properly representing the client, L2 would do well to consider this a change of circumstances with regard to reporting through L1.

The change-in-circumstances concern is also relevant to Rule 1.4. In Part IV(B), Scenario 1, we observed that Rule 1.4(a)(3) requires a lawyer to “keep the client *reasonably* informed,” while Rule 1.4(b) requires explaining a matter “to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation.”¹³³ We have argued that the reasonableness standard supports the propriety of channeling L2’s communications through L1. However, what is “reasonable” depends on the circumstances at each point in the representation, and an arrangement that is reasonable at one point may well cease to be so at a later time.

Moving beyond Rules 1.2 and 1.4, we can find a useful standard in Rule 3.3, which prohibits a lawyer from introducing into a proceeding any “evidence that the lawyer knows to be false.”¹³⁴ Comment 8 draws a distinction between what a lawyer *knows* to be false (this cannot be introduced into evidence) and what a lawyer *reasonably believes* to be false (introduction of such evidence is not prohibited).¹³⁵ The Comment tries to avoid pure subjectivity in assessing knowledge versus reasonable belief by stating that the lawyer’s knowledge “can be inferred from the circumstances.”¹³⁶ The Com-

131. *Id.* at 1.2(c).

132. *Id.* at 1.2 cmt. 3 (emphasis added). Rule 1.2 cmt. 3 concludes that “[t]he client may, however, revoke such authority at any time.” *Id.* This is straightforward, and our analysis will not address revocation by the client.

133. *Id.* at 1.4(a)(3) (emphasis added); *Id.* at 1.4(b).

134. MRPC R. 3.3(a)(3) (1983).

135. *Id.* at 3.3 cmt. 8.

136. *Id.* This statement reflects the definition of “knows” in Rule 1.0(f): “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from the circumstances.” *Id.* at 1.0(f).

ment ends with the pointed admonition that a lawyer “cannot ignore an obvious falsehood.”¹³⁷ The same standard can be applied with regard to whether L1’s improper behavior should cause L2 to stop communicating through L1 and report directly to the client. L2 may be reluctant to blow the whistle on L1, especially if L1 has brought L2 into the matter, and so L2 may prefer look the other way. However, under the standard of Comment 8 to Rule 3.3, L2 may not ignore the situation if L1’s malfeasance is obvious.

Finally, we may ask whether a lawyer’s general obligation to report another lawyer’s misconduct would compel L2 to inform the client of L1’s improper behavior. Rule 8.3 requires such reporting, but with two significant limitations. First, Rule 8.3 applies only if the conduct “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.”¹³⁸ There may be circumstances in which L2 determines that L1’s behavior on a matter is egregious enough to require a report to disciplinary authorities, but L1’s actions may affect the existing client only and not raise a Rule 8.3 “substantial question.” The second limitation is that the duty under Rule 8.3 is to report to “the appropriate professional authority.”¹³⁹ It does not impel a lawyer to inform the affected client. In the end, Rule 8.3 describes an obligation to the legal system, while in our discussion L2 is faced with more immediate and specific ethical duties to a particular client on whose behalf L2 has been engaged. Rule 8.3 may suggest a policy of reporting misbehavior to whomever is affected, but as written, it is not specifically crafted to require communicating with a client.¹⁴⁰

2. How the Courts Have Ruled

The question of when an attorney must inform the client of co-counsel’s malfeasance has been addressed by several courts. A useful analysis has been offered by the Fifth Circuit in *Curb Records v. Adams & Reese L.L.P.*,¹⁴¹ a case in which a music producer, Curb, was sued for copyright infringement in the United States District Court for the Eastern District of Louisiana.¹⁴² Curb retained a California lawyer, who we will refer to as L1,

137. *Id.* at 3.3 cmt. 8.

138. *Id.* at 8.3(a).

139. *Id.*

140. *Id.* Reliance on Rule 8.3(a) has been questioned in Richmond, *supra* note 2, at 504–05. Richmond argues that the Rule may be applicable in a case involving misappropriation (i.e., conduct that “raises a substantial question” as to a lawyer’s “honesty, trustworthiness or fitness as a lawyer in other respects”), but he argues that the Rule should not apply in “an isolated incident of negligence.” Richmond, *supra* note 2, at 504–05. He also observes that the Rule does not require reporting to a client, but to bar authorities. *Id.*

141. No. 98-31360, 1999 WL 1240800 (5th Cir. Nov. 29, 1999).

142. *Id.* at *1.

as lead counsel to defend the case.¹⁴³ L1 was required to retain local Louisiana counsel, and Curb authorized L1 to do so and “to limit local counsel’s authority as he saw fit.”¹⁴⁴ Thus, L1 retained L2, whose role was limited to receiving pleadings and forwarding them to L1, plus filing and serving pleadings received from L1. L1 specifically instructed L2 to have no direct contact with Curb.¹⁴⁵

As the case proceeded, L2 duly forwarded discovery requests to L1, who failed to respond, and L2 became aware of such failure.¹⁴⁶ Ultimately, the District Court imposed harsh discovery sanctions against Curb by striking Curb’s defenses in the case.¹⁴⁷ As a result, Curb was forced into an unfavorable settlement with the plaintiffs.¹⁴⁸ Curb then filed a malpractice suit against L2, but the District Court dismissed the case.¹⁴⁹ Referring specifically to L1’s instructions that L2 should have no contact with Curb, the court held that L2 had “absolutely no superior duty to disregard and violate the terms” on which L2 had been retained.¹⁵⁰

In a *de novo* review, the Fifth Circuit reversed the dismissal, reinstating the claim against L2.¹⁵¹ In essence, the appellate panel rejected the District Court’s reliance on contract principles to determine L2’s duties to Curb, stating that the attorney-client relationship “superinduces a trust status of the highest order . . . strictest fidelity and honor.”¹⁵² Referring to Louisiana’s MRPC 1.4, the court found that local counsel “owes an inherent nondelegable duty to report directly to [the] client any known instances of malfeasance or misfeasance on the part of lead counsel that an objectively reasonable lawyer in the locality would conclude are seriously prejudicial to the client’s interests.”¹⁵³

To avoid impractical results from this pronouncement, the Court noted that L2’s duty must be kept in perspective: “[I]t is clear that when the client has vested lead counsel with primary responsibility for controlling and conducting the litigation, local counsel’s direct obligations to the client are substantially lessened.”¹⁵⁴ Under this lessened obligation, local counsel need not

143. *Id.*

144. *Id.* at *2.

145. *Id.*

146. *Id.* at *1.

147. *Curb Records*, 1999 WL 1240800, at *1.

148. *Id.*

149. *Id.*

150. *Id.* at *3.

151. *Id.* at *1.

152. *Id.* at *1.

153. *Curb Records*, 1999 WL 1240800, at *6.

154. *Id.*

feel impelled to closely monitor lead counsel's work¹⁵⁵ and need not notify the client if he or she "disagrees with the professional judgment exercised and/or strategies pursued by lead counsel so long as those judgments and strategies lie somewhere on the spectrum of norms."¹⁵⁶ Nevertheless, the Court reiterated its conclusion that the "Louisiana Rules of Professional Conduct do not allow local counsel to turn a blind eye toward the willful disregard of court orders by lead counsel when it should be evident to him that such conduct will seriously prejudice the client's interests."¹⁵⁷

Consistent with the analysis of *Curb Records*, but reaching the opposite result, is the New Jersey Appellate decision in *Masone v. Levine*.¹⁵⁸ In that case, a client being sued for causing environmental damage wished to retain lead counsel from out of state (L1).¹⁵⁹ L1 was admitted *pro hac vice*, but he was required to affiliate local New Jersey counsel, L2.¹⁶⁰ During the course of settlement negotiations, L1 falsely told the client that the claim against it was covered by insurance.¹⁶¹ L2 was not aware that L1 was lying.¹⁶² Eventually, the client sued both attorneys for malpractice.¹⁶³ As to L2, the client argued that L1's malfeasance should be imputed to L2 because the court rule that permitted L1's temporary admission stated that the local attorney would be "responsible for . . . the conduct of the cause and of the admitted attorney therein."¹⁶⁴ The trial court dismissed the claim, and the client appealed.¹⁶⁵

The Appellate Court affirmed the dismissal because to do otherwise would be "to interpret the rule charging local counsel with responsibility for the course of the litigation as imposing virtually absolute liability on local counsel for the misdeeds of *pro hac vice* counsel."¹⁶⁶ The court easily distinguished several other New Jersey cases in which local counsel had been

155. *Id.* The court cited favorably an Eighth Circuit opinion, interpreting Minnesota law, that local counsel "does not automatically incur a duty of care with regard to the entire litigation." *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253, 257 (8th Cir. 1995).

156. *Curb Records*, 1999 WL 1240800, at *6.

157. *Id.* A similar case involved two local attorneys representing the same client and estate. *Estate of Spencer v. Gavin*, 946 A.2d 1051, 1054–59 (N.J. Super. Ct. App. Div. 2008). L2, who was providing limited services, became aware that L1 was misappropriating funds from the client. *Id.* at 1058–60. L2 did not participate in the malfeasance, but failed to inform the client of L1's behavior. *Id.* The New Jersey Appellate Court found a cause of action against L2. *Id.* at 1069. The court based its ruling in part on Rule 1.4, but it also found support in Rule 8.3(a), the duty of a lawyer to report another lawyer's ethical violations. *Id.* The court's reference to Rule 8.3(a) has been questioned in *Richmond*, *supra* note 2, at 504–05.

158. 887 A.2d 1191 (N.J. Super. Ct. App. Div. 2005).

159. *Id.* at 1192–93.

160. *Id.*

161. *Id.* at 1193–94.

162. *Id.*

163. *Id.* at 1194.

164. *Masone*, 887 A.2d at 1196.

165. *Id.* at 1192–93.

166. *Id.* at 1196–97.

found liable because in each of them the local attorney had actively participated in the improper behavior of lead counsel.¹⁶⁷

3. Summarizing the Rules and Case Law

As we have seen, the Rules and the selected cases do offer guidance to an attorney who contemplates serving as L2 and communicating through L1. The principles may be summarized as follows:

- i. L2 may assume a limited role in a matter in which L1 serves as lead counsel. If assigned a limited role, L2 has no duty to closely monitor L1's activities.
- ii. It is legitimate for L2 to report to L1 rather than to the client, but it is best if the client explicitly consents.
- iii. L2 should be sensitive to changes in circumstances that may raise doubts as to whether the agreed flow of communications is still appropriate.
- iv. If L2 ordinarily reports to L1, then L2 has no duty to communicate with the client if L2 simply disagrees with the way L1 is handling the matter.
- v. Regardless of the existing arrangements, L2 has an ethical obligation under Rule 1.4 to inform the client if L2 becomes aware that L1's activities are harming the client.
- vi. L2 may be liable to the client if L2 becomes aware of L1's harmful behavior and takes no action to inform the client. L2 will not be liable if L2 is unaware of the harmful behavior.

Assuming an arrangement in which L2 is asked to communicate through L1, these six principles should apply comfortably to Scenario 1 (Co-Counsel) and Scenario 3 (Expert Consultant). The principles may also govern Scenario 2 (Temporary Assistant) and Scenario 4 (Informal Consultant), but only if

167. *Id.* (citing *Maldonado v. New Jersey ex rel. Admin. Office of Courts-Prob. Div.*, 225 F.R.D. 120 (D.N.J. 2004); *Ingemi v. Pelino & Lentz*, 866 F. Supp. 156 (D.N.J. 1994); *Itel Containers Int'l Corp. v. Puerto Rico Marine Mgmt., Inc.*, 108 F.R.D. 96, 99, 104-05 (D.N.J. 1985)); *see also* *Richmond*, *supra* note 2, at 495-500 for additional analysis of *Curb Records*, 1999 WL 1240800, and *Masone*, 887 A.2d 1191, along with practical advice for local counsel.

L2 knows the identity of the client. If the client is unknown to L2, it would make no sense for a court to find that L2 has a duty to communicate with the person L1 is representing. In Scenario 5 (Local Counsel), L2 can assume responsibilities similar to those in any of the other four scenarios, and the application of the six principles will depend on L2's actual functions.

V. THE SHORTCOMINGS OF THE RULES AND WHAT TO DO ABOUT THEM

The analysis in Part IV has uncovered a number of shortcomings in the Rules with respect to the affiliation of L2 in a matter and with regard to the assignment of communication responsibilities as between L1 and L2. The shortcomings may be consolidated into two points of concern, for which solutions are offered by means of new Comments to Rules 1.2 and 1.4.

Shortcoming #1. *There is no requirement for L1 or L2 to inform the client that L2 is being engaged in a matter being handled by L1.* This problem was identified in Part IV(A) of this article.

Proposed Solution. The following Comment should be added to Rule 1.2, following current Comment 4:

A lawyer should obtain the client's informed consent, preferably in writing, before affiliating in the client matter a second attorney from a different law firm. Covered affiliations include the engagement of local counsel in a different jurisdiction, co-counsel to share responsibilities in a matter, and an expert consultant to strategize and advise on a matter. Such consent need not be obtained if: (1) the first lawyer seeks only a brief, informal consultation with the second lawyer; or (2) the second lawyer provides limited, temporary assistance under close supervision by the first lawyer. Nevertheless, whenever the second lawyer's fees are charged to the client, or when a consultation involves the disclosure of privileged information, the client's informed consent should be obtained with regard to the affiliation. Where consent should be obtained, the second lawyer should take reasonable steps to determine that the consent has been granted. This Comment does not address a lawyer's consultation with a second lawyer for ethics advice.

Analysis. This new Comment would address Scenario 1 (Co-Counsel), Scenario 2 (Temporary Assistant), Scenario 3 (Expert Consultant), Scenario 4 (Informal Consultant), and Scenario 5 (Local Counsel). The proposals are consistent with ABA Formal Opinions 88-356 (temporary law-

yers), 97-407 (expert consultant), and 98-411 (lawyer-to-lawyer consultation).

Shortcoming #2. *It is unclear whether the permissible limitation on the scope of representation under Rule 1.2(c) includes limitations on the means and extent of communication with a client. This gap in the Rules affects both single-lawyer and multiple-lawyer situations.* These concerns were raised in Parts III(B)(2), IV(B), and IV(C) of this article.

Proposed Solution. The following Comment should be added to Rule 1.2, following current Comment 8:

The means and frequency of communication from a lawyer to a client may be limited, provided that the limitation is reasonable under the circumstances and the client provides informed consent to the arrangement, preferably in writing. See Comment ___ to Rule 1.4. [Reference is to the proposal immediately following.]

In addition, the following Comment should be added to Rule 1.4, following current Comment 4:

As provided in Comment ___ to Rule 1.2, the means and frequency of communication from a lawyer to a client may be limited by agreement. A permitted limitation would include the assignment of communication responsibilities to one lawyer in a situation in which representation on a client matter is being carried out by lawyers in more than one law firm. The lawyer who, by agreement, does not have the communication responsibility, nevertheless retains a duty to report directly to the client if the lawyer reasonably believes that the reporting lawyer is violating these Rules or is otherwise causing actionable harm to the client.

Analysis. These new Comments can be applied to all of our scenarios in conjunction with the Comments proposed above for Shortcoming #1. The proposals are consistent with the case law described in Part IV(C)(2) of this article.

As an alternative to these new Comments, the ABA might opt for a new rule more broadly governing multiple-lawyer situations. As noted in Part III(A) of this article, references to affiliated attorneys may currently be found in Comments to Rules 1.1 and 1.6, and in Rules 1.5, 5.1, and 5.5 and their

respective Comments.¹⁶⁸ The ABA might consider adding a new Rule 1.19 at the end of the section on the client-lawyer relationship. Such a rule could cover client consent to the affiliation of L2 and the assignment of communication responsibilities, consistent with the Comments proposed above. The rule could also address supervisory responsibilities between the two lawyers and how each lawyer must address conflicts of interest, confidentiality, and other duties under the Rules.

If the task of drafting new comments or a new rule goes beyond what the ABA is willing to do, then the Committee on Ethics and Professional Responsibility should at least issue a Formal Opinion to address the concerns raised in this article. Such an Opinion could supplement and expand upon Formal Opinions 88-356 (temporary lawyers), 97-407 (expert consultant), and 98-411 (lawyer-to-lawyer consultation).

VI. CONCLUSION

The Rules of Professional Conduct cannot, and need not, cover every obligation of an attorney to his or her client. Nevertheless, as this article has demonstrated, the Rules should address whether L1 must inform the client when affiliating a second attorney to act as co-counsel, temporary assistant, expert consultant, informal consultant, or local counsel. Similarly, the Rules should be expanded to allow limitations on the scope of lawyer-client communications and to permit assigning communication responsibilities in multiple-lawyer situations. These additions to the MRPC will offer needed guidance and reflect the realities of contemporary law practice.

168. MRPC R. 1.1 (1983); *Id.* at 1.5; *Id.* at 1.6; *Id.* at 5.1; *Id.* at 5.5.