

North Dakota Supreme Court
Joint Committee on Attorney Standards

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STATE OF NORTH DAKOTA

Hon. Michael G. Sturdevant, Chair
314 W. 5th ST., Suite 12
Bottineau, ND 58318-1200
Phone: (701) 228-3618

June 16, 2015

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard
Bismarck, ND 58505-0530

Re: Rules of Professional Conduct - Proposed Amendments

Dear Chief Justice VandeWalle:

Following a referral from the Supreme Court, the Joint Committee on Attorney Standards has reviewed the various reports of the ABA Commission on Ethics 20/20. The Commission focused on broadly described issues related to globalization and technology and the impact of each on the practice of law and regulation of lawyers. The Ethics 20/20 Report recommended several rule amendments related to the impact of technology which addressed a range of topics, including confidentiality, new forms of advertising, outsourcing, and lawyer mobility. The Report also recommended amendments and new rules directed at issues of globalization, including choice of law and practice authority of foreign lawyers in the United States. These various rule recommendations, after consideration by the House of Delegates, were adopted as amendments to the Model Rules of Professional Conduct.

The Committee's beginning premise for review of the Ethics 20/20 recommendations was to meld the rule amendments, to the extent possible, with current North Dakota Rules. There are some North Dakota rules, such as Rule 5.5 on the unauthorized practice of law and multijurisdictional practice and the Rule 7 series related to lawyer advertising that differ notably from the model rules. The Joint Committee concluded a wholesale revision of such rules was unnecessary and instead sought to incorporate Ethics 20/20 amendments to the extent they were considered beneficial additions to the rules.

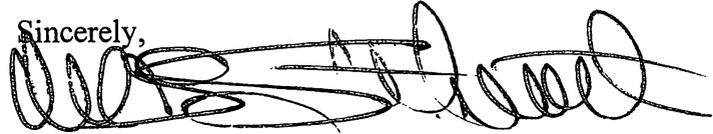
The Joint Committee has completed its review of the Ethics 20/20 recommendations and proposes attached amendments to several of the Rules of Professional Conduct. A summary is included which briefly describes the Joint Committee's proposed amendments to the Rules of Professional Conduct and its consideration of new rules proposed in the Ethics 20/20 Report.

The Joint Committee approved the proposals for submission to the Supreme Court pending review

and comment by the SBAND Board of Governors, as required by Administrative Rule 38, Section 3B. The Board of Governors has reviewed the Committee's report and agrees with the proposed amendments. The letter indicating the Board's agreement is attached.

I am pleased to submit the Joint Committee's proposed amendments to the Supreme Court for its consideration. I extend my thanks to Committee members for the commitment of their time and effort to this project.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Sturdevant", written in a cursive style.

Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

MGS/

cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje



State Bar Association of North Dakota

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Tony J. Weiler • *Executive Director*

June 11, 2015

Hon. Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards
314 West 5th Street, Suite 12
Bottineau, ND 58318-1200

Re: ABA Commission on Ethics 20/20 – Proposed Amendments to North Dakota Rules

Dear Judge Sturdevant:

The Board of Governors of the State Bar Association of North Dakota reviewed the materials attached to your letter dated January 8, 2015. Specifically, the changes were in response to a review by the JCAS of the various reports of the ABA Commission on Ethics 20/20.

Under Administrative Rule 38, section 3B, the Board of Governors reviewed the proposed changes (and lack of changes) made by the JCAS. The Board of Governors agrees with the suggested changes to the Rules of Professional Conduct, and also agrees that where North Dakota's Rules are already established and go beyond what the ABA recommends, that no changes need to be made.

The Board of Governors appreciates the work you and the JCAS have done in this area, and the positive outcome for both lawyers and the citizens of North Dakota.

Sincerely,

Jack McDonald
President

cc: Jim Ganje

SUMMARY OF PROPOSED RULE AMENDMENTS

The ABA's Commission on Ethics 20/20 focused on broadly described issues related to globalization and technology and the impact of each on the practice of law and regulation of lawyers. The Ethics 20/20 Report recommended several rule amendments related to the impact of technology which addressed a range of topics, including confidentiality, new forms of advertising, outsourcing, and lawyer mobility. The Report recommended amendments and new rules directed at issues of globalization, including choice of law and practice authority of foreign lawyers in the United States. Recommended rule amendments and new rules were submitted to the ABA House of Delegates and, as subsequently adopted, were distributed to the various states for review.

Upon referral by the North Dakota Supreme Court, the Joint Committee on Attorney Standards reviewed the Ethics 20/20 rule amendments and new rules. The Joint Committee proposes several rule amendments that follow some Model Rule provisions that address the impact of technology upon the practice of law. For reasons later explained in this Summary, the Joint Committee does not propose adoption of various new rules related to the practice of law by foreign lawyers.

Proposed amendments to the North Dakota Rules of Professional Conduct resulting from the Joint Committee's review of the Ethics 20/20 amendments to the Model Rules are briefly summarized below. Page number references relate to location of particular amendments.

Rule 1.0 - Terminology

The Joint Committee proposes following the Model Rule in amending the definition of "Writing" or "written" to replace "email" with "electronic communications" (p.11). Related amendments are proposed in Comment [7] (p.13), which addresses screening to prevent unauthorized sharing of information within a law firm, to replace "materials" with "information, including information in electronic form".

The proposed amendment to the definition ensures a more accurate awareness of the various ways that a "writing" can occur in the changing technological environment. The proposed comment amendment clarifies that screening should prevent the sharing of both "paper" and electronic information.

Rule 1.1 - Competence

The Joint Committee proposes following the Model Rule in amending the Comment section to include new Comments [7] and [8] and amendments to Comment [5] (pp.15-16). The amendments are broadly focused on situations in which lawyers outsource work to another lawyer or law firm.

Proposed Comment [7] underscores that lawyers who outsource services must take reasonable steps to ensure the services will be performed competently and that they contribute to the

competent and ethical representation of the client. The Comment lists several factors that lawyers should consider when retaining nonfirm lawyers.

Proposed Comment [8] emphasizes that when several firms work together on a client matter, the firms should consult with the client and each other about the scope of work being performed by each firm and the allocation of responsibility among the firms.

Proposed amendments to current Comment [5] (counterpart to Model Rule Comment[8]) underscore that part of maintaining a lawyer's requisite knowledge and skill includes awareness of the benefits and risks associated with relevant technology. The proposed language illustrates the importance of lawyer awareness of the impact of changing technology on the practice of law.

Rule 1.6 - Confidentiality

Ethics 20/20 amendments to Model Rule 1.6 addressed issues related to a lawyer's duty to protect confidential information. Protecting confidential information becomes a greater challenge with the on-going development of new modes of communication. Consequently, Ethics 20/20 amendments reflected additions to the black-letter rule and the comment.

The Joint Committee proposes following the Model Rule in amending Rule 1.6 to include new paragraph (d) (p.18), which would make clear that a lawyer has an ethical obligation to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or access to, information related to representation of a client. The emphasis on "reasonable efforts" reflects the awareness of the Ethics 20/20 Commission that a lawyer cannot be expected to absolutely guarantee electronic security of information related to representation of a client. The black-letter rule language makes clear that a Rule violation would not occur *simply because* information was disclosed or accessed inadvertently or without authority.

The Joint Committee proposes following the Model Rule in amending Rule 1.6 to include paragraph (c) (7) (p.18), which would give lawyers limited authority to disclose discrete categories of information to another firm to ensure conflicts of interest are detected before the lawyer is hired or two firms merge. However, disclosure of information could not compromise the attorney-client privilege or otherwise prejudice the client.

Related to proposed paragraph (c)(7), the Joint Committee proposes following the Model Rule in adding new Comments [16] and [17] (pp.23-24) to explain those circumstances in which a lawyer may disclose limited information to detect or resolve conflicts in a possible employment situation, and explain limits on those disclosures.

Related to proposed new paragraph (d), the Joint Committee proposes amendments to current Comment [16] (**renumbered** as Comment [18] (p. 24), which identify various factors lawyers should take into account when determining whether precautions taken to protect client information are reasonable. The factors recognize that no single approach can be applied to the entire profession as

each client, lawyer, and law firm may have distinct needs to consider.

Rule 1.17 - Sale of a Law Practice

The Joint Committee proposes following the Model Rule in making relatively minor amendments to Comment [6] (p.28) related to the kind of information that can be provided to the purchaser of a firm and to include a cross-reference to new paragraph (c)(7) of Rule 1.6 regarding permissible disclosure of information to detect or resolve conflicts of interest.

Rule 1.18 - Duties to Potential Client

Note: As a result of previous rule amendments, current Rule 1.18 refers throughout to “potential client” rather than “prospective client”, which is the Model Rule formulation. The Joint Committee did not see a need to change the current references.

As a general matter, Ethics 20/20 amendments to Model Rule 1.18 reflect the effort to address the different ways in which a lawyer-client relationship may arise in an increasingly technological environment. The objective was to adequately define circumstances in which a person would be considered a “potential client” and, thereby, provide sufficient flexibility to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services.

The Joint Committee proposes following the Model Rule in replacing “discusses” in paragraph (a) with “consults” (p.32). The change would make clear that a potential lawyer-client relationship can arise even when an oral discussion between a lawyer and person has not taken place.

The Joint Committee proposes following the Model Rule in amending Comment [2] (p.33), which would expand on the meaning of “consults” and provide guidance about how to avoid the creation of an inadvertent lawyer-client relationship. The new Comment language emphasizes that a consultation can occur, and a potential client relationship arise, if a lawyer specifically invites submission of information about a potential representation without clear and reasonably understandable warnings and cautions that limit the lawyer’s obligations. The new Comment clarifies that a consultation does not occur, and a potential 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 Joint Committee also proposes following the Model Rule in amending, in related fashion, paragraph (b) (p.32) to replace “had discussions with” with “learned information from” a potential client and in further amending Comment [2] to clarify that a person who communicates with a lawyer for purposes of disqualifying the lawyer is not a “potential client”.

The Joint Committee proposes following the Model Rule in amending Comments [1], [4],

and [5] to replace “discuss” or variants thereof with “consult” or variants thereof (pp.33-34).

The Joint Committee proposes a technical amendment to Comment [1] to remove the first sentence related to the use of “potential client” versus “prospective client” to avoid confusion in relation to Rule 7.3. The reference to “prospective client” would be removed from Rule 7.3.

Rule 4.5 - Inadvertent Transmission

Current Model Rule 4.4 addresses in paragraph (b) and related Comment [2] issues related to inadvertent transmission or receipt of a document relating to the representation of the lawyer’s client. The substance of Model Rule 4.4(b) and Comment [2] were adopted in North Dakota as Rule 4.5 - Inadvertent Transmission. The particular North Dakota counterparts are paragraph (a) and Comment [1].

The Joint Committee proposes following the Model Rule by amending North Dakota paragraph (a) (p.36) to clarify that electronically stored information, in addition to information in paper form, can trigger the notification requirements in the Rule. Similarly focused amendments to North Dakota Comments [1] and [2] are also proposed (p.36-37). Proposed amendments to Comment [1] would also provide a definition regarding when information may be considered “inadvertently sent”. Proposed amendments to Comment [2] would clarify when the notification requirement would apply to metadata contained in electronic documents.

Rule 5.3 - Responsibilities regarding Nonlawyer Assistants

Ethics 20/20 amendments to Comments to Model Rule 5.3 reflect a focus on circumstances involving the use of nonlawyers outside a particular firm.

The black-letter provisions of Model Rule 5.3 and North Dakota Rule 5.3 are generally similar except for the inclusion in the North Dakota rule of paragraph (d), which addresses the employment by a lawyer of legal assistants. The Model Rule and the North Dakota rule differ with respect to the comments. The Joint Committee concluded the current comment contents would be retained and modified to reflect model rule changes where appropriate.

The Joint Committee proposes following the Model Rule by amending Comment [2] (pp.39-40) to provide fuller guidance with respect to a lawyer’s responsibility to ensure nonlawyers comply with relevant rule requirements.

The Joint Committee proposes following the Model Rule by including new Comment [7] (pp.41-42), counterpart to Model Rule Comment [3], to address distinct concerns that arise when services are performed by nonlawyers *outside* the firm. The new Comment recognizes that nonlawyer services can take many forms, including services performed by individuals and services provided by automated products, such as online data storage. The new Comment then describes a lawyer’s obligations when using nonlawyer services outside the firm and sets out factors that

determine the extent of the lawyer's obligation. The new Comment also emphasizes that lawyers have an obligation to provide appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers.

The Joint Committee proposes following the Model Rule by also including new Comment [8] (p.42), counterpart to Model Rule Comment [4]), which addresses how a lawyer should respond when a client directs the lawyer to use a particular nonlawyer service provider. The new Comment also emphasizes that the lawyer may have additional obligations beyond the scope of the Rules if a matter is pending before a tribunal and there has been an allocation between the client and lawyer with respect to monitoring the nonlawyer service provider.

Rule 5.5 - Unauthorized Practice of Law

North Dakota Rule 5.5 differs substantially from Model Rule 5.5. The differences are the result of the earlier work of the State Bar Association's Multijurisdictional Practice Taskforce and subsequent review by the Joint Committee of Taskforce recommended amendments. The Joint Committee concluded it was unnecessary to modify the current rule to generally reflect the existing model rule. The Joint Committee received and reviewed a thorough report regarding the Ethics 20/20 amendments to Model Rule 5.5 prepared by Committee member Associate Professor Michael McGinniss.

The Joint Committee ultimately concluded that substantial amendments to current Rule 5.5 were unnecessary. However, the Joint Committee concluded that limited clarifying amendments regarding out-of-state lawyers providing legal services in the state would be beneficial.

The Joint Committee proposes an amendment to paragraph (c) (p.44)of the current rule to clarify that the lawyer's presence in the state is for the purpose of "performing legal services".

The Joint Committee also proposes an amendment to Comment [2] (p.45) of the current rule to clarify that the rule is not intended to authorize an out-of-state lawyer to establish a presence "other than temporary for performing legal services" in the state. The current comment refers to "other permanent presence".

Rule 7.2 - Advertising

North Dakota Rule 7.2 differs from Model Rule 7.2 in a limited fashion with respect to the black-letter provisions but more substantially with respect to the comments. The Joint Committee concluded it was unnecessary to generally reconcile the black-letter and comment differences in light of substantial earlier work that resulted in the current rule. The Joint Committee also concluded, however, that Ethics 20/20 model rule comment revisions should be incorporated where beneficial.

The Joint Committee proposes following the Model Rule by amending current Comment [1] (p.49) to include a reference to the public "learning about" legal services as an authorized purpose

for a lawyer providing information about services through marketing and advertising.

The Joint Committee proposes following the Model Rule by amending current Comment [5], **renumbered** as Comment [4] (pp.50-51), to clarify the scope of the Rule's prohibition against paying for a recommendation. For purposes of the prohibition, the new language would define a "recommendation" to include a "communication...[that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities". The definition would enable lawyers to use "lead generation services", which are increasingly prevalent online, but would require lawyers to ensure that lead generators comply with relevant rules.

Apart from Ethics 20/20 amendments, the Joint Committee proposes the deletion of current paragraph (b) of the rule (p.49). The paragraph, which is not included in the Model Rule, generally requires a lawyer to retain a copy of an advertisement or communication for two years after its last dissemination. There was general uncertainty about how the requirement would, or could, apply in the context of increasingly different social media platforms in which a reference to a lawyer or a law firm may appear without the awareness of or any affirmative action on the part of the lawyer or law firm. There was also no recollection of the provision ever being involved in a disciplinary proceeding. The Joint Committee also proposes the deletion of current Comment [4] as it is related to paragraph (b) (p.50).

The Joint Committee also proposes an amendment to Comment [2] to replace "prospective client" with "anyone known to be in need of legal services in a particular matter". The modification is related to proposed amendments to Rule 7.3.

Rule 7.3 - Direct Contact with Prospective Clients

Ethics 20/20 amendments to Model Rule 7.3 are intended to provide greater clarity with respect to the kinds of communications that would constitute direct solicitations that are governed by the rule. To facilitate the general purpose of the rule, the rule's title is changed to "Solicitation of Clients". The purpose of the change is to move away from an arguable focus on a particular person, when "prospective client" is used, and focus instead on contacts with all possible future clients by referring generally to "targets of solicitation" or to "anyone" needing legal services. The change in focus is intended, in part, to reflect the widely varying social media platforms by which lawyers can communicate about the provision of legal services.

The Joint Committee proposes following the Model Rule by amending the title to reflect the Model Rule's title, to remove references to "prospective client" in the black-letter provisions and Comments, and to refer to "target of solicitation" in paragraph (b)(1) (p.52).

The Joint Committee proposes following the Model Rule by including new Comment [1] to provide a clearer definition of what constitutes solicitation (p.53).

Apart from Ethics 20/20 amendments, the Joint Committee discussed the concern that the

rule's general prohibition in paragraph (a) may prohibit what may otherwise be a common interaction between a lawyer and a potential client. There was recognition of the rule's general purpose in avoiding the exploitation of the personal circumstances of someone who might be in need of legal services, but there was also concern that the rule's prohibition may sweep too broadly. The Joint Committee concluded it may be beneficial to more directly link the prohibition in paragraph (a) against in-person contact to a person known to be in need of legal services.

The Joint Committee proposes amendment paragraph (a) (p.52) to prohibit a lawyer from in-person solicitation of professional employment from "anyone known to be in need of legal services in a particular matter". The Joint Committee also proposes conforming amendments to **renumbered** Comments [2], [3], [4], and [6] (pp.53-54).

The Joint Committee also proposes amendments to remove the dissenting opinion from the rule (pp.54-57).

Rule 8.5 - Jurisdiction

As part of the Ethics 20/20 review, several issues relating to the "globalization" of the practice of law were discussed. A particular issue concerned the increasing frequency of clients requesting lawyers to handle matters that implicate multiple jurisdictions. As a result, conflicts-related choice of law issues can arise in many situations and are especially difficult to resolve when a lawyer's representation of a client involves a matter that relates to several jurisdictions at the same time. Model Rule 8.5, in addition to generally addressing disciplinary authority, addresses choice of law. The Ethics 20/20 Report recommended amendments to the model rule comment.

Current North Dakota Rule 8.5, titled "Jurisdiction", is generally similar to paragraph (a) of the Model Rule, but does not include the choice of law provision and related comments. The Joint Committee concluded that the choice of law provision would be beneficial in aiding a lawyer in understanding which rules apply in a given situation involving multiple jurisdictions.

The Joint Committee proposes following the Model Rule by including in Rule 8.5 the choice of law provision as new paragraph (c) of the rule and including new Comments [3] - [8] related to the choice of law black-letter provision (pp.58-60).

Ethics 20/20 - Proposed Model Rules

The Ethics 20/20 Report recommended adoption of several model rules. The Joint Committee's consideration of each model rule is summarized below.

Model Rule on Practice Pending Admission. The model rule would seek to establish a framework that would permit a lawyer licensed in another jurisdiction to practice law in a new jurisdiction while pursuing admission in that jurisdiction. Current North Dakota Rule 6.1 of the Admission to Practice Rules likewise enables an out-of-state lawyer seeking admission to practice

law in the state on a temporary basis.

The Joint Committee concluded there was no compelling reason to replace the current rule with the model rule and, consequently, does not recommend adoption of the model rule.

Model Rule on Admission by Motion. Current North Dakota Rule 7 of the Admission to Practice Rules is generally similar to the model rule. Information received by the Joint Committee indicated that few jurisdictions have adopted a model rule on admissions.

The Joint Committee does not recommend adoption of the model rule.

Model Rule for Registration of In-House Counsel. North Dakota Rule 3B of the Admission to Practice Rules is the current general counterpart to the model rule. Information received by the Joint Committee indicated that approximately three lawyers have registered as in-house counsel under the rule. The Model Rule reflects the general Ethics 20/20 discussion regarding the globalization of the practice of law by including a registration process for foreign lawyers. Current Rule 3B does not include such a provision. Background information reviewed by the Joint Committee indicated that the foreign lawyer issue was a contentious topic of discussion during the Ethics 20/20 effort.

Given the current registration rule and its limited use, the Joint Committee does not recommend replacing the rule with the model rule.

Model Rule on Pro Hac Vice Admission. North Dakota Rule 3A of the Admission to Practice Rules is the current general counterpart to the model rule. As with the model rule for registration of in-house counsel, the major portions of the model pro hac vice rule reflect the inclusion of foreign lawyers as eligible for admission in a particular proceeding.

The Joint Committee concluded the current rule is sufficient and, therefore, does not recommend replacing the rule with the model rule.

Technical Amendments

The Joint Committee proposes amendments to the various rules to include a source note indicating the date of adoption, date of amendment, or both.

SUMMARY OF PROPOSED RULE AMENDMENTS

The ABA's Commission on Ethics 20/20 focused on broadly described issues related to globalization and technology and the impact of each on the practice of law and regulation of lawyers. The Ethics 20/20 Report recommended several rule amendments related to the impact of technology which addressed a range of topics, including confidentiality, new forms of advertising, outsourcing, and lawyer mobility. The Report recommended amendments and new rules directed at issues of globalization, including choice of law and practice authority of foreign lawyers in the United States. Recommended rule amendments and new rules were submitted to the ABA House of Delegates and, as subsequently adopted, were distributed to the various states for review.

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Proposed amendments to the North Dakota Rules of Professional Conduct resulting from the Joint Committee's review of the Ethics 20/20 amendments to the Model Rules are briefly summarized below. Page number references relate to location of particular amendments.

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Rule 1.17 - Sale of a Law Practice

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amendments to Comment [6] (p.28) related to the kind of information that can be provided to the purchaser of a firm and to include a cross-reference to new paragraph (c)(7) of Rule 1.6 regarding permissible disclosure of information to detect or resolve conflicts of interest.

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Note: As a result of previous rule amendments, current Rule 1.18 refers throughout to “potential client” rather than “prospective client”, which is the Model Rule formulation. The Joint Committee did not see a need to change the current references.

As a general matter, Ethics 20/20 amendments to Model Rule 1.18 reflect the effort to address the different ways in which a lawyer-client relationship may arise in an increasingly technological environment. The objective was to adequately define circumstances in which a person would be considered a “potential client” and, thereby, provide sufficient flexibility to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services.

The Joint Committee proposes following the Model Rule in replacing “discusses” in paragraph (a) with “consults” (p.32). The change would make clear that a potential lawyer-client relationship can arise even when an oral discussion between a lawyer and person has not taken place.

The Joint Committee proposes following the Model Rule in amending Comment [2] (p.33), which would expand on the meaning of “consults” and provide guidance about how to avoid the creation of an inadvertent lawyer-client relationship. The new Comment language emphasizes that a consultation can occur, and a potential client relationship arise, if a lawyer specifically invites submission of information about a potential representation without clear and reasonably understandable warnings and cautions that limit the lawyer’s obligations. The new Comment clarifies that a consultation does not occur, and a potential 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.

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The Joint Committee proposes a technical amendment to Comment [1] to remove the first sentence related to the use of “potential client” versus “prospective client” to avoid confusion in relation to Rule 7.3. The reference to “prospective client” would be removed from Rule 7.3.

Rule 4.5 - Inadvertent Transmission

Current Model Rule 4.4 addresses in paragraph (b) and related Comment [2] issues related to inadvertent transmission or receipt of a document relating to the representation of the lawyer's client. The substance of Model Rule 4.4(b) and Comment [2] were adopted in North Dakota as Rule 4.5 - Inadvertent Transmission. The particular North Dakota counterparts are paragraph (a) and Comment [1].

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Rule 5.3 - Responsibilities regarding Nonlawyer Assistants

Ethics 20/20 amendments to Comments to Model Rule 5.3 reflect a focus on circumstances involving the use of nonlawyers outside a particular firm.

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Rule 5.5 - Unauthorized Practice of Law

North Dakota Rule 5.5 differs substantially from Model Rule 5.5. The differences are the result of the earlier work of the State Bar Association's Multijurisdictional Practice Taskforce and subsequent review by the Joint Committee of Taskforce recommended amendments. The Joint Committee concluded it was unnecessary to modify the current rule to generally reflect the existing model rule. The Joint Committee received and reviewed a thorough report regarding the Ethics 20/20 amendments to Model Rule 5.5 prepared by Committee member Associate Professor Michael McGinniss.

The Joint Committee ultimately concluded that substantial amendments to current Rule 5.5 were unnecessary. However, the Joint Committee concluded that limited clarifying amendments regarding out-of-state lawyers providing legal services in the state would be beneficial.

The Joint Committee proposes an amendment to paragraph (c) (p.44)of the current rule to clarify that the lawyer's presence in the state is for the purpose of "performing legal services".

The Joint Committee also proposes an amendment to Comment [2] (p.45) of the current rule to clarify that the rule is not intended to authorize an out-of-state lawyer to establish a presence "other than temporary for performing legal services" in the state. The current comment refers to "other permanent presence".

Rule 7.2 - Advertising

North Dakota Rule 7.2 differs from Model Rule 7.2 in a limited fashion with respect to the black-letter provisions but more substantially with respect to the comments. The Joint Committee concluded it was unnecessary to generally reconcile the black-letter and comment differences in light of substantial earlier work that resulted in the current rule. The Joint Committee also concluded, however, that Ethics 20/20 model rule comment revisions should be incorporated where beneficial.

The Joint Committee proposes following the Model Rule by amending current Comment [1] (p.49) to include a reference to the public "learning about" legal services as an authorized purpose for a lawyer providing information about services through marketing and advertising.

The Joint Committee proposes following the Model Rule by amending current Comment [5], **renumbered** as Comment [4] (pp.50-51), to clarify the scope of the Rule's prohibition against paying for a recommendation. For purposes of the prohibition, the new language would define a "recommendation" to include a "communication...[that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities". The definition would enable lawyers to use "lead generation services", which are increasingly prevalent online, but would require lawyers to ensure that lead generators comply with relevant rules.

Apart from Ethics 20/20 amendments, the Joint Committee proposes the deletion of current paragraph (b) of the rule (p.49). The paragraph, which is not included in the Model Rule, generally requires a lawyer to retain a copy of an advertisement or communication for two years after its last

dissemination. There was general uncertainty about how the requirement would, or could, apply in the context of increasingly different social media platforms in which a reference to a lawyer or a law firm may appear without the awareness of or any affirmative action on the part of the lawyer or law firm. There was also no recollection of the provision ever being involved in a disciplinary proceeding. The Joint Committee also proposes the deletion of current Comment [4] as it is related to paragraph (b) (p.50).

The Joint Committee also proposes an amendment to Comment [2] to replace “prospective client” with “anyone known to be in need of legal services in a particular matter”. The modification is related to proposed amendments to Rule 7.3.

Rule 7.3 - Direct Contact with Prospective Clients

Ethics 20/20 amendments to Model Rule 7.3 are intended to provide greater clarity with respect to the kinds of communications that would constitute direct solicitations that are governed by the rule. To facilitate the general purpose of the rule, the rule’s title is changed to “Solicitation of Clients”. The purpose of the change is to move away from an arguable focus on a particular person, when “prospective client” is used, and focus instead on contacts with all possible future clients by referring generally to “targets of solicitation” or to “anyone” needing legal services. The change in focus is intended, in part, to reflect the widely varying social media platforms by which lawyers can communicate about the provision of legal services.

The Joint Committee proposes following the Model Rule by amending the title to reflect the Model Rule’s title, to remove references to “prospective client” in the black-letter provisions and Comments, and to refer to “target of solicitation” in paragraph (b)(1) (p.52).

The Joint Committee proposes following the Model Rule by including new Comment [1] to provide a clearer definition of what constitutes solicitation (p.53).

Apart from Ethics 20/20 amendments, the Joint Committee discussed the concern that the rule’s general prohibition in paragraph (a) may prohibit what may otherwise be a common interaction between a lawyer and a potential client. There was recognition of the rule’s general purpose in avoiding the exploitation of the personal circumstances of someone who might be in need of legal services, but there was also concern that the rule’s prohibition may sweep too broadly. The Joint Committee concluded it may be beneficial to more directly link the prohibition in paragraph (a) against in-person contact to a person known to be in need of legal services.

The Joint Committee proposes amendment paragraph (a) (p.52) to prohibit a lawyer from in-person solicitation of professional employment from “anyone known to be in need of legal services in a particular matter”. The Joint Committee also proposes conforming amendments to **renumbered** Comments [2], [3], [4], and [6] (pp.53-54).

The Joint Committee also proposes amendments to remove the dissenting opinion from the rule (pp.54-57).

Rule 8.5 - Jurisdiction

As part of the Ethics 20/20 review, several issues relating to the “globalization” of the practice of law were discussed. A particular issue concerned the increasing frequency of clients requesting lawyers to handle matters that implicate multiple jurisdictions. As a result, conflicts-related choice of law issues can arise in many situations and are especially difficult to resolve when a lawyer’s representation of a client involves a matter that relates to several jurisdictions at the same time. Model Rule 8.5, in addition to generally addressing disciplinary authority, addresses choice of law. The Ethics 20/20 Report recommended amendments to the model rule comment.

Current North Dakota Rule 8.5, titled “Jurisdiction”, is generally similar to paragraph (a) of the Model Rule, but does not include the choice of law provision and related comments. The Joint Committee concluded that the choice of law provision would be beneficial in aiding a lawyer in understanding which rules apply in a given situation involving multiple jurisdictions.

The Joint Committee proposes following the Model Rule by including in Rule 8.5 the choice of law provision as new paragraph (c) of the rule and including new Comments [3] - [8] related to the choice of law black-letter provision (pp.58-60).

Ethics 20/20 - Proposed Model Rules

The Ethics 20/20 Report recommended adoption of several model rules. The Joint Committee’s consideration of each model rule is summarized below.

Model Rule on Practice Pending Admission. The model rule would seek to establish a framework that would permit a lawyer licensed in another jurisdiction to practice law in a new jurisdiction while pursuing admission in that jurisdiction. Current North Dakota Rule 6.1 of the Admission to Practice Rules likewise enables an out-of-state lawyer seeking admission to practice law in the state on a temporary basis.

The Joint Committee concluded there was no compelling reason to replace the current rule with the model rule and, consequently, does not recommend adoption of the model rule.

Model Rule on Admission by Motion. Current North Dakota Rule 7 of the Admission to Practice Rules is generally similar to the model rule. Information received by the Joint Committee indicated that few jurisdictions have adopted a model rule on admissions.

The Joint Committee does not recommend adoption of the model rule.

Model Rule for Registration of In-House Counsel. North Dakota Rule 3B of the Admission to Practice Rules is the current general counterpart to the model rule. Information received by the Joint Committee indicated that approximately three lawyers have registered as in-house counsel under the rule. The Model Rule reflects the general Ethics 20/20 discussion regarding the globalization of the practice of law by including a registration process for foreign lawyers. Current Rule 3B does not include such a provision. Background information reviewed by the Joint

Committee indicated that the foreign lawyer issue was a contentious topic of discussion during the Ethics 20/20 effort.

Given the current registration rule and its limited use, the Joint Committee does not recommend replacing the rule with the model rule.

Model Rule on Pro Hac Vice Admission. North Dakota Rule 3A of the Admission to Practice Rules is the current general counterpart to the model rule. As with the model rule for registration of in-house counsel, the major portions of the model pro hac vice rule reflect the inclusion of foreign lawyers as eligible for admission in a particular proceeding.

The Joint Committee concluded the current rule is sufficient and, therefore, does not recommend replacing the rule with the model rule.

Technical Amendments

The Joint Committee proposes amendments to the various rules to include a source note indicating the date of adoption, date of amendment, or both.

PROPOSED AMENDMENTS

1 RULE 1.0 - TERMS

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

4 (b) "Consent in writing", when used with reference to the consent of a person, denotes consent that
5 is given in writing by the person or oral consent promptly confirmed in writing to the client by the
6 lawyer.

7 (c) "Consult" or "consultation" denotes communication of information reasonably sufficient to
8 permit the client to appreciate the significance of the matter in question.

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

12 (e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent
13 misrepresentation or negligent failure to apprise another of relevant information.

14 (f) "Jurisdiction" means this state, another state of the United States, the District of Columbia, Puerto
15 Rico, or a territory or possession of the United States.

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

18 (h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal
19 services, and who through formal education, training, or experience, has knowledge and expertise
20 regarding the legal system and substantive and procedural law which qualifies the person to do work
21 of a legal nature under the direct supervision of a licensed lawyer.

1 (i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding,
2 application, request for a ruling or other determination, contract claim, controversy, investigation,
3 charge, accusation, arrest, or other transaction.

4 (j) "Notice of dishonor" refers to the notice that an eligible financial institution is required to give,
5 under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

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

8 (l) "Properly payable" refers to an instrument that, if presented in the normal course of business, is
9 in a form requiring payment under the laws of this jurisdiction.

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

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

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

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

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

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

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

11 Comment

12 Consent in Writing

13 [1] Where it is required by these Rules, a client's consent must be given in writing at the time consent
14 is given or oral consent by the client must be promptly confirmed in writing to the client by the
15 lawyer. If a lawyer has obtained a client's oral consent, the lawyer may act in reliance on that oral
16 consent so long as it is promptly confirmed in writing.

17 Firm

18 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific
19 facts. For example, two practitioners who share office space and occasionally consult or assist each
20 other ordinarily would not be regarded as constituting a firm. However, if they present themselves
21 to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should
22 be regarded as a firm for purposes of the Rules. The terms of any formal agreement between
23 associated lawyers are relevant in determining whether they are a firm, as is the fact that they have
24 mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful

1 cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be
2 regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing
3 parties in litigation, while the same group of lawyers might not be regarded as a firm for purposes
4 of the rule that information acquired by one lawyer is attributed to another.

5 [3] With respect to the law department of an organization, including the government, there is
6 ordinarily no question that the members of the department constitute a firm within the meaning of
7 these Rules. There can be uncertainty, however, as to the identity of the client. For example, it may
8 not be clear whether the law department of a corporation represents a subsidiary or an affiliated
9 corporation, as well as the corporation by which the members of the department are directly
10 employed. A similar question can arise concerning an unincorporated association and its local
11 affiliates.

12 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
13 organizations. Depending upon the structure of the organization, the entire organization or different
14 components of it may constitute a firm or firms for purposes of these Rules.

15 Fraud

16 [5] When used in these Rules, the terms "fraud" or "fraudulent" do not include merely negligent
17 misrepresentation or negligent failure to apprise another of relevant information. For purposes of
18 these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation
19 or failure to inform in order for the misrepresentation or failure to inform to constitute fraud.

20 Screened

21 [6] This definition applies to situations where screening of a personally disqualified lawyer is
22 permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12, and 1.18.

23 [7] The purpose of screening is to assure the affected parties that confidential information known

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

15 Amended effective 08/01/06, 08/01/09, _____

16 Reference: N.D.C.C. 41-03-60; Minutes of the Professional Conduct Subcommittee of the Attorney
17 Standards Committee on 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney
18 Standards Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 09/24/04, 03/18/05, 06/14/05,
19 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08, 09/13/2013, 09/12/14.

PROPOSED AMENDMENTS

RULE 1.1 COMPETENCE

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

3 COMMENT

4 Legal Knowledge and Skill

5 [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter,
6 relevant factors include the relative complexity and specialized nature of the matter, the lawyer's
7 general experience, the lawyer's training and experience in the field in question, the preparation and
8 study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate
9 or consult with, a lawyer of established competence in the field in question.

10 [2] A lawyer need not necessarily have special training or prior experience to handle legal problems
11 of a type unfamiliar to the lawyer. A newly admitted lawyer can be as competent as a practitioner
12 with long experience. Some important legal skills, such as the analysis of precedent, the evaluation
13 of evidence and legal drafting, are required in all legal representations. Perhaps the most fundamental
14 legal skill consists of determining what kind of legal problems a situation may involve, a skill that
15 necessarily transcends any particular specialized knowledge. A lawyer can provide adequate
16 representation in a wholly novel field through necessary study. Competent representation can also
17 be provided through the association of a lawyer of established competence in the field in question.

18 [3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not
19 have the skill ordinarily required to competently represent the client without violating these Rules.
20 The definition of an emergency depends upon all of the circumstances surrounding the request for
21 advice or assistance and the lawyer's decision to accept representation. Relevant circumstances
22 include, but are not limited to (a) the client's past relationship with the lawyer; (b) the practicality,
23 considering the means of the client to refer to, consult with or associate with another lawyer; (c) the

1 matter upon which advice is requested; (d) the time and location of the contact with the lawyer; (e)
2 whether the lawyer has been asked to render immediate services; and (f) whether the lawyer
3 reasonably determined that legal services were immediately required. Even in an emergency,
4 however, assistance should be limited to that reasonably necessary in the circumstances, for ill
5 considered action under emergency conditions can jeopardize the client's interest.

6 [4] A lawyer may accept representation where the requisite level of competence can be achieved by
7 reasonable preparation.

8 [5] To maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law
9 and its practice, including the benefits and risks associated with relevant technology, engage in
10 continuing study and education and comply with all continuing legal education requirements.

11 Thoroughness and Preparation

12 [6] Competent handling of a particular matter includes inquiry into and analysis of the factual and
13 legal elements of the problem, and use of methods and procedures meeting the standards of
14 competent practitioners. It also includes adequate preparation. The required attention and preparation
15 are determined in part by what is at stake; major litigation and complex transactions ordinarily
16 require more extensive treatment than matters of lesser consequence. An agreement between the
17 lawyer and the client regarding the scope of the representation may limit the matters for which the
18 lawyer is responsible. See Rule 1.2(c).

19 Retaining or Contracting With Other Lawyers

20 [7] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide
21 or assist in the provision of legal services to a client, the lawyer should ordinarily obtain consent
22 from the client and must reasonably believe that the other lawyers' services will contribute to the
23 competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4
24 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized

1 practice of law). The reasonableness of the decision to retain or contract with other lawyers outside
2 the lawyer's own firm will depend upon the circumstances, including the education, experience and
3 reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and
4 the legal protections, professional conduct rules, and ethical environments of the jurisdictions in
5 which the services will be performed, particularly relating to confidential information.

6 [8] When lawyers from more than one law firm are providing legal services to the client on a
7 particular matter, the lawyers ordinarily should consult with each other and the client about the scope
8 of their respective representations and the allocation of responsibility among them. See Rule 1.2.
9 When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties
10 may have additional obligations that are a matter of law beyond the scope of these Rules.

11 Amended effective 08/01/06, _____

12 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
13 on 09/29/83, 09/20/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
14 11/19/04, 06/14/05, 09/ /2013, 09/12/14.

PROPOSED AMENDMENTS

1 RULE 1.6 CONFIDENTIALITY OF INFORMATION

2 (a) A lawyer shall not reveal information relating to the representation of the client unless the client
3 consents, the disclosure is impliedly authorized in order to carry out the representation, or the
4 disclosure is required by paragraph (b) or permitted by paragraph (c). The duty of confidentiality
5 continues after the lawyer-client relationship has terminated.

6 (b) A lawyer is required to reveal information relating to the representation of a client to the extent
7 the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily
8 harm.

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

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

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

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

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

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

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

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

7 Comment

8 [1] This Rule governs the disclosure by a lawyer of information relating to the representation of a
9 client during and after the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties
10 with respect to information provided to the lawyer by a potential client and Rules 1.8(b) and 1.9(c)
11 for the lawyer's duties with respect to the use of such information to the disadvantage of clients and
12 former clients.

13 [2] A fundamental principle in the client-lawyer relationship is that the lawyer must not reveal
14 information relating to the representation without the client's consent. While it is not a requirement,
15 it is a preferable practice to obtain the client's consent in writing when consent is given. This
16 contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby
17 encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as
18 to embarrassing or legally damaging subject matter. The lawyer needs this information to represent
19 the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost
20 without exception, clients come to lawyers in order to determine their rights and what is, in the
21 complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers
22 know that almost all clients follow the advice given, and the law is upheld.

23 [3] This principle of lawyer-client confidentiality is given effect by related law, such as the
24 attorney-client privilege, the work product doctrine and the rule of confidentiality established in

1 professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and
2 other proceedings in which a lawyer may be called as a witness or otherwise required to produce
3 evidence concerning a client. The rule of lawyer-client confidentiality applies in situations other than
4 those where evidence is sought from the lawyer through compulsion of law. This rule applies not
5 merely to matters communicated in confidence by the client but also to all information relating to
6 the representation, whatever its source. A lawyer may not disclose such information except as
7 authorized or required by these Rules or other law.

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

14 Impliedly Authorized Disclosure

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

22 Disclosure Adverse to Client

23 [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve
24 the confidentiality of information relating to the representation of their clients, the confidentiality
25 rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and

1 physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death
2 or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently
3 or if there is a present and substantial threat that a person will suffer such harm at a later date if the
4 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client
5 has accidentally discharged toxic waste into a town's water supply must reveal this information to
6 the authorities if there is a present and substantial risk that a person who drinks the water will
7 contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate
8 the threat or reduce the number of victims.

9 [7] Paragraph (c)(1) is a limited exception to the rule of confidentiality that permits the lawyer to
10 reveal information to the extent necessary to enable affected persons or appropriate authorities to
11 prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably
12 certain to result in substantial injury to the financial or property interests of another and in
13 furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the
14 client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course,
15 prevent such disclosure by refraining from the wrongful conduct. Although paragraph (c)(1) does
16 not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the
17 client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16
18 with respect to the lawyer's obligation or right to withdraw from the representation of the client in
19 such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization,
20 to reveal information relating to the representation in limited circumstances.

21 [8] Paragraph (c)(2) addresses the situation in which the lawyer does not learn of the client's crime
22 or fraud until after it has been consummated. Although the client no longer has the option of
23 preventing disclosure by refraining from the wrongful conduct, there will be situations in which the
24 loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the
25 lawyer may disclose information relating to the representation to the extent necessary to enable the
26 affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.
27 Paragraph (c)(2) does not apply when a person who has committed a crime or fraud thereafter
28 employs a lawyer for representation concerning that offense.

1 Disclosure to Secure Compliance Advice

2 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal
3 advice about the lawyer's personal responsibility to comply with these Rules. In most situations,
4 disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out
5 the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(3) permits
6 such disclosure because of the importance of a lawyer's compliance with these Rules.

7 Disclosure in Controversies Regarding the Lawyer's Conduct

8 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct
9 or other misconduct of the lawyer involving representation of the client, the lawyer may respond to
10 the extent the lawyer reasonably believes necessary to establish a defense. The same is true with
11 respect to a claim involving the conduct or representation of a former client. Such a charge can arise
12 in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly
13 committed by the lawyer against the client or on a wrong alleged by a third person, for example, a
14 person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right
15 to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not
16 require the lawyer to await the commencement of an action or proceeding that charges such
17 complicity, so that the defense may be established by responding directly to a third party who has
18 made such an assertion. The right to defend also applies, of course, where a proceeding has been
19 commenced.

20 [11] A lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an
21 action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary
22 relationship may not exploit it to the detriment of the fiduciary.

23 Disclosure Required by Law or Court Order

24 [12] When disclosure of information relating to the representation appears to be required by other

1 law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If the other
2 law requires disclosure, paragraph (c)(5) permits the lawyer to make such disclosures as are
3 necessary to comply with the law.

4 [13] A lawyer may be ordered to reveal information relating to the representation of a client by a
5 court or by another tribunal or governmental entity claiming authority pursuant to other law to
6 compel the disclosure. Absent the client's written consent to do otherwise, the lawyer should assert
7 on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that
8 the information sought is protected against disclosure by the attorney-client privilege or other
9 applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the
10 possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph
11 (c)(5) permits the lawyer to comply with the court's order.

12 Limits of Extent of Disclosure

13 [14] Paragraph (b) requires and paragraph (c) permits disclosure only to the extent the lawyer
14 reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where
15 practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the
16 need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than
17 the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
18 in connection with a judicial proceeding, the disclosure should be made in a manner that limits
19 access to the information to the tribunal or other persons having a need to know it and appropriate
20 protective orders or other arrangements should be sought by the lawyer to the fullest extent
21 practicable.

22 [15] Paragraph (c) permits but does not require the disclosure of information relating to a client's
23 representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(5). In exercising
24 the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the
25 lawyer's relationship with the client and with those who might be injured by the client, the lawyer's
26 own involvement in the transaction and factors that may extenuate the conduct in question. A

1 lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule. Disclosure
2 may be required, however, by other rules. Some rules require disclosure only if such disclosure
3 would be permitted by paragraph (c). See Rules 8.1 and 8.3. Rule 3.3, on the other hand, requires
4 disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.

5 Detection of Conflicts of Interest

6 [16] Paragraph (c)(7) recognizes that lawyers in different firms may need to disclose limited
7 information to each other to detect and resolve conflicts of interest, such as when a lawyer is
8 considering an association with another firm, two or more firms are considering a merger, or a
9 lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [6]. Under these
10 circumstances, lawyers and law firms are permitted to disclose limited information, but only once
11 substantive discussions regarding the new relationship have occurred. Any such disclosure should
12 ordinarily include no more than the identity of the persons and entities involved in a matter, a brief
13 summary of the general issues involved, and information about whether the matter has terminated.
14 Even this limited information, however, should be disclosed only to the extent reasonably necessary
15 to detect and resolve conflicts of interest that might arise from the possible new relationship.
16 Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client
17 privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on
18 a corporate takeover that has not been publicly announced; that a person has consulted a lawyer
19 about the possibility of divorce before the person's intentions are known to the person's spouse; or
20 that a person has consulted a lawyer about a criminal investigation that has not led to a public
21 charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former
22 client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a
23 lawyer's conduct when exploring an association with another firm and is beyond the scope of these
24 Rules.

25 [17] Any information disclosed pursuant to paragraph (c)(7) may be used or further disclosed only
26 to the extent necessary to detect and resolve conflicts of interest. Paragraph (c)(7) does not restrict
27 the use of information acquired by means independent of any disclosure pursuant to paragraph (c)(7).

1 Paragraph (c)(7) also does not affect the disclosure of information within a law firm when the
2 disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses
3 information to another lawyer in the same firm to detect and resolve conflicts of interest that could
4 arise in connection with undertaking a new representation.

5 Acting Competently to Preserve Confidentiality

6 [16 18] A Paragraph (d) requires a lawyer must to act competently to safeguard information relating
7 to the representation of a client against unauthorized access by third parties and against inadvertent
8 or unauthorized disclosure by the lawyer or other persons who are participating in the representation
9 of the client or who are subject to the lawyer's supervision. See Rules 5.1, 5.3 and 8.4(a). The
10 unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the
11 representation of a client does not constitute a violation of paragraph (d) if the lawyer has made
12 reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the
13 reasonableness of the lawyer's efforts include the sensitivity of the information, the likelihood of
14 disclosure if additional safeguards are not employed, the cost of employing additional safeguards,
15 the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect
16 the lawyer's ability to represent clients (e.g., by making a device or important piece of software
17 excessively difficult to use). A client may require the lawyer to implement special security measures
18 not required by this Rule or may consent to forgo security measures that would otherwise be
19 required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a
20 client's information in order to comply with other law, such as state and federal laws that govern data
21 privacy or that impose notification requirements upon the loss of, or unauthorized access to,
22 electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing
23 information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [7]-[8].

24 [17 19] When transmitting a communication that includes information relating to the representation
25 of a client, the lawyer must take reasonable precautions to prevent the information from coming into
26 the hands of unintended recipients. This duty, however, does not require that the lawyer use special
27 security measures if the method of communication affords a reasonable expectation of privacy.

1 Special circumstances, however, may warrant special precautions. Factors to be considered in
2 determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity
3 of the information and the extent to which the privacy of the communication is protected by law or
4 by a confidentiality agreement. A client may require the lawyer to implement special security
5 measures not required by this Rule or may give written consent to the use of a means of
6 communication that would otherwise be prohibited by this Rule.

7 Lawyer Copying of Items Related to Representation

8 [~~18~~ 20] For the lawyer's own purposes, including facilitation of any revelation that might be
9 permitted by paragraph (c), a lawyer is permitted to make copies of items in a file. The lawyer may
10 charge the client for this copying only if allowed by Rule 1.19. The protection of this Rule, and the
11 circumstances in which revelation is required or permitted, are applicable to the lawyer's copy or
12 copies.

13 Use of Confidential Information to the Disadvantage of Client or Former Client

14 [~~19~~ 21] Use by the lawyer of confidential information to the disadvantage of a client or former client
15 is governed by Rules 1.8(b) and 1.9.

16 Amended effective 08/01/01, 08/01/03, 08/01/06,

17 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
18 on 03/16/84, 05/23/84, 06/27/84, 08/17/84, 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85,
19 04/26/85, 08/23/85 and 03/15/86; Minutes of the Joint Committee on Attorney Standards on 6/8/99,
20 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, 11/17/00, 6/12/01, 02/28/03, 02/27/04, 11/19/04,
21 06/14/05, 09/09/05, 09/13/2013, 09/12/14.

PROPOSED AMENDMENTS

1 RULE 1.17 SALE OF A LAW PRACTICE

2 A lawyer or a law firm may sell or purchase all or part of a law practice, including good will, if the
3 following conditions are satisfied:

4 (a) The seller ceases to engage in the private practice of law or some particular area of the practice
5 of law within an agreed upon geographic area in which the practice has been conducted;

6 (b) The practice or particular area of practice is sold as an entirety to another lawyer or law firm;

7 (c) Actual written notice is given by certified mail, return receipt requested, to each of the seller's
8 clients regarding:

9 (1) the proposed sale;

10 (2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

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

12 (4) the fact that the client's consent to the sale will be presumed if the client does not take any
13 action or does not otherwise object within ninety days of receipt of the notice.

14 If written notice by certified mail is ineffective, the seller should take all reasonable steps to see
15 that notice of the sale is received by the client. If after all reasonable steps have been exhausted,
16 notice has still not been received by the client, representation of the client may be transferred to the
17 purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may
18 disclose to the court in camera information relating to the representation only to the extent necessary
19 to obtain an order authorizing the transfer of a file.

1 (d) The sale may not be financed by increases in fees charged the clients of the practice. Existing
2 agreements between the seller and the client as to fees and the scope of the work must be honored
3 by the purchaser, unless the client consents in writing after consultation.

4 (e) Any sale of any particular area of practice arising out of the selling lawyer's cessation of
5 practice in an area of practice must include all of the selling attorney's files in the area of specialty
6 or practice.

7 Comment

8 [1] The practice of law is a profession, not merely a business. Clients are not commodities that can
9 be purchased and sold at will. Under this rule, when a lawyer or an entire firm ceases to practice in
10 total or in a particular area of specialty or practice and other lawyers or firms take over the
11 representation, the selling lawyer or firm may obtain compensation for the reasonable value of the
12 practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

13 [2] The requirement that a seller cease to engage in the private practice of law or an area of practice
14 does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity
15 which provides legal services to persons of limited means or as in-house counsel to a business.

16 Sale of Entire Practice or Entire Area of Practice

17 [3] This rule permits the sale of an entire practice attendant upon retirement from the private practice
18 of law within the agreed upon geographic area. It accommodates the lawyer who sells a practice upon
19 the occasion of moving to another state or to another geographic area. There is no requirement that
20 the lawyer leave the jurisdiction; it is sufficient that the selling lawyer ceases to practice in the agreed
21 upon geographic area where the practice to be sold is located. See also commentary to Rule 5.6.

22 [4] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is
23 sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any

1 matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint
2 responsibility for a matter in connection with the division of a fee with another lawyer as would
3 otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate
4 planning matters and a substantial number of probate administration cases may sell the estate
5 planning portion of the practice but remain in the practice of law by concentrating on probate
6 administration; however, that practitioner may not thereafter accept any estate planning matters.
7 Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire
8 practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby
9 preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

10 [5] This Rule requires that the seller's entire practice, or an entire area of practice be sold. The
11 prohibition against sale of less than an entire practice or area of practice protects those clients whose
12 matters are less lucrative and who might find it difficult to secure other counsel if a sale could be
13 limited to substantial fee-generating matters. Purchasers are required to undertake all client matters
14 in the practice or area of practice, subject to client consent. This requirement is satisfied, however,
15 even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

16 Client Confidences, Consent, and Notice

17 [6] Negotiations between seller and prospective purchaser prior to disclosure of information relating
18 to a specific representation of an identifiable client no more violate the confidentiality provisions of
19 Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or
20 mergers between firms, with respect to which client consent is not required. See Rule 1.6(c)(7).
21 Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation
22 ~~and to~~ , such as the client's file, however, requires client consent. The rule provides that before such
23 information can be disclosed by the seller to the purchaser the client must be given actual written
24 notice of the contemplated sale, including the identity of the purchaser and any proposed change in
25 terms of future representation, and must be told that the decision to consent or to make other
26 arrangements must be made within ninety days. If nothing is heard from the client within that time,
27 consent to the sale is presumed.

1 [7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some
2 clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves
3 consent to the purchase or direct any other disposition of their files, this rule requires an order from
4 a court having jurisdiction authorizing the transfer or other disposition. The court can be expected
5 to determine whether reasonable efforts to locate the client have been exhausted, and whether the
6 absent client's legitimate interests will be served by authorizing the transfer of the file so that the
7 purchaser may continue the representation. Preservation of client confidences requires that the
8 petition for court order be considered in camera.

9. [8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer
10 and transfer the representation to another, survive the sale of the practice or an area of practice.

11 Fee Arrangements Between Client and Purchaser

12 [9] The fees charged clients shall not be increased by reason of the sale, except as provided for in
13 this Rule. As a practical matter, this requires the purchasing lawyer to honor the existing fee
14 agreement between the seller and the client unless and until the purchasing lawyer and the client
15 agree to a new fee arrangement.

16 [10] This Rule provides for the automatic transfer of the client's legal work to the purchaser if the
17 client does not object within ninety days of the proposed sale. The automatic transfer provision
18 should greatly reduce the possibility of a gap in the representation of the client. This is particularly
19 true in instances where the selling lawyer has died, disappeared or is disabled, will be retiring, or is
20 entirely ceasing to practice law.

21 Other Applicable Ethical Standards

22 [11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical
23 standards applicable to involving another lawyer in the representation of a client. These include, for
24 example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume

1 the practice and the purchaser's obligation to undertake the representation competently (see Rule
2 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's consent if consent is
3 allowable under Rule 1.7(c); and the obligation to protect information relating to the representation
4 (see Rules 1.6, 1.8(b) and 1.9).

5 [12] This Rule also provides that either the selling lawyer or someone authorized to act on the selling
6 lawyer's behalf in the case of a deceased, disabled or disappeared lawyer, is responsible for preparing
7 and providing the clients with the notice of sale. While it is obviously necessary for someone to act
8 on behalf of a deceased, disabled or disappeared lawyer in the case of the sale of a practice, this rule
9 contemplates that the selling lawyer continues representation of the client until the transfer is
10 finalized. During the pendency of the transfer, the selling lawyer remains responsible to ensure that
11 the clients' business is not neglected. The selling lawyer cannot avoid the ethical duty to protect
12 clients' positions by allowing the lawyer's practice to be "brokered." This rule retains accountability
13 with the selling lawyer until the transfer is complete.

14 Approval of Substitution of Counsel

15 [13] If the approval of the substitution of the purchasing attorney for the selling attorney is required
16 by the rules of any tribunal in which a matter is pending, such approval must be obtained before the
17 matter can be included in the sale. See Rule 1.16.

18 Application of the Rule

19 [14] This Rule applies to the sale of a law practice by representatives of a deceased, disabled, or
20 disappeared lawyer. Thus, a seller may be represented by a non-lawyer representative who is not
21 subject to these rules. Since, however, no lawyer may participate in a sale of a law practice that does
22 not conform to the requirements of this Rule, the representatives of the seller as well as the
23 purchasing lawyer can be expected to see to it that they are met.

24 [15] Admission to or retirement from a law partnership or a professional association, retirement

1 plans and similar arrangements, and a sale of the tangible assets of a law practice do not constitute
2 a sale or purchase governed by this Rule.

3 [16] This Rule does not apply to the transfers of legal representation between lawyers when such
4 transfers are unrelated to the sale of a law practice.

5 Amended effective 08/01/06,

6 Reference: Minutes of the Joint Committee on Attorney Standards Meetings of 09/15/95, 12/01/95,
7 06/11/96; 02/27/04, 03/18/05, 06/14/05, 12/13 /2013. 09/12/14.

PROPOSED AMENDMENTS

1 RULE 1.18 DUTIES TO POTENTIAL CLIENT

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

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

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

14 (d) When the lawyer has received significantly harmful information, representation is permissible
15 if:

16 (1) both the affected client and the potential client have given consent; or

17 (2) the lawyer who received the information took reasonable measures to avoid exposure to more
18 significantly harmful information than was reasonably necessary to determine whether to represent
19 the potential client and notice is promptly given to the potential client.

20 Comment

21 Definition of Potential Client

1 [1] ~~The term "potential client" is used in this Rule to eliminate any confusion with the term~~
2 ~~"prospective client" as used in Rule 7.3. Potential clients, like clients, may disclose information to~~
3 ~~a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice.~~
4 ~~A lawyer's discussions consultations with a potential client usually are limited in time and depth and~~
5 ~~leave both the potential client and the lawyer free (and sometimes required) to proceed no further.~~
6 Hence, potential clients should receive some but not all of the protection afforded clients.

7 [2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this~~
8 ~~Rule. A person who communicates A person becomes a potential client by consulting with a lawyer~~
9 ~~about the possibility of forming a client-lawyer relationship with respect to a matter. Whether~~
10 ~~communications, including written, oral, or electronic communications, constitute a consultation~~
11 ~~depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer,~~
12 ~~either in person or through the lawyer's advertising in any medium, specifically requests or invites~~
13 ~~the submission of information about a potential representation without clear and reasonably~~
14 ~~understandable warnings and cautionary statements that limit the lawyer's obligations, and a person~~
15 ~~provides information in response. See also Comment [4]. In contrast, a consultation does not occur~~
16 ~~if a person provides information to a lawyer in response to advertising that merely describes the~~
17 ~~lawyer's education, experience, areas of practice, and contact information, or provides legal~~
18 ~~information of general interest. Such a person communicates information unilaterally to a lawyer,~~
19 ~~without any reasonable expectation that the lawyer is willing to discuss the possibility of forming~~
20 ~~a client-lawyer relationship, and is thus not a "potential client" within the meaning of paragraph (a).~~
21 ~~Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is~~
22 ~~not a "potential client".~~

23 Initial Consultation

24 [3] It is often necessary for a potential client to reveal information to the lawyer during an initial
25 consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often
26 must learn such information to determine whether there is a conflict of interest with an existing client
27 and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the

1 lawyer from using or revealing information, except as permitted by Rule 1.9, even if the client or
2 lawyer decides not to proceed with the representation. The duty exists regardless of how brief the
3 initial conference may be. A lawyer is not prohibited from revealing to an existing client that an
4 opposing party has contacted the lawyer seeking representation.

5 [4] In order to avoid acquiring significantly harmful information from a potential client, a lawyer
6 considering whether or not to undertake a new matter should limit the initial interview consultation
7 to only such information as reasonably appears necessary for that purpose. Where the information
8 indicates that a conflict of interest or other reason for non-representation exists, the lawyer should
9 so inform the potential client or decline the representation. If the potential client wishes to retain the
10 lawyer, and if consent is allowed under Rule 1.7(c), then consent from all affected present or former
11 clients must be obtained before accepting the representation.

12 [5] A lawyer may condition conversations a consultation with a potential client on the person's
13 consent that no information disclosed during the consultation will prohibit the lawyer from
14 representing a different client in the matter. If the agreement expressly so provides, the potential
15 client may also consent to the lawyer's subsequent use of information received from the potential
16 client.

17 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from
18 representing a client with interests adverse to those of the potential client in the same or a
19 substantially related matter unless the lawyer has received from the potential client information that
20 could be significantly harmful if used in the matter.

21 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule
22 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains consent from both
23 the potential and affected clients. Obtaining the client's consent in writing is the preferred practice.
24 Lack of a writing may make it difficult to prove client consent if a dispute arises later. In the
25 alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and notice is
26 promptly given to the potential client.

1 [8] Notice, including a general description of the subject matter about which the lawyer was
2 consulted generally should be given as soon as practical.

3 [9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a
4 potential client, see Rule 1.1. For a lawyer's duties when a potential client entrusts valuables or
5 papers to the lawyer's care, see Rule 1.15.

6 Amended effective 03/01/97, 08/01/06,

7 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
8 on 11/08/85, 01/31/86 and 03/15/86; Minutes of the Joint Committee on Attorney Standards
9 Meetings of 09/15/95, 12/01/95, 06/11/96; 02/27/04; 04/16/04, 03/18/05, 06/14/05, 09/09/05,
10 06/ 10/2014, 09/12/14.

PROPOSED AMENDMENTS

1 RULE 4.5 INADVERTENT TRANSMISSION

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

5 (b) A lawyer who receives a document under the circumstances creating a duty under this rule does
6 not violate Rule 1.2 or Rule 1.4 by not communicating to or consulting with the client regarding the
7 receipt or the return of the document.

8 Comment

9 [1] This Rule recognizes that lawyers sometimes receive ~~documents~~ a document or electronically
10 stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers,
11 or by third parties. A document or electronically stored information is inadvertently sent when it is
12 accidentally transmitted, such as when an email or letter is misaddressed or a document or
13 electronically stored information is accidentally included with information that was intentionally
14 transmitted. If a lawyer knows or reasonably should know that such a document or electronically
15 stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the
16 sender in order to permit that person to take protective measures. Whether the lawyer is required to
17 take additional steps, such as returning or deleting the ~~original~~ document or electronically stored
18 information, is a matter of law beyond the scope of these Rules, as is the question of whether the
19 privileged status of a document or electronically stored information has been waived. Similarly, this
20 Rule does not address the legal duties of a lawyer who receives a document or electronically stored
21 information that the lawyer knows or reasonably should know may have been ~~wrongfully~~
22 inappropriately obtained by the sending person. For purposes of this rule, "document or
23 electronically stored information" includes, in addition to paper documents, e-mail ~~or other~~
24 electronic modes of transportation and other forms of electronically stored information, including
25 embedded data (commonly referred to as "metadata"), that is subject to being read or put into

1 readable form. Metadata in electronic documents creates an obligation under this Rule only if the
2 receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the
3 receiving lawyer.

4 [2] Some lawyers may choose to return a document or delete electronically stored information
5 unread, for example, when the lawyer learns before receiving ~~the document~~ it that it was
6 inadvertently sent to ~~the wrong address~~. Where a lawyer is not required by applicable law to do so,
7 the decision to voluntarily return such a document or delete electronically stored information is a
8 matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

9 Amended effective 08/01/06.

10 Reference: Minutes of the Joint Committee on Attorney Standards on 08/06/04, 09/24/04, 06/14/05,
11 09/13/2013, 12/13 /2013, 06/10/14.

PROPOSED AMENDMENTS

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

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

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

9 (c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of these Rules
10 if:

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

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

17 (d) In addition to paragraphs (a), (b) and (c), the following apply with respect to a legal assistant
18 employed or retained by or associated with a lawyer:

19 (1) A lawyer may delegate to a legal assistant any task normally performed by the lawyer except
20 those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or
21 regulation, controlling authority, or these Rules.

1 (2) A lawyer may not delegate to a legal assistant:

2 (i) responsibility for establishing a lawyer-client relationship;

3 (ii) responsibility for establishing the amount of a fee to be charged for a legal service;

4 (iii) responsibility for a legal opinion rendered to a client; or

5 (iv) responsibility for the work product.

6 (3) The lawyer shall make reasonable efforts to ensure that clients, courts, and other lawyers are
7 aware that a legal assistant is not licensed to practice law.

8 Comment

9 Nonlawyers Within the Firm

10 [1] Lawyers generally employ nonlawyers in their practice, including secretaries, legal assistants,
11 investigators, law student interns, and paraprofessionals. These individuals, whether employees or
12 independent contractors, act for the lawyer in rendition of the lawyer's professional services. A
13 lawyer must give such nonlawyers appropriate instruction and supervision concerning the ethical
14 aspects of their employment, particularly regarding the obligation not to disclose information relating
15 to representation of the client, and is responsible for their work product. The measures employed in
16 supervising nonlawyers should take account of the fact that they do not have legal training and are
17 not subject to professional discipline.

18 [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable
19 efforts to ~~establish internal policies and procedures designed to provide~~ ensure that the firm has in
20 effect measures giving reasonable assurance that nonlawyers in the firm ~~will and nonlawyers outside~~
21 the firm who work on firm matters act in a way compatible with these Rules the professional

1 obligations of the lawyer. See Comment [7] to Rule 1.1 (retaining lawyers outside the firm) and
2 Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b)
3 applies to lawyers who have supervisory authority over ~~the work of a nonlawyer~~ such nonlawyers
4 within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible
5 for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation
6 of these Rules if engaged in by a lawyer.

7 [3] While appropriate delegation of tasks to legal assistants is allowed, a lawyer may not permit a
8 legal assistant to engage in the "practice of law." The key to appropriate delegation is proper
9 supervision, which includes adequate instruction when assigning projects, monitoring of the project,
10 and review of the project. Lawyers should take care in hiring and choosing a legal assistant to work
11 on a specific project to ensure that the legal assistant has the education, knowledge, and ability
12 necessary to perform the delegated tasks competently.

13 [4] The following guidelines have been recognized as helpful in evaluating the education, training
14 or experience of a qualified legal assistant.

15 1) Graduation from one of the following ABA approved legal assistant/paralegal programs:
16 bachelor's degree, associate's degree, or a post-baccalaureate program. If not ABA approved,
17 graduation from a legal assistant/paralegal program that consists of a minimum of 60 semester credit
18 hours or the equivalent, of which eighteen semester credit hours are substantive legal
19 assistant/paralegal courses.

20 2) A bachelor's degree in any field, and either one-year employer training as a legal
21 assistant/paralegal or eighteen semester credit hours of legal assistant/paralegal substantive courses.

22 3) Successful completion of a national certifying examination that is specifically designed for legal
23 assistants/paralegals and which includes continuing legal education for maintenance of that
24 certification status.

1 4) Seven years or more of experience working as a legal assistant/paralegal who has been
2 employer trained by and under the supervision of a lawyer.

3 [5] The essential elements of any lawyer-client relationship are the agreement to undertake
4 representation, the scope of that representation, and the fee arrangement relating to that
5 representation. In evaluating whether to undertake the representation, the lawyer must evaluate
6 whether any circumstances exist which would require that the representation be declined (See, Rule
7 1.16). Rule 1.2 requires that the lawyer consult with the client regarding any limitations on the scope
8 of representation. The lawyer must further obtain the agreement of the client, and in some cases
9 written agreement, with respect to the fee arrangement relating to the representation (See, Rule 1.5).
10 In addition, Rule 2.1 requires a lawyer to exercise independent professional judgment and render
11 candid advice. These matters are of such importance that they must be handled personally by the
12 lawyer. Regardless of how the legal assistant may be used in the initial stages of establishing a
13 lawyer-client relationship, i.e., gathering background information from the client and others,
14 preparing initial drafts of fee arrangements, or performing other incidental tasks, the lawyer may not
15 delegate responsibility to a legal assistant or other nonlawyer for deciding whether the representation
16 will be undertaken or for any legal opinion rendered to a client.

17 [6] ~~Finally, nonlawyers~~ Nonlawyers may not hold themselves out as lawyers. It is the lawyer's
18 responsibility to see that communications about services rendered by the law firm and its nonlawyers
19 are not false, fraudulent, deceptive or misleading (See, Rule 7.1), and that nonlawyer employees of
20 the firm understand those limitations. If the lawyer or a legal assistant becomes aware that the role
21 of the legal assistant is unclear, the lawyer has an affirmative duty to clarify the legal assistant's role.

22 Nonlawyers Outside the Firm

23 [7] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services
24 to the client. Examples include the retention of an investigative or paraprofessional service, hiring
25 a document management company to create and maintain a database for complex litigation, sending
26 client documents to a third party for printing or scanning, and using an Internet-based service to store

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

12 [8] Where the client directs the selection of a particular nonlawyer service provider outside the firm,
13 the lawyer ordinarily should agree with the client concerning the allocation of responsibility for
14 monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation
15 in a matter pending before a tribunal, lawyers and parties may have additional obligations that are
16 a matter of law beyond the scope of these Rules.

17 Amended effective 03/01/97, 08/01/06, _____

18 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
19 on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards Meetings of
20 06/13/95, 09/15/95, 12/01/95, 06/11/96, 08/06/04, 04/08/05, 06/14/05, 09/09/05, 09/13/2013,
21 09/12/14.

PROPOSED AMENDMENTS

1 RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

2 (a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal
3 profession in that jurisdiction.

4 (b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who performs
5 legal services in this jurisdiction on a temporary basis does not engage in the unauthorized practice
6 of law in this jurisdiction when:

7 (1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf of the client's
8 commonly owned affiliates, except for work for which pro hac vice admission or registration under
9 Admission to Practice R.3 is required;

10 (2) the lawyer acts with respect to a matter that arises out of the lawyer's representation of a client
11 in a jurisdiction in which the lawyer is admitted to practice, except for work for which pro hac vice
12 admission or registration under Admission to Practice R.3 is required;

13 (3) with respect to matters for which registration or pro hac vice admission is available under
14 Admission to Practice R.3, the lawyer is authorized to represent a client or is preparing for a matter
15 in which the lawyer reasonably expects to be so authorized;

16 (4) with respect to matters, transactions or proceedings pending in or substantially related to this
17 jurisdiction and for which pro hac vice admission is not available under Admission to Practice R.3,
18 the lawyer is associated in the matter, transaction or proceeding with a lawyer admitted to practice
19 in this jurisdiction who actively participates in the representation of the client in the matter,
20 transaction or proceeding; or

21 (5) the lawyer performs a service that may be performed by a person without a license to practice
22 law or without other authorization from a federal, state or local governmental body.

1 (c) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction, who establishes
2 an office or whose presence for performing legal services is other than temporary in this jurisdiction
3 does not engage in the unauthorized practice of law in this jurisdiction when:

4 (1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf of the client's
5 commonly owned affiliates, and the lawyer is eligible for and has complied with the lawyer
6 registration rules under Admission to Practice R.3, or

7 (2) the lawyer renders services in this jurisdiction pursuant to other authority granted by federal
8 law or a law or Court rule of this jurisdiction.

9 (d) A lawyer who is not admitted to practice in this jurisdiction shall not represent or hold out to the
10 public that the lawyer is admitted to practice law in this jurisdiction. A lawyer who practices law in
11 this jurisdiction under paragraph(b) or (c) shall disclose in writing to the client that the lawyer is not
12 licensed in this jurisdiction.

13 (e) A lawyer shall not assist another person in the unauthorized practice of law.

14 Comment

15 [1] Paragraph (a) states the general rule that each state judiciary may regulate the legal profession
16 within the borders of the jurisdiction. A lawyer may regularly practice law only in a jurisdiction in
17 which the lawyer is admitted to practice. The practice of law in violation of lawyer-licensing
18 standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict
19 the ability of lawyers authorized by federal statute or other federal law to represent the interests of
20 the United States or other persons in any jurisdiction.

21 [2] There are occasions when out-of state lawyers perform services in this state on a temporary basis
22 under circumstances that do not create a significant risk of harm to clients, the courts, or the public.
23 Paragraph (b) identifies five situations in which the out-of-state lawyer may perform services in this

1 state without fear of violating this Rule. By creating these five specific "safe harbors" for
2 multijurisdictional practice, this Rule does not address the question of whether other conduct
3 constitutes the unauthorized practice of law. The fact that conduct is not specifically included or
4 described in this Rule is not intended to imply that such conduct is the unauthorized practice of law.
5 Nothing in this Rule is intended to authorize a lawyer to establish an office or ~~other permanent~~
6 presence other than temporary for performing legal services in this jurisdiction without being
7 admitted to practice here. In addition, nothing in this Rule is intended to authorize an out-of-state
8 lawyer to solicit clients in this jurisdiction.

9 [3] Paragraph (b)(1) permits in-house corporate counsel and governmental lawyers to represent their
10 employers and their employers' commonly-owned affiliates on a temporary basis without being
11 admitted to the bar of this state. The safe harbor in this rule does not cover appearances in court or
12 other work for which pro hac vice admission or registration is required under Admission to Practice
13 R.3.

14 [4] Paragraph (b) (2) is intended to provide broad protection to several kinds of work in this
15 jurisdiction that are related to the lawyer's work in the lawyer's home state, such as negotiations,
16 contracts, depositions and other forms of discovery, witness interviews, and meetings with clients
17 or other parties to a transaction. The Rule recognizes that it should be sufficient to rely on the
18 lawyer's jurisdiction of licensure as the jurisdiction with the primary responsibility to ensure the
19 lawyer has the requisite character and fitness to practice law. Also, the Rule recognizes that a client
20 should be able to have a single lawyer conduct all aspects of a transaction, even if the lawyer must
21 travel to other states. The safe harbor in this paragraph, however, does not cover transactions that
22 are pending in or substantially related to this state. For these state-related transactions, the
23 out-of-state lawyer is required to seek admission or to associate with a licensed North Dakota lawyer
24 as co-counsel in the representation of the client in the transaction. See paragraph (b)(4).

25 [5] Paragraph (b)(3) requires out-of-state lawyers to be admitted pro hac vice under Admission to
26 Practice R.3 to appear in all matters pending in a tribunal or administrative agency in this state. This
27 Rule provides a temporary safe harbor to a lawyer acting on a client's behalf in preparatory matters

1 before pro hac vice admission, so long as the lawyer reasonably expects to be so admitted. Such
2 preparatory work might include factual investigations and discovery in connection with litigation or
3 an administrative proceeding where the lawyer reasonably expects to be admitted pro hac vice.

4 [6] Paragraph (b)(4) requires the out-of-state lawyer to associate with a duly licensed local lawyer
5 for all transactions that are pending in or substantially related to this jurisdiction and for which pro
6 hac vice admission is not available. The Rule recognizes that association with a lawyer licensed in
7 this jurisdiction is likely to protect the interests of both clients and the public. The local lawyer may
8 not serve merely as a conduit for the out-of state lawyer, but must actively participate in and share
9 actual responsibility for the representation of the client in the matter. If the licensed lawyer's
10 involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

11 [7] Paragraph (b)(5) allows an out-of-state lawyer to perform services that a person who is not a
12 lawyer may perform without a law license or other authorization from a federal, state, or local
13 governmental body, e.g., in private alternative dispute resolution contexts, a non-lawyer may serve
14 as a mediator or arbitrator. In some administrative proceedings, a non-lawyer is permitted by law to
15 appear on behalf of a party. The Rule assumes that the public is adequately protected in these
16 instances by the over-arching provisions of Rule 8.5, which subjects all lawyers performing any
17 services in this jurisdiction to the Rules of Professional Conduct. If, for example, an out-of-state
18 lawyer performing as a neutral engages in conduct in violation of these Rules, the lawyer could be
19 disciplined for the misconduct, even if serving as the neutral was not the unauthorized practice of
20 law under this Rule. It should be noted that whereas an out-of-state lawyer who represents a client
21 in ADR proceedings pending in another jurisdiction would be covered by the safe harbor in this
22 Rule, an out-of-state lawyer who represents a client in an ADR proceeding in North Dakota must
23 register under Admission to Practice R.3. See paragraph (b)(3).

24 [8] Paragraph (c) creates two categories of allowable multijurisdictional practice for out-of state
25 lawyers who establish an office or other permanent presence in the state: 1) in-house counsel who
26 comply with registration rules, and 2) lawyers performing services pursuant to federal or state law
27 or court rule.

1 [9] Paragraph (c)(1) creates a safe harbor for in-house corporate counsel or other employed lawyers
2 who establish an office or other permanent presence in the state, provided they comply with the
3 registration rules under Admission to Practice R.3. If the out-of state lawyer is not eligible for
4 registration under Rule 3, this safe harbor would not apply and the lawyer must seek licensure in this
5 jurisdiction.

6 [10] Paragraph (c) (2) permits out-of-state-lawyers to provide legal services in this state when
7 authorized to do so by federal law or state law or court rule.

8 [11] Lawyers who are not licensed to practice law in this jurisdiction must not represent or hold
9 themselves out to the public as licensed to practice law in this jurisdiction. Paragraph (d) requires
10 out-of-state lawyers practicing law in North Dakota under one of the safe harbors in paragraphs (b)
11 and (c) to disclose in writing to their clients that they are not licensed in this state.

12 [12] Limiting the practice of law to members of the bar protects the public from unqualified persons
13 performing legal services. Paragraph (e) does not prohibit a lawyer from employing the services of
14 paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated
15 work and retains responsibility for it. See Rule 5.3. Lawyers may also provide professional advice
16 and instruction to nonlawyers whose employment requires knowledge of law; for example, claims
17 adjusters, employees of financial or commercial institutions, social workers, accountants and
18 employees of government agencies. Lawyers may assist independent nonlawyers authorized by law
19 to provide particular legal services, for example, paraprofessionals authorized to provide some kinds
20 of legal services. In addition, a lawyer may counsel nonlawyers who wish to represent themselves.

21 [13] Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that
22 has been affected by a major disaster, but in which they are not otherwise authorized to practice law,
23 as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another
24 jurisdiction, but in which they are not otherwise authorized to practice law, should consult
25 Admission to Practice R. 3.2.

1 Amended effective 03/01/05, 08/01/06, 05/01/12

2 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
3 on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on 06/24/03,
4 09/25/03, 11/14/03, 04/16/04, 08/06/04, 09/16/11, 12/09/11, 09/13/13, 12/06/13, 09/12/14 .

PROPOSED AMENDMENTS

RULE 7.2 ADVERTISING

1 (a) Subject to the requirements of Rule 7.1 and 7.3, a lawyer may market and advertise legal services
2 through media, including published and on-line directories; newspapers, newsletters and other
3 periodicals; outdoor advertising; electronic advertising, including radio, television, video and the
4 Internet; and through text-based communications including written correspondence and e-mail.

5 ~~(b) A copy or recording of an advertisement or communication must be kept for two years after its
6 last dissemination along with a record of when and where it was used. For written correspondence
7 and e-mail, a lawyer shall retain for two years from the date of sending a list of addressees. When
8 a lawyer uses recorded voice communications and transmits a communication by telephone call, the
9 lawyer shall retain for two years from the date of the call a record of any telephone number called.~~

10 ~~(c)~~(b) Any communication made pursuant to this Rule must include the name and office address of
11 at least one lawyer or law firm responsible for its contents.

12 ~~(d)~~(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services,
13 except that a lawyer may

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

15 (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

16 (3) pay for a law practice in accordance with Rule 1.17.

17 Comment

18 [1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to
19 provide information about their services through various forms of marketing and advertising. The
20 public's need to gain information about legal services can be fulfilled in part through marketing and

1 advertising methods. These methods engage traditional media such as the Yellow Pages, newspapers
2 and television, as well as emerging technologies such as on-line directories, web sites, and e-mail.
3 Although information about legal services can benefit all types of clients, the need for information
4 is particularly acute among clients who may be unfamiliar with legal services. While the need for
5 information justifies the use of advertising, it, at the same time, increases the risk of misleading or
6 overreaching endeavors.

7 [2] Television is now one of the most powerful media for getting information to the public;
8 prohibiting television advertising, therefore, would impede the flow of information about legal
9 services to many sectors of the public. Limiting the information that may be advertised has a similar
10 effect and assumes that the bar can accurately forecast the kind of information that the public would
11 regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of
12 information about legal services, and lawful communication by electronic mail is permitted by this
13 Rule. But see Rule 7.3(a) for the prohibition against the solicitation of ~~a prospective client~~ anyone
14 known to be in need of legal services in a particular matter through a real-time electronic exchange
15 that is not initiated by the ~~prospective client~~ person.

16 [3] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to
17 members of a class in class action litigation.

18 Record of Advertising

19 ~~[4] Paragraph (b) requires that a record of the content and use of advertising be kept in order to~~
20 ~~facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to~~
21 ~~dissemination.~~

22 Paying Others to Recommend a Lawyer

23 ~~[5]~~[4] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law
24 practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay *another*

1 person for recommending the lawyer's services or for channeling professional work in a manner that
2 violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a
3 lawyer's credentials, abilities, competence, character, or other professional qualities. Moreover, a
4 lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the
5 lead generator does not recommend the lawyer, any payment to the lead generator is consistent with
6 Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead
7 generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's
8 services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or
9 creates a reasonable impression that it is recommending the lawyer, is making the referral without
10 payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer
11 should receive the referral. This restriction does not prevent an organization or person other than the
12 lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid
13 legal services plan may pay to advertise legal services provided under its auspices. Likewise, a
14 lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by
15 such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as
16 a secretary, to prepare communications permitted by this Rule.

17 Amended effective 03/01/97, 03/01/04, 08/01/06, _____

18 Reference: Minutes of Joint Committee on Attorney Standards on 06/08/99, 09/16/99, 11/19/99,
19 03/23/00, 06/13/00, 09/15/00, 11/17/00, 06/11/02, 09/12/02, 11/15/02, and, 06/24/03, 06/10/2014,
20 09/12/14.

PROPOSED AMENDMENTS

RULE 7.3 - ~~DIRECT CONTACT WITH PROSPECTIVE~~ SOLICITATION OF CLIENTS

1 (a) A lawyer, or the lawyer's representative, shall not by in-person or telephone contact, or other
2 real-time contact, solicit professional employment from ~~a prospective client~~ anyone known to be in
3 need of legal services in a particular matter when a significant motive for the solicitation is the
4 lawyer's pecuniary gain unless the person contacted:

5 (1) is a lawyer; or

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

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

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

12 (2) the solicitation involves coercion, duress, or harassment; or

13 (3) the receipt of the solicitation is uninvited and imposes any involuntary economic cost on the
14 prospective client to respond to the solicitation.

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

19 Comment

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

7 ~~[1 2]~~ The lawyer is a trained advocate and the client in need of legal services may be emotionally
8 vulnerable. As a result, ~~the prospective client~~ a person in need of legal services, who may be
9 overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to
10 fully evaluate all available alternatives with reasoned judgment in the lawyer's presence and
11 insistence upon immediate retention. Such a situation is fraught with the possibility of undue
12 influence, intimidation, unaccountable misrepresentation and over-reaching.

13 ~~[2 3]~~ Other forms of ~~client development~~ solicitation are permissible under these rules, offering
14 lawyers alternative means of conveying necessary information to those who may be in need of legal
15 services. Advertising may be communicated via virtually any type of media. Materials may be mailed
16 ~~to potential clients~~ in most circumstances and the Internet is available for lawyers to present a vast
17 array of credentials in an affordable way, without subjecting ~~the prospective client~~ a person known
18 to be in need of legal services to persuasion that may overwhelm the client's ~~the person's~~ judgment.

19 ~~[3 4]~~ Additionally, the contents of advertising and other non-direct communications permitted in
20 these rules can be permanently recorded so that they cannot be disputed. This potential for informal
21 review is itself likely to help guard against statements and claims that might constitute false or
22 misleading communications in violation of Rule 7.1. The contents of direct communications between
23 a lawyer and a ~~prospective client~~ person known to be in need of legal services can be disputed and
24 are not subject to verification and the protection that can derive from a record. Consequently, the
25 direct communication is more likely to approach the line between accurate representations and those
26 that are false or misleading.

1 [4 5] There are several circumstances in which direct communications with prospective clients are
2 permitted including when the prospective client is a lawyer, a family member, a current or prior
3 client or where the lawyer accepts the case without any pecuniary gain.

4 [5 6] Any solicitation that contains information that is unlawful or is false or misleading within the
5 meaning of Rule 7.1 is prohibited. Additionally, any solicitation that involves contact with a
6 prospective client person who has indicated a desire to the lawyer not to be solicited, any solicitation
7 that involves coercion, duress or harassment, or any solicitation that imposes any involuntary
8 economic cost to respond on the prospective client are all impermissible under this rule. If after
9 sending a letter or other communication to a prospective client a person known to be in need of legal
10 services in a manner that is permissible by these rules, a lawyer receives no response, any further
11 effort to communicate with the ~~prospective client~~ person may be deemed harassment under this rule.
12 Likewise, multiple uninvited e-mail messages could fall under this category.

13 [6 7] Paragraph (c) of this Rule permits a lawyer to participate with an organization that uses
14 personal contact to solicit members for its group or prepaid legal service plan, provided that the
15 personal contact is not undertaken by any lawyer who would be a provider of legal services through
16 the plan. The organization referred to in paragraph (c) must not be owned by or directed (whether
17 as manager or otherwise) by any lawyer of law firm that participates in the plan. For example,
18 paragraph (c) would not permit a lawyer to create an organization controlled directly or indirectly
19 by the lawyer and use the organization for direct solicitation of legal employment of the lawyer
20 through memberships in the plan or otherwise. The communication permitted by these organizations
21 must also not be directed to a person known to need legal services in a particular matter, but is to be
22 designed to inform potential plan members generally of another means of affordable legal services.
23 Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in
24 compliance with the other rules governing communications concerning the services of a lawyer.

25 Dissent:

26 I respectfully dissent:

1 I start with the proposition that disciplinary rules are not aspirational rules; they are rules to define
2 conduct that is intolerable or incompatible with the practice of law and the conduct of the profession
3 and to provide the basis for disciplining the lawyer who engages in such conduct. A lawyer's direct
4 in-person communication with a non-lawyer can be abusive. Rule 7.1, prior to these amendments,
5 prohibited such abusive conduct. It provided, in part:

6 (b) A lawyer shall not, by in-person contact made by the lawyer or the lawyer's representative,
7 suggest or request that a nonlawyer employ the lawyer if the nonlawyer has not sought advice from
8 the lawyer or the person professionally associated with the lawyer regarding employment of a lawyer
9 and:

10 (1) the suggestion or request involves use of a statement or claim that is false or misleading,
11 within the meaning of subsection (a), or

12 (2) the suggestion or request involves the use of undue influence, coercion, duress, compulsion,
13 intimidation, threat, or vexatious or harassing conduct, or

14 (3) the lawyer or representative knows or reasonably should know that the potential client's
15 physical or mental condition makes it unlikely that the potential client can exercise reasonable,
16 considered judgment as to the potential employment, or

17 (4) the suggestion or request involves use of a representative and the lawyer knows or reasonably
18 should know that such conduct violates the representative's contractual or other legal obligations.

19 (c) A lawyer shall not contact, in person or through a representative, a nonlawyer for the purpose
20 of suggesting or requesting that the nonlawyer employ the lawyer or a person professionally
21 associated with the lawyer if the lawyer or representative knows or reasonably should know that the
22 potential client does not wish to be contacted for this purpose.

23 Prior Rule 7.1 dealt with the situation frequently described as "ambulance chasing," when a

~~1 prospective client is particularly vulnerable, and a lawyer who engaged in such conduct could be
2 disciplined under it. The language quoted above has been deleted from Rule 7.1 and replaced with
3 a new rule, Rule 7.3, dealing with direct contact with prospective clients.~~

~~4 Rule 7.3 makes sanctionable direct in-person contact that I would describe as ordinary commercial
5 speech. I posit three examples which are sanctionable under this new rule:~~

~~6 A new lawyer moves to town in North Dakota. The lawyer walks up and down main street of her
7 new town and hands out business cards, introducing herself and telling the people to whom the
8 lawyer gives her business card that she would appreciate being able to assist them if they have legal
9 needs.~~

~~10 A lawyer sitting at a banquet overhears another person sitting at the same table describe a problem
11 he is having. The lawyer says to that person: "My firm has had experience in dealing with that issue.
12 We would certainly be interested in helping you resolve it."~~

~~13 After giving a speech to a local trade association, the lawyer socializes with its members. In
14 conversation with a member the lawyer has never met before, he says to the member, "I know this
15 is a problem you will be dealing with soon. With the information I've given you today, you'll
16 recognize the need for legal help and I hope you will come to me."~~

~~17 None of the lawyers has violated the former Rule 7.1, but all of the lawyers have violated Rule 7.3(a)
18 if they are hoping to get paid for their work.~~

~~19 This overly broad rule may make it more difficult for newly admitted lawyers to get established in
20 the profession and will give an advantage to those firms with the resources and inclination to engage
21 in expensive media advertising.~~

~~22 I do not believe Rule 7.3 could survive constitutional scrutiny, if challenged under the First
23 Amendment. See Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002); Greater New Orleans~~

1 ~~Broad. Ass'n v. United States, 527 U.S. 173 (1999). The fact that this Court promulgates a rule to~~
2 ~~regulate a profession rather than ordinary commercial speech does not immunize it from challenge.~~
3 ~~Republican Party of Minn. v. White, 536 U.S. 765 (2002); Ibanez v. Florida Dep't of Bus. & Prof'l~~
4 ~~Regulation, 512 U.S. 136 (1994).~~

5 ~~Because I believe prior Rule 7.1 appropriately dealt with unethical in-person contact, I dissent from~~
6 ~~the amendments to that rule. Because I believe Rule 7.3 is more extensive than necessary to serve~~
7 ~~this Court's interest in disciplining lawyers whose in-person contact with prospective clients is~~
8 ~~incompatible with the standards of our profession, I dissent from the adoption of Rule 7.3.~~

9 ~~Carol Ronning Kapsner~~

10 ~~Dale V. Sandstrom~~

11 ~~Adopted effective 03/01/04. Amended effective 08/01/06,~~

12 ~~Reference: Minutes of Joint Committee on Attorney Standards on 06/08/99, 09/16/99, 11/19/99,~~
13 ~~03/23/00, 06/13/00, 09/15/00, 11/17/00, 06/11/02, 09/12/02, 11/15/02, and, 06/24/03,06/10/14,~~
14 ~~09/12/14.~~

PROPOSED AMENDMENTS

1 RULE 8.5 JURISDICTION

2 (a) A lawyer admitted to practice in this jurisdiction is subject to disciplinary action in this
3 jurisdiction even though the conduct of the lawyer giving rise to the discipline may have occurred
4 outside of this jurisdiction and even when that conduct may subject or has subjected the lawyer to
5 discipline by another jurisdiction.

6 (b) Persons not licensed to practice law in this jurisdiction, but eligible to practice elsewhere who
7 actually engage in this jurisdiction in the practice of law, are subject to the disciplinary authority of
8 this jurisdiction.

9 (c) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct
10 to be applied shall be as follows:

11 (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in
12 which the tribunal sits, unless the rules of the tribunal provide otherwise; and

13 (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or
14 if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction
15 shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct
16 conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect
17 of the lawyer's conduct will occur.

18 Comment

19 [1] In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which
20 they are licensed to practice, either in another state or outside the United States. In doing so, they
21 remain subject to the governing authority of the jurisdiction in which they are licensed to practice
22 and may also become subject to the authority of the other jurisdiction. Their activity in another

1 jurisdiction may also constitute the unauthorized practice of law in that jurisdiction. See Rule 5.5.
2 When this jurisdiction exercises its authority over persons eligible to practice elsewhere but not here,
3 although there is no license or certificate of admission against which to act the disciplinary authority
4 may enter findings of violations of these rules and enter, as relief, prohibitions from applying for
5 admission here, pro hac vice or otherwise, for a period, and report the action to the jurisdiction in
6 which the person is eligible.

7 [2] Lawyers not licensed here may lawfully practice here within the safe harbors identified in Rule
8 5.5 or when registered or admitted pro hac vice pursuant to applicable rules. Such lawyers are not,
9 by virtue of that limited admission, licensed to practice law in this jurisdiction, but are nonetheless
10 subject to discipline here.

11 Choice of Law

12 [3] A lawyer may be potentially subject to more than one set of rules of professional conduct which
13 impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction
14 with differing rules, or may be admitted to practice before a particular court with rules that differ
15 from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice.
16 Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

17 [4] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts
18 between rules, as well as uncertainty about which rules are applicable, is in the best interest of both
19 clients and the profession (as well as the bodies having authority to regulate the profession).
20 Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be
21 subject to only one set of rules of professional conduct, (ii) making the determination of which set
22 of rules applies to particular conduct as straightforward as possible, consistent with recognition of
23 appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from
24 discipline for lawyers who act reasonably in the face of uncertainty.

25 [5] Paragraph (c)(1) provides that as to a lawyer's conduct relating to a proceeding pending before

1 a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits
2 unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other
3 conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal,
4 paragraph (c)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the
5 lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the
6 rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a
7 proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be
8 where the conduct occurred, where the tribunal sits or in another jurisdiction.

9 [6] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may
10 not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other
11 than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules
12 of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the
13 lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in
14 determining a lawyer's reasonable belief under paragraph (c)(2), an agreement, preferably in writing,
15 between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope
16 of that paragraph may be considered if the agreement was obtained with the client's consent
17 confirmed in the agreement.

18 [7] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should,
19 applying this rule, identify the same governing ethics rules. They should take all appropriate steps
20 to see that they do apply the same rule to the same conduct, and in all events should avoid
21 proceeding against a lawyer on the basis of two inconsistent rules.

22 [8] The choice of law provision applies to lawyers engaged in transnational practice, unless
23 international law, treaties or other agreements between competent regulatory authorities in the
24 affected jurisdictions provide otherwise.

25 Amended effective 03/01/05, 08/01/06, _____

1 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee
2 on 12/13/85 and 01/10/86; Minutes of the Joint Committee on Attorney Standards on 06/24/03,
3 09/25/03, 11/14/03, 04/16/04, 08/06/04, 09/24/04, 04/08/05, 09/13/13, 03/14/14, 09/12/14 .