COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

AGENDA

June 5, 2015 9:00 a.m.
Colorado Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in numbers: 720-625-5050 or 888-604-0017 - Access Code: 51661147#
WiFi Access Code: @cce$$0123

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1. Introduction of new staff liaisons:
   a. Staff Attorney Melissa Meirink
   b. Supreme Court Library Rules Research Attorney Jenny Moore
2. Approval of minutes of March 14, 2014 meeting [to be distributed separately]
3. Report on status of proposed changes based on ABA Amendments to Model Rules – May 22, 2015 Letter to Justices Coats and Marquez, with attachments [Marcy Glenn, pages 1-106]
4. Report from Subcommittee on Recommended Pro Bono Policies for In-House and Governmental Attorneys [Dave Stark, pages 107-109]
5. New business:
   a. Potential changes to Rule 1.5(f) and its Comment [12] in light of *In re Gilbert*, 2015 CO 22 [Marcy Glenn, pages 110-151]
   b. Potential changes to Rule 1.5 proposed by Attorney Regulation Committee [Marcy Glenn, pages 152-153]
6. Administrative matters: Select next meeting date
7. Adjournment (before noon)

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May 22, 2015

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

The Honorable Monica Márquez
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Amendments to the Colorado Rules of Professional Conduct, Based on the ABA's "20/20" Amendments to the Model Rules of Professional Conduct

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee), which is recommending proposed amendments to multiple rules and comments in the Colorado Rules of Professional Conduct (CRPC).

These proposed amendments arose out of amendments that the ABA House of Delegates adopted in 2012 and 2013 to the ABA Model Rules of Professional Conduct. The attached report provides a detailed summary of the recommended rule changes and describes the process that led the Standing Committee to make these recommendations.

I am enclosing the Committee's report regarding the proposed rules. That report has three attachments:

Appendix A shows, in redline, the amendments made by the ABA.

Appendix B displays the existing CRPC that the Committee recommends amending, with the recommended changes shown in redline.

Appendix C is a clean version of those Colorado rules and comments that the Committee recommends amending.

The Standing Committee respectfully asks the Court to favorably consider the proposed changes.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)
Melissa Meirink, Esq. (via email, w/enclosures)
Jenny Moore, Esq. (via email, w/enclosures)

COLORADO SUPREME COURT STANDING COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

REPORT AND RECOMMENDATIONS REGARDING THE 2012 AND 2013 AMENDMENTS TO THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

May 22, 2015

I. Introduction

In 2012 and 2013, the ABA House of Delegates amended the ABA Model Rules of Professional Conduct (Amended ABA Rules). Many of the amendments resulted from recognition that the practice of law has changed because of advances in communications technologies since the last comprehensive revision of the ABA Model Rules in 2002.

The Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct (Committee) appointed a subcommittee to study and make recommendations regarding the adoption of the Amended ABA Rules in Colorado.[1] Following receipt of the Subcommittee's Report, the Committee considered the Subcommittee's recommendations. This Report sets forth the recommendations of the Committee.[2]

The Subcommittee reviewed each of the Amended ABA Rules and made an initial decision whether the changes were such that no further study was necessary (generally because of clarifying wording changes that did not affect any change in substance) or whether further study was required. For rules requiring further study, the Subcommittee established working groups comprised of between two and four members of the Subcommittee, to study designated

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[1] The Subcommittee was comprised of Judge John Webb; Judge Ruthanne Polidori; Dave Stark; Dave Little; Alec Rothrock; Dick Reeve; Marcy Glenn; Tony van Westrum; Tom Downey; Jamie Sudler; Cecil Morris; and Judge Michael Berger, Chair.

[2] Appendix A reflects the amendments made by the ABA. Appendix B displays the existing Colorado Rules of Professional Conduct that the Committee recommends amending, marked to show the recommended changes. Appendix C is a clean version of those Colorado rules and comments that the Committee recommends amending.

rules and report to the Subcommittee. Each working group delivered a written report to the Subcommittee, which discussed the working group's recommendations. The Subcommittee prepared a report that summarized much of what was contained in the working group reports. The Subcommittee was unanimous with respect to its recommendations on some of the Amended ABA Rules, and was divided as to others. When the Subcommittee was other than unanimous, its report noted that fact and the substance of and basis for the minority view. In some instances, the Subcommittee presented drafting alternatives to the full Committee.

In addition to considering the ABA changes, the Subcommittee sought and obtained authority from the Committee to consider additional changes to Colorado Rule 4.4, and it proposed potential changes to that rule beyond those contained in Amended ABA Rule 4.4. However, the full Committee voted against recommending those additional changes to the Court.

The Committee is mindful that uniformity in the Rules of Professional Conduct among the states is beneficial, but it viewed the presumption of uniformity as rebuttable if there are good reasons to deviate from the Amended ABA Rules.

II. Rules and Comments Amended by the ABA, With Summary of the Committee's Recommendations

The ABA amended the following rules and comments in 2012 and 2013. The Committee recommends the following action on each of the ABA's amendments:

- **Rule 1.0 (Definitions).** Making clarifying changes to the definition of "writing" in Colorado Rule 1.0(n). The Committee recommends adoption of the clarifying changes in Amended ABA Rule 1.0(n), and further recommends adoption of a new Colorado-specific Rule 1.0(b-1), to define the word "document" as including electronic communications.

- **Rule 1.0, Comment [9] (Definitions).** Making clarifying changes relating to the definition of "screened." The Committee recommends adoption of the clarifying changes in Comment [9].

- **Rule 1.1, Comments [6] and [7] (Competence).** Comments [6] and [7] are new and address the hiring on behalf of a client of lawyers outside of the lawyer's firm and the scope of representation by the lawyer from a different firm. The Committee recommends adoption of new Comments [6] and [7].

- **Rule 1.1, Comment [8] (Competence).** Amendments to existing Comment [6], to be renumbered as Comment [8], address maintaining competence and the risks and benefits associated with relevant technologies. The Committee recommends adoption of newly numbered Comment [8], but with Colorado-specific revisions to remove the "risks and benefits" language, with language regarding a lawyer's duty to maintain competence concerning new technologies, and a cross-reference to Rule 1.6, Comments [18] and [19].

- **Rule 1.2, Comments [5A] and [5B] (Scope of Representation and Allocation of Authority Between Client and Lawyer).** There are no ABA amendments to Rule 1.2 or its comments, but the Committee recommends adoption of Colorado-specific Comments [5A] and [5B], cross-referencing new (and recommended) Comments [6] and [7] to Rule 1.1.

- **Rule 1.4, Comment [4] (Communication).** Replacing the phrase "client telephone calls" with the phrase "client communications." The Committee recommends adoption of the clarifying change to Comment [4]. The Committee further recommends adoption of new, Colorado-specific Comments [6A] and [6B], cross-referencing new (and recommended) Comments [6] and [7] to Rule 1.1.

- **Rule 1.6(b)(7) and Comments [13] and [14](Confidentiality of Information).** Permitting the disclosure of protected information to detect and resolve conflicts arising from changes in the lawyer's employment or in the composition of a law firm. The Committee recommends adoption of Amended ABA Rule 1.6(b)(7), with wording changes that would reformulate when an attorney would not be permitted to provide conflict-related information; the adoption of ABA Comments [13] and [14], which explain new (and recommended) Rule 1.6(b)(7); the repeal of existing Colorado Comment [5A], which addresses the same subject matter and would be unnecessary if the Court adopts new (and recommended) Rule 1.6(b)(7) and new (and recommended) Comments [13] and [14]; the renumbering of existing Rule 1.6(b)(7) to Rule 1.6(b)(8), to maintain uniformity with the numbering of the Amended ABA Rules; and the renumbering of existing Comments [13] through [18] (renumbered as Comments [15] through [20]) to maintain uniformity with the renumbering of the comments to the Amended ABA Rules.

- **Rule 1.6(c) and Comments [18] and [19] (Confidentiality of Information).** New subsection to address a lawyer's obligation to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information protected by Rule 1.6, and amendments to existing ABA Comments [16] and [17] (renumbered as Comments [18] and 19]) to provide guidance regarding that obligation. The Committee recommends adoption of Amended ABA Rule 1.6(c) and renumbered ABA Comments [18] and [19], with Colorado-specific changes to replace the phrase "to act competently" in Comment [18] with the phrase "to take reasonable measures."

- **Rule 1.17, Comment [7] (Sale of Law Practice).** Inserting cross-reference to new Rule 1.6(b)(7). The Committee recommends adoption of the clarifying change to Comment [7]

- **Rule 1.18(a) and (b) and Comments [1], [4], and [5] (Duties to Prospective Client).** Substituting the word "consults" (and its variants) for the words "discuss," "interview," and "conversations," and substituting the phrase "learned information from" for "had discussions with." The Committee recommends adoption of Amended ABA Rule 1.18(a) and (b) and the clarifying changes to Comments [1], [4], and [5].

- **Rule 1.18, Comment [2] (Duties to Prospective Client).** Providing additional guidance on when a person becomes a prospective client and when a consultation is deemed to have occurred. Also, introducing a new concept to the Rules (but not to the law of lawyering), expressly providing that a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client." The Committee recommends adoption of Amended Comment [2].

- **Rule 4.4(b) and Comment [3] (Respect for Rights of Third Person).** Adding "or electronically stored information" after the word "document" in ABA Rule 4.4(b), and adding "or delete electronically stored information" after "return such a document" in Comment [3]. The Committee does not recommend these amendments, which are intended to clarify that "document" includes electronic communications. Instead, the Committee recommends defining "document" to include electronically stored information in new recommended Colorado Rule 1.0(b-1).

- **Rule 4.4, Comment [2] (Respect for Rights of Third Person).** Addressing metadata for the first time in the ABA Rules, and adding references to clarify that "document" includes electronically stored information. The Committee recommends adoption of the ABA's amended language regarding metadata, but does not recommend adoption of the ABA's insertion

of the phrase "or electronically stored information" after "document" in a number of places in Comment [2].

- **Rule 5.3, Comments [1] and [2] (Responsibilities Regarding Non-Lawyer Assistants).** Reversing order of Comments [1] and [2], and making changes to existing Comment [2] (renumbered as Comment [1]) to clarify that the lawyer's obligations to ensure that the firm has in effect measures to ensure non-lawyers' compliance with lawyers' ethical obligations extend to non-lawyer assistants outside the firm. The Committee recommends reversal of the order of Comments [1] and [2], and the adoption of the ABA amendments to renumbered Comment [1].

- **Rule 5.3, Comment [3] (Responsibilities Regarding Non-Lawyer Assistants).** Addressing the duties of lawyers with managerial authority and addressing the supervision of non-lawyer assistants outside the firm. The Committee recommends adoption of new Comment [3].

- **Rule 5.3, Comment [4] (Responsibilities Regarding Non-Lawyer Assistants).** Introducing the concept of "monitoring" of non-lawyer assistants and independent contractors. The Committee recommends rejection of new ABA Comment [4], but recommends adoption of a Colorado-specific comment that focuses upon the allocation of responsibility between the client and the lawyer for supervising the provider that the client requests.

- **Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).** Addressing limited practice by lawyers licensed in another United States jurisdiction. The Committee does not recommend any changes to Rule 5.5.

- **Rule 7.1, Comment [8] (Communications Concerning a Lawyer's Services).** Replacing the phrase "prospective client" with the word "public." The Committee recommends

adoption of ABA Comment [3], which expands upon when communications are misleading, including the comment's clarifying amendment, renumbered as new Colorado Comment [8].

- **Rule 7.2, Comments [1], [2], [3], [6], and [7] (Advertising).** Making clarifying, non-substantive changes. The Committee recommends adoption of the clarifying amendments to Comments [1], [2], [3], [6], and [7].

- **Rule 7.2, Comment [5] (Advertising).** Amending comment [5] to introduce the concept of "lead generation." The Committee recommends adoption of the ABA amendments to Colorado Comment [5].

- **Rule 7.3 (Direct Contact with Prospective Clients).** Changing title of rule to "Solicitation of Client" and making minor clarifying changes to ABA Rule 7.3(a), 7.3(b)(1), and 7.3(c). The Committee recommends adopting the ABA title change and the amendments to ABA Rule 7.3(b)(1) and 7.3(c), which appear in Colorado Rule 7.3(b)(1) and 7.3(d). The Committee does not recommend the ABA amendment to Rule 7.3(a).

- **Rule 7.3, Comment [1] (Direct Contact with Prospective Clients).** Adding new ABA Comment [1], which defines a solicitation subject to the rule. The Committee recommends adoption of the new ABA comment as new Colorado Comment [1].

- **Rule 7.3, Comments [2] through [9] (Direct Contact with Prospective Clients).** Making clarifying changes to ABA Comments [1] through [6] (renumbered as Comments [2] through [7]) and renumbering ABA Comments [7] and [8] as Comments [8] and [9]. The Committee recommends all of the ABA's clarifying amendments and, if the Court adopts new (and recommended) Comment [1], renumbering existing Comments [1] and [8] as Comments [2] through [9].

- **Rule 8.5, Comment [5] (Disciplinary Authority; Choice of Law).** Providing that in determination of conflicts of interest, choice of law agreements between lawyer and client may be considered. The Committee recommends rejection of ABA Comment [5].

III. Non-ABA Housekeeping Matters

The Committee recommends the following changes to correct typographical errors in the current Colorado Rules of Professional Conduct:

a. Rule 1.5, Comment [7] incorrectly refers to subparagraph (e). The correct reference is (d).

b. Rule 1.5, Comment [8] incorrectly refers to subparagraph (e). The correct reference is (d).

c. Rule 1.13, Comment [3] inaccurately refers to paragraph (19). The correct reference is (b).

d. Rule 4.3, Comment [1] incorrectly refers to Rule 1.13(d). The correct reference is Rule 1.13(f).

e. In multiple rules, the Committee recommends adding "the serial comma," *i.e.* a comma before the word "and" or "or" in lists.

f. In several rules, the Committee recommends hyphenating the word "e-mail" and the phrase "attorney-client privilege," for internal consistency.

IV. Committee's Analysis of Amended ABA Rules and Comments

A. Rule 1.0 (Terminology)

The ABA amended Rule 1.0(n), the definition of "writing," to include "electronic communications" and to delete "e-mail" because email is just one species of electronic communications. The ABA also amended Comment [9], which explains that "screened" includes screening of electronic information. Both changes are beneficial and the Committee

recommends adoption of these changes. The Committee further recommends adoption of a new Colorado-specific Rule 1.0(b-1), to define the word "Document" as "includ[ing] e-mail or other electronic modes of communication subject to being read or put into readable form."

B. Rule 1.1 (Competence)

The ABA added two new comments to Rule 1.1 – Comments [6] and [7] – and amended existing Comment [6] (now Comment [8]). New Comment [6] provides that a lawyer ordinarily should obtain the client's informed consent before retaining another lawyer outside of the lawyer's firm to assist in a representation. The comment also provides useful guidance in determining when the hiring of another lawyer outside of the lawyer's firm is reasonable and appropriate. The Committee believes the new comment is useful, accurately states the appropriate ethical rules in this respect, and recommends its adoption.

New Comment [7] provides the common sense advice that when lawyers from more than one firm are providing services to a client on a matter, the lawyers should consult with each other regarding the scope of their respective representations and the allocation of responsibilities between them. While these concepts seem obvious, there is no harm in including a comment to that effect and the Committee recommends its adoption.

Existing Colorado Comment [6] (renumbered by the ABA as ABA Amended Comment [8]) addresses a lawyer's responsibility to keep abreast of changes in the law and its practice. The ABA added language to address changing technologies, which can provide challenges to lawyers in a number of respects, particularly involving confidentiality. However, the Committee was troubled by the ABA's use of the phrase "benefits and risks," which suggests that lawyers have a duty to weigh such benefits and risks every time they send an email or otherwise use electronic communications technologies, which the Committee viewed as an inappropriate

burden on lawyers. As a result, the Committee recommends that Comment [8] be amended to read as follows:

> *Maintaining Competence.*
>
> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

C. Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Based on the overlap between Rules 1.1 and 1.2, the Committee recommends the addition of Colorado-specific Comments [5A] and [5B], which provide helpful cross-references to proposed Comments [6] and [7] to Rule 1.1.

D. Rule 1.4 (Communications)

The Committee recommends adoption of the minor wording change by the ABA in the last sentence of Comment [4]. This change recognizes that lawyers communicate with clients other than by telephone, and that lawyers should promptly acknowledge or respond to all client communications (regardless of the mode of communication). Based on the overlap between Rules 1.1 and 1.4, the Committee also recommends the addition of Colorado-specific Comments [6A] and [6B], which provide cross-references to proposed Comments [6] and [7] to Rule 1.1.

E. Rule 1.6 (Confidentiality of Information)

Amended ABA Rule 1.6(b)(7) creates an express exception to the duty of confidentiality for information necessary "to detect and resolve conflicts of interest arising from the lawyer's change of employment. . . ." Amended ABA Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent inadvertent disclosures.

1. ABA Rule 1.6(b)(7)

The new exception provides:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

There are two new ABA comments, which read:

> [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.
>
> [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the

> disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

The current Colorado Rules presaged these amendments in Comment [5A], which reads:

> A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

The Committee identified the following differences between the Colorado Rule 1.6 and its comments and ABA Amended Rule 1.6 and its comments:

- Basis – The ABA has recognized an additional exception, while Colorado Rule 1.6 Comment [5A] couches it as one type of impliedly authorized disclosure under Colorado Rule 1.6(a).
- Structure – The ABA has put the exception in the rule itself, while Colorado Rule 1.6 Comment [5A] recognizes the disclosure as permitted only in a comment, although the rule itself permits impliedly authorized disclosures (one type of which this disclosure purports to be).
- Application – The ABA permits disclosure both when a lawyer changes firms and when there are changes in the composition or ownership of a firm, while Colorado Rule 1.6 Comment [5A] applies only when the lawyer changes firms.

- Timing – The ABA permits disclosure "only once substantive discussions . . . have occurred." Colorado Rule Comment [5A] allows disclosure earlier – when the lawyer is "contemplating a move."

- Scope of disclosure – Amended ABA Rule 1.6(b)(7) ordinarily limits disclosure to "the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated." Colorado Rule 1.6 Comment [5A] permits a more limited disclosure, of "the identity of the client and the basic nature of the representation," but not whether the matter has terminated, though that is arguably part of "the basic nature of the representation." Both the Amended ABA Rule and the Colorado comment limit the purpose of disclosure to information needed to check for conflicts, though the Colorado comment uses the word "essential" rather than "reasonably necessary."

- Agreement to confidentiality – Colorado Rule Comment [5A] requires "all lawyers who receive the information" to agree in advance to its confidentiality. No such requirement appears in Amended ABA Rule 1.6 (b)(7).

- Independently obtained information – The ABA expressly excludes from the scope of this rule information that the lawyer obtains independently. Colorado Rule 1.6 Comment [5A] is silent on this point.

- Privileged information – The ABA prohibits disclosure of information that "would compromise the attorney-client privilege." Colorado Rule 1.6 Comment [5A] permits the disclosure of only "non-privileged information."

With this background, the Committee recommends adoption of the Amended ABA Rule 1.6(b)(7), for these reasons:

a. To get this provision into the rule itself, rather than just in a comment.

b. To make clear that it is an express exception rather than merely an impliedly authorized disclosure. That rationale has never really worked because Rule 1.6(a) permits disclosures that are "impliedly authorized to carry out the representation," not to allow a lawyer to change firms.

c. To broaden the application from moving lawyers to changes in ownership or composition of a firm.

d. To narrow the timing of permitted disclosures – only after "substantive discussions" have occurred.

e. To broaden the scope of allowed disclosures, to include whether the matter has terminated.

f. To change "essential" disclosures to "reasonably necessary" disclosures.

g. To remove the language in Colorado Rule 1.6, Comment [5A] about lawyers agreeing to confidentiality.

h. To make clear that the exception does not apply to independently obtained information.

i. For the sake of uniformity.

j. And, finally, because the Subcommittee concluded that the Amended ABA Rule 1.6(b)(7) and its comments are better drafted than is Colorado Rule 1.6 Comment [5A].

However, the Committee recommends changing the following underscored language in the ABA rule and comment in limited respects:

> Rule 1.6(b)(7): "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from

> changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."
>
> Comment [13]: ". . . Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client . . ."

The Committee has three concerns with the underscored language. *First*, "compromise the attorney-client privilege" is a vague phrase. *Second*, the Committee does not believe that any prejudice should suffice—only material prejudice should prohibit the exchange of information. The Committee believes this would be consistent with the reference in existing Colorado Comment [5A] to a "disclosure that may materially prejudice the client." *Third*, the use of "would" and "would not" with respect to prejudice to the client seems too narrow; the Committee believes the rule should prohibit a disclosure that is "reasonably likely to materially prejudice the client," not merely one that certainly "would" materially prejudice the client. Accordingly, the Committee recommends that new Colorado Rule 1.6(b)(7) read:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to materially prejudice the client.

The Committee also recommends the revision of the quoted sentence from Colorado Comment [13] to read:

> Moreover, the disclosure of any information is prohibited if the information is protected by the attorney-client privilege or its disclosure is reasonably likely to materially prejudice the client . . .

If the Court adopts new Colorado Rule 1.6(b)(7), then current Colorado Rule 1.6(b)(7) will be renumbered as new Colorado Rule 1.6(b)(8). Therefore, it will be necessary to change

the references to "paragraph (b)(7)" to "paragraph (b)(8)" in renumbered Comments [15] (where it appears twice) and [17].

2. **Model Rule 1.6(c)**

Amended ABA Rule 1.6(c) reads:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The ABA renumbered former Comment [16] as Amended ABA Comment [18] and revised it to read as follows:

> Taking Reasonable Means to Preserve Confidentiality
>
> [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

In addition, the ABA renumbered former ABA Comment [17] as Amended ABA Comment [19] and revised it to add a new final sentence:

> [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

The Committee recommends adoption of new subsection (c). It addresses an important subject and furthers the presumption in favor of uniformity.

The Committee recommends one change to newly numbered Amended ABA Comment [18]. The first sentence of that comment requires a lawyer to "act competently" to safeguard client information. However, Amended ABA Rule 1.6(c) requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to representation of a client"—not to "act competently" in that regard. Accordingly, the Subcommittee recommends changing "act competently" to "take reasonable measures" in Comment [18]. This is a proposal to change language that was in existing Colorado Comment [16] before the ABA's recent amendments, but the Committee believes this change is necessary to render that preexisting comment language consistent with new language in the amended rule.

The Committee also recommends adoption of the additional language in Amended ABA Comment [19]. Although it duplicates in some respects Comment [18], the Committee views the comment as correct and recommends its adoption for the sake of uniformity. (This eliminates the search for meaning that might occur if Colorado did not adopt Amended ABA Comment [19].)

F. Rule 1.17 (Sale of Law Practice)

The Committee recommends adoption of the ABA's changes to Comment [7]. These changes are clarifying in nature and add a cross-reference to Amended ABA Rule 1.6(b)(7), which addresses information necessary to detect and resolve conflicts arising from a lawyer's change in law firm or ownership of a law firm.

G. Rule 1.18 (Duties to Prospective Client)

The theme of the changes in Amended ABA Rule 1.18 is to "help lawyers understand how to avoid the inadvertent creation of such relationships [with prospective clients] in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer." ABA 20/20 Commission Report, Resolution 105B, p. 1. This is a salutary goal and Amended ABA Rule 1.18 accomplishes this objective in three ways.

First, in reference to preliminary communications between a lawyer and a person who may or may not qualify as a "prospective client," the Rule and its Comments replace the word "discuss" (and its variants) with the word "consult" (and its variants). The term "consults" is a more precise word to describe the purpose of a prospective client's communication to a lawyer. The ABA 20/20 Commission stated that "[t]his change would make clear what [ABA Comm. on Ethics & Prof'l Resp., Formal Op. 10-457 (2010)] concluded: a prospective client-lawyer

relationship can arise even when an oral discussion between a lawyer and client has not taken place. The word 'consults' makes this point more clearly than the word 'discusses' and anticipates future methods of interaction between lawyers and the public. . . . In sum, the word 'consults,' when paired with the proposed new Comment language, will give lawyers more guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship." ABA Report, Resolution 105B, pp. 2, 3.

Second, new language in Comment [2] distinguishes between invited and uninvited communications to help determine whether a person who communicates with a lawyer (or law firm) is or is not a prospective client. This change was motivated by a desire to adapt the Amended ABA Rules to "new forms of marketing" such as internet advertising and electronic communications. Report, Resolution 105B, p. 1.

Third, a new sentence in Comment [2] states that a "person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" A leading treatise states that "[c]ourts and other authorities have had little difficulty seeing through this ruse, typically finding that inasmuch as the consultation was not actually for the purpose of obtaining legal services, any information disclosed does not fall under the protection of the confidentiality, former client, or prospective client rules." 1 G. Hazard & W. Hodes, *The Law of Lawyering*, § 21A.4, p. 21A-9 (3d ed. 2011) (emphasis in original). The treatise states that former ABA Comment [2] (existing Colorado Comment [2]) "suggested as much," but that this new sentence makes the point explicitly. *Id.*[3] Although this sentence does not seem closely

[3] Similarly, referring to this sentence, the ABA 20/20 Commission explained, "Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior. . . . In fact, some states have incorporated this concept into their own versions of Model Rule 1.18." Report, Resolution 105B, p. 3.

related to the problems of the "increasingly technology-driven world," it is welcome language nonetheless.

The Committee concluded that Amended ABA Rule 1.18 and its Comments are beneficial and noncontroversial. They are consistent with established principles of legal ethics in Colorado, and the interest in uniformity among jurisdictions provides a compelling reason to adopt them as written. The Committee recommends adoption of these ABA changes.

H. Rule 4.4 (Respect for Rights of Third Persons)

Amended ABA Rule 4.4(b) adds the phrase "or electronically stored information" after the word "document" in two places. The Committee does not recommend these changes. Instead, the Committee recommends adding a definition of "document" in new Colorado Rule 1.0(b-1).

ABA Rule 4.4 differs substantially from existing Colorado Rule 4.4. The ABA rule, both before and after the 2013 amendments, does not contain any counterpart to Colorado Rule 4.4(c). In very limited circumstances, Colorado Rule 4.4(c), in addition to imposing a duty to notify the sender of an inadvertently sent communication in accordance with Rule 4.4(b), prohibits the receiving lawyer from examining the document and requires the receiving lawyer to abide by the sender's instructions as to its disposition.

In addition to considering the minor changes that the ABA made in Amended ABA Rule 4.4, discussed above, the Committee considered various proposals regarding the duties of lawyers who receive inadvertently sent information. One proposal was to eliminate Colorado Rule 4.4(c) entirely and thus to fully conform Colorado Rule 4.4 to ABA Rule 4.4. Another proposal was to impose greater non-use and non-disclosure obligations upon the recipient of the

information. All of these proposals failed in the Committee and, by divided vote, the Committee voted to recommend the retention of the substance of existing Colorado Rule 4.4.

I. Rule 4.4, Comments [2] and [3] (Respect for Rights of Third Persons)

The ABA made a few, relatively minor changes to Comments [2] and [3] to ABA Rule 4.4. To reflect the reality that much of today's information is preserved electronically and not in a physical "document," the ABA clarified in those comments that a document includes electronically stored information. For the same reason that the Committee does not recommend amending Rule 4.4(b) itself to include "or electronically stored information," the Committee does not recommend adding that phrase to Comments [2] and [3].

The ABA also addressed for the first time metadata contained in electronic documents. Amended ABA Comment [2] provides that the duty to notify opposing counsel of inadvertently produced information under ABA Rule 4.4 (b) arises only when the metadata contains what reasonably appears to be confidential information. The Committee believes that this approach makes sense because all electronic documents contain metadata and most metadata is insignificant. However, when a lawyer receives an electronic document containing metadata that includes confidential information that the lawyer knows was inadvertently sent, the lawyer must comply with the duty to notify the sending party under Rule 4.4(b).

The Committee recommends adoption of these ABA changes, as described above.

J. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

The ABA renumbered and rearranged Comments [1] and [2] to Rule 5.3, and added new Comments [3] and [4]. The renumbering and the modifications to Amended ABA Comment [1] (formerly Comment [2]) are not remarkable and should assist lawyers in the practice of retaining

non-lawyers outside the firm to provide legal services. The Committee recommends adoption of the ABA changes to existing Comments [1] and [2].

Amended ABA Comment [3] appropriately reminds lawyers of the responsibilities they assume when securing services from non-lawyers outside of their own firms. In the view of the Committee, it provides needed guidance and the Committee recommends its adoption.

Amended ABA Comment [4] contains a new concept not previously defined or even mentioned in the ABA Rules: a lawyer's monitoring of non-lawyers outside the firm.

The Committee does not recommend the adoption of Amended ABA Comment [4]. It is not helpful (and may be harmful) to impose an obligation of "monitoring" without defining the concept or addressing its contours under varying facts. Instead, the Committee recommends adoption of a different, Colorado-unique Comment [4A], which would read as follows:

> [4A] Where the client directs the selection of a particular non-lawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

K. Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)

Existing Colorado Rule 5.5 differs substantially from both the prior and new versions of ABA Rule 5.5. The Colorado Rule recognizes that much of the substance of ABA Rule 5.5 is addressed in Rules 220 through 223 of the Colorado Rules of Civil Procedure. Those rules are not within the purview of the Committee. Therefore, the Committee does not recommend the adoption of any of the changes to ABA Rule 5.5.

L. Rule 7.1 (Communications Concerning a Lawyer's Services)

The text of Colorado Rule 7.1 differs significantly from ABA Rule 7.1 because Colorado Rule 7.1 provides substantially more substance and guidance than the ABA rule. The Committee recommends that the text and comments to Colorado Rule 7.1 be retained. The existing comments to Colorado Rule 7.1 generally track the comments to ABA Rule 7.1. The ABA made a clarifying change to Comment [3] to ABA Rule 7.1, replacing the words "a prospective client," with the words "the public." Existing Colorado Rule 7.1 does not include ABA Comment [3], but the ABA comment provides useful information and is consistent with Colorado Rule 7.1, and the Committee therefore recommends adoption of Amended ABA Comment [3] as Colorado Comment [8].

M. Rule 7.2 (Advertising)

The ABA made no changes to the text of ABA Rule 7.2. However, it made several changes to the Rule's comments. Most of these changes are clarifying in nature, brought about by the increasing use of the Internet for lawyer advertising purposes. These changes are beneficial; they are faithful to Colorado law, the Committee sees no downside to them, and accordingly it recommends their adoption.

The ABA made one substantive change to Comment [5]. The ABA addressed, for the first time in the Rules, the concept of "lead-generation" and the new comment provides that lead-generation is permitted provided that (a) the lead generator does not recommend the lawyer, (b) any payment to the lead generator is consistent with Rules 1.5(e) (division of fees), and 5.4 (professional independence), and (c) the lead generator's communications are consistent with Rule 7.1. The ABA Commission's Report provides an excellent discussion of the reasons for these changes, as well as alternatives that the ABA considered, but rejected. Although some people will be put off by the term "lead generation," it is fairly descriptive in nature and

accurately identifies or explains what, in fact, is going on in the real world. For those who abhor advertising by lawyers, this is one more step down the slope. For those who either support or are resigned to increased levels of lawyer advertising (which in large part is constitutionally protected), it is salutary for the Colorado Rules to provide guidance as to when the use of lead generation is consistent with a lawyer's ethical obligations. The bottom line is that this issue needs to be addressed, and the Committee is not confident that it can do a better job of addressing it than has the ABA.

There is also a uniformity issue here. Many law firms transcend state boundaries. To the extent that the rules regarding advertising and solicitation can be consistent among the states, that is a good thing. Because the Committee believes the ABA appropriately dealt with the issue of lead-generation, the Committee recommends adoption of Amended ABA Rule 7.2.

N. Rule 7.3 (Direct Contact With Prospective Clients)

Colorado Rule 7.3 differs substantially from the ABA Rule. Unlike the ABA Rule, the Colorado Rule prohibits certain solicitations arising from personal injury or death. The Colorado Rule also contains disclaimer requirements and retention requirements not contained in the ABA Rule. As with Colorado Rule 7.1, the Committee recommends that existing Colorado Rule 7.3 generally be retained.

There are, however, several changes in Amended ABA Rule 7.3 that the Committee believes should be adopted in Colorado. The ABA changed the title of Rule 7.3 to "Solicitation of Clients" and, for the first time, provided a definition of "solicitation" in Amended ABA Comment [1]. These changes are beneficial and the Committee recommends their adoption. The adoption of ABA Comment [1] would require a renumbering of existing Colorado Comments [1] through [8] to Comments [2] through [9]. The ABA also made clarifying changes to the text of

the rule, distinguishing the technical concept of a "prospective client" under Rule 1.18 from the broader class of persons who are recipients of communications governed by Rule 7.3. The Committee recommends these changes as well.

The only controversy with respect to the changes to the Comment to Rule 7.3 is in Amended ABA Comment [3] (existing Colorado Comment [2]). That comment makes clear that communications, however made, that do not involve real-time contact and do not violate other laws regarding solicitation, do not constitute prohibited solicitations. Some, including the ABA Business Law Section in its comments on the proposed Amended ABA Rules, have posited that computer generated responses can now be customized to such an extent that they may be the equivalent of face-to-face or live telephone communications and should be treated accordingly. Nevertheless, the House of Delegates approved the changes recommended by the Ethics 20/20 Commission. The Committee recommends adoption of these ABA changes; if the Committee and the Court become aware in the future of abuses along the lines suggested by the ABA Business Law Section, they can react to those abuses, but at the moment these possible abuses are purely hypothetical in nature.

O. Rule 8.5 (Disciplinary Authority; Choice of Law)

The ABA amended Comment [5] to add the following underscored text:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may

be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

The Committee considered several courses of action with respect to this ABA change. Some members favored expanding the new sentence in Amended ABA Comment [5] to expressly permit the use of written agreements with clients to determine choice of law on other types of ethics issues—not merely conflicts issues. A majority of the Committee concluded that such an expanded sentence would be ill-advised because it would invite lawyers to contract around numerous ethical rules. (The ABA Report specifically stated that such agreements would be considered only to resolve conflicts issues, precisely to avoid contracting around other ethics rules.)

Some members of the Committee were concerned that there could be situations in which an agreement on choice of law *may* be relevant to issues in addition to conflicts, but that the adoption of Amended ABA Comment [5] could result in a negative inference that an agreement on choice of law for issues other than conflicts is never relevant.

In the end, a majority of the Committee recommends rejection of Amended ABA Comment [5].

Respectfully submitted,

Marcy Glenn, Chair

Appendix A

AUGUST 2012 AMENDMENTS TO
ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "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.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

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Screened

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[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

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Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[~~6~~ 8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, 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

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Communicating with Client

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[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.

...

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

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Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[153] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[175] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to

disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[197] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20~~18~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

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Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation, ~~and to~~ such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

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Rule 1.18: Duties to Prospective Client

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not

occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client," ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

...

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

...

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

...

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is ~~email or other electronic modes of transmission~~ subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it the ~~document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[~~2~~1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct.~~ See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~.~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[~~1~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that ~~provide legal services in this jurisdiction that~~:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule **to provide in this jurisdiction.**

Comment

...

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting

another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

...

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admission.

...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

...

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

...

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public, ~~a prospective client.~~

...

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are ~~is~~ now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income;

prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~ a solicitation ~~of a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that is not initiated by the prospective client.~~

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek ~~prospective clients~~ to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~ the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. ~~prospective clients.~~ See, e.g.,

the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

...

Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment ~~from a prospective client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone ~~a prospective client~~ known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[~~1~~2] There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with someone ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence

upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[~~2~~3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications~~,~~ can ~~which may be~~ be mailed ~~or autodialed~~ or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

[~~3~~4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4~~5~~] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication ~~prospective client~~ may violate the provisions of

Rule 7.3(b).

[~~6~~7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. ~~a prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[~~7~~8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[~~8~~9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

...

AUGUST 2012 AMENDMENTS
TO OTHER ABA POLICIES

ABA Model Rule on Practice Pending Admission [NEW]

1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;

   b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;

   c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;

   d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;

   e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;

   f. associates with a lawyer who is admitted to practice in this jurisdiction;

   g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and

   h. pays any annual client protection fund assessment.

2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;

   b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

   c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;

d. reasonably expects to fulfill all of this jurisdiction's requirements for admission as a foreign legal consultant; and

e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.

3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.

4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer's application for admission to this jurisdiction.

5. The authority in this Rule shall terminate immediately if:

a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;

b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;

c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;

d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or

e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.

6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:

a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;

b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer's authority to practice pursuant to this Rule;

c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and

d. take all other necessary steps to protect the interests of the lawyer's clients.

7. Upon the denial of the lawyer's application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.

8. The Court, in its discretion, may extend the time limits set forth in this Rule for good cause shown.

Comment

[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer's clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission. The practice authority provided pursuant to this Rule commences immediately upon the lawyer's establishment of an office or other systematic and continuous presence for the practice of law.

[2] Paragraph 1(f) requires a lawyer practicing in this jurisdiction pursuant to the authority granted under this Rule to associate with a lawyer who is admitted to practice law in this jurisdiction. The association between the incoming lawyer and the lawyer licensed in this jurisdiction is akin to that between a local lawyer and a lawyer practicing in a jurisdiction on a temporary basis pursuant to Model Rule of Professional Conduct 5.5(c)(1).

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

[4] The provisions of paragraph 5 (a) through (d) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

    (a) have been admitted to practice law in another state, territory, or the District of Columbia;
    (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
    (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;
    (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
    (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
    (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
    (g) designate the Clerk of the jurisdiction's highest court for service of process.

For purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

    (a) Representation of one or more clients in the private practice of law;
    (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
    (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
    (d) Service as a judge in a federal, state, territorial or local court of record;
    (e) Service as a judicial law clerk; or
    (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this ~~r~~Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this ~~r~~Rule shall not be eligible for admission on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.

Appendix B

Rule 1.0. Terminology

(a) – (b) **[NO CHANGE]**

(b-1) "Document" includes e-mail or other electronic modes of communication subject to being read or put into readable form.

(c) – (m) **[NO CHANGE]**

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

[1] – [8] **[NO CHANGE]**

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] **[NO CHANGE]**

Rule 1.1. Competence

[NO CHANGE]

COMMENT

[1] – [5] **[NO CHANGE]**

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[68] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject. See Comments [18] and [19] to Rule 1.6.

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

[NO CHANGE]

COMMENT

[1] – [5] **[NO CHANGE]**

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[6] – [14] **[NO CHANGE]**

Rule 1.4. Communication

[NO CHANGE]

COMMENT

[1] – [3] **[NO CHANGE]**

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls~~A lawyer should ~~be~~ promptly ~~returned or acknowledged~~respond to or acknowledge client communications.

[5] – [6] **[NO CHANGE]**

[6A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[6B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[7] – [7A] **[NO CHANGE]**

Rule 1.5. Fees

[NO CHANGE]

COMMENT

[1] – [6] [NO CHANGE]

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (de) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (de) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

[9] – [18] **[NO CHANGE]**

Rule 1.6. Confidentiality of Information

(a) **[NO CHANGE]**

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or

(8) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

COMMENT

[1] – [5] **[NO CHANGE]**

~~[5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or~~

~~would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.~~

[6] – [12] **[NO CHANGE]**

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if the information is protected by the attorney-client privilege or its disclosure is reasonably likely to materially prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[~~13~~15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(~~8~~7), a subpoena is a

court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(87) permits the lawyer to comply with the court's order.

[1315A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[1416] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[16A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and among those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules or law may require disclosure. For example, Rule 3.3 requires disclosure of certain information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the circumstances under which a lawyer representing an organization may disclose information, regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to a third party of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the Rules of Professional Conduct, except where this Rule does not permit those disclosures.

[1517] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(87). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that

may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

Reasonable Measures to Preserve Confidentiality

[~~16~~] A18] Paragraph (c) requires a lawyer ~~must act competently~~to make reasonable measures to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer~~'~~'s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Comments [3] and [4] to Rule 5.3.

[~~17~~19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[~~18~~20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.13. Organization as Client

[NO CHANGE]

COMMENT

[1] – [2] **[NO CHANGE]**

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b~~19~~) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] – [14] [NO CHANGE]

Rule 1.18. Duties to Prospective Client

(a) A person who ~~discusses~~consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) – (d) **[NO CHANGE]**

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who~~A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client" ~~within the meaning of paragraph (a).~~." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] **[NO CHANGE]**

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the

representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] – [9] **[NO CHANGE]**

Rule 4.3. Dealing With Unrepresented Persons

[NO CHANGE]

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(fd).

[2] – [2A] **[NO CHANGE]**

Rule 4.4. Respect for Rights of Third Persons

[NO CHANGE]

COMMENT

[1] **[NO CHANGE]**

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. A document is inadvertently sent when it is accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately ~~wrongfully~~ obtained by the sending person. ~~For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.~~ For purposes of this Rule, "document" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] **[NO CHANGE]**

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

[NO CHANGE]

COMMENT

[21] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving ~~establish internal policies and procedures designed to provide~~ reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer~~Rules of Professional Conduct~~. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority~~,~~ over such ~~the work of~~ nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[~~1~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 7.1. Communications Concerning a Lawyer's Services

[NO CHANGE]

COMMENT

[1] – [7] **[NO CHANGE]**

[8] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[98] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

Rule 7.2. Advertising

[NO CHANGE]

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, e-mail address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television ~~is now one of~~, the Internet, and other forms of electronic communications are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see~~See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange ~~that is not~~ initiated by the ~~prospective client~~lawyer.

[4] **[NO CHANGE]**

Paying Others to Recommend a Lawyer

[5] ~~Lawyers~~Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work

in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. ~~See Rule 5.3 for the~~ Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers ~~who prepare marketing materials for them.~~); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists ~~prospective clients~~people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for ~~prospective clients~~the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of ~~prospective clients~~the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not ~~refer prospective clients~~make referrals to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal

service plans and lawyer referral services may communicate with ~~prospective clients~~the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead ~~prospective clients~~the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] **[NO CHANGE]**

Rule 7.3. ~~Direct Contact with Prospective~~Solicitation of Clients

(a) **[NO CHANGE]**

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded, or electronic communication, or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded, or electronic communication from a lawyer soliciting professional employment from ~~a prospective client~~anyone known to be in need of legal services in a particular matter shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) **[NO CHANGE]**

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[~~1~~2] There is a potential for abuse ~~inherent in~~when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with ~~a prospective client~~someone known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the lay~~persona person to the private importuning of the trained advocate in a direct interpersonal encounter. The ~~prospective client~~person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[~~2~~3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since ~~lawyer advertising and written and recorded communication permitted under Rule 7.2 offer~~lawyers have alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client~~In particular, communications can be mailed or transmitted by e-mail or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the ~~prospective client~~public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm ~~the client~~a person's judgment.

[~~3~~4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to ~~prospective client~~the public, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic ~~conversations between a lawyer and a prospective client~~contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[45] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client~~,~~ or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the ~~prospective client~~recipient of the communication may violate the provisions of Rule 7.3(b).

[~~6~~7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to ~~a prospective client~~people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[~~7~~8] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[~~8~~9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization

controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).