

Appendix B

**The Colorado Rules of Professional Conduct,
marked to show the changes recommended by the
New ABA Model Rules Subcommittee of the Colorado Supreme Court Standing Committee
on the Colorado Rules of Professional Conduct
October 2013**

1 **Rule 1.0. Terminology.**

2

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

5

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

12

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

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16 (c) "Firm" or "law firm" denotes a partnership, professional company, or other entity or a
17 sole proprietorship through which a lawyer or lawyers render legal services; or lawyers
18 employed in a legal services organization or the legal department of a corporation or other
19 organization.

20

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

3
4 (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct
5 after the lawyer has communicated adequate information and explanation about the
6 material risks of and reasonably available alternatives to the proposed course of conduct.

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

10
11 (g) "Partner" denotes a member of a partnership, an owner of a professional company, or a
12 member of an association authorized to practice law.

13
14 (l) "Professional company" has the meaning ascribed to the term in C.R.C.P. 265.

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

18
19 (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes
20 that the lawyer believes the matter in question and that the circumstances are such that the
21 belief is reasonable.

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

3
4 (k) "Screened" denotes the isolation of a lawyer from any participation in a matter through
5 the timely imposition of procedures within a firm that are reasonably adequate under the
6 circumstances to protect information that the isolated lawyer is obligated to protect under
7 these Rules or other law.

8
9 (l) "Substantial" when used in reference to degree or extent denotes a material matter of
10 clear and weighty importance.

11
12 (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a
13 legislative body, administrative agency or other body acting in an adjudicative capacity. A
14 legislative body, administrative agency or other body acts in an adjudicative capacity when
15 a neutral official, after the presentation of evidence or legal argument by a party or parties,
16 will render a binding legal judgment directly affecting a party's interests in a particular
17 matter.

18
19 (n) "Writing" or "written" denotes a tangible or electronic record of a communication or
20 representation, including handwriting, typewriting, printing, photostating, photography,
21 audio or videorecording and ~~e-mail~~electronic communications. A "signed" writing includes
22 an electronic sound, symbol or process attached to or logically associated with a writing and
23 executed or adopted by a person with the intent to sign the writing.

1

2 **COMMENT**

3 *Confirmed in Writing*

4 1. If it is not feasible to obtain or transmit a written confirmation at the time the client gives
5 informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If
6 a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so
7 long as it is confirmed in writing within a reasonable time thereafter.

8

9 *Firm*

10 2. Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific
11 facts. For example, two practitioners who share office space and occasionally consult or assist
12 each other ordinarily would not be regarded as constituting a firm. However, if they present
13 themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm,
14 they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement
15 between associated lawyers are relevant in determining whether they are a firm, as is the fact that
16 they have mutual access to information concerning the clients they serve. Furthermore, it is
17 relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group
18 of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not
19 represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule
20 that information acquired by one lawyer is attributed to another.

21

22 3. With respect to the law department of an organization, including the government, there is
23 ordinarily no question that the members of the department constitute a firm within the meaning of

1 the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the
2 client. For example, it may not be clear whether the law department of a corporation represents a
3 subsidiary or an affiliated corporation, as well as the corporation by which the members of the
4 department are directly employed. A similar question can arise concerning an unincorporated
5 association and its local affiliates.

6
7 4. Similar questions can also arise with respect to lawyers in legal aid and legal services
8 organizations. Depending upon the structure of the organization, the entire organization or
9 different components of it may constitute a firm or firms for purposes of these Rules.

10
11 *Fraud*

12 5. When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is
13 characterized as such under the substantive or procedural law of the applicable jurisdiction and has
14 a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure
15 to apprise another of relevant information. For purposes of these Rules, it is not necessary that
16 anyone has suffered damages or relied on the misrepresentation or failure to inform.

17
18 *Informed Consent*

19 6. Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of
20 a client or other person (e.g., a former client or, under certain circumstances, a prospective client)
21 before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules
22 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according
23 to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The

1 lawyer must make reasonable efforts to ensure that the client or other person possesses information
2 reasonably adequate to make an informed decision. Ordinarily, this will require communication
3 that includes a disclosure of the facts and circumstances giving rise to the situation, any
4 explanation reasonably necessary to inform the client or other person of the material advantages
5 and disadvantages of the proposed course of conduct and a discussion of the client's or other
6 person's options and alternatives. In some circumstances it may be appropriate for a lawyer to
7 advise a client or other person to seek the advice of other counsel. A lawyer need not inform a
8 client or other person of facts or implications already known to the client or other person;
9 nevertheless, a lawyer who does not personally inform the client or other person assumes the risk
10 that the client or other person is inadequately informed and the consent is invalid. In determining
11 whether the information and explanation provided are reasonably adequate, relevant factors
12 include whether the client or other person is experienced in legal matters generally and in making
13 decisions of the type involved, and whether the client or other person is independently represented
14 by other counsel in giving the consent. Normally, such persons need less information and
15 explanation than others, and generally a client or other person who is independently represented by
16 other counsel in giving the consent should be assumed to have given informed consent.

17

18 7. Obtaining informed consent will usually require an affirmative response by the client or other
19 person. In general, a lawyer may not assume consent from a client's or other person's silence.
20 Consent may be inferred, however, from the conduct of a client or other person who has
21 reasonably adequate information about the matter. A number of Rules require that a person's
22 consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and
23 "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be

1 obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of
2 "signed," see paragraph (n).

3
4 *Knowingly, Known or Knows*

5 7. A In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme
6 Court has stated, "with one important exception involving knowing misappropriation of property
7 we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for
8 disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also
9 *People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998). For
10 purposes of applying the ABA Standards for Imposing Lawyer Sanctions, and in determining
11 whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However,
12 where a Rule of Professional Conduct specifically requires the mental state of "knowledge,"
13 recklessness will not be sufficient to establish a violation of that Rule and to that extent, the
14 *Egbune* line of cases will not be followed.

15
16 *Screened*

17 8. This definition applies to situations where screening of a personally disqualified lawyer is
18 permitted to remove imputation of a conflict of interest under Rules 1.10(e), 1.11, 1.12 or 1.18.

19
20 9. The purpose of screening is to assure the affected parties that confidential information known
21 by the personally disqualified lawyer remains protected. The personally disqualified lawyer should
22 acknowledge the obligation not to communicate with any of the other lawyers in the firm with
23 respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be

1 informed that the screening is in place and that they may not communicate with the personally
2 disqualified lawyer with respect to the matter. Additional screening measures that are appropriate
3 for the particular matter will depend on the circumstances. To implement, reinforce and remind all
4 affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake
5 such procedures as a written undertaking by the screened lawyer to avoid any communication with
6 other firm personnel and any contact with any firm files or other ~~materials~~ information, including
7 information in electronic form, relating to the matter, written notice and instructions to all other
8 firm personnel forbidding any communication with the screened lawyer relating to the matter,
9 denial of access by the screened lawyer to firm files or other ~~materials~~ information, including
10 information in electronic form, relating to the matter, and periodic reminders of the screen to the
11 screened lawyer and all other firm personnel.

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13 10. In order to be effective, screening measures must be implemented as soon as practical after a
14 lawyer or law firm knows or reasonably should know that there is a need for screening.

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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

Legal knowledge and skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A

1 lawyer can provide adequate representation in a wholly novel field through necessary study.
2 Competent representation can also be provided through the association of a lawyer of established
3 competence in the field in question.

4
5 [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does
6 not have the skill ordinarily required where referral to or consultation or association with another
7 lawyer would be impractical. Even in an emergency, however, assistance should be limited to that
8 reasonably necessary in the circumstances, for ill-considered action under emergency conditions
9 can jeopardize the client's interest.

10
11 [4] A lawyer may accept representation where the requisite level of competence can be achieved
12 by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an
13 unrepresented person. See also Rule 6.2.

14
15 *Thoroughness and Preparation*

16 [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and
17 legal elements of the problem, and use of methods and procedures meeting the standards of
18 competent practitioners. It also includes adequate preparation. The required attention and
19 preparation are determined in part by what is at stake; major litigation and complex transactions
20 ordinarily require more extensive treatment than matters of lesser complexity and consequence.
21 An agreement between the lawyer and the client regarding the scope of the representation may
22 limit the matters for which the lawyer is responsible. See Rule 1.2(c).

23

1 Retaining or Contracting With Other Lawyers

2 [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide
3 or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed
4 consent from the client and must reasonably believe that the other lawyers' services will contribute
5 to the competent and ethical representation of the client. See also Rules 1.2 (allocation of
6 authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a)
7 (unauthorized practice of law). The reasonableness of the decision to retain or contract with other
8 lawyers outside the lawyer's own firm will depend upon the circumstances, including the
9 education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to
10 the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical
11 environments of the jurisdictions in which the services will be performed, particularly relating to
12 confidential information.

13
14 [7] When lawyers from more than one law firm are providing legal services to the client on a
15 particular matter, the lawyers ordinarily should consult with each other and the client about the
16 scope of their respective representations and the allocation of responsibility among them. See Rule
17 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and
18 parties may have additional obligations that are a matter of law beyond the scope of these Rules.

19
20 Maintaining Competence

21 [68] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the
22 law and its practice, and changes in communications and other relevant technologies, engage in

1 | continuing study and education, and comply with all continuing legal education requirements to
2 | which the lawyer is subject.
3

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2 **Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.**
3

4 [Same as additional comments to 1.4]
5

6
7 [5A] Regarding communications with clients when a lawyer retains or contracts with other
8 lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the
9 client, see Comment [6] to Rule 1.1.
10

11 [5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when
12 lawyers from more than one firm are providing legal services to the client on a particular matter,
13 see Comment [7] to Rule 1.1.
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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
...

1 [4] A lawyer's regular communication with clients will minimize the occasions on which a client
2 will need to request information concerning the representation. When a client makes a reasonable
3 request for information, however, paragraph (a)(4) requires prompt compliance with the request,
4 or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff,
5 acknowledge receipt of the request and advise the client when a response may be expected. ~~Client~~
6 ~~telephone calls~~ A lawyer should be promptly returned or acknowledged respond to or
7 acknowledge client communications.
8

9 [6A] Regarding communications with clients when a lawyer retains or contracts with other
10 lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the
11 client, see Comment [6] to Rule 1.1.
12

13 [6B] Regarding communications with clients and with lawyers outside of the lawyer's firm when
14 lawyers from more than one firm are providing legal services to the client on a particular matter,
15 see Comment [7] to Rule 1.1.
16

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2 **Rule 1.6. Confidentiality of Information-**
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4 **(a) A lawyer shall not reveal information relating to the representation of a client unless the**
5 **client gives informed consent, the disclosure is impliedly authorized in order to carry out the**
6 **representation, or the disclosure is permitted by paragraph (b).**

7
8 **(b) A lawyer may reveal information relating to the representation of a client to the extent**
9 **the lawyer reasonably believes necessary:**

10
11 **(1) to prevent reasonably certain death or substantial bodily harm;**

12
13 **(2) to reveal the client's intention to commit a crime and the information necessary to**
14 **prevent the crime;**

15
16 **(3) to prevent the client from committing a fraud that is reasonably certain to result in**
17 **substantial injury to the financial interests or property of another and in furtherance of**
18 **which the client has used or is using the lawyer's services;**

19
20 **(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of**
21 **another that is reasonably certain to result or has resulted from the client's commission of a**
22 **crime or fraud in furtherance of which the client has used the lawyer's services;**
23

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

3
4 (6) to establish a claim or defense on behalf of the lawyer in a controversy between the
5 lawyer and the client, to establish a defense to a criminal charge or civil claim against the
6 lawyer based upon conduct in which the client was involved, or to respond to allegations in
7 any proceeding concerning the lawyer's representation of the client; or

8
9 (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment
10 or from changes in the composition or ownership of a firm, but only if the revealed
11 information is not protected by the attorney-client privilege and its revelation is not
12 reasonably likely to otherwise materially prejudice the client; or

13
14 (8) to comply with other law or a court order.

15
16 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized
17 disclosure of, or unauthorized access to, information relating to the representation of a
18 client.

19
20 **COMMENT**

21 [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a
22 client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with
23 respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the

1 lawyer's duty not to reveal information relating to the lawyer's prior representation of a former
2 client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such
3 information to the disadvantage of clients and former clients.
4

5 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's
6 informed consent, the lawyer must not reveal information relating to the representation. See Rule
7 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the
8 client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to
9 communicate fully and frankly with the lawyer even as to embarrassing or legally damaging
10 subject matter. The lawyer needs this information to represent the client effectively and, if
11 necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients
12 come to lawyers in order to determine their rights and what is, in the complex of laws and
13 regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all
14 clients follow the advice given, and the law is upheld.
15

16 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the
17 attorney-client privilege, the work-product doctrine and the rule of confidentiality established in
18 professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and
19 other proceedings in which a lawyer may be called as a witness or otherwise required to produce
20 evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other
21 than those where evidence is sought from the lawyer through compulsion of law. The
22 confidentiality rule, for example, applies not only to matters communicated in confidence by the
23 client but also to all information relating to the representation, whatever its source. A lawyer may

1 not disclose such information except as authorized or required by the Rules of Professional
2 Conduct or other law. See also Scope.

3
4 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a
5 client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal
6 protected information but could reasonably lead to the discovery of such information by a third
7 person. A lawyer's use of a hypothetical to discuss issues relating to the representation is
8 permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the
9 identity of the client or the situation involved.

10
11 *Authorized Disclosure*

12 [5] Except to the extent that the client's instructions or special circumstances limit that authority, a
13 lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out
14 the representation. In some situations, for example, a lawyer may be impliedly authorized to admit
15 a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory
16 conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each
17 other information relating to a client of the firm, unless the client has instructed that particular
18 information be confined to specified lawyers.

19
20 ~~[5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly~~
21 ~~authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to~~
22 ~~conduct a conflicts check to determine whether the lawyer or the new firm is or would be~~
23 ~~disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express~~
24 ~~client consent, the identity of the client and the basic nature of the representation to insure~~

1 ~~compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual~~
2 ~~circumstances, even this basic disclosure may materially prejudice the interests of the client or~~
3 ~~former client. In those circumstances, disclosure is prohibited without client consent. In all cases,~~
4 ~~the disclosures must be limited to the information essential to conduct the conflicts check, and the~~
5 ~~confidentiality of this information must be agreed to in advance by all lawyers who receive the~~
6 ~~information.~~

7
8 *Disclosure Adverse to Client*

9 [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve
10 the confidentiality of information relating to the representation of their clients, the confidentiality
11 rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and
12 physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death
13 or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered
14 imminently or if there is a present and substantial threat that a person will suffer such harm at a
15 later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who
16 knows that a client has accidentally discharged toxic waste into a town's water supply may reveal
17 this information to the authorities if there is a present and substantial risk that a person who drinks
18 the water will contract a life threatening or debilitating disease and the lawyer's disclosure is
19 necessary to eliminate the threat or reduce the number of victims.

20
21 [6A] [(b)(2) permits disclosure regarding a client's intention to commit a crime in the future and
22 authorizes the disclosure of information necessary to prevent the crime. This paragraph does not
23 apply to completed crimes. Although paragraph (b)(2) does not require the lawyer to reveal the
24 client's intention to commit a crime, the lawyer may not counsel or assist the client in conduct the
25 lawyer knows is criminal. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's
26 obligation or right to withdraw from the representation of the client in such circumstances, and

1 Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information
2 relating to the representation in limited circumstances.

3
4 [7] Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to
5 reveal information to the extent necessary to enable affected persons or appropriate authorities to
6 prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to
7 result in substantial injury to the financial or property interests of another and in furtherance of
8 which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer
9 relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such
10 disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require
11 the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in
12 conduct the lawyer knows is fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the
13 lawyer's obligation or right to withdraw from the representation of the client in such
14 circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to
15 reveal information relating to the representation in limited circumstances.

16
17 [8] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime
18 or fraud until after it has been consummated. Although the client no longer has the option of
19 preventing disclosure by refraining from the wrongful conduct, there will be situations in which
20 the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations,
21 the lawyer may disclose information relating to the representation to the extent necessary to enable
22 the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their
23 losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud
24 thereafter employs a lawyer for representation concerning that offense.

25
26 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential
27 legal advice about the lawyer's personal responsibility to comply with these Rules, other law, or a

1 court order. In most situations, disclosing information to secure such advice will be impliedly
2 authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly
3 authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's
4 compliance with these Rules, other law, or a court order. For example, Rule 1.6(b)(5) authorizes
5 disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's
6 duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure
7 of information that the lawyer reasonably believes is necessary to secure legal advice concerning
8 the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

9
10 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's
11 conduct or other misconduct of the lawyer involving representation of the client, the lawyer may
12 respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is
13 true with respect to a claim involving the conduct or representation of a former client. Such a
14 charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong
15 allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for
16 example, a person claiming to have been defrauded by the lawyer and client acting together. The
17 lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph
18 (b)(6) does not require the lawyer to await the commencement of an action or proceeding that
19 charges such complicity, so that the defense may be established by responding directly to a third
20 party who has made such an assertion. The right to defend also applies, of course, where a
21 proceeding has been commenced.

22
23 [11] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an
24 action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary
25 relationship may not exploit it to the detriment of the fiduciary.

1 [12] Other law may require that a lawyer disclose information about a client. Whether such a law
2 supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of
3 information relating to the representation appears to be required by other law, the lawyer must
4 discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law
5 supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such
6 disclosures as are necessary to comply with the law.

7
8 *Detection of Conflicts of Interest*

9 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited
10 information to each other to detect and resolve conflicts of interest, such as when a lawyer is
11 considering an association with another firm, two or more firms are considering a merger, or a
12 lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these
13 circumstances, lawyers and law firms are permitted to disclose limited information, but only once
14 substantive discussions regarding the new relationship have occurred. Any such disclosure should
15 ordinarily include no more than the identity of the persons and entities involved in a matter, a brief
16 summary of the general issues involved, and information about whether the matter has terminated.
17 Even this limited information, however, should be disclosed only to the extent reasonably
18 necessary to detect and resolve conflicts of interest that might arise from the possible new
19 relationship. Moreover, the disclosure of any information is prohibited if it is protected by the
20 attorney-client privilege or otherwise is reasonably likely to materially prejudice the client (e.g.,
21 the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly
22 announced; that a person has consulted a lawyer about the possibility of divorce before the
23 person's intentions are known to the person's spouse; or that a person has consulted a lawyer about
24 a criminal investigation that has not led to a public charge). Under those circumstances, paragraph
25 (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's
26 fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an
27 association with another firm and is beyond the scope of these Rules.

1
2 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only
3 to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict
4 the use of information acquired by means independent of any disclosure pursuant to paragraph
5 (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when
6 the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses
7 information to another lawyer in the same firm to detect and resolve conflicts of interest that could
8 arise in connection with undertaking a new representation.
9

10 [15] A lawyer may be ordered to reveal information relating to the representation of a client by
11 a court or by another tribunal or governmental entity claiming authority pursuant to other law to
12 compel the disclosure. For purposes of paragraph (b)(7), a subpoena is a court order. Absent
13 informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all
14 nonfrivolous claims that the order is not authorized by other law or that the information sought is
15 protected against disclosure by the attorney client privilege or other applicable law. In the event of
16 an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the
17 extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer
18 to comply with the court's order.
19

20 [15A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or
21 fraudulent act, if such disclosure will not violate this Rule 1.6.
22

23 [16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the
24 disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer

1 should first seek to persuade the client to take suitable action to obviate the need for disclosure. In
2 any case, a disclosure adverse to the client's interest should be no greater than the lawyer
3 reasonably believes necessary to accomplish the purpose. If the disclosure will be made in
4 connection with a judicial proceeding, the disclosure should be made in a manner that limits access
5 to the information to the tribunal or other persons having a need to know it and appropriate
6 protective orders or other arrangements should be sought by the lawyer to the fullest extent
7 practicable.

8

9 [16A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and
10 among those rules, are complex and require careful study by lawyers in order to discharge their
11 sometimes conflicting obligations to their clients and the courts, and more generally, to our system
12 of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end
13 the inquiry. A lawyer must determine whether and under what circumstances other rules or other
14 law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive,
15 other rules or law may require disclosure. For example, Rule 3.3 requires disclosure of certain
16 information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this
17 Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the
18 circumstances under which a lawyer representing an organization may disclose information,
19 regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to
20 a third party of material facts when disclosure is necessary to avoid assisting a criminal or
21 fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule
22 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is
23 criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and

1 attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the
2 Rules of Professional Conduct, except where this Rule does not permit those disclosures.

3
4 ~~[45]17]~~ Paragraph (b) permits but does not require the disclosure of information relating to a
5 client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(7). In
6 exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature
7 of the lawyer's relationship with the client and with those who might be injured by the client, the
8 lawyer's own involvement in the transaction and factors that may extenuate the conduct in
9 question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this
10 Rule.

11 *Reasonable Measures to Preserve Confidentiality*

12 ~~[46]A18]~~ Paragraph (c) requires a lawyer ~~must act competently to make reasonable~~ measures to
13 safeguard information relating to the representation of a client against unauthorized access by third
14 parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are
15 participating in the representation of the client or who are subject to the lawyer's supervision. See
16 Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure
17 of, information relating to the representation of a client does not constitute a violation of paragraph
18 (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be
19 considered in determining the reasonableness of the lawyer's efforts include, but are not limited to,
20 the sensitivity of the information, the likelihood of disclosure if additional safeguards are not
21 employed, the cost of employing additional safeguards, the difficulty of implementing the
22 safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent
23 clients (e.g., by making a device or important piece of software excessively difficult to use). A

1 client may require the lawyer to implement special security measures not required by this Rule or
2 may give informed consent to forgo security measures that would otherwise be required by this
3 Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information
4 in order to comply with other law, such as state and federal laws that govern data privacy or that
5 impose notification requirements upon the loss of, or unauthorized access to, electronic
6 information, is beyond the scope of these Rules. For a lawyer's duties when sharing information
7 with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

8
9 [1719] When transmitting a communication that includes information relating to the
10 representation of a client, the lawyer must take reasonable precautions to prevent the information
11 from coming into the hands of unintended recipients. This duty, however, does not require that the
12 lawyer use special security measures if the method of communication affords a reasonable
13 expectation of privacy. Special circumstances, however, may warrant special precautions. Factors
14 to be considered in determining the reasonableness of the lawyer's expectation of confidentiality
15 include the sensitivity of the information and the extent to which the privacy of the communication
16 is protected by law or by a confidentiality agreement. A client may require the lawyer to
17 implement special security measures not required by this Rule or may give informed consent to the
18 use of a means of communication that would otherwise be prohibited by this Rule. Whether a
19 lawyer may be required to take additional steps in order to comply with other law, such as state and
20 federal laws that govern data privacy, is beyond the scope of these Rules.

1 | *Former Client*

2 | [1820] The duty of confidentiality continues after the client-lawyer relationship has terminated.

3 | See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the
4 | disadvantage of the former client.

5 |

6 |

1 **Rule 1.18. Duties to Prospective Client.**

2
3 (a) A person who ~~discusses~~consults with a lawyer about the possibility of forming a
4 client-lawyer relationship with respect to a matter is a prospective client.

5
6 (b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions~~
7 withlearned information from a prospective client shall not use or reveal that information
8 ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a
9 former client.

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

17
18 (d) When the lawyer has received disqualifying information as defined in paragraph (c),
19 representation is permissible if:

20
21 (1) both the affected client and the prospective client have given informed consent,
22 confirmed in writing; or

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

4
5 (i) the disqualified lawyer is timely screened from any participation in the matter and is
6 apportioned no part of the fee therefrom; and

7
8 (ii) written notice is promptly given to the prospective client.
9

10 **COMMENT**

11 [1] Prospective clients, like clients, may disclose information to a lawyer, place documents or
12 other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's
13 discussions~~consultations~~ with a prospective client usually are limited in time and depth and leave
14 both the prospective client and the lawyer free (and sometimes required) to proceed no further.
15 Hence, prospective clients should receive some but not all of the protection afforded clients.
16

17 ~~[2] Not all persons who communicate information to a lawyer are entitled to protection under this~~
18 ~~Rule. A person who~~ A person becomes a prospective client by consulting with a lawyer about the
19 possibility of forming a client-lawyer relationship with respect to a matter. Whether
20 communications, including written, oral, or electronic communications, constitute a consultation
21 depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer,
22 either in person or through the lawyer's advertising in any medium, specifically requests or invites
23 the submission of information about a potential representation without clear and reasonably

1 | understandable warnings and cautionary statements that limit the lawyer's obligations, and a
2 | person provides information in response. See also Comment [4]. In contrast, a consultation does
3 | not occur if a person provides information to a lawyer in response to advertising that merely
4 | describes the lawyer's education, experience, areas of practice, and contact information, or
5 | provides legal information of general interest. Such a person communicates information
6 | unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the
7 | possibility of forming a client-lawyer relationship, and is thus not a "prospective client" within the
8 | meaning of paragraph (a)." Moreover, a person who communicates with a lawyer for the purpose
9 | of disqualifying the lawyer is not a "prospective client."
10 |

11 | [3] It is often necessary for a prospective client to reveal information to the lawyer during an
12 | initial consultation prior to the decision about formation of a client-lawyer relationship. The
13 | lawyer often must learn such information to determine whether there is a conflict of interest with
14 | an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph
15 | (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9,
16 | even if the client or lawyer decides not to proceed with the representation. The duty exists
17 | regardless of how brief the initial conference may be.
18 |

19 | [4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer
20 | considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation
21 | to only such information as reasonably appears necessary for that purpose. Where the information
22 | indicates that a conflict of interest or other reason for non-representation exists, the lawyer should
23 | so inform the prospective client or decline the representation. If the prospective client wishes to

1 retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present
2 or former clients must be obtained before accepting the representation.

3
4 [5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's
5 informed consent that no information disclosed during the consultation will prohibit the lawyer
6 from representing a different client in the matter. See Rule 1.0(e) for the definition of informed
7 consent. If the agreement expressly so provides, the prospective client may also consent to the
8 lawyer's subsequent use of information received from the prospective client.

9
10 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from
11 representing a client with interests adverse to those of the prospective client in the same or a
12 substantially related matter unless the lawyer has received from the prospective client information
13 that could be significantly harmful if used in the matter.

14
15 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in
16 Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the
17 informed consent, confirmed in writing, of both the prospective and affected clients. In the
18 alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all
19 disqualified lawyers are timely screened and written notice is promptly given to the prospective
20 client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not
21 prohibit the screened lawyer from receiving a salary or partnership share established by prior
22 independent agreement, but that lawyer may not receive compensation directly related to the
23 matter in which the lawyer is disqualified.

1

2 [8] Notice, including a general description of the subject matter about which the lawyer was
3 consulted, and of the screening procedures employed, generally should be given as soon as
4 practicable after the need for screening becomes apparent.

5

6 [9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's
7 care, see Rule 1.15.

8

1 **Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**

2
3 **With respect to nonlawyers employed or retained by or associated with a lawyer:**

4
5 **(a) a partner, and a lawyer who individually or together with other lawyers possesses**
6 **comparable managerial authority in a law firm shall make reasonable efforts to ensure that**
7 **the firm has in effect measures giving reasonable assurance that the person's conduct is**
8 **compatible with the professional obligations of the lawyer;**

9
10 **(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable**
11 **efforts to ensure that the person's conduct is compatible with the professional obligations of**
12 **the lawyer; and**

13
14 **(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the**
15 **Rules of Professional Conduct if engaged in by a lawyer if:**

16
17 **(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct**
18 **involved; or**

19
20 **(2) the lawyer is a partner or has comparable managerial authority in the law firm in which**
21 **the person is employed, or has direct supervisory authority over the person, and knows of**
22 **the conduct at a time when its consequences can be avoided or mitigated but fails to take**
23 **reasonable remedial action.**

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COMMENT

[1] 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.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment 1 to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority, over the work of nonlawyers. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of nonlawyers that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

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

1 client documents to a third party for printing or scanning, and using an Internet-based service to
2 store client information. When using such services outside the firm, a lawyer must make
3 reasonable efforts to ensure that the services are provided in a manner that is compatible with the
4 lawyer's professional obligations. The extent of this obligation will depend upon the
5 circumstances, including the education, experience and reputation of the nonlawyer; the nature of
6 the services involved; the terms of any arrangements concerning the protection of client
7 information; and the legal and ethical environments of the jurisdictions in which the services will
8 be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2
9 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a)
10 (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When
11 retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions
12 appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is
13 compatible with the professional obligations of the lawyer.

14
15 [4] Where the client directs the selection of a particular nonlawyer service provider outside the
16 firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility,
17 as between the client and the lawyer, for the supervisory activities described in Comment [3]
18 above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending
19 before a tribunal, lawyers and parties may have additional obligations that are a matter of law
20 beyond the scope of these Rules.

1 **Rule 5.5. Unauthorized Practice Of Law; Multijurisdictional Practice of Law.**

2

3 | [The Subcommittee does not recommend any of the ABA changes to existing Colo. RPC 5.5]

4

1 **Rule 7.1. Communications Concerning a Lawyer's Services.**
2

3 **(a) A lawyer shall not make a false or misleading communication about the lawyer or the**
4 **lawyer's services. A communication is false or misleading if it:**

5
6 **(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make**
7 **the statement considered as a whole not materially misleading;**

8
9 **(2) compares the lawyer's services with other lawyers' services, unless the comparison can**
10 **be factually substantiated; or**

11
12 **(3) is likely to create an unjustified expectation about results the lawyer can achieve;**

13
14 **(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications**
15 **concerning a lawyer's services by a lawyer not in the same firm unless the communication**
16 **discloses the name and address of the non-advertising lawyer, the relationship between the**
17 **advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may**
18 **refer any case received through the advertisement to the non-advertising lawyer.**

19
20 **(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients**
21 **shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted**
22 **delivery, and shall not resemble legal pleadings or other legal documents.**

1 **(d) Any communication that states or implies the client does not have to pay a fee if there is**
2 **no recovery shall also disclose that the client may be liable for costs. This provision does not**
3 **apply to communications that only state that contingent or percentage fee arrangements are**
4 **available, or that only state the initial consultation is free.**

5
6 **(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or**
7 **other persons to make communications on behalf of the lawyer or the law firm in violation of**
8 **this Rule or Rules 7.2 through 7.4.**

9
10 **(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the**
11 **purchasing lawyer's suitability and competence to represent existing clients shall not violate**
12 **this Rule if the lawyer complies with Rule 1.17(d).**

13
14 **COMMENT**

15 [1] This Rule governs all communications about a lawyer's services, including advertising
16 permitted by Rule 7.2 and solicitations governed by Rule 7.3.

17
18 [2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications
19 regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's
20 services provide a valuable public service and, in any event, are constitutionally protected. False
21 and misleading statements regarding a lawyer's services do not serve any valid purpose and may be
22 constitutionally proscribed.

1 [3] It is not possible to catalog all types and variations of communications that are false or
2 misleading. Nevertheless, certain types of statements recur and deserve special attention.

3
4 [4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters
5 accepted by the lawyer. Rule 1.1. It is therefore false and misleading for a lawyer to advertise for
6 clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

7
8 [5] Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be
9 misleading if those statements cannot be factually substantiated. Similarly, characterizations
10 regarding a lawyer's abilities or skills have the potential to be misleading where those
11 characterizations cannot be factually substantiated. Equally problematic are factually
12 unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such
13 statements often imply that the lawyer will be able to obtain the same or similar results in the
14 future. This type of statement, due to the inevitable factual and legal differences between different
15 representations, is likely to mislead prospective clients.

16
17 [6] Statements that a law firm has a vast number of years of experience, by aggregating the
18 experience of all members of the firm, provide little meaningful information to prospective clients
19 and have the potential to be misleading.

20
21 [7] Statements such as "no recovery, no fee" are misleading if they do not additionally mention
22 that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies

1 the client does not have to pay a fee if there is no recovery shall also disclose that the client may be
2 liable for costs.

3
4 [8] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former
5 clients may be misleading if presented so as to lead a reasonable person to form an unjustified
6 expectation that the same results could be obtained for other clients in similar matters without
7 reference to the specific factual and legal circumstances of each client's case. Similarly, an
8 unsubstantiated comparison of the lawyer's services or fees with the services or fees of other
9 lawyers may be misleading if presented with such specificity as would lead a reasonable person to
10 conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or
11 qualifying language may preclude a finding that a statement is likely to create unjustified
12 expectations or otherwise mislead the public.

13
14 [9] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of
15 delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising
16 information to a prospective client by registered mail or other forms of restricted delivery. Such
17 modes falsely imply a degree of exigence or importance that is unjustified under the
18 circumstances.

1 **Rule 7.2. Advertising.**

2
3 **(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through**
4 **written, recorded or electronic communication, including public media.**

5
6 **(b) A lawyer shall not give anything of value to a person for recommending the lawyer's**
7 **services except that a lawyer may**

8
9 **(1) pay the reasonable costs of communications permitted by this Rule;**

10
11 **(2) pay the usual charges of a not-for-profit lawyer referral service or legal service**
12 **organization.**

13
14 **(3) pay for a law practice in accordance with Rule 1.17; and**

15
16 **(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise**
17 **prohibited under these Rules that provides for the other person to refer clients or customers**
18 **to the lawyer, if**

19
20 **(i) the reciprocal referral agreement is not exclusive, and**

21
22 **(ii) the client is informed of the existence and nature of the agreement.**

1 (c) Any communication made pursuant to this Rule shall include the name and office
2 address of at least one lawyer or law firm responsible for its content.
3

4 **COMMENT**

5 [1] To assist the public in learning about and obtaining legal services, lawyers should be allowed
6 to make known their services not only through reputation but also through organized information
7 campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to
8 the tradition that a lawyer should not seek clientele. However, the public's need to know about
9 legal services can be fulfilled in part through advertising. This need is particularly acute in the case
10 of persons of moderate means who have not made extensive use of legal services. The interest in
11 expanding public information about legal services ought to prevail over considerations of
12 tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or
13 overreaching.

14
15 [2] This Rule permits public dissemination of information concerning a lawyer's name or firm
16 name, address, e-mail address, website, and telephone number; the kinds of services the lawyer
17 will undertake; the basis on which the lawyer's fees are determined, including prices for specific
18 services and payment and credit arrangements; a lawyer's foreign language ability; names of
19 references and, with their consent, names of clients regularly represented; and other information
20 that might invite the attention of those seeking legal assistance.

21
22 [3] Questions of effectiveness and taste in advertising are matters of speculation and subjective
23 judgment. Some jurisdictions have had extensive prohibitions against television and other forms of

1 advertising, against advertising going beyond specified facts about a lawyer, or against
2 "undignified" advertising. ~~Television is now one of, the Internet and other forms of electronic~~
3 ~~communications are now among~~ the most powerful media for getting information to the public,
4 particularly persons of low and moderate income; prohibiting television and other forms of
5 electronic advertising, therefore, would impede the flow of information about legal services to
6 many sectors of the public. Limiting the information that may be advertised has a similar effect
7 and assumes that the bar can accurately forecast the kind of information that the public would
8 regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of~~
9 ~~information about legal services, and lawful communication by electronic mail is permitted by this~~
10 ~~Rule. But see~~ See Rule 7.3 (a) for the prohibition against the solicitation of a prospective client
11 through a real-time electronic exchange ~~that is not initiated by the prospective client~~ lawyer.

12
13 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to
14 members of a class in class action litigation.

15
16 *Paying Others to Recommend a Lawyer*

17 [5] ~~Lawyers~~ Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay
18 others for recommending the lawyer's services or for channeling professional work in a manner
19 that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a
20 lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph
21 (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this
22 Rule, including the costs of print directory listings, on-line directory listings, newspaper ads,
23 television and radio airtime, domain-name registrations, sponsorship fees, banner

1 | ~~ads~~Internet-based advertisements, and group advertising. A lawyer may compensate employees,
2 | agents and vendors who are engaged to provide marketing or client-development services, such as
3 | publicists, public-relations personnel, business-development staff and website designers. See Rule
4 | ~~5.3 for the~~Moreover, a lawyer may pay others for generating client leads, such as Internet-based
5 | client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead
6 | generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of
7 | the lawyer), and the lead generator's communications are consistent with Rule 7.1
8 | (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay
9 | a lead generator that states, implies, or creates a reasonable impression that it is recommending the
10 | lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal
11 | problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of
12 | lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials
13 | for them.); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

14 |
15 | [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified
16 | lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar
17 | delivery system that assists ~~prospective clients~~people who seek to secure legal representation. A
18 | lawyer referral service, on the other hand, is any organization that holds itself out to the public as a
19 | lawyer referral service. Such referral services are understood by ~~lay persons~~the public to be
20 | consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate
21 | experience in the subject matter of the representation and afford other client protections, such as
22 | complaint procedures or malpractice insurance requirements. Consequently, this Rule only
23 | permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A

1 qualified lawyer referral service is one that is approved by an appropriate regulatory authority as
2 | affording adequate protections for ~~prospective clients~~the public. See, e.g., the American Bar
3 Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model
4 Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that
5 are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed
6 and eligible to practice in the jurisdiction and who meet reasonable objective eligibility
7 | requirements as may be established by the referral service for the protection of ~~prospective~~
8 ~~clients~~the public; (ii) require each participating lawyer to carry reasonably adequate malpractice
9 insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv)
10 | do not ~~refer prospective clients~~make referrals to lawyers who own, operate or are employed by the
11 referral service).

12
13 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a
14 lawyer referral service must act reasonably to assure that the activities of the plan or service are
15 compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and
16 | lawyer referral services may communicate with ~~prospective clients~~the public, but such
17 communication must be in conformity with these Rules. Thus, advertising must not be false or
18 misleading, as would be the case if the communications of a group advertising program or a group
19 | legal services plan would mislead ~~prospective clients~~the public to think that it was a lawyer referral
20 service sponsored by a state agency or bar association. Nor could the lawyer allow in-person,
21 telephonic, or real-time contacts that would violate Rule 7.3.

1 [8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the
2 undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral
3 arrangements must not interfere with the lawyer's professional judgment as to making referrals or
4 as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule
5 1.5(d), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely
6 for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer
7 clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not
8 exclusive and the client is informed of the referral agreement. Conflicts of interest created by such
9 arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite
10 duration and should be reviewed periodically to determine whether they comply with these Rules.
11 This Rule does not restrict referrals or divisions of revenues or net income among lawyers within
12 firms comprised of multiple entities.

13

1 | **Rule 7.3. ~~Direct Contact with Prospective~~Solicitation of Clients.**

2
3 **(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit**
4 **professional employment from a prospective client when a significant motive for the**
5 **lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:**

6
7 **(1) is a lawyer; or**

8
9 **(2) has a family, close personal, or prior professional relationship with the lawyer.**

10
11 **(b) A lawyer shall not solicit professional employment from a prospective client by written,**
12 **recorded or electronic communication or by in-person, telephone or real-time electronic**
13 **contact even when not otherwise prohibited by paragraph (a), if:**

14
15 | **(1) the ~~prospective client~~target of the solicitation has made known to the lawyer a desire not**
16 **to be solicited by the lawyer; or**

17
18 **(2) the solicitation involves coercion, duress or harassment.**

19
20 **(c) A lawyer shall not solicit professional employment from a prospective client believed to**
21 **be in need of legal services which arise out of the personal injury or death of any person by**
22 **written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the**
23 **lawyer has a family or prior professional relationship with the prospective client or if the**

1 communication is issued more than 30 days after the occurrence of the event for which the
2 legal representation is being solicited. Any such communication must comply with the
3 following:

4
5 (1) no such communication may be made if the lawyer knows or reasonably should know
6 that the person to whom the communication is directed is represented resented by a lawyer
7 in the matter; and

8
9 (2) if a lawyer other than the lawyer whose name or signature is contained in the
10 communication will actually handle the case or matter, or if the case or matter will be
11 referred to another lawyer or law firm, any such communication shall include a statement so
12 advising the prospective client.

13
14 (d) Every written, recorded or electronic communication from a lawyer soliciting
15 professional employment from a ~~prospective client~~anyone known to be in need of legal
16 services in a particular matter shall:

17
18 (1) include the words "Advertising Material" on the outside envelope, if any, and at the
19 beginning and ending of any recorded or electronic communication, unless the recipient of
20 the communication is a person specified in paragraphs (a)(1) or (a)(2);

21
22 (2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the
23 nature of the prospective client's legal problem.

1
2 **A copy of or recording of each such communication and a sample of the envelopes, if any,**
3 **in which the communications are enclosed shall be kept for a period of four years from the**
4 **date of dissemination of the communication.**

5
6 **(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a**
7 **prepaid or group legal service plan operated by an organization not owned or directed by**
8 **the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions**
9 **for the plan from persons who are not known to need legal services in a particular matter**
10 **covered by the plan.**

11
12 **COMMENT**

13 [1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific
14 person and that offers to provide, or can reasonably be understood as offering to provide, legal
15 services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is
16 directed to the general public, such as through a billboard, an Internet banner advertisement, a
17 website or a television commercial, or if it is in response to a request for information or is
18 automatically generated in response to Internet searches.

19
20 [42] There is a potential for abuse inherent in when a solicitation involves direct in-person, live
21 telephone or real-time electronic contact by a lawyer with a prospective client someone known to
22 need legal services. These forms of contact between a lawyer and a prospective client subject the
23 layperson a person to the private importuning of the trained advocate in a direct interpersonal

1 | encounter. The ~~prospective client~~ person, who may already feel overwhelmed by the circumstances
2 | giving rise to the need for legal services, may find it difficult fully to evaluate all available
3 | alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's
4 | presence and insistence upon being retained immediately. The situation is fraught with the
5 | possibility of undue influence, intimidation, and over-reaching.

6 |
7 | [23] This potential for abuse inherent in direct in-person, live telephone or real-time electronic
8 | solicitation of ~~prospective clients~~ justifies its prohibition, particularly since ~~lawyer advertising and~~
9 | ~~written and recorded communication permitted under Rule 7.2 offer~~ lawyers have alternative
10 | means of conveying necessary information to those who may be in need of legal services.

11 | ~~Advertising and written and recorded communications which may be mailed or autodialed make it~~
12 | ~~possible for a prospective client~~ In particular, communications can be mailed or transmitted by
13 | e-mail or other electronic means that do not involve real-time contact and do not violate other laws
14 | governing solicitations. These forms of communications and solicitations make it possible for the
15 | public to be informed about the need for legal services, and about the qualifications of available
16 | lawyers and law firms, without subjecting the ~~prospective client~~ public to direct in-person,
17 | telephone or real-time electronic persuasion that may overwhelm the ~~client~~ person's judgment.

18 |
19 | [34] The use of general advertising and written, recorded or electronic communications to
20 | transmit information from lawyer to ~~prospective client~~ the public, rather than direct in-person, live
21 | telephone or real-time electronic contact, will help to assure that the information flows cleanly as
22 | well as freely. The contents of advertisements and communications permitted under Rule 7.2 can
23 | be permanently recorded so that they cannot be disputed and may be shared with others who know

1 the lawyer. This potential for informal review is itself likely to help guard against statements and
2 claims that might constitute false and misleading communications, in violation of Rule 7.1. The
3 contents of direct in-person, live telephone or real-time electronic ~~conversations between a lawyer~~
4 ~~and a prospective client~~contact can be disputed and may not be subject to third-party scrutiny.
5 Consequently, they are much more likely to approach (and occasionally cross) the dividing line
6 between accurate representations and those that are false and misleading.

7
8 [45] There is far less likelihood that a lawyer would engage in abusive practices against an
9 ~~individual who is a former client, or a person~~ with whom the lawyer has close personal or family
10 relationship, or in situations in which the lawyer is motivated by considerations other than the
11 lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a
12 lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c)
13 are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from
14 participating in constitutionally protected activities of public or charitable legal- service
15 organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose
16 purposes include providing or recommending legal services to its members or beneficiaries.

17
18 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains
19 information which is false or misleading within the meaning of Rule 7.1, which involves coercion,
20 duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a
21 ~~prospective client~~someone who has made known to the lawyer a desire not to be solicited by the
22 lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or
23 other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any

1 further effort to communicate with the ~~prospective client~~recipient of the communication may
2 violate the provisions of Rule 7.3(b).

3
4 [67] This Rule is not intended to prohibit a lawyer from contacting representatives of
5 organizations or groups that may be interested in establishing a group or prepaid legal plan for
6 their members, insureds, beneficiaries or other third parties for the purpose of informing such
7 entities of the availability of and details concerning the plan or arrangement which the lawyer or
8 lawyer's firm is willing to offer. This form of communication is not directed to a ~~prospective~~
9 ~~client~~people who are seeking legal services for themselves. Rather, it is usually addressed to an
10 individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if
11 they choose, become prospective clients of the lawyer. Under these circumstances, the activity
12 which the lawyer undertakes in communicating with such representatives and the type of
13 information transmitted to the individual are functionally similar to and serve the same purpose as
14 advertising permitted under Rule 7.2.

15
16 [78] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising
17 Material" does not apply to communications sent in response to requests of potential clients or
18 their spokespersons or sponsors. General announcements by lawyers, including changes in
19 personnel or office location, do not constitute communications soliciting professional employment
20 from a client known to be in need of legal services within the meaning of this Rule.

21
22 [89] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses
23 personal contact to solicit members for its group or prepaid legal service plan, provided that the

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

11

1 **Rule 8.5. Disciplinary Authority; Choice of Law.**

2 | The Subcommittee does not recommend any of the ABA changes to Rule 8.5 or its Comments

Appendix C

**Ethics 20/20 Reports adopted (as revised in two instances)
by the ABA House of Delegates on August 6, 2012**

Report 105A Revised	lawyers' use of technology and confidentiality
Report 105B	lawyers' use of technology and client development
Report 105C	ethical implications of retaining lawyers and non-lawyers outside the firm to work on client matters (i.e. outsourcing)
Report 105F Revised	detection of conflicts of interest when lawyers move from one firm to another, firms merge or there is a sale of a law practice

AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

STANDING COMMITTEE ON CLIENT PROTECTION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

STANDING COMMITTEE ON PROFESSIONALISM

STANDING COMMITTEE ON SPECIALIZATION

NEW YORK STATE BAR ASSOCIATION

GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

SECTION OF INTERNATIONAL LAW

YOUNG LAWYERS DIVISION

NEW YORK COUNTY LAWYERS' ASSOCIATION

SECTION OF BUSINESS LAW

LAW PRACTICE MANAGEMENT SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
2 Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and
3 confidentiality as follows (insertions underlined, deletions ~~struck through~~):
4

5 (a) the black letter and Comments to Model Rule 1.0 (Terminology);

6 (b) the Comments to Model Rule 1.1 (Competence);

7 (c) the Comments to Model Rule 1.4 (Communication);

8 (d) the black letter and Comments to Model Rule 1.6 (Confidentiality of Information); and

9 (e) the black letter and Comments to Model Rule 4.4 (Respect for Rights of Third Parties).
10

11 **Rule 1.0 Terminology**

12
13 (a) **"Belief" or "believes" denotes that the person involved actually supposed the**
14 **fact in question to be true. A person's belief may be inferred from circumstances.**

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

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

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

27 (e) "Informed consent" denotes the agreement by a person to a proposed course of
28 conduct after the lawyer has communicated adequate information and explanation about
29 the material risks of and reasonably available alternatives to the proposed course of
30 conduct.

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

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

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

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

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

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

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

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

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

61
62 Comment

63 ...
64
65
66

67 Screened

68 ...

69 [9] The purpose of screening is to assure the affected parties that confidential information
70 known by the personally disqualified lawyer remains protected. The personally disqualified
71 lawyer should acknowledge the obligation not to communicate with any of the other lawyers in
72 the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the
73 matter should be informed that the screening is in place and that they may not communicate with
74 the personally disqualified lawyer with respect to the matter. Additional screening measures that
75 are appropriate for the particular matter will depend on the circumstances. To implement,
76 reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate
77 for the firm to undertake such procedures as a written undertaking by the screened lawyer to
78 avoid any communication with other firm personnel and any contact with any firm files or other
79 materials information, including information in electronic form, relating to the matter, written
80 notice and instructions to all other firm personnel forbidding any communication with the
81 screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or
82 other materials information, including information in electronic form, relating to the matter, and
83 periodic reminders of the screen to the screened lawyer and all other firm personnel.

84 ...

85

86 Rule 1.1 Competence

87

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

91

92 Comment

93 ...

94 Maintaining Competence

95 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
96 changes in the law and its practice, including the benefits and risks associated with relevant
97 technology, engage in continuing study and education and comply with all continuing legal
98 education requirements to which the lawyer is subject.

99

100 Rule 1.4 Communication

101

102 (a) A lawyer shall:

103 (1) promptly inform the client of any decision or circumstance with respect to
104 which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

105 (2) reasonably consult with the client about the means by which the client's
106 objectives are to be accomplished;

107 (3) keep the client reasonably informed about the status of the matter;

108 (4) promptly comply with reasonable requests for information; and

109 (5) consult with the client about any relevant limitation on the lawyer's
110 conduct when the lawyer knows that the client expects assistance not permitted by the
111 Rules of Professional Conduct or other law.

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

105A Revised

114 **Comment**

115 ...

116

117 **Communicating with Client**

118 ...

119 [4] A lawyer's regular communication with clients will minimize the occasions on which
120 a client will need to request information concerning the representation. When a client makes a
121 reasonable request for information, however, paragraph (a)(4) requires prompt compliance with
122 the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's
123 staff, acknowledge receipt of the request and advise the client when a response may be expected.
124 ~~Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly~~
125 respond to or acknowledge client communications.

126 ...

127

128 **Rule 1.6 Confidentiality of Information**

129

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

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

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

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

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

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

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

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

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

154

155 **Comment**

156 ...

157

158

159

160 **Acting Competently to Preserve Confidentiality**

161 [16] Paragraph (c) requires a lawyer must to act competently to safeguard information
162 relating to the representation of a client against unauthorized access by third parties and against
163 inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are
164 participating in the representation of the client or who are subject to the lawyer’s supervision.
165 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized
166 disclosure of, confidential information relating to the representation of a client does not
167 constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the
168 access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s
169 efforts include, but are not limited to, the sensitivity of the information, the likelihood of
170 disclosure if additional safeguards are not employed, the cost of employing additional
171 safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards
172 adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important
173 piece of software excessively difficult to use). A client may require the lawyer to implement
174 special security measures not required by this Rule or may give informed consent to forgo
175 security measures that would otherwise be required by this Rule. Whether a lawyer may be
176 required to take additional steps to safeguard a client’s information in order to comply with other
177 law, such as state and federal laws that govern data privacy or that impose notification
178 requirements upon the loss of, or unauthorized access to, electronic information, is beyond the
179 scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside
180 the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

181 [17] When transmitting a communication that includes information relating to the
182 representation of a client, the lawyer must take reasonable precautions to prevent the information
183 from coming into the hands of unintended recipients. This duty, however, does not require that
184 the lawyer use special security measures if the method of communication affords a reasonable
185 expectation of privacy. Special circumstances, however, may warrant special precautions.
186 Factors to be considered in determining the reasonableness of the lawyer’s expectation of
187 confidentiality include the sensitivity of the information and the extent to which the privacy of
188 the communication is protected by law or by a confidentiality agreement. A client may require
189 the lawyer to implement special security measures not required by this Rule or may give
190 informed consent to the use of a means of communication that would otherwise be prohibited by
191 this Rule. Whether a lawyer may be required to take additional steps in order to comply with
192 other law, such as state and federal laws that govern data privacy, is beyond the scope of these
193 Rules.

194 ...

196 **Rule 4.4 Respect for Rights of Third Persons**

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

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

105A Revised

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.

105A

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution.

Resolution 105a: Technology and Confidentiality

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."

- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.
- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to "promptly respond to or acknowledge client communications."

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of this Resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new

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ethics issues relating to technology and confidentiality. Resolution 105a, if adopted, would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these increasingly important issues.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the

National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

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EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105a: Technology and Confidentiality

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."
- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of

changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.

- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

2. Summary of the Issue that the Resolution Addresses

The ABA's last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105a addresses the ethical issues associated with technology and confidentiality of client information. Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. Resolution 105a provides lawyers with more guidance regarding their ethical obligations when using this technology and updates the Model Rules of Professional Conduct to reflect the realities of a digital age. Resolution 105a offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105a updates the Model Rules of Professional Conduct to reflect a lawyer's ethical duties in a digital age. For example, the black letter of Model Rule 1.6(a) does not currently describe what, if any, ethical obligations lawyers have to prevent unauthorized or inadvertent disclosure of, or unauthorized

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access to, confidential client information. Rather, the Rule only instructs lawyers not to "reveal" that information. Thus, the black letter of the Rule does not offer lawyers any guidance regarding their ethical obligations when using technology (e.g., smart phones, laptops, or other mobile devices) to store or transmit confidential information. New paragraph (c) in Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) and new language in Comment [16] will help lawyers understand their ethical duty to take reasonable measures to protect a client's confidential information. New Comment language would identify various factors that lawyers need to take into account when determining whether their precautions are reasonable but make clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

Resolution 105a also updates Model Rules 1.0 (Terminology), 1.1 (Competence), 1.4 (Communication), and 4.4 (Respect for Rights of Third Persons) so that lawyers understand how technology is transforming their ethical obligations. For example, the Commission's proposal to amend the Comment to Model Rule 1.1 makes explicit that which has been long implicit in the Rules. Namely, the duty of competence, which requires a lawyer to stay abreast of developments in the law and its practice, encompasses staying abreast of the risks and benefits associated with relevant technology (e.g., how technology used by a lawyer impacts the duty to protect confidential client information).

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105a as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105a relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral

comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

AMERICAN BAR ASSOCIATION
 COMMISSION ON ETHICS 20/20
 STANDING COMMITTEE ON CLIENT PROTECTION
 STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
 STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
 STANDING COMMITTEE ON PROFESSIONALISM
 STANDING COMMITTEE ON SPECIALIZATION
 NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
 2 Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and
 3 confidentiality as follows (insertions underlined, deletions ~~struck through~~):

- 4
 5 (a) the black letter and Comments to Model Rule 1.0 (Terminology);
 6 (b) the Comments to Model Rule 1.1 (Competence);
 7 (c) the Comments to Model Rule 1.4 (Communication);
 8 (d) the black letter and Comments to Model Rule 1.6 (Confidentiality of Information); and
 9 (e) the black letter and Comments to Model Rule 4.4 (Respect for Rights of Third Parties).

10
 11 **Rule 1.0 Terminology**

12
 13 (a) **"Belief" or "believes"** denotes that the person involved actually supposed the
 14 fact in question to be true. A person's belief may be inferred from circumstances.

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

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

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

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27 (e) "Informed consent" denotes the agreement by a person to a proposed course of
28 conduct after the lawyer has communicated adequate information and explanation about
29 the material risks of and reasonably available alternatives to the proposed course of
30 conduct.

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

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

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

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

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

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

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

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

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

61 Comment

62 ...

63 Screened

64 ...

65 [9] The purpose of screening is to assure the affected parties that confidential information
66 known by the personally disqualified lawyer remains protected. The personally disqualified
67 lawyer should acknowledge the obligation not to communicate with any of the other lawyers in
68 the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the
69 matter should be informed that the screening is in place and that they may not communicate with
70 the personally disqualified lawyer with respect to the matter. Additional screening measures that
71 are appropriate for the particular matter will depend on the circumstances. To implement,
72

73 reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate
 74 for the firm to undertake such procedures as a written undertaking by the screened lawyer to
 75 avoid any communication with other firm personnel and any contact with any firm files or other
 76 ~~materials~~ information, including information in electronic form, relating to the matter, written
 77 notice and instructions to all other firm personnel forbidding any communication with the
 78 screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or
 79 other ~~materials~~ information, including information in electronic form, relating to the matter, and
 80 periodic reminders of the screen to the screened lawyer and all other firm personnel.

81 ...

82 83 **Rule 1.1 Competence**

84
85 A lawyer shall provide competent representation to a client. Competent representation
 86 requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for
 87 the representation.

88 89 **Comment**

90 ...

91 **Maintaining Competence**

92 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
 93 changes in the law and its practice, including the benefits and risks associated with relevant
 94 technology, engage in continuing study and education and comply with all continuing legal
 95 education requirements to which the lawyer is subject.

96 97 **Rule 1.4 Communication**

98 99 (a) A lawyer shall:

- 100 (1) promptly inform the client of any decision or circumstance with respect to
 101 which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 102 (2) reasonably consult with the client about the means by which the client's
 103 objectives are to be accomplished;
 104 (3) keep the client reasonably informed about the status of the matter;
 105 (4) promptly comply with reasonable requests for information; and
 106 (5) consult with the client about any relevant limitation on the lawyer's
 107 conduct when the lawyer knows that the client expects assistance not permitted by the
 108 Rules of Professional Conduct or other law.

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

111 112 **Comment**

113 ...

114 115 **Communicating with Client**

116 ...

117 [4] A lawyer's regular communication with clients will minimize the occasions on which
 118 a client will need to request information concerning the representation. When a client makes a
 119 reasonable request for information, however, paragraph (a)(4) requires prompt compliance with

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20 the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's
121 staff, acknowledge receipt of the request and advise the client when a response may be expected.
122 ~~Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly~~
123 ~~respond to or acknowledge client communications.~~

124 ...

126 Rule 1.6 Confidentiality of Information

127
128 (a) A lawyer shall not reveal information relating to the representation of a client
129 unless the client gives informed consent, the disclosure is impliedly authorized in order to
130 carry out the representation or the disclosure is permitted by paragraph (b).

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

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

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

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

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

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

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

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

153 Comment

154 ...

156 Acting Competently to Preserve Confidentiality

157 [16] Paragraph (c) requires a A lawyer must to act competently to safeguard information
158 relating to the representation of a client against unauthorized access by third parties and against
159 inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are
160 participating in the representation of the client or who are subject to the lawyer's supervision.
161 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized
162 disclosure of, confidential information does not constitute a violation of paragraph (c) if the
163 lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered
164 in determining the reasonableness of the lawyer's efforts include, but are not limited to, the
165 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].

[17] 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.

...

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

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.12 information original document, is a matter of law beyond the scope of these Rules, as is the
213 question of whether the privileged status of a document or electronically stored information has
214 been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a
215 document or electronically stored information that the lawyer knows or reasonably should know
216 may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this
217 Rule, “document or electronically stored information” includes, in addition to paper documents,
218 email and other forms of electronically stored information, including embedded data (commonly
219 referred to as “metadata”), that is email or other electronic modes of transmission subject to
220 being read or put into readable form. Metadata in electronic documents creates an obligation
221 under this Rule only if the receiving lawyer knows or reasonably should know that the metadata
222 was inadvertently sent to the receiving lawyer.

223 [3] Some lawyers may choose to return a document or electronically stored information
224 unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was
225 inadvertently sent to ~~the wrong~~ address. Where a lawyer is not required by applicable law to do
226 so, the decision to voluntarily return such a document or electronically stored information is a
227 matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

REPORT

Introduction

Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. One of the objectives of the ABA Commission on Ethics 20/20 has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology, and to update the Model Rules of Professional Conduct to reflect the realities of a digital age.

The Commission's recommendations in this area take two forms. First, the Commission has asked the ABA Center for Professional Responsibility to work with relevant entities within the Association to create a centralized user-friendly website with continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers' use of technology, including information about the latest data security standards. The Commission concluded that this web-based resource is critical given that rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology. The ABA's Legal Technology Resource Center and Law Practice Management Section's eLawyering Task Force have developed excellent technology-related resources, but those resources exist in different places on the ABA website. The Commission found that lawyers are seeking a website that serves as a centralized and continuously updated resource on these issues.

The Commission believes that the information contained on this website should be presented in such a way that lawyers who may not have extensive knowledge about technology and associated ethics issues can easily understand the information. For example, this resource should identify the key issues that lawyers should consider when using technology in their practices, such as the administrative, technical, and physical safeguards that should be employed. The resource should also highlight additional cutting-edge and more sophisticated topics. The website also should include regularly updated information about security standards, including the identification of standards-setting organizations, so that lawyers can more easily determine whether the technology that they employ is compliant with those standards.

Second, the Commission is proposing to amend several Model Rules of Professional Conduct and their Comments. Unlike the proposed website, which can be regularly updated in light of new technology and changing security concerns, the Rule and Comment-based proposals necessarily offer more general guidance and do not offer advice regarding the use of any particular type of technology.

The Commission identified six areas that would benefit from this guidance. First, the Commission concluded that technology has raised new issues for law firms that employ screens pursuant to Model Rules 1.10, 1.11, 1.12, and 1.18. The Commission determined that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Commission is proposing an amendment to address this point in Comment [9] of Model Rule 1.0 (Terminology), which concerns the definition of a screen under Model Rule 1.0(k).

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Second, the Commission determined that the definition of a “writing” in Model Rule 1.0(n) does not reflect the full range of ways in which lawyers use technology to memorialize an understanding. Thus, the Commission is recommending that the word “e-mail” be replaced by “electronic communications.”

Third, the Commission concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Commission is recommending an amendment to Comment [6] of Model Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology.

Fourth, the Commission is proposing a change to the last sentence of Comment [4] to Model Rule 1.4, which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Commission proposes to replace that admonition with the following language: “A lawyer should promptly respond to or acknowledge client communications.” Although not related to a lawyer’s confidentiality obligations, the Commission nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fifth, the Commission is proposing to add a new paragraph to Model Rule 1.6 (Confidentiality of Information). Proposed new Model Rule 1.6(c) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent or unauthorized disclosures as well as from unauthorized access. This duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6. The Commission also concluded that the Comments should be amended to offer lawyers more guidance about how to comply with this obligation.

Finally, the Commission is proposing new language to clarify the scope of Model Rule 4.4(b), which concerns a lawyer’s obligations upon receiving inadvertently sent confidential information. The current provision describes the receipt of “documents” containing such information, but confidential information can also take the form of electronically stored information. Thus, the Commission is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to give lawyers more guidance as to when notification requirement of Model Rule 4.4(b) is triggered.

The Commission concluded that these amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology’s many benefits. The proposals also update the language of the Model Rules to ensure that they reflect the realities of 21st century law practice. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

I. Model Rule 1.0(k) (Terminology; Screening)

Model Rule 1.0 is the Terminology Section of the Model Rules. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer's access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Commission concluded and heard that greater clarity and specificity is needed. To that end, the Commission is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

II. Model Rule 1.0(n) (Terminology; Writing)

The word "writing" is another defined term that should be updated in light of changes in technology. Currently, Model Rule 1.0(n) defines "writing" or "written" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." The Commission concluded that this definition is not sufficiently expansive given the wide range of methods that lawyers now use (or are likely to use in the near future) when memorializing an agreement, such as written consents to conflicts of interest. The Commission, therefore, proposes to replace the word "e-mail" with "electronic communications."

III. Model Rule 1.1 (Competence)

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent.

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IV. Model Rule 1.4 (Communication)

Model Rule 1.4 describes a lawyer's duty to communicate with clients, and the last sentence of Comment [4] to Model Rule 1.4 currently instructs lawyers that "[c]lient telephone calls should be promptly returned or acknowledged." Clients, however, now communicate with lawyers in an increasing number of ways, including by email and other forms of electronic communication, and a lawyer's obligation to respond should exist regardless of the medium that is used. Accordingly, the Commission proposes to replace the last sentence of Comment [4] with the following language: "A lawyer should promptly respond to or acknowledge client communications." The Commission concluded that this language more accurately describes a lawyer's obligations in light of changes in technology and evolving methods of communication.

V. Model Rule 1.6 (Duty of Confidentiality)

Currently, Model Rule 1.6(a) states that a lawyer has a duty not to reveal a client's confidential information, except for the circumstances described in Model Rule 1.6(b). The Rule, however, does not indicate what ethical obligations lawyers have to *prevent* such a revelation. Although this obligation is described in Comments [16] and [17], the Commission concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Model Rule 1.6(c).

The idea of explaining a lawyer's duty to safeguard information within the black letter of the Rule is not new. The proposed Model Rule 1.6(c) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Commission concluded that a similar provision should appear in Model Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

To be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The

reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances.

The Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available. Nevertheless, the Commission is proposing new language to Comment [16] to identify several factors that lawyers should consider when determining whether their efforts are reasonable, including 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). Moreover, as explained above, the Commission has recommended that the ABA create a centralized website that contains continuously updated and detailed information about data security.

In addition to setting out the factors that lawyers need to consider when securing their clients' confidences, the proposed Comment language recognizes that some clients might require the lawyer to implement special security measures not required by the Rule or may give informed consent to the use of security measures that would otherwise be prohibited by the Rule. A nearly identical observation appears in Comment [17] in the context of security measures that lawyers might have to employ when transmitting confidential information. The Commission concluded that a similar thought should be expressed in the context of Comment [16], which pertains to the storage of such information.

Finally, the Commission's research revealed that there has been a dramatic growth in federal, state, and international laws and regulations relating to data privacy. The Commission found that this body of law increasingly applies to lawyers and law firms and that lawyers need to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence to the end of Comment [16] and Comment [17] that would remind lawyers that other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Model Rules of Professional Conduct. Other Comments in the Model Rules instruct lawyers to consult law outside of the ethics rules, and the Commission concluded that a lawyer's duty of confidentiality is another area where other legal obligations have become sufficiently important and common that lawyer should be expressly reminded to consider those obligations, both when storing confidential information (Comment [16]) and when transmitting it (Comment [17]).

VI. Model Rule 4.4 (Respect for Rights of Third Persons)

Technology has increased the risk that confidential information will be inadvertently disclosed, and Model Rule 4.4(b) addresses one particular ethics issue associated with this risk. Namely, it provides that, if lawyers receive documents that they know or reasonably should know were inadvertently sent to them, they must notify the sender.

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The Commission concluded that the word “document” is inadequate to express the various kinds of information that can be inadvertently sent in a digital age. For example, confidential information can now be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata). To make clear that the Rule applies to those situations, the Commission is proposing that the word “document” be replaced with a phrase that is commonly used in the context of discovery – “document or electronically stored information.”

In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, the last sentence of Comment [2] addresses the issue of metadata. The Comment states that the receipt of metadata (i.e., data embedded in electronic information, such as the date an electronic document was created) triggers the notification duties of the Rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

The new language about metadata does not resolve a more controversial question: whether a lawyer should be permitted to look at metadata in the absence of consent or court authority to do so. Several ethics opinions, including ABA Formal Opinion 06-442, have concluded that Rule 4.4 does not prohibit a lawyer from reviewing metadata under those circumstances,¹ but other ethics opinions have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party’s metadata in the absence of consent or a court order.² The Commission’s proposal does not resolve this issue, but merely recognizes that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances (e.g., with the opponent’s or a court’s permission). The Commission’s proposal makes clear that, under those circumstances, if a lawyer uncovers metadata that the lawyer knows the sending lawyer did not intend to include, Model Rule 4.4(b)’s notification requirement is triggered.

The Commission is also proposing to define the phrase “inadvertently sent.” The phrase is ambiguous and potentially misleading, because, for example, it could be read to exclude information that is *intentionally* sent, but to the wrong person. To ensure that the purpose of the Model Rule is clear, the Commission proposes to add the following sentence: “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.”

VII. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients’ confidential information and that reasonable safeguards are ethically required.

¹ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006); Md. St. Bar Ass’n. Comm. on Ethics, Docket No. 2007-09 (2007); Vt. State Bar Ass’n Ethics Comm., Ethics Op. 01 (2009).

² See, e.g., Ala. St. Bar Office of Gen. Counsel, Formal Op. 02 (2007); State Bar of Ariz. Ethics Comm., Ethics Op. 03 (2007); Fla. State Bar Prof’l Ethics Comm., Formal Op. 02 (2006); Me. Bd. of Overseers of the Bar Prof’l Ethics Comm’n, Ethics Op. 196 (2007); N.H. Bar Ass’n. Ethics Comm., Advisory Op. 4 (2008-2009); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 749 at *3 (2001); NYCLA Comm. on Prof’l Ethics, Ethics Op. 738 (2008).

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The Commission's proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology's many benefits. The proposals also update the language of the Model Rules so that it reflects the way that law is practiced in the 21st century. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

AMERICAN BAR ASSOCIATION
 COMMISSION ON ETHICS 20/20
 STANDING COMMITTEE ON CLIENT PROTECTION
 STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
 STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
 STANDING COMMITTEE ON PROFESSIONALISM
 STANDING COMMITTEE ON SPECIALIZATION
 NEW YORK STATE BAR ASSOCIATION
 GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
 LOS ANGELES COUNTY BAR ASSOCIATION
 SECTION OF INTERNATIONAL LAW
 YOUNG LAWYERS DIVISION
 NEW YORK COUNTY LAWYERS' ASSOCIATION
 SECTION OF BUSINESS LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
 2 Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and client
 3 development as follows (insertions underlined, deletions ~~struck through~~):
 4

- 5 (a) the black letter and Comments to Model Rule 1.18 (Duties to Prospective Client);
- 6 (b) the Comments to Model Rule 7.1 (Communications Concerning a Lawyer's Services);
- 7 (c) the Comments to Model Rule 7.2 (Advertising);
- 8 (d) the title, black letter, and Comments to Model Rule 7.3 (Direct Contact with Prospective
- 9 Clients); and
- 10 (e) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice
- 11 of Law).

12
 13 **Rule 1.18: Duties to Prospective Client**

14
 15 (a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a
 16 client-lawyer relationship with respect to a matter is a prospective client.

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

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

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

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

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

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

37 (ii) written notice is promptly given to the prospective client.
38

39 Comment

40 [1] Prospective clients, like clients, may disclose information to a lawyer, place
41 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's
42 ~~discussions~~ consultations with a prospective client usually are limited in time and depth and
43 leave both the prospective client and the lawyer free (and sometimes required) to proceed no
44 further. Hence, prospective clients should receive some but not all of the protection afforded
45 clients.

46 [2] ~~Not all persons who communicate information to a lawyer are entitled to~~
47 ~~protection under this Rule. A person becomes a prospective client by consulting with a lawyer~~
48 ~~about the possibility of forming a client-lawyer relationship with respect to a matter. Whether~~
49 ~~communications, including written, oral, or electronic communications, constitute a consultation~~
50 ~~depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer,~~
51 ~~either in person or through the lawyer's advertising in any medium, specifically requests or~~
52 ~~invites the submission of information about a potential representation without clear and~~
53 ~~reasonably understandable warnings and cautionary statements that limit the lawyer's~~
54 ~~obligations, and a person provides information in response. See also Comment [4]. In contrast, a~~
55 ~~consultation does not occur if a person provides information to a lawyer in response to~~
56 ~~advertising that merely describes the lawyer's education, experience, areas of practice, and~~
57 ~~contact information, or provides legal information of general interest. A person who~~
58 ~~communicates. Such a person communicates~~ information unilaterally to a lawyer, without any
59 reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-
60 lawyer relationship, and is thus not a "prospective client," within the meaning of paragraph (a).
61 Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer
62 is not a "prospective client."
63 ...

64 [4] In order to avoid acquiring disqualifying information from a prospective client, a
65 lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the
66 initial consultation to only such information as reasonably appears necessary for that purpose.
67 Where the information indicates that a conflict of interest or other reason for non-representation
68 exists, the lawyer should so inform the prospective client or decline the representation. If the
69 prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then
70 consent from all affected present or former clients must be obtained before accepting the
71 representation.
72

73 [5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the
 74 person's informed consent that no information disclosed during the consultation will prohibit the
 75 lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of
 76 informed consent. If the agreement expressly so provides, the prospective client may also
 77 consent to the lawyer's subsequent use of information received from the prospective client.

78 ...

79
 80 **Rule 7.1 Communications Concerning a Lawyer's Services**

81
 82 **A lawyer shall not make a false or misleading communication about the lawyer or the**
 83 **lawyer's services. A communication is false or misleading if it contains a material**
 84 **misrepresentation of fact or law, or omits a fact necessary to make the statement**
 85 **considered as a whole not materially misleading.**

86
 87 **COMMENT**

88 ...

89 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients
 90 or former clients may be misleading if presented so as to lead a reasonable person to form an
 91 unjustified expectation that the same results could be obtained for other clients in similar matters
 92 without reference to the specific factual and legal circumstances of each client's case. Similarly,
 93 an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other
 94 lawyers may be misleading if presented with such specificity as would lead a reasonable person
 95 to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer
 96 or qualifying language may preclude a finding that a statement is likely to create unjustified
 97 expectations or otherwise mislead the public, ~~a prospective client~~.

98 ...

99
 100 **Rule 7.2 Advertising**

101
 102 **(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services**
 103 **through written, recorded or electronic communication, including public media.**

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

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

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

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

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

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

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

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

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119 Comment

120 [1] To assist the public in learning about and obtaining legal services, lawyers should be
121 allowed to make known their services not only through reputation but also through organized
122 information campaigns in the form of advertising. Advertising involves an active quest for
123 clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's
124 need to know about legal services can be fulfilled in part through advertising. This need is
125 particularly acute in the case of persons of moderate means who have not made extensive use of
126 legal services. The interest in expanding public information about legal services ought to prevail
127 over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are
128 misleading or overreaching.

129 [2] This Rule permits public dissemination of information concerning a lawyer's name or
130 firm name, address, email address, website, and telephone number; the kinds of services the
131 lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for
132 specific services and payment and credit arrangements; a lawyer's foreign language ability;
133 names of references and, with their consent, names of clients regularly represented; and other
134 information that might invite the attention of those seeking legal assistance.

135 [3] Questions of effectiveness and taste in advertising are matters of speculation and
136 subjective judgment. Some jurisdictions have had extensive prohibitions against television and
137 other forms of advertising, against advertising going beyond specified facts about a lawyer, or
138 against "undignified" advertising. Television, the Internet, and other forms of electronic
139 communication are is now ~~one of~~ among the most powerful media for getting information to the
140 public, particularly persons of low and moderate income; prohibiting television, Internet, and
141 other forms of electronic advertising, therefore, would impede the flow of information about
142 legal services to many sectors of the public. Limiting the information that may be advertised has
143 a similar effect and assumes that the bar can accurately forecast the kind of information that the
144 public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an~~
145 ~~important source of information about legal services, and lawful communication by electronic~~
146 ~~mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against a solicitation of
147 a prospective client through a real-time electronic exchange initiated by the lawyer, that is not
148 initiated by the prospective client.

149 ...

150 **Paying Others to Recommend a Lawyer**

151 [5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~awyers are not permitted to pay
152 others for ~~channeling professional work~~ recommending the lawyer's services or for channeling
153 professional work in a manner that violates Rule 7.3. A communication contains a
154 recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence,
155 character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for
156 advertising and communications permitted by this Rule, including the costs of print directory
157 listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name
158 registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising.
159 A lawyer may compensate employees, agents and vendors who are engaged to provide marketing
160 or client development services, such as publicists, public-relations personnel, business-
161 development staff and website designers. Moreover, a lawyer may pay others for generating
162 client leads, such as Internet-based client leads, as long as the lead generator does not
163 recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e)
164 (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's

165 communications are consistent with Rule 7.1 (communications concerning a lawyer's services).
 166 To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a
 167 reasonable impression that it is recommending the lawyer, is making the referral without
 168 payment from the lawyer, or has analyzed a person's legal problems when determining which
 169 lawyer should receive the referral. See also Rule 5.3 for the- (duties of lawyers and law firms
 170 with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules
 171 through the acts of another). -who prepare marketing materials for them.

172 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or
 173 qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a
 174 similar delivery system that assists people who seek prospective clients to secure legal
 175 representation. A lawyer referral service, on the other hand, is any organization that holds itself
 176 out to the public as a lawyer referral service. Such referral services are understood by ~~lawyers~~
 177 the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with
 178 appropriate experience in the subject matter of the representation and afford other client
 179 protections, such as complaint procedures or malpractice insurance requirements. Consequently,
 180 this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer
 181 referral service. A qualified lawyer referral service is one that is approved by an appropriate
 182 regulatory authority as affording adequate protections for the public, prospective clients. See,
 183 e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral
 184 Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring
 185 that organizations that are identified as lawyer referral services (i) permit the participation of all
 186 lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable
 187 objective eligibility requirements as may be established by the referral service for the protection
 188 of the public, prospective clients; (ii) require each participating lawyer to carry reasonably
 189 adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client
 190 complaints; and (iv) do not make referrals prospective clients to lawyers who own, operate or are
 191 employed by the referral service).

192 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
 193 from a lawyer referral service must act reasonably to assure that the activities of the plan or
 194 service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service
 195 plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such
 196 communication must be in conformity with these Rules. Thus, advertising must not be false or
 197 misleading, as would be the case if the communications of a group advertising program or a
 198 group legal services plan would mislead the public, prospective clients to think that it was a
 199 lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer
 200 allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

201 ...

202

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

204

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

208

(1) is a lawyer; or

209

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

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

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

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

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

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

227

228 Comment

229 [1] A solicitation is a targeted communication initiated by the lawyer that is directed to a
230 specific person and that offers to provide, or can reasonably be understood as offering to provide,
231 legal services. In contrast, a lawyer's communication typically does not constitute a solicitation
232 if it is directed to the general public, such as through a billboard, an Internet banner
233 advertisement, a website or a television commercial, or if it is in response to a request for
234 information or is automatically generated in response to Internet searches.

235 [12] There is a potential for abuse when a solicitation involves inherent in direct in-
236 person, live telephone or real-time electronic contact by a lawyer with someone a prospective
237 client known to need legal services. These forms of contact between a lawyer and a prospective
238 client subject the layperson a person to the private importuning of the trained advocate in a direct
239 interpersonal encounter. The person prospective client, who may already feel overwhelmed by
240 the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate
241 all available alternatives with reasoned judgment and appropriate self-interest in the face of the
242 lawyer's presence and insistence upon being retained immediately. The situation is fraught with
243 the possibility of undue influence, intimidation, and over-reaching.

244 [23] This potential for abuse inherent in direct in-person, live telephone or real-time
245 electronic solicitation of prospective clients justifies its prohibition, particularly since lawyers
246 have advertising and written and recorded communication permitted under Rule 7.2 offer
247 alternative means of conveying necessary information to those who may be in need of legal
248 services. Advertising and written and recorded In particular, communications, can which may be
249 be mailed or automated or transmitted by email or other electronic means that do not involve
250 real-time contact and do not violate other laws governing solicitations. These forms of
251 communications and solicitations make it possible for the public a prospective client to be
252 informed about the need for legal services, and about the qualifications of available lawyers and
253 law firms, without subjecting the prospective client the public to direct in-person, telephone or
254 real-time electronic persuasion that may overwhelm the client's a person's judgment.

255 [34] The use of general advertising and written, recorded or electronic communications to
 256 transmit information from lawyer to the public prospective client, rather than direct in-person,
 257 live telephone or real-time electronic contact, will help to assure that the information flows
 258 cleanly as well as freely. The contents of advertisements and communications permitted under
 259 Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with
 260 others who know the lawyer. This potential for informal review is itself likely to help guard
 261 against statements and claims that might constitute false and misleading communications, in
 262 violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic
 263 ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be
 264 subject to third-party scrutiny. Consequently, they are much more likely to approach (and
 265 occasionally cross) the dividing line between accurate representations and those that are false
 266 and misleading.

267 [45] There is far less likelihood that a lawyer would engage in abusive practices against
 268 ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or
 269 family relationship, or in situations in which the lawyer is motivated by considerations other than
 270 the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted
 271 is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule
 272 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a
 273 lawyer from participating in constitutionally protected activities of public or charitable legal-
 274 service organizations or bona fide political, social, civic, fraternal, employee or trade
 275 organizations whose purposes include providing or recommending legal services to ~~its~~ their
 276 members or beneficiaries.

277 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation which
 278 contains information which is false or misleading within the meaning of Rule 7.1, which
 279 involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves
 280 contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be
 281 solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after
 282 sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives
 283 no response, any further effort to communicate with the recipient of the communication
 284 ~~prospective client~~ may violate the provisions of Rule 7.3(b).

285 [67] This Rule is not intended to prohibit a lawyer from contacting representatives of
 286 organizations or groups that may be interested in establishing a group or prepaid legal plan for
 287 their members, insureds, beneficiaries or other third parties for the purpose of informing such
 288 entities of the availability of and details concerning the plan or arrangement which the lawyer or
 289 lawyer's firm is willing to offer. This form of communication is not directed to people who are
 290 seeking legal services for themselves, ~~a prospective client~~. Rather, it is usually addressed to an
 291 individual acting in a fiduciary capacity seeking a supplier of legal services for others who may,
 292 if they choose, become prospective clients of the lawyer. Under these circumstances, the activity
 293 which the lawyer undertakes in communicating with such representatives and the type of
 294 information transmitted to the individual are functionally similar to and serve the same purpose
 295 as advertising permitted under Rule 7.2.

296 [78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising
 297 Material" does not apply to communications sent in response to requests of potential clients or
 298 their spokespersons or sponsors. General announcements by lawyers, including changes in
 299 personnel or office location, do not constitute communications soliciting professional
 300 employment from a client known to be in need of legal services within the meaning of this Rule.

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301 [89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which
302 uses personal contact to solicit members for its group or prepaid legal service plan, provided that
303 the personal contact is not undertaken by any lawyer who would be a provider of legal services
304 through the plan. The organization must not be owned by or directed (whether as manager or
305 otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)
306 would not permit a lawyer to create an organization controlled directly or indirectly by the
307 lawyer and use the organization for the in-person or telephone solicitation of legal employment
308 of the lawyer through memberships in the plan or otherwise. The communication permitted by
309 these organizations also must not be directed to a person known to need legal services in a
310 particular matter, but is to be designed to inform potential plan members generally of another
311 means of affordable legal services. Lawyers who participate in a legal service plan must
312 reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See
313 8.4(a).

314

315 **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

316

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

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

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

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

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

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

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

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

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

341 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
342 suspended from practice in any jurisdiction, may provide legal services in this jurisdiction
343 that:

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

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346 (2) are services that the lawyer is authorized to provide by federal law or other law
347 of this jurisdiction.
348

349 **Comment**

350 ...

351 [21] Paragraphs (c) and (d) do not authorize communications advertising legal services to
352 ~~prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other
353 jurisdictions. Whether and how lawyers may communicate the availability of their services to
354 ~~prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

AMERICAN BAR ASSOCIATION
 COMMISSION ON ETHICS 20/20
 STANDING COMMITTEE ON CLIENT PROTECTION
 STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
 STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
 STANDING COMMITTEE ON PROFESSIONALISM
 STANDING COMMITTEE ON SPECIALIZATION
 NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
 2 Conduct dated August 2012, to provide guidance regarding lawyers' use of technology and client
 3 development as follows (insertions underlined, deletions ~~struck through~~):

- 4
 5 (a) the black letter and Comments to Model Rule 1.18 (Duties to Prospective Client);
 6 (b) the Comments to Model Rule 7.1 (Communications Concerning a Lawyer's Services);
 7 (c) the Comments to Model Rule 7.2 (Advertising);
 8 (d) the title, black letter, and Comments to Model Rule 7.3 (Direct Contact with Prospective
 9 Clients); and
 10 (e) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice
 11 of Law).

12
 13 **Rule 1.18: Duties to Prospective Client**

14
 15 (a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a
 16 client-lawyer relationship with respect to a matter is a prospective client.

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

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

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

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

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

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

37 (ii) written notice is promptly given to the prospective client.
38

39 Comment

40 [1] Prospective clients, like clients, may disclose information to a lawyer, place
41 documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's
42 ~~discussions~~ consultations with a prospective client usually are limited in time and depth and
43 leave both the prospective client and the lawyer free (and sometimes required) to proceed no
44 further. Hence, prospective clients should receive some but not all of the protection afforded
45 clients.

46 [2] ~~Not all persons who communicate information to a lawyer are entitled to~~
47 ~~protection under this Rule. A person becomes a prospective client by consulting with a lawyer~~
48 ~~about the possibility of forming a client-lawyer relationship with respect to a matter. Whether~~
49 ~~communications, including written, oral, or electronic communications, constitute a consultation~~
50 ~~depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer,~~
51 ~~either in person or through the lawyer's advertising in any medium, specifically requests or~~
52 ~~invites the submission of information about a potential representation without clear and~~
53 ~~reasonably understandable warnings and cautionary statements that limit the lawyer's~~
54 ~~obligations, and a person provides information in response. See also Comment [4]. In contrast, a~~
55 ~~consultation does not occur if a person provides information to a lawyer in response to~~
56 ~~advertising that merely describes the lawyer's education, experience, areas of practice, and~~
57 ~~contact information, or provides legal information of general interest. A person who~~
58 ~~communicates~~ Such a person communicates information unilaterally to a lawyer, without any
59 reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-
60 lawyer relationship, and is thus not a "prospective client," within the meaning of paragraph (a).
61 Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer
62 is not a "prospective client."
63 ...

64 [4] In order to avoid acquiring disqualifying information from a prospective client, a
65 lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the
66 initial consultation to only such information as reasonably appears necessary for that purpose.
67 Where the information indicates that a conflict of interest or other reason for non-representation
68 exists, the lawyer should so inform the prospective client or decline the representation. If the
69 prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then
70 consent from all affected present or former clients must be obtained before accepting the
71 representation.

72 [5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the

73 person's informed consent that no information disclosed during the consultation will prohibit the
74 lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of
75 informed consent. If the agreement expressly so provides, the prospective client may also
76 consent to the lawyer's subsequent use of information received from the prospective client.

77 ...

78 79 **Rule 7.1 Communications Concerning a Lawyer's Services**

80
81 **A lawyer shall not make a false or misleading communication about the lawyer or the**
82 **lawyer's services. A communication is false or misleading if it contains a material**
83 **misrepresentation of fact or law, or omits a fact necessary to make the statement**
84 **considered as a whole not materially misleading.**

85 86 **COMMENT**

87 ...

88 [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients
89 or former clients may be misleading if presented so as to lead a reasonable person to form an
90 unjustified expectation that the same results could be obtained for other clients in similar matters
91 without reference to the specific factual and legal circumstances of each client's case. Similarly,
92 an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other
93 lawyers may be misleading if presented with such specificity as would lead a reasonable person
94 to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer
95 or qualifying language may preclude a finding that a statement is likely to create unjustified
96 expectations or otherwise mislead the public. ~~a prospective client.~~

97 ...

98 99 **Rule 7.2 Advertising**

100
101 (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services
102 through written, recorded or electronic communication, including public media.

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

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

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

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

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

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

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

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

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18 Comment

119 [1] To assist the public in learning about and obtaining legal services, lawyers should be
120 allowed to make known their services not only through reputation but also through organized
121 information campaigns in the form of advertising. Advertising involves an active quest for
122 clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's
123 need to know about legal services can be fulfilled in part through advertising. This need is
124 particularly acute in the case of persons of moderate means who have not made extensive use of
125 legal services. The interest in expanding public information about legal services ought to prevail
126 over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are
127 misleading or overreaching.

128 [2] This Rule permits public dissemination of information concerning a lawyer's name or
129 firm name, address, email address, website, and telephone number; the kinds of services the
130 lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for
131 specific services and payment and credit arrangements; a lawyer's foreign language ability;
132 names of references and, with their consent, names of clients regularly represented; and other
133 information that might invite the attention of those seeking legal assistance.

134 [3] Questions of effectiveness and taste in advertising are matters of speculation and
135 subjective judgment. Some jurisdictions have had extensive prohibitions against television and
136 other forms of advertising, against advertising going beyond specified facts about a lawyer, or
137 against "undignified" advertising. Television, the Internet, and other forms of electronic
138 communication are ~~is now one of~~ among the most powerful media for getting information to the
139 public, particularly persons of low and moderate income; prohibiting television, Internet, and
140 other forms of electronic advertising, therefore, would impede the flow of information about
141 legal services to many sectors of the public. Limiting the information that may be advertised has
142 a similar effect and assumes that the bar can accurately forecast the kind of information that the
143 public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an~~
144 ~~important source of information about legal services, and lawful communication by electronic~~
145 ~~mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against the a solicitation of
146 a prospective client through a real-time electronic exchange initiated by the lawyer, that is not
147 initiated by the prospective client.

148 ...

149 **Paying Others to Recommend a Lawyer**

150 [5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay
151 others for channeling professional work recommending the lawyer's services or for channeling
152 professional work in a manner that violates Rule 7.3. A communication contains a
153 recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence,
154 character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for
155 advertising and communications permitted by this Rule, including the costs of print directory
156 listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name
157 registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising.
158 A lawyer may compensate employees, agents and vendors who are engaged to provide marketing
159 or client development services, such as publicists, public-relations personnel, business-
160 development staff and website designers. Moreover, a lawyer may pay others for generating
161 client leads, such as Internet-based client leads, as long as the lead generator does not
162 recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e)
163 (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's

54 communications are consistent with Rule 7.1 (communications concerning a lawyer's services).
 165 To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a
 166 reasonable impression that it is recommending the lawyer, is making the referral without
 167 payment from the lawyer, or has analyzed a person's legal problems when determining which
 168 lawyer should receive the referral. See also Rule 5.3 for the- (duties of lawyers and law firms
 169 with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules
 170 through the acts of another). -who prepare marketing materials for them.

171 [6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or
 172 qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a
 173 similar delivery system that assists people who seek ~~prospective clients~~ to secure legal
 174 representation. A lawyer referral service, on the other hand, is any organization that holds itself
 175 out to the public as a lawyer referral service. Such referral services are understood by ~~lawyers~~
 176 the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with
 177 appropriate experience in the subject matter of the representation and afford other client
 178 protections, such as complaint procedures or malpractice insurance requirements. Consequently,
 179 this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer
 180 referral service. A qualified lawyer referral service is one that is approved by an appropriate
 181 regulatory authority as affording adequate protections for the public, ~~prospective clients~~. See,
 182 e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral
 183 Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring
 184 that organizations that are identified as lawyer referral services (i) permit the participation of all
 185 lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable
 186 objective eligibility requirements as may be established by the referral service for the protection
 187 of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably
 188 adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client
 189 complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are
 190 employed by the referral service).

191 [7] A lawyer who accepts assignments or referrals from a legal service plan or referrals
 192 from a lawyer referral service must act reasonably to assure that the activities of the plan or
 193 service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service
 194 plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such
 195 communication must be in conformity with these Rules. Thus, advertising must not be false or
 196 misleading, as would be the case if the communications of a group advertising program or a
 197 group legal services plan would mislead the public ~~prospective clients~~ to think that it was a
 198 lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer
 199 allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

200 ...

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

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

205 (1) is a lawyer; or

206 (2) has a family, close personal, or prior professional relationship with the lawyer.
 207
 208

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

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

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

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

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

226 227 Comment

228 [1] A solicitation is a targeted communication initiated by the lawyer that is directed to a
229 specific person and that offers to provide, or can reasonably be understood as offering to provide,
230 legal services. In contrast, a lawyer's communication typically does not constitute a solicitation
231 if it is directed to the general public, such as through a billboard, an Internet banner
232 advertisement, a website or a television commercial, or if it is in response to a request for
233 information or is automatically generated in response to Internet searches.

234 [1-2] There is a potential for abuse when a solicitation involves inherent in direct in-
235 person, live telephone or real-time electronic contact by a lawyer with someone a ~~prospective~~
236 ~~client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective~~
237 ~~client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct
238 interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by
239 the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate
240 all available alternatives with reasoned judgment and appropriate self-interest in the face of the
241 lawyer's presence and insistence upon being retained immediately. The situation is fraught with
242 the possibility of undue influence, intimidation, and over-reaching.

243 [2-3] This potential for abuse inherent in direct in-person, live telephone or real-time
244 electronic solicitation of ~~prospective clients~~ justifies its prohibition, particularly since lawyers
245 ~~have advertising and written and recorded communication permitted under Rule 7.2~~ offer
246 alternative means of conveying necessary information to those who may be in need of legal
247 services. ~~Advertising and written and recorded~~ In particular, communications, can ~~which may be~~
248 be mailed or autodialed or transmitted by email or other electronic means that do not involve
249 real-time contact and do not violate other laws governing solicitations. These forms of
250 communications and solicitations make it possible for the public a ~~prospective client~~ to be
251 informed about the need for legal services, and about the qualifications of available lawyers and
252 law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or
253 real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

254 [34] The use of general advertising and written, recorded or electronic communications to
 255 transmit information from lawyer to the public ~~prospective client~~, rather than direct in-person,
 256 live telephone or real-time electronic contact, will help to assure that the information flows
 257 cleanly as well as freely. The contents of advertisements and communications permitted under
 258 Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with
 259 others who know the lawyer. This potential for informal review is itself likely to help guard
 260 against statements and claims that might constitute false and misleading communications, in
 261 violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic
 262 ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be
 263 subject to third-party scrutiny. Consequently, they are much more likely to approach (and
 264 occasionally cross) the dividing line between accurate representations and those that are false
 265 and misleading.

266 [45] There is far less likelihood that a lawyer would engage in abusive practices against
 267 ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or
 268 family relationship, or in situations in which the lawyer is motivated by considerations other than
 269 the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted
 270 is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule
 271 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a
 272 lawyer from participating in constitutionally protected activities of public or charitable legal-
 273 service organizations or bona fide political, social, civic, fraternal, employee or trade
 274 organizations whose purposes include providing or recommending legal services to ~~its~~ their
 275 members or beneficiaries.

276 [56] But even permitted forms of solicitation can be abused. Thus, any solicitation which
 277 contains information which is false or misleading within the meaning of Rule 7.1, which
 278 involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves
 279 contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be
 280 solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after
 281 sending a letter or other communication to ~~a client~~ as permitted by Rule 7.2 the lawyer receives
 282 no response, any further effort to communicate with the recipient of the communication
 283 ~~prospective client~~ may violate the provisions of Rule 7.3(b).

284 [67] This Rule is not intended to prohibit a lawyer from contacting representatives of
 285 organizations or groups that may be interested in establishing a group or prepaid legal plan for
 286 their members, insureds, beneficiaries or other third parties for the purpose of informing such
 287 entities of the availability of and details concerning the plan or arrangement which the lawyer or
 288 lawyer's firm is willing to offer. This form of communication is not directed to people who are
 289 seeking legal services for themselves, ~~a prospective client~~. Rather, it is usually addressed to an
 290 individual acting in a fiduciary capacity seeking a supplier of legal services for others who may,
 291 if they choose, become prospective clients of the lawyer. Under these circumstances, the activity
 292 which the lawyer undertakes in communicating with such representatives and the type of
 293 information transmitted to the individual are functionally similar to and serve the same purpose
 294 as advertising permitted under Rule 7.2.

295 [78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising
 296 Material" does not apply to communications sent in response to requests of potential clients or
 297 their spokespersons or sponsors. General announcements by lawyers, including changes in
 298 personnel or office location, do not constitute communications soliciting professional
 299 employment from a client known to be in need of legal services within the meaning of this Rule.

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100 [89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which
301 uses personal contact to solicit members for its group or prepaid legal service plan, provided that
302 the personal contact is not undertaken by any lawyer who would be a provider of legal services
303 through the plan. The organization must not be owned by or directed (whether as manager or
304 otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d)
305 would not permit a lawyer to create an organization controlled directly or indirectly by the
306 lawyer and use the organization for the in-person or telephone solicitation of legal employment
307 of the lawyer through memberships in the plan or otherwise. The communication permitted by
308 these organizations also must not be directed to a person known to need legal services in a
309 particular matter, but is to be designed to inform potential plan members generally of another
310 means of affordable legal services. Lawyers who participate in a legal service plan must
311 reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See
312 8.4(a).

313

314 Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

315

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

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

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

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

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

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

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

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

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

340 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
341 suspended from practice in any jurisdiction, may provide legal services in this jurisdiction
342 that:

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

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15 (2) are services that the lawyer is authorized to provide by federal law or other law
346 of this jurisdiction.
347

348 **Comment**

349 ...

350 [21] Paragraphs (c) and (d) do not authorize communications advertising legal services to
351 ~~prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other
352 jurisdictions. Whether and how lawyers may communicate the availability of their services to
353 ~~prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

REPORT**I. Introduction**

Lawyers regularly use the Internet to disseminate information about the law and legal services as well as to attract new clients. In general, this development has had the salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers. One of the goals of the ABA Commission on Ethics 20/20 has been to ensure that lawyers continue to provide this valuable information in a manner that is consistent with their ethical obligations.

As a result of its examination of these issues, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that Model Rule 7.1's prohibition against false and misleading communications is readily applicable to online advertising and other forms of electronic communications that are used to attract new clients. Thus, the Commission concluded that there is no need to develop new or different restrictions with regard to those communications. The Commission determined, however, that some Model Rules – specifically Model Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) – have unclear implications for new forms of marketing and that lawyers would benefit from several clarifying amendments.¹ As a result of these proposed changes, a conforming amendment also needs to be made to Comment [3] of Model Rule 7.1.

First, the Commission is proposing amendments to Model Rule 1.18 (Duties to Prospective Clients) and its Comments that would clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments are designed to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

Second, the Commission is proposing amendments to the Comments to Model Rule 7.2 (Advertising). The Commission found that there is considerable confusion concerning the kinds of Internet-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a “recommendation.” To address this ambiguity, the Commission is proposing to define a “recommendation” in a Comment. Additional language in the same Comment would make clear that payments for “lead

¹ The Commission has asked the ABA Center for Professional Responsibility to develop an informational report about the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that such a report would be desirable in light of recent court decisions holding that some states have imposed unconstitutional restrictions on lawyers' marketing-related communications. The informational report will explain the constitutional issues at stake and encourage jurisdictions to develop regulations that are more uniform and constitutionally defensible. The Commission also concluded that Model Rule 7.1 (Communications Concerning a Lawyer's Services), if read literally, could apply to lawyers' communications about their services even when those communications appear on lawyers' personal networking sites and are accessible only to close friends or family. Thus, the informational report would address these concerns. The Commission also has identified and referred to the Standing Committee on Ethics and Professional Responsibility several related topics that are not amenable to treatment in the Model Rules, but that would be more usefully addressed in a Formal Ethics Opinion.

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generation,” including online lead generation, are permissible as long as the generator of the lead complies with certain requirements.

Third, the Commission is proposing amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) that would change the title of the Rule and clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule. For example, a new Comment would explain that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”

Finally, the Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

II. Proposed Amendments to Model Rule 1.18 (Prospective Clients)

Model Rule 1.18 was proposed by the ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission) and was adopted by the ABA House of Delegates in 2002. The purpose of the Rule is to identify a lawyer’s duties to prospective clients.

Critical to the application of Model Rule 1.18 is the definition of a “prospective client.” The Commission concluded that the definition must be sufficiently flexible to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services. In a recently released Formal Ethics Opinion, the ABA Standing Committee on Ethics and Professional Responsibility identified the circumstances under which these communications might give rise to a prospective client-lawyer relationship,² and the Commission concluded that lawyers and the public would benefit from a codification of elements of that Formal Opinion.

First, the Commission concluded that the definition of a “prospective client” needs to be updated in light of the various new ways in which lawyers and the public interact, including online. Thus, the Commission is proposing to replace the word “discusses” in paragraph (a) of Model Rule 1.18 with the word “consults.” This change would make clear what the Formal Opinion concluded: a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place.³ The word “consults” makes this point more clearly than the word “discusses” and anticipates future methods of interaction between lawyers and the public.

The Commission is also proposing new Comment language that would elaborate on the meaning of the word “consults” and give lawyers more guidance about how to avoid the creation of an inadvertent client-lawyer relationship. The Comment emphasizes that such a consultation

² ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010).

³ *Id.* at 4.

can occur, and a prospective client relationship can arise, if a lawyer specifically 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.

At the same time, the Commission sought to retain the idea that unilateral communications from a person to a lawyer are not sufficient to give rise to a prospective client relationship, even if the information is submitted through a lawyer's website. For example, the Comment explains that a consultation does not occur, and a prospective client relationship does not arise, 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. The proposal, therefore, is consistent with ABA Formal Opinion 10-457, which reached a similar conclusion.⁴ 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.

For similar reasons, the Commission proposes to replace the phrase "had discussions with a prospective client" in paragraph (b) with the phrase "learned information from a prospective client." The Commission is proposing conceptually similar changes in Comments [4] and [5].

Finally, the Commission proposes to add a sentence at the end of Comment [2] to make clear that a person is not owed any duties under Model Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent. Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior, which is commonly referred to as "taint shopping."⁵ In fact, some states have incorporated this concept into their own versions of Model Rule 1.18.⁶ The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes this "taint shopping" possible.

III. Proposed Amendments to Model Rule 7.2 (Advertising)

Model Rule 7.2(b) currently prohibits a lawyer from giving anything of value for recommending the lawyer's services. The Rule, however, creates exceptions that permit a lawyer to pay for the "reasonable costs" of advertising and the "usual charges" of non-profit or state-qualified lawyer referral services. In practical effect, the Model Rule has been interpreted to mean that a lawyer may divide client fees with non-profit or approved referral services, but may only pay set costs to advertising programs, such as the cost of a television commercial or a newspaper advertisement.

Prior to the Internet, this dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or

⁴ *Id.*

⁵ See, e.g., N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-02 (2006); Va. State Bar, Ethics Op. 1794 (2004).

⁶ N.Y. Rules of Prof'l Conduct R. 1.18(e)(2).

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payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear. For example, new marketing methods have emerged, such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell's Lawyers.com that do not fit neatly into existing categories. Although the particular models vary, lawyers often pay these entities a fee for each client lead that is generated. An important question in this context is whether the lead generator is "recommending" the lawyer for whom the lead is generated. If so, any payments from the lawyer would violate Rule 7.2(b). The problem is that the existing version of Model Rule 7.2 does not clearly resolve this issue.⁷

To address this ambiguity, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to people (e.g., "runners" or "cappers") who might engage in conduct that the lawyer was not permitted to employ, such as engaging in in-person solicitations or using false or misleading tactics. See also Rule 8.4(a) (prohibiting the violation of the Rules of Professional Conduct "through the acts of another"). Another reason for the restriction is that nonlawyers typically do not have the expertise to know which lawyers are best able to handle a particular matter. A recommendation, therefore, can give the public a false impression about the appropriateness of using a specific lawyer. The Commission concluded that it should propose clarifying language regarding the scope of Model Rule 7.2 that is consistent with these rationales for the Rule, while not unreasonably limiting lawyers' ability to use new client development tools.

A. The Commission's Proposal

To clarify the scope of Model Rule 7.2's prohibition against paying for a recommendation, the Commission proposes to define the word "recommendation" in Comment [5]. The word would be defined as a "communication . . . [that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

This new definition would permit lawyers to use lead generation services, such as those that are increasingly prevalent online, but would require lawyers to ensure that the lead generators do not engage in the kind of conduct that the Model Rule was intended to prohibit. Namely, the definition would make clear that lawyers cannot pay lead generators who endorse or vouch for the lawyer's credentials, abilities, competence, character, or other professional qualities. This restriction is consistent with the idea that nonlawyers do not have the necessary expertise to know which lawyer has the necessary professional qualities to handle a particular matter.

⁷ A related question is whether such fees would be considered an impermissible form of fee sharing under Rule 5.4. There is considerable case law and numerous ethics opinions that define a "legal fee" for purposes of Rule 5.4, and the Commission concluded that no additional guidance is necessary to address the issue. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 00-10 (2000); Va. State Bar, Ethics Op. 1712 (1998).

The Commission concluded that there are other possible concerns associated with lead generation that should also be identified. First, the proposed Comment explains that, even if a lead generator does not “recommend” the lawyer, the lawyer’s use of the lead generator must be consistent with Model Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer). The reference to Model Rule 1.5(e) acknowledges that the lead generator may be another lawyer, *see* Model Rule 7.2(b)(4), in which case the restrictions on fee divisions in Rule 1.5(e) must be observed. The reference to Model Rule 5.4 is intended to remind lawyers that, although the lawyer can pay a fee to a nonlawyer for a client lead, the fee should typically not be contingent on a person’s use of the lawyer’s service. Such a fee would constitute an impermissible sharing of fees with nonlawyers under Model Rule 5.4(a). Moreover, the reference to Rule 5.4 is intended to remind lawyers that a nonlawyer lead generator should not in any way direct or regulate how the lawyer’s work is performed. *See* Model Rule 5.4(c).

Second, in order to ensure that the public is not misled, the proposed Comment language reminds lawyers that they should not use a lead generator unless the lead generator’s communications are consistent with Model Rule 7.1, which prohibits false or misleading communications. To comply with this obligation, the Comment explains that a lawyer should not pay a lead generator if the lead generator 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.

The Commission considered whether to require lead generators to state affirmatively that they are not recommending the lawyer and have not analyzed a person’s legal needs. The Commission concluded that lead generation takes many forms, and some of those forms will not require any affirmative statements from the lead generator in order to prevent misunderstandings. For example, “pay-per-click” advertising is a form of lead generation where a lawyer pays a fee to a nonlawyer (e.g., Google) each time someone clicks on the lawyer’s advertisement and is taken to the lawyer’s website. When someone clicks on such an advertisement, there is typically no reason to believe that the provider of the “pay-per-click” service (in this example, Google) is recommending the lawyer or that the provider of the service has, in some way, analyzed the person’s legal needs. The Commission concluded that, under these circumstances, it would be unnecessary to require the lead generator to state affirmatively that it is not recommending the lawyer or that it has not analyzed a person’s legal needs. It would be obvious from the context that the lead generator has not done so.

For these reasons, the Commission concluded that it would be more appropriate to state generally that lead generators should not state, imply, or create a reasonable impression that they are recommending the lawyer, have made the referral without payment from the lawyer, or have analyzed a person’s legal problems when determining which lawyer should receive the referral. In some circumstances, this requirement might mean that the lead generator has to make affirmative statements (e.g., that it is not recommending the lawyer, that it is getting paid for the lead, or that it has not analyzed the person’s legal problems). In other circumstances, however, where there is no reasonable likelihood of confusion (e.g., typical “pay-per-click” advertising), no such affirmative statements should be necessary.

Finally, the Commission is retaining the existing word “channeling” in Comment [5]. The Commission had considered deleting the word, because it is ambiguous and does not appear in the black letter. The Commission heard concerns, however, that some forms of lead generation might be problematic, even if no “recommendation” (as that word would be defined) is made. For example, someone might be paid to distribute a lawyer’s business cards to accident victims without actually “recommending” the lawyer in explicit terms. Such a person would be “channeling” professional work without “recommending” the lawyer. The Commission concluded that such activities would be prohibited as in-person solicitations under Model Rule 7.3 and that the word “channeling” will serve as a reminder about Rule 7.3’s restrictions. In sum, the retention of the word “channeling” is only intended as a reminder that lawyers should not use others to engage in forms of client development that violate Model Rule 7.3.

B. Alternate Approaches Considered

The Commission considered several alternatives to amending Model Rule 7.2 and paid particular attention to one that would have had more significant implications than the approach that the Commission decided to propose. In particular, the Commission considered eliminating altogether Model Rule 7.2(b)’s prohibition against paying nonlawyers for recommendations. Such a change would have enabled lawyers to pay for such recommendations as long as the nonlawyers’ methods were consistent with the lawyer’s own ethical obligations. See Model Rule 8.4(a). For example, a lawyer under this alternate approach would have been permitted to pay a for-profit referral service for recommending the lawyer, but only if the service did not employ any methods that the lawyer could not employ (e.g., it did not use misleading communications or engage in in-person solicitations). The Commission learned that the District of Columbia has adopted a somewhat similar approach.⁸

This alternative would have retained the historical restrictions on paying others to engage in unethical conduct (such as paying “runners” to engage in in-person solicitation), but free lawyers to use new and innovative forms of marketing. For example, for-profit lawyer referral services would be able to recommend lawyers who are particularly well-suited to provide the specific services that a person is seeking, including offering a description of the lawyers’ qualifications and the cost of their services relative to other lawyers who offer similar services. Arguably, such a for-profit referral service would be able to match people with appropriate lawyers more effectively and efficiently than not-for-profit models and thus make the delivery of legal services more accessible, affordable, and transparent.⁹

⁸ D.C. RULES OF PROF’L CONDUCT R. 7.1(b)(2) (“A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact”); D.C. Bar Legal Ethics Comm., Ethics Op. 342 (2007).

⁹ The proposal also would be consistent with the Commission’s proposed approach to outsourcing under Rule 5.3. In particular, proposed Comment [4] to that Rule provides that, “[w]hen 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 premise of that proposal is consistent with the idea that lawyers should be permitted to pay others to perform services on the lawyer’s behalf as long as the services are performed in a manner that is consistent with the lawyer’s own professional obligations.

The Commission nevertheless decided to retain the restriction on paying others for a recommendation. Concerns were raised that, by removing the restriction, for-profit entities would develop undue influence over the referral of professional work, even if they do not have the expertise to do so. Moreover, there was concern that such entities might wield inappropriate influence over lawyers who want to be recommended, despite the restrictions contained in Model Rule 5.4. For these reasons, the Commission's current proposal retains the current prohibition against paying for a recommendation, but clarifies what counts as a "recommendation."

IV. Proposed Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)

Model Rule 7.3 regulates a lawyer's direct contacts with the public for the purpose of soliciting business. Paragraph (a) prohibits most kinds of in-person, live telephone, and real-time electronic solicitations, but the Model Rule permits and regulates other forms of solicitations, such as those sent by direct mail and email.

The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a "solicitation" and thus fall within the scope of Model Rule 7.3. In the early days of the Internet, little such guidance was needed. Ethics opinions had concluded that emails constituted a solicitation and were governed by Rule 7.3, but that less targeted forms of advertising (such as websites) were not governed by the Rule.¹⁰ Today, however, lawyers can post information on their social or professional networking pages (which function like websites), but can control the viewers and enter into conversations via those pages (like email). Similarly, some websites allow lawyers and the public to interact, sometimes in "real-time" and sometimes not. The Commission was advised that lawyers are uncertain as to whether these new forms of Internet-based activities fall within Model Rule 7.3.

The Commission concluded that, to address this ambiguity, lawyers need a clearer definition of a "solicitation." A new proposed Comment [1] would explain that a lawyer's communications constitute a solicitation when the lawyer offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific person. The phrase "reasonably understood to be offering to provide" is intended to ensure that lawyers are governed by the Model Rule even if their communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose. For example, if a lawyer approaches people at their homes and describes various legal services, the lawyer's communications constitute a "solicitation" even if the lawyer does not formally offer to provide those services, as long as a reasonable person would interpret the lawyer's communications as an offer to provide those services.

The second sentence is designed to clarify that a response to a request for information and an advertisement that is not directed to specific people are not "solicitations." For example, the sentence makes clear that advertisements that are automatically generated in response to an Internet search are not solicitations. Because those advertisements are generated in response to Internet-based research, they are more analogous to a lawyer's response to a request for

¹⁰ Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer's services).

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information (which is not a solicitation) than an unsolicited and targeted letter to a person who is known to be in need of a particular legal service (which is a solicitation). These examples are intended to clarify when a lawyer's activities constitute a solicitation and are thus governed by Model Rule 7.3.

The Commission concluded that additional elaboration on this point also would be useful in renumbered Comment [3]. In particular, technology has enabled various kinds of online interactions between lawyers and the public. The clarifying language makes clear that lawyers do not violate paragraph (a) if they are responding to a request for information, which can occur in many settings, including online.

The Commission's research also revealed that "autodialing" (or "robo-calling") is now unlawful in many situations. *See, e.g.*, 47 U.S.C. 227(b). As a result, the Commission proposes to delete the reference to "autodialing" in renumbered Comment [3] and to remind lawyers that other law often governs a lawyer's conduct in this area.

Finally, the Commission's proposal addresses a matter of terminology. With the creation of Model Rule 1.18 in 2002, the phrase "prospective client" refers to a specific person who has actually shared information with a lawyer. Model Rule 7.3 clearly intends to cover contacts with all possible future clients, not just those who have had some contact with lawyers and have become "prospective clients" under Model Rule 1.18. (See the description of Model Rule 1.18 earlier in this Report.) Thus, the Commission proposes to re-title the Model Rule 7.3 "Solicitation of Clients" so that the title more clearly and accurately reflects the Rule's purpose.

V. Conclusion

Technology has enabled lawyers to communicate about themselves and their services more easily and efficiently, and it has enabled the public to learn necessary information about lawyers, their credentials, and the particular legal services those lawyers provide as well as the cost of those services. Lawyers, however, need to ensure that these communications satisfy existing ethical obligations. The Commission's proposals are designed to give lawyers more guidance regarding these obligations in the context of various new client development tools. The Commission respectfully requests that the House of Delegates adopt the amendments to the Model Rules of Professional Conduct set forth in the Resolutions accompanying this Report.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105b: Technology and Client Development

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new ethics issues relating to technology and client development. Resolution 105b would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these issues.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The

Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on

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Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY1. Summary of the Resolution(s)**Resolution 105b: Technology and Client Development**

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105b offers lawyers guidance regarding their ethical obligations when using new technology to market their services. The Resolution offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession

3. Please Explain How the Proposed Policy Position will address the issue

The Commission determined that, although no new restrictions on lawyer advertising are necessary, the existing Rules do not have clear implications for new forms of client development. Proposed Resolution 105b, if adopted, will provide lawyers with more guidance about how they can use new forms of marketing to disseminate information about themselves and their services, while protecting the public from false or misleading communications.

For example, the Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a "discussion" and does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word "discussion" with the word "consults" and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a "consultation" occurs under Rule 1.18.

The Resolution also updates several other Model Rules to reflect the changing nature of the technology that lawyers use for client development. Currently, Model Rule 7.2(b) of the Model Rules of Professional Conduct (Advertising) provides that a lawyer typically cannot provide anything of value to someone for recommending the lawyer's services. This prohibition has unclear implications

for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Rule 7.2 of the Model Rules of Professional Conduct that would define a "recommendation" to include communications that endorse or vouch for a lawyer's credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.

The Commission is also proposing amendments to Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients) to clarify when a lawyer's online communications constitute "solicitations" and are thus governed by the Rule.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105b as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105b relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website (click [here](#)). Moreover, the Commission created and maintained a listserv for interested persons to

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keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
SECTION OF INTERNATIONAL LAW
YOUNG LAWYERS DIVISION
NEW YORK COUNTY LAWYERS' ASSOCIATION
SECTION OF BUSINESS LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
 2 Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining
 3 lawyers and nonlawyers outside the firm to work on client matters (i.e. outsourcing) as follows
 4 (insertions underlined, deletions ~~struck through~~):

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- 6 (a) the Comments to Model Rule 1.1 (Competence);
- 7 (b) the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer
- 8 Assistants); and
- 9 (c) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice
- 10 of Law).

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13 *Client-Lawyer Relationship*

14 **Rule 1.1 Competence**

15

16 **A lawyer shall provide competent representation to a client. Competent**

17 **representation requires the legal knowledge, skill, thoroughness and preparation**

18 **reasonably necessary for the representation.**

19

20 **Comment**

21 ...

22

23

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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.

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

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

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

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

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

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

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

69 **Comment**

70 [21] Paragraph (a) requires lawyers with managerial authority within a law firm to make
71 reasonable efforts ~~to establish internal policies and procedures designed to provide to ensure that~~
72 the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and
73 nonlawyers outside the firm who work on firm matters will act in a way compatible with the
74 professional obligations of the lawyer, with the Rules of Professional Conduct. See Comment [6]
75 to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1: (responsibilities
76 with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory
77 authority over ~~the work of a nonlawyer, such nonlawyers within or outside the firm.~~ Paragraph
78 (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~
79 such nonlawyers within or outside the firm that would be a violation of the Rules of Professional
80 Conduct if engaged in by a lawyer.

81

82 **Nonlawyers Within the Firm**

83 [42] Lawyers generally employ assistants in their practice, including secretaries,
84 investigators, law student interns, and paraprofessionals. Such assistants, whether employees or
85 independent contractors, act for the lawyer in rendition of the lawyer's professional services. A
86 lawyer must give such assistants appropriate instruction and supervision concerning the ethical
87 aspects of their employment, particularly regarding the obligation not to disclose information
88 relating to representation of the client, and should be responsible for their work product. The
89 measures employed in supervising nonlawyers should take account of the fact that they do not
90 have legal training and are not subject to professional discipline.

91

92 **Nonlawyers Outside the Firm**

93 [3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal
94 services to the client. Examples include the retention of an investigative or paraprofessional
95 service, hiring a document management company to create and maintain a database for complex
96 litigation, sending client documents to a third party for printing or scanning, and using an
97 Internet-based service to store client information. When using such services outside the firm, a
98 lawyer must make reasonable efforts to ensure that the services are provided in a manner that is
99 compatible with the lawyer's professional obligations. The extent of this obligation will depend
100 upon the circumstances, including the education, experience and reputation of the nonlawyer; the
101 nature of the services involved; the terms of any arrangements concerning the protection of client
102 information; and the legal and ethical environments of the jurisdictions in which the services will
103 be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2
104 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a)
105 (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When
106 retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions
107 appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is
108 compatible with the professional obligations of the lawyer.

109

110 [4] Where the client directs the selection of a particular nonlawyer service provider
111 outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of
112 responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making
113 such an allocation in a matter pending before a tribunal, lawyers and parties may have additional
114 obligations that are a matter of law beyond the scope of these Rules.

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115 *Law Firms And Associations Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional*
116 *Practice Of Law*

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

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

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

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

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

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

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

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

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

142 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
143 suspended from practice in any jurisdiction, may provide legal services in this jurisdiction
144 that:

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

147 (2) are services that the lawyer is authorized to provide by federal law or
148 other law of this jurisdiction.

149 **Comment**

150 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
151 practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be
152 authorized by court rule or order or by law to practice for a limited purpose or on a restricted
153 basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the
154 lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not

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155 assist a person in practicing law in violation of the rules governing professional conduct in that
156 person's jurisdiction.

157 ...

158 [21] Paragraphs (c) and (d) do not authorize communications advertising legal services to
159 ~~prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other
160 jurisdictions. Whether and how lawyers may communicate the availability of their services to
161 ~~prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

AMERICAN BAR ASSOCIATION
 COMMISSION ON ETHICS 20/20
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 26 obtain informed consent from the client and must reasonably believe that the other lawyers'
 27 services will contribute to the competent and ethical representation of the client. See also Rules
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29 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision
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39 lawyers and parties may have additional obligations that are a matter of law beyond the scope of
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121 (2) hold out to the public or otherwise represent that the lawyer is admitted
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125 basis in this jurisdiction that:

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153 assist a person in practicing law in violation of the rules governing professional conduct in that
154 person's jurisdiction.

155 ...

REPORT**Introduction**

Law firms, lawyers, and corporate counsel are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession's core values.¹ State and local bar associations also have offered guidance in this area.² To date, however, the Model Rules of Professional Conduct and their accompanying Comments have not specifically addressed outsourcing.

The ABA Commission on Ethics 20/20 has concluded that, although changes to the text of the Model Rules are not necessary, Comments to certain Rules should be clarified to address this issue so that lawyers can more easily determine their ethical obligations. In particular, the Resolutions that accompany this Report propose three changes. First, the Commission proposes a new Comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client's matter (i.e., outsourcing legal work to other lawyers). Second, the Commission proposes new Comments to Model Rule 5.3, in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers). Finally, the Commission proposes a new sentence to Comment [1] to Model Rule 5.5 to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. In each of these cases, the Commission's goal is to clarify how existing rules and principles apply to the particular context of outsourcing.

The Commission's proposals also reflect the view that the evolution of law practice and the continued rapid changes in and diversity of outsourcing arrangements make bright lines impossible to draw. Like many obligations described in the Model Rules, the proposals are intended to be rules of reason and are not intended to preclude consideration of broader legal concerns, such as malpractice and tort liability as well as the law described in the Restatements of Agency and the Law Governing Lawyers. In sum, the proposals do not (and cannot) replace existing legal principles that already govern lawyer conduct; rather, they are designed to ensure that lawyers engage in outsourcing in a manner that is consistent with applicable rules of professional conduct.

¹ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).

² See, e.g., State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. State Bar Prof'l Ethics Comm., Ethics Op. 07-2 (2008); N.C. State Bar, 2007 Formal Op. 12 (2008); N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Ethics Op. 762 (2003); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009), <http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf>; Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), http://www.ccbec.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf.

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The Commission understands that certain outsourcing is controversial in light of the current employment market for lawyers and the economic hardships faced by lawyers currently seeking jobs. The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct are neither an endorsement nor a rejection of the practice of outsourcing. Rather, the proposals respond to the existence and continuing growth of these practices and are intended to clarify a lawyer's obligations in this context so that lawyers who decide to outsource do so in an ethical and responsible manner.

In addition to its analysis of the issues, the Commission has conducted extensive outreach, held public meetings and public hearings on outsourcing, invited and considered comments from numerous entities and parties, posted material on its website, and sought the views of all ABA groups. Also, throughout its consideration the Commission has worked with the ABA's Standing Committee on Ethics and Professional Responsibility and the ABA Section of International Law Task Force on International Outsourcing of Legal Services. Their participation was critical to the development of the Resolutions and this Report, and the Commission is grateful for their assistance.

I. An Overview of Outsourcing by Lawyers and Law Firms

Outsourcing refers generally to the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider, either in the United States or in another country.³ Among the factors that have contributed to the significant growth of outsourcing are globalization, the technology-driven efficiencies developed and utilized by many providers of outsourced services, and the demand by clients for cost-effective services.

Lawyers have found that the same technology-driven efficiencies that have led to an increase in outsourcing throughout the global economy are also making outsourcing an appealing option within the legal profession for certain work. In particular, lawyers have found that, if they exercise proper care in the selection of a provider, work can be completed with greater speed and lower costs without sacrificing quality. These efficiencies offer opportunities for solo practitioners and small and medium-sized U.S. law firms, allowing them to better compete for large matters without fear that they will lack adequate resources to perform the legal work involved. Also, by reducing the cost of legal services, outsourcing can improve access to justice by making legal services more affordable.

Lawyers use outsourcing for a variety of tasks. Examples of law-related work that is frequently outsourced includes investigative services, offsite online data storage or online practice management tools (e.g., "cloud computing" services), and creation and maintenance of databases to manage discovery in litigation. Outsourcing also occurs when lawyers retain other lawyers and law firms to conduct a range of services, such as legal research, document review, patent searches, due diligence, and contract drafting. The Commission's research indicates that lawyers still tend to outsource legal and law-related work domestically more often than they outsource work internationally. In fact, information reviewed by the Commission indicates that,

³ When outsourced work is sent outside the U.S., the activity is often referred to as "offshoring." Work outsourced within the United States has been referred to as "onshoring," "insourcing" or "homesourcing."

more recently, the outsourcing industry is responding to client demand for greater availability of on-shore operations.

II. The Commission's Research Regarding Outsourcing

As noted above, as it studied outsourcing the Commission benefited from the efforts of other ABA entities. In particular, the ABA Standing Committee on Ethics and Professional Responsibility had released Formal Opinion 08-451 in 2008, which addressed a variety of ethical issues associated with outsourcing. Moreover, shortly after the release of Formal Opinion 08-451, the ABA Section of International Law had created a Task Force on the International Outsourcing of Legal Services to examine related issues.

The Commission's research focused on the ethics-related issues identified in ABA Formal Opinion 08-451: fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and nonlawyers, unauthorized practice of law, and independence of professional judgment. The Commission also considered the ethics opinions issued by international, state and local bar associations, the vast majority of which identified issues similar to those in Formal Opinion 08-451.⁴

The Commission's conclusions regarding these issues were informed by scholarly articles, studies, and surveys; testimony offered at the Commission's public hearings; comments received in response to questions that were posed to clients, lawyers, law firms, and providers of outsourced services; and news reports. The Commission also reviewed materials from domestic and international outsourcing providers, finding substantial evidence that the providers are focused on the ethical considerations identified in the organized bars' ethics opinions. For example, providers of outsourced legal and non-legal services have developed protocols that include increasingly sophisticated technology to ensure quality control, adequate security over personnel and information, and opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.⁵

The Commission was particularly interested in procedures to protect confidential information. Although procedures vary depending on the type of work that is being outsourced, the Commission found that lawyer and nonlawyer employees of many outsourcing providers are required to sign confidentiality agreements, with some firms requiring employees to sign new and separate confidentiality agreements for each new assignment. Providers also frequently use security measures to protect electronic information (e.g., encryption, malware protection, firewalls). They use biometric and other security measures to ensure only authorized physical access to data, such as separate premises or areas for each project. They use continuous video monitoring, monitoring of employee computers, and repeated identity checks within buildings, elevators, and other areas where work is being performed. They frequently disable the portals on employee computers so that portable data storage devices cannot be used to remove information

⁴ See *supra* note 2.

⁵ See ABA Commission on Ethics 20/20,

http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html for a sample bibliography and other materials related to the Commission's research.

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from the premises. They also perform extensive background checks on employees as well as periodic internal and external audits of all of the foregoing measures.

The Commission found that conflict-of-interest considerations are increasingly given careful attention. For example, a number of outsourcing providers employ conflicts checking procedures modeled after those used by large U.S. and U.K. law firms; others are developing similar systems. These systems include maintaining extensive databases for existing and former clients and screening the work history of new recruits and existing employees against both the information contained in the databases and information supplied by the client.

The Commission's research has revealed that a number of companies that provide outsourced services have established sophisticated training programs for nonlawyer and lawyer employees on a variety of topics, including U.S. substantive and procedural law, legal research and writing, and the rules of professional conduct. These companies also regularly seek input from and collaboration with the organized bar and lawyers and law firms in the development of ethics policies and training regimes for their lawyer and nonlawyer employees.

III. Guiding Principles for the Commission's Recommendations

In considering possible changes to the ABA Model Rules of Professional Conduct, the Commission relied on two important principles. First, the Model Rules are a critical, but not exclusive, source of the law governing lawyers. In particular, the Model Rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."⁶ Second, the comments to the Model Rules are often used to provide guidance as to these additional obligations.⁷ In light of these guiding principles, the Commission concluded that lawyers should be given more guidance on outsourcing through changes to the Comments to the Model Rules.

The Commission's review of the Model Rules of Professional Conduct revealed that, in all but three instances, they are either easily recognizable as having application to outsourcing, or they bear no relation to it at all. For example, the extensive commentary accompanying the series of Model Rules dealing with conflicts of interest (Rules 1.7 through 1.13), when considered in conjunction with the wealth of ethics opinions, court cases, and scholarly discussion generally available on that subject, revealed that no special language needed to be added to those Rules to remind lawyers of how they apply to outsourcing practices. The Commission reached the same conclusion about Model Rule 1.5 (Fees) and the wealth of ethics opinions available treating myriad specific questions relating to the reasonableness of fees for both legal and non-legal services, as well as regarding Model Rule 1.15 (Safekeeping Property).

The Commission ultimately determined, however, that the comments to Rule 1.1 (Competence), Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) and Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) were appropriate locations for clearer guidance.

⁶ ABA MODEL RULES OF PROF'L CONDUCT, Scope, par. [15].

⁷ See *id.* (observing that "comments are sometimes used to alert lawyers to their responsibilities under...other law").

IV. The Commission's Proposal Regarding Model Rule 1.1: Retention of Nonfirm Lawyers

Model Rule 1.1 requires a lawyer to perform legal services competently. The Commission concluded that, in light of the frequency with which lawyers now outsource work to another lawyer or law firm, the Comments to Rule 1.1 should be expanded to refer specifically to the practice.

The Commission concluded that Model Rule 1.1 is the appropriate location for this guidance for two reasons. First, Comment [1] to Model Rule 1.1 already addresses a related subject: a lawyer's duty to associate with another lawyer to ensure competent representation of a client. Second, as Formal Opinion 08-451 makes clear, the primary ethical consideration when retaining a nonfirm lawyer is whether the nonfirm lawyer is competent to assist in the representation. The Commission considered other locations for the new commentary, including Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), but concluded that the primary ethical consideration when retaining nonfirm lawyers is the competence of those nonfirm lawyers and that Model Rule 1.1 is therefore the appropriate location for further guidance.

The first sentence of the proposed new Comment [6] restates a general position expressed in ABA Formal Opinion 08-451 and in various state and local ethics opinions: lawyers should take reasonable steps to ensure that the outsourced services will be performed competently and that they contribute to the overall competent and ethical representation of the client.

The first sentence also explains that, ordinarily, a lawyer should obtain a client's informed consent before retaining a nonfirm lawyer. The Commission was reluctant to conclude that consent is always required, because consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information. Nevertheless, the Commission concluded that consent will typically be required, and will almost always be advisable, when a nonfirm lawyer is retained to assist on a client's matter.

Following the first sentence is a list of other Model Rules that lawyers should consult when retaining nonfirm lawyers. The Commission concluded that these Model Rules are commonly implicated in this context and that lawyers should be aware of their potential application.

The next sentence lists several factors that lawyers should consider when retaining nonfirm lawyers, 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. This list is not intended to be exhaustive, but is intended to give lawyers some guidance regarding some of the most important considerations to take into account when retaining nonfirm lawyers.

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In early drafts of this proposal, the Commission had an additional sentence at the end of the Comment that would have required lawyers to reasonably believe that the nonfirm lawyer's work was competently performed. The Commission heard concerns that the sentence could be read to impose unnecessary, costly obligations to determine the competency of work performed by other lawyers in different firms to whom work was outsourced. The Commission concluded that these concerns were well-founded. Because the outsourcing of work to other lawyers takes many different forms, the Commission concluded that the level of oversight over those lawyers should be addressed in an ethics opinion, which can provide a nuanced treatment of the issue, rather than in a Comment to the Model Rules. The Commission has asked the ABA Standing Committee on Ethics and Professional Responsibility to address this issue either in a revised version of Formal Opinion 08-451 or a separate Formal Opinion.

Proposed Comment [7] emphasizes that, when multiple firms work together on a client's matter, the firms ordinarily should consult with the client and each other about the scope of the work being performed by each firm and the allocation of responsibility among them. When making such allocations of responsibility, however, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.

Finally, although the new Comments address outsourcing, the Commission does not use the word "outsourcing" in its proposed additions to the official Comments. The Commission concluded that, in this context, lawyers are more familiar with the concept of "retaining" or "contracting with" a nonfirm lawyer and that the word "outsourcing" would create unnecessary confusion. Moreover, the word "outsourcing" may become dated or fall out of use, to be replaced by a new term-of-art. Thus, the Commission retained the traditional terminology, but concluded that outsourcing as it occurs today is conceptually identical to the retention of nonfirm lawyers.

V. Use of Nonlawyer Assistance Outside the Firm: Proposal Regarding Model Rule 5.3

Model Rule 5.3 was adopted in 1983, and was designed to ensure that lawyers employ appropriate supervision of nonlawyers. Although the Rule has been interpreted to apply to lawyers' use of nonlawyers within and outside the firm,⁸ the Commission concluded that lawyers would benefit from additional guidance regarding the application of the Rule to outside nonlawyers.

A. Proposed Changes to Comment [1]

The Commission determined that Comment [2], which offers an overview of Model Rule 5.3, is more appropriately located in Comment [1]. The Commission also concluded that this overview Comment should make clear that, consistent with existing authority,⁹ Model Rule 5.3 applies to the use of nonlawyers within *and* outside the firm.

⁸ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995) (concluding that, "[u]nder Rule 5.3, a lawyer retaining . . . an *outside service provider* is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information") (emphasis added).

⁹ *Id.*

B. Proposed Changes to Comment [3]

An existing Comment (which would become Comment [2]) identifies the considerations that apply when the services are performed *within* the firm, and the Commission concluded that a separate Comment – proposed Comment [3] – should identify the distinct concerns that arise when the services are performed *outside* the firm.

As an initial matter, proposed Comment [3] recognizes that nonlawyer services can take many forms, including services performed by individuals and services performed by automated products (e.g., online data storage). To reflect the scope of the nonlawyer services now being provided outside of firms, the first sentence of the Comment [3] includes a “cloud computing” example. (For similar reasons, the Commission is proposing to change the title of Model Rule 5.3 from “Nonlawyer Assistants” to “Nonlawyer Assistance.”)

The rest of proposed Comment [3] describes a lawyer’s obligations when using nonlawyer services outside the firm. The Comment states that, when using such services, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer’s professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer’s obligations in this regard. The Comment also references several other Model Rules that lawyers should consider when using nonlawyer services outside the firm.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes an assignment, but the lawyer’s instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator’s conduct is compatible with the lawyer’s professional obligations.

Notably, the proposed Comment language does not describe whether a lawyer must obtain consent when disclosing confidential information to nonlawyer service providers outside the firm. The Commission concluded that there are many circumstances where such consent is unnecessary. For example, lawyers regularly send documents to outside vendors for scanning or copying, but there is ordinarily no need to obtain the client’s consent to have those services performed. There are, however, other situations where client consent might be advisable or required. As with the issue above relating to the level of oversight over nonfirm lawyers to whom work has been outsourced, the Commission concluded that lawyers would benefit from further clarification of this issue by the Standing Committee on Ethics and Professional Responsibility and has requested that the Committee undertake consideration of this issue.

Finally, as is the case with the proposed Comment to Model Rule 1.1, proposed Comment [3] does not use the term “outsourcing.” The Commission concluded that lawyers may incorrectly conclude that they are not engaged in “outsourcing” when using nonlawyer services outside the firm. To avoid such a misunderstanding, the Commission decided to retain the original phrasing of the Model Rule within the Comment.

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C. Proposed Changes to Comment [4]

Proposed Comment [4] recognizes that clients sometimes direct lawyers to use particular nonlawyer service providers. In such situations, the lawyer ordinarily should consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.

The word “monitoring” reflects a new ethical concept. The Commission concluded that it was needed because, when a nonlawyer outside the firm is performing services in connection with a matter, it may not be possible to “directly supervise” the nonlawyer. The word “monitoring” makes clear that there is nevertheless a need to remain aware of how nonlawyer services are being performing. The Comment explains that, when the client directs the lawyer to use a particular nonlawyer, the lawyer and client should ordinarily agree who will have this “monitoring” responsibility. In contrast, if the client has not directed the selection of the nonlawyer, the lawyer or law firm would have the “monitoring” responsibility.

The final sentence of the proposed Comment [4] is intended to remind lawyers that they may have duties to a tribunal that are not necessarily satisfied through compliance with the Rules of Professional Conduct. For example, if a client instructs the lawyer to hire a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client, given that the lawyer may have to make certain representations to a tribunal regarding the vendor’s work.

VI. Assisting the Unauthorized Practice of Law: Proposal Regarding Model Rule 5.5

When lawyers outsource work to lawyers and nonlawyers, it is important to ensure that those lawyers and nonlawyers are not engaging in the unauthorized practice of law. The Commission concluded that it is important to make this point explicitly in Comment [1] to Model Rule 5.5. The Commission’s proposed amendment to that Comment serves that purpose.

Conclusion

The Commission believes that continued study by, and education of, the profession about outsourcing practices is essential, especially given that those practices will evolve and new ethics issues may arise. Thus, in addition to recommending the adoption of the amendments described in the Resolutions accompanying this Report, the Commission enthusiastically endorses a comprehensive, user-friendly website that would be managed by the ABA Center for Professional Responsibility and would track all significant news and developments relating to the ethics of outsourcing. This website will provide up-to-date access to both evolving outsourcing practices and the technological changes that make them possible. During the period in which the continued and rapid evolution in outsourcing practices renders the creation of a static, established set of practice standards both unwieldy and premature, this web-based resource will serve as an easily-updated “living document,” useful both to those who engage in outsourcing and to those who study it.

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The Ethics 20/20 Commission respectfully requests that the House of Delegates adopt the proposed amendments to Model Rules 1.1, 5.3, and 5.5 in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

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GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105c: Outsourcing

- The Commission is proposing new Comments to Rule 1.1 of the Model Rules of Professional Conduct (Competence) to identify the factors that lawyers need to consider when retaining lawyers in a different firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.
- The Commission is proposing amendments to the title of, and Comments to, Rule 5.3 of the Model Rules of Professional Conduct to address issues relating to the retention of nonlawyers outside the firm. To reflect the increasingly important role of automated nonlawyer assistance, such as "cloud computing" services, the title of the Rule will change from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Moreover, the Comments will emphasize that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.
- The Commission is proposing amendments to Comment [1] to Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of these resolutions would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002. One aspect of this transformation has been the extent to which lawyers now outsource legal and nonlegal services. The Commission found that the Model Rules currently offer lawyers limited guidance regarding their ethical obligations in this increasingly important context.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105(c): Outsourcing

- The Commission is proposing new Comments to Rule 1.1 of the Model Rules of Professional Conduct (Competence) to identify the factors that lawyers need to consider when retaining lawyers in a different firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.
- The Commission is proposing amendments to the title of, and Comments to, Rule 5.3 of the Model Rules of Professional Conduct to address issues relating to the retention of nonlawyers outside the firm. To reflect the increasingly important role of automated nonlawyer assistance, such as "cloud computing" services, the title of the Rule will change from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Moreover, the Comments will emphasize that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.
- The Commission is proposing amendments to Comment [1] of Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the practice of law. One aspect of this transformation is that legal and nonlegal work can be, and often is, disaggregated. The outsourcing of work, both domestically and internationally, as a means to provide clients with competent and cost-effective services is not new, but it is occurring with greater frequency due to technological change and increased globalization.

The Commission found that the Model Rules currently offer lawyers limited guidance regarding their ethical obligations in this increasingly important context. Resolution 105c, if adopted, will provide that guidance and do so in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105c, if adopted, will give lawyers who decide to engage in outsourcing more guidance regarding their ethical obligations.

The Commission's proposed new Comments [6] and [7] to Rule 1.1 of the Model Rules of Professional Conduct (Competence) identify the factors that lawyers need to consider when retaining lawyers in another firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.

The Commission's proposed amendments to Rule 5.3 are designed to give lawyers more guidance regarding the retention of outside nonlawyers. The proposed new Comments identify the factors that lawyers need to consider when outsourcing work to nonlawyers and emphasize that lawyers should make reasonable efforts to ensure that those nonlawyers provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers and that the lawyer's instructions must be reasonable under the circumstances.

Comment [4] recognizes that clients frequently direct lawyers to use particular nonlawyer service providers. In such situations, Comment [4] provides that lawyers ordinarily should consult with their clients to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.

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Finally, the Commission is proposing amendments to Comment [1] to Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105c as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105c relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The

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Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

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AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

STANDING COMMITTEE ON CLIENT PROTECTION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

STANDING COMMITTEE ON PROFESSIONALISM

STANDING COMMITTEE ON SPECIALIZATION

NEW YORK STATE BAR ASSOCIATION

GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

SECTION OF INTERNATIONAL LAW

NEW YORK COUNTY LAWYERS' ASSOCIATION

SECTION OF BUSINESS LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
2 Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest
3 when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as
4 follows (insertions underlined, deletions ~~struck-through~~):
5

6 (a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and

7 (b) the Comments to Model Rule 1.17 (Sale of Law Practice).
8

9 Rule 1.6 Confidentiality of Information

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

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

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

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

20 (3) to prevent, mitigate or rectify substantial injury to the financial interests
21 or property of another that is reasonably certain to result or has resulted from the

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22 client's commission of a crime or fraud in furtherance of which the client has used
23 the lawyer's services;

24 (4) to secure legal advice about the lawyer's compliance with these Rules;(5)
25 to establish a claim or defense on behalf of the lawyer in a controversy between the
26 lawyer and the client, to establish a defense to a criminal charge or civil claim
27 against the lawyer based upon conduct in which the client was involved, or to
28 respond to allegations in any proceeding concerning the lawyer's representation of
29 the client; or

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

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

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

38
39 Comment

40 ...

41 42 Detection of Conflicts of Interest

43
44 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose
45 limited information to each other to detect and resolve conflicts of interest, such as when a
46 lawyer is considering an association with another firm, two or more firms are considering a
47 merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7].
48 Under these circumstances, lawyers and law firms are permitted to disclose limited information,
49 but only once substantive discussions regarding the new relationship have occurred. Any such
50 disclosure should ordinarily include no more than the identity of the persons and entities
51 involved in a matter, a brief summary of the general issues involved, and information about
52 whether the matter has terminated. Even this limited information, however, should be disclosed
53 only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise
54 from the possible new relationship. Moreover, the disclosure of any information is prohibited if
55 it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact
56 that a corporate client is seeking advice on a corporate takeover that has not been publicly
57 announced; that a person has consulted a lawyer about the possibility of divorce before the
58 person's intentions are known to the person's spouse; or that a person has consulted a lawyer
59 about a criminal investigation that has not led to a public charge). Under those circumstances,
60 paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A
61 lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring
62 an association with another firm and is beyond the scope of these Rules.

63 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further
64 disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7)
65 does not restrict the use of information acquired by means independent of any disclosure
66 pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information
67 within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a

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68 lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve
69 conflicts of interest that could arise in connection with undertaking a new representation.

70 [153] A lawyer may be ordered to reveal information relating to the representation of a
71 client by a court or by another tribunal or governmental entity claiming authority pursuant to
72 other law to compel the disclosure. Absent informed consent of the client to do otherwise, the
73 lawyer should assert on behalf of the client all nonfrivolous claims that the order is not
74 authorized by other law or that the information sought is protected against disclosure by the
75 attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer
76 must consult with the client about the possibility of appeal to the extent required by Rule 1.4.
77 Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's
78 order.

79 [164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
80 the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the
81 lawyer should first seek to persuade the client to take suitable action to obviate the need for
82 disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the
83 lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
84 in connection with a judicial proceeding, the disclosure should be made in a manner that limits
85 access to the information to the tribunal or other persons having a need to know it and
86 appropriate protective orders or other arrangements should be sought by the lawyer to the fullest
87 extent practicable.

88 [175] Paragraph (b) permits but does not require the disclosure of information relating to
89 a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).
90 In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the
91 nature of the lawyer's relationship with the client and with those who might be injured by the
92 client, the lawyer's own involvement in the transaction and factors that may extenuate the
93 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not
94 violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require
95 disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),
96 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
97 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

98 **Acting Competently to Preserve Confidentiality**

99 [186] Paragraph (c) requires a lawyer to act competently to safeguard information
100 relating to the representation of a client against unauthorized access by third parties and against
101 inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are
102 participating in the representation of the client or who are subject to the lawyer's supervision.
103 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized
104 disclosure of, confidential information relating to the representation of a client does not
105 constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the
106 access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's
107 efforts include, but are not limited to, the sensitivity of the information, the likelihood of
108 disclosure if additional safeguards are not employed, the cost of employing additional
109 safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards
110 adversely affect the lawyer's ability to represent clients (e.g., by making a device or important
111 piece of software excessively difficult to use). A client may require the lawyer to implement
112 special security measures not required by this Rule or may give informed consent to forgo
113 special security measures not required by this Rule or may give informed consent to forgo

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114 security measures that would otherwise be required by this Rule. Whether a lawyer may be
115 required to take additional steps to safeguard a client's information in order to comply with other
116 law, such as state and federal laws that govern data privacy or that impose notification
117 requirements upon the loss of, or unauthorized access to, electronic information, is beyond the
118 scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside
119 the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

120
121 [197] When transmitting a communication that includes information relating to the
122 representation of a client, the lawyer must take reasonable precautions to prevent the information
123 from coming into the hands of unintended recipients. This duty, however, does not require that
124 the lawyer use special security measures if the method of communication affords a reasonable
125 expectation of privacy. Special circumstances, however, may warrant special precautions.
126 Factors to be considered in determining the reasonableness of the lawyer's expectation of
127 confidentiality include the sensitivity of the information and the extent to which the privacy of
128 the communication is protected by law or by a confidentiality agreement. A client may require
129 the lawyer to implement special security measures not required by this Rule or may give
130 informed consent to the use of a means of communication that would otherwise be prohibited by
131 this Rule. Whether a lawyer may be required to take additional steps in order to comply with
132 other law, such as state and federal laws that govern data privacy, is beyond the scope of these
133 Rules.

134 135 Former Client

136 [2048] The duty of confidentiality continues after the client-lawyer relationship has
137 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
138 information to the disadvantage of the former client.

139 140 Rule 1.17 Sale of Law Practice

141
142 A lawyer or a law firm may sell or purchase a law practice, or an area of law practice,
143 including good will, if the following conditions are satisfied:

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

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

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

150 (1) the proposed sale;

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

152 and

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

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

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

161

162 Comment

163 ...

164

165 **Client Confidences, Consent and Notice**

166 [7] Negotiations between seller and prospective purchaser prior to disclosure of
167 information relating to a specific representation of an identifiable client no more violate the
168 confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the
169 possible association of another lawyer or mergers between firms, with respect to which client
170 consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~
171 detailed information relating to the representation, ~~and to such as the client's file~~, however,
172 requires client consent. The Rule provides that before such information can be disclosed by the
173 seller to the purchaser the client must be given actual written notice of the contemplated sale,
174 including the identity of the purchaser, and must be told that the decision to consent or make
175 other arrangements must be made within 90 days. If nothing is heard from the client within that
176 time, consent to the sale is presumed.

177 ...

AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
NEW YORK STATE BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional
 2 Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest
 3 when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as
 4 follows (insertions underlined, deletions ~~struck-through~~):

- 5
 6 (a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and
 7 (b) the Comments to Model Rule 1.17 (Sale of Law Practice).
 8

9 **Rule 1.6 Confidentiality of Information**

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

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

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

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

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

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

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- 25 (5) to establish a claim or defense on behalf of the lawyer in a controversy
26 between the lawyer and the client, to establish a defense to a criminal charge or civil
27 claim against the lawyer based upon conduct in which the client was involved, or to
28 respond to allegations in any proceeding concerning the lawyer's representation of
29 the client; ~~or~~
30 (6) to comply with other law or a court order; ~~or~~
31 (7) to detect and resolve conflicts of interest between lawyers in different
32 firms, but only if the revealed information would not compromise the attorney-
33 client privilege or otherwise prejudice the client.
34

35 Comment

36 ...

37 Detection of Conflicts of Interest

39
40 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose
41 limited information to each other to detect and resolve conflicts of interest, such as when a
42 lawyer is considering an association with another firm, two or more firms are considering a
43 merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17,
44 Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose
45 limited information, but only once substantive discussions regarding the new relationship have
46 occurred. Any such disclosure should ordinarily include no more than the identity of the persons
47 and entities involved in a matter, a brief summary of the general issues involved, and information
48 about whether the matter has terminated. Even this limited information, however, should be
49 disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that
50 might arise from the possible new relationship. Moreover, the disclosure of any information is
51 prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client
52 (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been
53 publicly announced; that a person has consulted a lawyer about the possibility of divorce before
54 the person's intentions are known to the person's spouse; or that a person has consulted a lawyer
55 about a criminal investigation that has not led to a public charge). Under those circumstances,
56 paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A
57 lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring
58 an association with another firm and is beyond the scope of these Rules.

59 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further
60 disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7)
61 does not restrict the use of information acquired by means independent of any disclosure
62 pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information
63 within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a
64 lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve
65 conflicts of interest that could arise in connection with undertaking a new representation.

66 [15] A lawyer may be ordered to reveal information relating to the representation of a
67 client by a court or by another tribunal or governmental entity claiming authority pursuant to
68 other law to compel the disclosure. Absent informed consent of the client to do otherwise, the
69 lawyer should assert on behalf of the client all nonfrivolous claims that the order is not
70 authorized by other law or that the information sought is protected against disclosure by the

71 attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer
 72 must consult with the client about the possibility of appeal to the extent required by Rule 1.4.
 73 Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's
 74 order.

75 [164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
 76 the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the
 77 lawyer should first seek to persuade the client to take suitable action to obviate the need for
 78 disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the
 79 lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
 80 in connection with a judicial proceeding, the disclosure should be made in a manner that limits
 81 access to the information to the tribunal or other persons having a need to know it and
 82 appropriate protective orders or other arrangements should be sought by the lawyer to the fullest
 83 extent practicable.

84 [175] Paragraph (b) permits but does not require the disclosure of information relating to
 85 a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).
 86 In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the
 87 nature of the lawyer's relationship with the client and with those who might be injured by the
 88 client, the lawyer's own involvement in the transaction and factors that may extenuate the
 89 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not
 90 violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require
 91 disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),
 92 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
 93 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

94 95 **Acting Competently to Preserve Confidentiality**

96 [186] A lawyer must act competently to safeguard information relating to the
 97 representation of a client against inadvertent or unauthorized disclosure by the lawyer or other
 98 persons who are participating in the representation of the client or who are subject to the
 99 lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

100 [197] When transmitting a communication that includes information relating to the
 101 representation of a client, the lawyer must take reasonable precautions to prevent the information
 102 from coming into the hands of unintended recipients. This duty, however, does not require that
 103 the lawyer use special security measures if the method of communication affords a reasonable
 104 expectation of privacy. Special circumstances, however, may warrant special precautions.
 105 Factors to be considered in determining the reasonableness of the lawyer's expectation of
 106 confidentiality include the sensitivity of the information and the extent to which the privacy of
 107 the communication is protected by law or by a confidentiality agreement. A client may require
 108 the lawyer to implement special security measures not required by this Rule or may give
 109 informed consent to the use of a means of communication that would otherwise be prohibited by
 110 this Rule.

111 112 **Former Client**

113 [2048] The duty of confidentiality continues after the client-lawyer relationship has
 114 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
 115 information to the disadvantage of the former client.

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16

117 Rule 1.17 Sale of Law Practice

118

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

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

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

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

127 (1) the proposed sale;

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

129 and

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

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

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

138

39 Comment

140

...

141 Client Confidences, Consent and Notice

142 [7] Negotiations between seller and prospective purchaser prior to disclosure of
143 information relating to a specific representation of an identifiable client no more violate the
144 confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the
145 possible association of another lawyer or mergers between firms, with respect to which client
146 consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~
147 detailed information relating to the representation, ~~and to~~ such as the client's file, however,
148 requires client consent. The Rule provides that before such information can be disclosed by the
149 seller to the purchaser the client must be given actual written notice of the contemplated sale,
150 including the identity of the purchaser, and must be told that the decision to consent or make
151 other arrangements must be made within 90 days. If nothing is heard from the client within that
152 time, consent to the sale is presumed.

153

...

REPORT**Introduction**

The ABA Commission on Ethics 20/20 has examined how globalization and technology have transformed the practice of law and continue to fuel an increase in lawyer mobility. The Commission found that this increased mobility has raised a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility,¹ the Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance in this important area.

To offer this guidance, the Commission is proposing black letter and Comment amendments to Model Rule 1.6 (Confidentiality of Information) that track the Formal Opinion and more clearly explain the ethical considerations associated with these disclosures. The Commission is also proposing a change to Comment [7] to Model Rule 1.17 (Sale of Law Practice), because that Comment addresses conceptually similar issues.

These proposed amendments would codify what has long been common practice and acknowledged as essential in ethics opinions: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest.² By codifying existing authority and practices and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

I. Proposed Amendment to Model Rule 1.6

The Commission proposes to amend Model Rule 1.6 and its Comments in order to provide a clearer doctrinal basis for, and place appropriate limitations on, disclosures of confidential information to detect and resolve conflicts of interest.

¹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 [hereinafter ABA Formal Op. 09-455] (2009).

² *Id.* at 1 n.6 (citing LAWRENCE J. FOX & SUSAN MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 6.07 (ALI-ABA 2005)); *id.* at 4 (citing COLO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [5A] (2008); Boston Bar Ass'n Ethics Comm., Ethics Op. 2004-1 (2004); D.C. Bar Legal Ethics Comm., Ethics Op. 312 (2002); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 720 (1999); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2000-3 (2000)). See also Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

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A. Rationale for Change

Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently explained that lawyers and law firms must have discretion to disclose limited information to each other in order to determine if a conflict of interest will arise from a lawyer's association with the firm.³ The Formal Opinion nevertheless concluded that "[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6."

The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it is arising, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more readily available guidance on the limitations on such disclosures.

B. Limitations on the Disclosure Authority

The Commission concluded that the authority to disclose information, although necessary, needs to be carefully limited and regulated to ensure client protection while permitting the detection and resolution of conflicts of interest that arise from professional mobility, benefitting both clients and lawyers. Comment [13] to Model Rule 1.6 would make clear that 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. The Comment then explains that even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. For example, if the disclosure of a client's identity would be sufficient to detect and resolve a conflict, the lawyer should not disclose any additional information.

Formal Opinion 09-455 reached a nearly identical conclusion regarding the categories of information that may be disclosed.⁴ The Ethics Committee found that, "[i]n most situations involving lawyers moving between firms[,] . . . lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for [a] conflicts analysis." The Commission's proposal goes one modest step further by allowing lawyers to disclose whether the matter has terminated. The Commission concluded that this additional information is often needed because conflicts analyses differ for former and current clients. The Commission also uses the word "ordinarily," recognizing that there may be additional narrow categories of information that are not privileged or prejudicial and may need to be disclosed in order to detect a conflict of interest. For example, it may be necessary to disclose the location where work on a current or former matter occurred in order to address choice of law issues relating to conflicts of interest.

Even this limited disclosure is not permissible, absent informed client consent, if it would "compromise the attorney-client privilege or otherwise prejudice the client." For example, the

³ ABA Formal Op. 09-455 describes the need to perform a conflicts check when hiring (or discussing the possibility of hiring) a lateral lawyer, but the logic of the Opinion applies equally well to other conceptually similar situations, such as when law firms consider a merger or when a lawyer considers the purchase of another lawyer's practice.

⁴ ABA Formal Op. 09-455 (2009), *supra* note 1, at 3.

proposed Comment explains that, if a lawyer or firm knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible to disclose sufficient information to ensure compliance with the conflicts of interest rules.⁵ If the lawyer is not able to obtain informed consent, the proposed relationship may have to be postponed unless the lawyer can be screened or the firm can obtain the information needed to conduct the conflicts check from other sources.⁶

As noted, these limitations are drawn from Formal Opinion 09-455. The Formal Opinion concluded that the disclosed information “must not compromise the attorney-client privilege or otherwise prejudice a client or former client.”⁷ Moreover, the examples of situations that could cause such prejudice (an undisclosed plan for a hostile takeover, a consultation regarding a possible divorce, and an appearance before a grand jury) are drawn directly from the Formal Opinion.⁸ Finally, the Formal Opinion, like the Commission’s proposal, provides that a lawyer can nevertheless disclose privileged or prejudicial information after getting “informed consent.”⁹

Another limitation on the lawyer’s authority to disclose appears in Comment [13]. That Comment explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred. This timing is consistent with the Formal Opinion, which concluded that “conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.”¹⁰

The last sentence of Comment [13] reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.¹¹

Proposed Comment [14] reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. Comment [14] explains that other lawyers in the same firm are nevertheless permitted to use the information if it was acquired from an

⁵ *Id.* (concluding that an interpretation of Rule 1.6 that prohibited “any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest”).

⁶ *Id.* at 4. The last sentence of Comment [13] emphasizes that the prohibition against disclosing privileged or prejudicial information exists only under “paragraph (b)(7),” because lawyers may have the ability to disclose this kind of information pursuant to one of the *other* exceptions to Rule 1.6(b). For example, it may be possible to disclose the information to an independent lawyer, who may be able to help the lawyer and the firm to determine whether a conflict would arise from the possible new relationship without disclosing the lawyer’s information to the firm or the firm’s information to the lawyer. Such a disclosure would be permissible under Rule 1.6(b)(4), which permits disclosures to secure legal advice about compliance with the Rules. *Id.* at 5 (citing GEOFFREY C. HAZARD, & W. WILLIAM HODES, *THE LAWYER OF LAWYERING*, § 14.4, n.2 at 14-40 (3d ed. 2009 Supp.); Tremblay, *supra* note 2, at 544; Wald, *supra* note 2, at 227).

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-414, at 2 (1999).

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independent source. For example, a lawyer who works on a transaction might learn detailed information about the business structure of another party to the transaction. The lawyer can use that information, even if the lawyer for the other party to that transaction subsequently discloses the same information to the firm as part of a conflicts check.

Proposed Comment [14] also explains that law firms regularly need to conduct conflicts checks in response to inquiries from potential new clients or in response to existing clients who may wish to retain the firm on a new matter. To conduct conflicts checks in these situations, the firm may need to contact lawyers within the firm to determine whether their work on current or former matters would give rise to a conflict in the event that the firm accepts the new matter. The last sentence of the Comment makes clear that, as they always have been, such disclosures are impliedly authorized under Comment [5]. That Comment provides that “[l]awyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.” This point is also made through the inclusion of the phrase “between lawyers in different firms” in the black letter of the proposed Rule.

C. Concerns Raised in Response to the Commission’s Proposal

Although the Commission’s proposal contains important restrictions and limitations that are consistent with existing authorities and scholarly commentary,¹² the Commission heard several concerns in response to early drafts.

One concern was that lawyers should never be permitted to disclose this sort of information without client consent. The Commission concluded that such an absolute requirement is unworkable for the reasons that the Ethics Committee explained in its Formal Opinion:

[S]eeking prior informed consent likely would involve giving notice to the lawyer’s current firm, with unpredictable and possibly adverse consequences. Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm.¹³

The Commission had in mind, for example, a second-year associate in her current firm, looking to relocate. Under the Commission’s proposal, that lawyer cannot disclose any information that would compromise the attorney-client privilege or prejudice the client, so the client is protected. If the lawyer needs to disclose such information, client consent is required. In sum, the Commission rejected the idea that informed consent should be required in all instances, and instead sought to codify the Formal Opinion’s approach, which carefully balances the tensions between the reality of lawyer mobility and the importance of protecting confidential client information.

¹² See ABA Formal Op. 09-455, *supra* note 1.

¹³ *Id.*

The Commission also heard claims that the proposal would jeopardize the client-lawyer relationship and the duty of confidentiality for the mere purpose of business expediency. The Commission disagrees. These disclosures are essential to ensure that lawyers comply with their ethical obligation to avoid conflicts of interest.¹⁴ Moreover, this proposal will provide more, not less protection, for client confidences by filling a void left by the lack of any express guidance regarding these disclosures, with a practical framework for regulating them. By codifying the Formal Opinion's approach to this issue and expressly regulating and carefully limiting the scope of disclosures that can occur, the proposal will ensure that the legal profession provides more protection for client confidences than the present framework provides.

The Commission also considered the views expressed by two members, who maintain their views, that informed consent alone is not sufficient to protect the client and that client consent to disclosure of information that would compromise the attorney-client privilege or prejudice the client should not only be confirmed in writing but also be accompanied by the lawyer's advice to the client to seek independent counsel. The reasons for this view are that the lawyer has an interest in securing consent and so is not disinterested; that in instances where the interests of the lawyer and client diverge financially, the lawyer must advise the client to seek independent counsel, as provided in Rules 1.8(a) and 1.8(h)(2); that proposed new 1.6(b)(7) contains nothing comparable to the written notice, statement, agreement, and certification requirements for effective screening, as provided in Rule 1.10(a)(2)(ii) and (iii); that consents to conflicts under Rules 1.7 and 1.9 also require confirmation in writing; and that the interests at risk here are as or more compelling than the client interests in these rules.

The Commission seriously considered these arguments, but concluded that these additional restrictions are unnecessary and inconsistent with existing procedures. Model Rule 1.6(a) currently permits a lawyer to disclose privileged or prejudicial information with a client's informed consent; the Rule does not require the lawyer to confirm the consent in writing or advise the client to seek independent counsel. The Commission has heard of no problems arising from the existing framework and thus concluded that "informed consent," as that term is defined in Model Rule 1.0(e) and Comment [6] to that Rule, is sufficient to protect the client's interests.

The ABA Formal Opinion provides that a lawyer can disclose privileged or prejudicial information after getting "informed consent."¹⁵ The Formal Opinion does not suggest that the consent should be in writing or that a lawyer should have to advise the client to seek independent counsel.

The Commission also concluded that any additional requirements would be inconsistent with how the Rules treat other, conceptually similar disclosures of information. As noted above, a lawyer already can reveal *any* information, regardless of what it is or the purpose of the disclosure, with just informed consent under Model Rule 1.6(a). Moreover, a lawyer may now use protected information generally to the "disadvantage" of a client, with just informed consent under Model Rule 1.8(b). In light of these provisions, the Commission concluded that it would be inconsistent to impose any requirements beyond "informed consent" when lawyers are trying to abide by their ethical duty to avoid conflicts of interest.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 4.

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II. Proposed Amendment to Model Rule 1.17

Model Rule 1.17 describes a number of ethical obligations that arise during the sale of a law practice, and Comment [7] describes the information that can be shared between the owner of the law practice and the prospective buyer. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

Conclusion

For the reasons set forth above, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105(f): Conflicts Detection

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.
- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

2. Approval by Submitting Entity.

The Commission approved this Resolution during a meeting via conference call on May 1, 2012.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of these resolutions would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social

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change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility that address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY1. Summary of the Resolution(s)**Resolution 105(f): Conflicts Detection**

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.
- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility that

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address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

Resolution 105f provides a doctrinal basis for, and places appropriate limitations on, disclosures of confidential information that are made to detect and resolve conflicts of interest. The Resolution ensures that these disclosures occur in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105f, if adopted, would codify what has long been common practice and acknowledged as essential in ethics opinions and seminal scholarly writings on the subject: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest. By codifying existing authority and practices, and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

The Commission concluded that the proposed authority to disclose information in new black letter Model Rule 1.6(b)(7), although necessary, must be carefully limited and regulated to ensure client protection. For example, new language in Comment [13] of the Rule would make clear that 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 disclosure, however, is not permissible, absent informed client consent, if it would "compromise the attorney-client privilege or otherwise prejudice the client." Comment [13] further explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred and reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. All of these limitations are drawn from Formal Opinion 09-455.

New Comment language also reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.

Proposed amendments to Comment [7] of Model Rule 1.17 (Sale of a Law Practice) address conceptually similar ethical obligations that arise during the sale of a law practice. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105f as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105f relating to Conflicts Detection: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as

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complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.