

Proposed Amendments to the Rules of Professional Conduct

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Executive Summary of Recommended Amendments to the North Carolina Rules of Professional Conduct

North Carolina State Bar Study Committee on Ethics 20/20

Introduction

In 2009, the American Bar Association (ABA) appointed the ABA Ethics 20/20 Commission to review the ABA Model Rules of Professional Conduct and the US system of lawyer regulation in the context of advances in technology and global legal practice. At its annual meeting in August 2012 and mid-year meeting in 2013, the ABA House of Delegates adopted ten resolutions upon the recommendation of the Ethics 20/20 Commission. Six of the resolutions amended the ABA Model Rules of Professional Conduct to address issues of technology, outsourcing, and lawyer mobility. The remaining resolutions amended or adopted model practice rules in response to the globalization of the practice of law, multijurisdictional practice, and cross border practice.

In March 2013, then State Bar President M. Keith Kapp appointed a special committee of State Bar councilors to study the ABA's actions and to make recommendations to the State Bar Council on whether the North Carolina State Bar should follow the ABA's lead. The committee, called the "Study Committee on Ethics 20/20," is chaired by Mark W. Merritt. The following councilors serve on the committee: Barbara R. Christy, G. Thomas Davis Jr., R. Lee Farmer, Margaret M. Hunt, Michael L. Robinson, and John M. Silverstein. Alice Neece Mine is counsel to the committee.

The committee has completed its review of the Ethics 20/20 amendments to the ABA Model Rules. Based upon that review, the committee recommends amendments to 13 of the North Carolina Rules of Professional Conduct (the NC Rules). The proposed amended rules follow this executive summary, which highlights and explains the proposed changes to the NC Rules. In most instances, the proposed amendments are relatively minor adjustments to the NC Rules to insure that the NC Rules are responsive to advances in technology, and to increases in outsourcing and lawyer mobility.

Rule 1.0, *Terminology*

The proposed amendments to Rule 1.0, the rule that defines certain terms used throughout the NC Rules, are limited to an expansion of the definition of "writing" and "written" to include embedded data (or metadata) and "electronic communications."

Rule 1.1, *Competence*

The proposed amendments to Rule 1.1 on the duty of competence address outsourcing. They are limited to the addition of two new paragraphs to the commentary to the rule that explain a lawyer's duty when retaining or contracting with lawyers outside the lawyer's firm to provide assistance with the provision of legal services to a client. The proposed comments emphasize the need to obtain informed consent from the client and set forth factors for determining whether it is reasonable to retain lawyers outside the firm to assist with the representation.

There is also a proposed amendment to the comment on "maintaining competence" to alert lawyers to the need to keep abreast of the benefits and risks associated with technology.

Rule 1.4, *Communication*

The proposed amendments to Rule 1.4 on the duty to communicate with a client are limited to the addition of a sentence to the comment that states that a lawyer should discuss with a client how the client and lawyer will communicate during the client-lawyer relationship. The sentence also recognizes that a lawyer should respond to client communications in a timely manner. The purpose of this comment is to encourage lawyers to address, early in the relationship, the many alternatives for communication that exist due to changes in technology.

Rule 1.6, *Confidentiality*

Two significant amendments to Rule 1.6, on the duty of confidentiality, are recommended. One amendment adds an exception to the duty that would allow a lawyer to disclose confidential client information to detect conflicts of interest that arise because of a lawyer's change of employment or because of changes in the composition of a law firm. The other amendment specifies that there is no strict liability for inadvertent disclosure of client confidences: a lawyer has only a duty to "make reasonable efforts" to prevent the inadvertent or unauthorized disclosure of confidential client information. This is a codification of the standard that currently appears in a number of North Carolina formal ethics opinions. See RPC 133 and RPC 215.

To clarify the proposed amendments to the black letter rule, two new paragraphs in the commentary are also

proposed. The new comments explain the exception to the duty of confidentiality that allows disclosure to detect conflicts when a lawyer moves or the composition of a law firm changes. In addition, amendments to an existing comment are proposed to explain that unauthorized or inadvertent disclosure of confidential client information is not a violation of the duty of confidentiality if the lawyer has made reasonable efforts to prevent access or disclosure. Factors to be considered in determining whether the lawyer's efforts were reasonable are set forth in the proposed amendments to the comment.

Rule 1.17, *Sale of a Law Practice*

The recommended proposed amendments to the comment to Rule 1.17, *Sale of a Law Practice*, are minor and for the sole purpose of clarifying existing language in the comment. For example, one amendment adds a cross reference to another rule.

Amendments to Rule 1.17 were approved by the State Bar Council at the October 2013 annual meeting. Submission of those proposed amendments to the North Carolina Supreme Court for approval has been deferred by the council until the Ethics 20/20 proposed amendments to Rule 1.17 are finally considered by the council. The amendments proposed by the Study Committee on Ethics 20/20 will not impact the amendments already approved by the council. (See the "Rule Amendments" article elsewhere in this edition of the *Journal* for further information on the status of these prior proposed amendments to Rule 1.17.)

Rule 1.18, *Duties to Prospective Client*

Rule 1.18, *Duties to Prospective Client*, currently contemplates that an initial consultation with a prospective client will take place over the telephone or in-person. Proposed amendments to the rule broaden the language to incorporate communications with a prospective client electronically. For example, email to a lawyer sent by a visitor to the lawyer's website or blog might qualify as a consultation with the lawyer under the rule unless, as the comment warns, the lawyer does not take steps to notify the visitor otherwise.

The comment to the rule similarly requires amendment to expand its scope to electronic communications from prospective clients. Proposed amendments to the comment will specify circumstances that indicate whether communications with a prospective client constitute a "consultation." The comment explains when a lawyer has an affirmative obligation to warn a person that a communication with the lawyer will not create a client-lawyer relationship and that information conveyed to the lawyer will not be treated as confidential.

Rule 4.4, *Respect for Rights of Third Persons*

Amendments to the comment to Rule 4.4, *Respect for Rights of Third Persons*, are recommended to specify that the duty to notify the sender that a "writing" was inadvertently sent applies to electronic communications, electronically stored information, and to metadata. The amended comment references 2009 FEO 1, an existing ethics opinion on metadata, for the principle that a lawyer who receives an electronic communication from an opposing party or the party's lawyer must refrain from searching for or using confidential information found in the communication's metadata.

Rule 5.3, *Responsibilities Regarding Nonlawyer Assistants*

The proposed amendments to this rule include an amendment to the title of the rule to expand its reach to "nonlawyer assistance." No amendments to the substance of the rule are recommended. However, amendments to the comment address the increasingly common practice of outsourcing work by specifying that the duties in the rule extend to "nonlawyers outside the firm who work on firm matters." Two new comments on the supervision of nonlawyers outside the firm are proposed. One comment discusses the risk of unauthorized disclosure of confidential client information when work is outsourced, and lists factors to be considered when determining what steps should be taken to manage the risk.

Rule 5.5, *Unauthorized Practice of Law*

An amendment to the title of Rule 5.5 is recommended to indicate that the rule not only addresses the unauthorized practice of law, but it also sets forth some "safe harbors" for lawyers engaged in multijurisdictional practice.

The recommended amendments to Rule 5.5 are more extensive than for any other rule. This is due, in part, to the committee's determination—independent of any amendments adopted by the ABA—that the safe harbors for limited practice by out-of-state lawyers should be separated into three paragraphs reflecting categories with specific limitations. Therefore, one of the key changes to the rule is structural. In addition, the committee determined that the rule should specify that foreign lawyers who are employed as in-house counsel are not engaged in unauthorized practice.

Three paragraphs in the revised rule set forth the three categories of limited practice as follows:

- Paragraph (c) allows a lawyer admitted to practice in another US jurisdiction, and who is not suspended or disbarred in any jurisdiction, to appear or participate in matters that arise out of or are reasonably related to the lawyer's

representation of a client in the lawyer's home jurisdiction. If pro hac vice admission is required, the lawyer may not engage in the limited practice without being so admitted. Lawyers in this category are prohibited by Rule 5.5(b)(1) from establishing an office or other systematic and continuous presence in North Carolina for the practice of law.

· Paragraph (d) allows a lawyer admitted in a US or foreign jurisdiction, and not suspended or disbarred from practice in any jurisdiction, to establish an office or systematic and continuous presence in North Carolina if the lawyer's legal activities in North Carolina are limited to providing legal services to the lawyer's employer. Services performed by a foreign lawyer may not include advice about the laws of North Carolina, another US jurisdiction, or the United States unless the advice is based upon the advice of a lawyer who is licensed in the relevant US jurisdiction.

· Paragraph (e) sets forth the existing "safe harbor" for limited practice by a lawyer who has applied to the North Carolina Board of Law Examiners for admission by comity, and who is not suspended or disbarred from practice in any jurisdiction. The proposed amendments clarify that such a lawyer may establish an office or other systematic presence in North Carolina for the practice of law.

New paragraph (i) explains that a foreign lawyer allowed to engage in limited practice under paragraph (d) must be a member in good standing of a recognized legal profession in the foreign jurisdiction.

There are numerous proposed amendments to the comment. Many of these amendments are proposed to bring the comment to the North Carolina rule more in line with the comment to ABA Model Rule 5.5, although the current differences between the commentaries have existed for some time and are not due to the recent Ethics 20/20 amendments. The committee believes that the comment to the Model Rule is clearer and more thorough and should, therefore, replace the NC comment where appropriate. There are also new comments that explain the three "safe harbor" paragraphs described above.

Rule 7.1, *Communications Concerning a Lawyer's Services*

A minor amendment to the comment to Rule 7.1, *Communications Concerning a Lawyer's Services*, is recommended to clarify that the prohibition on statements that are likely to create unjustified expectations protects not only prospective clients, but also the public in general.

Rule 7.2, *Advertising*

A number of amendments to the comment to Rule 7.2, *Advertising*, are recommended to update the comment to reflect that much advertising now occurs over the Internet or other forms of electronic communication. Substantial amendments to comment [5] provide guidance on when a lawyer may pay others for generating leads over the Internet. The comment is consistent with holding in Ethics Decision 2012-4 (October 26, 2012).

As with the comment to Rule 7.1, there are a number of minor amendments to Rule 7.2's commentary to emphasize that the rule protects the public in general and not just prospective clients.

Rule 7.3, *Direct Contact with Potential Clients*

A significant amendment to Rule 7.3's title is proposed. It is recommended that the subject matter of the rule—solicitation—be explicitly stated in the title. Recommended amendments to the comment also clarify that the rule addresses solicitation. A new opening comment explains the difference between in-person solicitation and communications that are directed to the general public. As with the amendments to the commentary for Rules 7.1 and 7.2, amendments to the Rule 7.3's commentary add references to forms of electronic communication where necessary to explain the rule's reach, and replace references to "potential clients" and "clients" with references to "the public" or "a person" to emphasize that the prohibitions in the rule protect the public in general.

Amendments to Rule 7.3 were approved by the State Bar Council at the October 2013 annual meeting. Submission of those proposed amendments to the North Carolina Supreme Court for approval has been deferred by the council until the Ethics 20/20 proposed amendments to Rule 7.3 are finally considered by the council. The amendments proposed by the Study Committee on Ethics 20/20 will not impact the amendments already approved by the council. (See the "Rule Amendments" article elsewhere in this edition of the *Journal* for further information about the status of these prior proposed amendments to Rule 7.3.)

Rule 8.5, *Disciplinary Authority; Choice of Law*

The recommended amendment to comment [5] of Rule 8.5, *Disciplinary Authority; Choice of Law*, recognizes that a lawyer and a client may enter into a written agreement to specify a particular jurisdiction for the purpose of determining what jurisdiction's rules of professional conduct will be applied to the lawyer's conduct if the agreement was obtained with the client's informed consent and that consent is confirmed in writing.

Proposed Amendments to the North Carolina Rules of Professional Conduct

1.0: Terminology

(a) ...

(o) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, **and any data embedded therein (commonly referred to as metadata)**, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and ~~e-mail~~ **electronic communications**. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] ...

Screened

[8] ...

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

[10] ...

Rule 1.1 Competence

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] ...

Retaining or Contracting with Other Lawyers

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

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

Maintaining Competence

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

[Re-numbering remaining paragraphs]

Rule 1.4 Communication

(a) A lawyer shall:

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

(2) ...

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

Comment

[1] ...

Communicating with Client

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

...

Rule 1.6 Confidentiality of Information

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

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) ...

(6) ...; ~~or~~

(7) ...; or

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

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

~~(d)~~ ...

Comment

[1] ...

Detection of Conflicts of Interest

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

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

Acting Competently to Preserve Confidentiality

[17][19] Paragraph (c) requires a lawyer ~~must~~ **to** act competently to safeguard information acquired during the representation of a client against **unauthorized access by third parties and against** inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. **The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].**

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

[Re-numbering remaining paragraphs]

Rule 1.17 Sale of a Law Practice

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, from an office that is within a one-hundred (100) mile radius of the purchased law practice, except the seller may work for the purchaser as an independent contractor and may provide legal representation at no charge to indigent persons or to members of the seller's family;

(b)

Comment

[1] ...

[8] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. **See Rule 1.6(b)(8).** Providing the purchaser access to ~~client-specific~~ **detailed** information relating to the representation, ~~and to the~~ **such as the client's** file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 30 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

Rule 1.18 Duties to Prospective Client

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

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

(c) ...

Comment

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

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

[3] ...

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

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

[6] ...

Rule 4.4 Respect for Rights of Third Persons

(a)

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

Comment

[1] ...

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. See Rule 1.0(o) for the definition of "writing," which includes electronic communications and metadata. A writing is inadvertently sent when it is accidentally transmitted, such as when an electronic communication or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the ~~original~~ writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. ~~See Rule 1.0(o) for the definition of "writing."~~ Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. A lawyer who receives an electronic communication from the opposing party or the opposing party's lawyer must refrain from searching for or using confidential information found in the metadata embedded in the communication. See 2009 FEO 1.

[3] Some lawyers may choose to return a writing or delete electronically stored information unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent ~~to the wrong address~~. Whether the

lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. *See* Rules 1.2 and 1.4.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants Assistance

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

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

(b) ...

Comment

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

~~[1]~~^[2] ...

Nonlawyers Outside the Firm

^[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations and, depending upon the risk of unauthorized disclosure of confidential client information, should consider whether client consent is required. *See* Rule 1.1, cmt. [7]. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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

~~[3]~~^[5] ...

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

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

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

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

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

(c) A lawyer admitted to practice in another United States jurisdiction, ~~but not in this jurisdiction,~~ and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; ~~or~~

(2) ~~other than engaging in conduct governed by paragraph (1):~~

(A) ~~the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not~~

services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

~~(B)(2)~~ the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required;

~~(C)(3)~~ the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer's services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; or

~~(D)(4)~~ the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required; or.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

~~(2)(A)(1)~~ the lawyer provides legal services to the lawyer's employer or its organizational affiliates; and the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1); or

~~(E)(2)~~ the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, ~~(F)~~ the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and the lawyer satisfies the following conditions:

~~(i)(1)~~ is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

~~(ii)(2)~~ is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

~~(iii)(3)~~ has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

~~(iv)(4)~~ is domiciled in North Carolina;

~~(v)(5)~~ has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

~~(vi)(6)~~ gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision ~~is not subject to the prohibition in Paragraph (b)(1);~~ may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

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

~~(g)~~

~~(h)~~

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Comment

[1] A lawyer may regularly practice law only in a jurisdiction in which the lawyer is ~~admitted~~ authorized to practice. The practice of law in violation of lawyer-licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not restrict the ability of lawyers authorized by federal statute or other federal law to represent the interests of the United States or other persons in any jurisdiction.

[2] There are occasions in which lawyers admitted to practice in another United States jurisdiction, but not in ~~this~~

~~jurisdiction~~ North Carolina, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis will engage in conduct in ~~this jurisdiction~~ North Carolina under circumstances that do not create ~~significant~~ an unreasonable risk to the interests of their clients, the courts, or the public. ~~Paragraphs (c), (d), and (e) identify~~ identifies six seven situations in which the lawyer may engage in such conduct without fear of violating this Rule. All such conduct is subject to the duty of competent representation. See Rule 1.1. Rule 5.5 does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. With the exception of ~~paragraph (c)(2)(A)(d) and (F)(e) (e)~~, this Rule does not authorize a US or foreign ~~nothing in this Rule is intended to authorize~~ a lawyer to establish an office or other systematic and continuous presence in ~~this jurisdiction~~ North Carolina without being admitted to practice here. Presence may be systematic and continuous even if the lawyer is not physically present in this jurisdiction. ~~Such a~~ A lawyer not admitted to practice in North Carolina must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in ~~this jurisdiction~~ North Carolina. See also Rules 7.1(a) and 7.5(b). However, a lawyer admitted to practice in another jurisdiction who is partner, shareholder, or employee of an interstate or international law firm that is registered with the North Carolina State Bar pursuant to 27 N.C.A.C. 1E, Section .0200, may practice, subject to the limitations of this Rule, in the North Carolina offices of such law firm.

[3] Paragraphs (c), (d), and (e) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States and, where noted, any foreign jurisdiction. The word “admitted” in paragraphs (c), (d)(2), and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[4] Paragraphs (c), (d), and (e) do not authorize communications advertising legal services in North Carolina by lawyers who are admitted to practice in other jurisdictions. Nothing in these paragraphs authorizes a lawyer not licensed in this jurisdiction to solicit clients in North Carolina. Whether and how lawyers may communicate the availability of their services in this jurisdiction are governed by Rules 7.1-7.5.

~~[3]~~[5] Lawyers not admitted to practice generally in ~~the jurisdiction~~ North Carolina may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules or law governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph ~~(b)(1)(c)(1)~~, a lawyer does not violate this Rule when the lawyer appears before such a tribunal or agency. Nor does a lawyer violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing, such as factual investigations and discovery conducted in connection with a litigation or administrative proceeding, in which an out-of-state lawyer has been admitted or in which the lawyer reasonably expects to be admitted. ~~Nothing in paragraph (c)(1) is intended to authorize a lawyer not licensed in this jurisdiction to solicit clients in this jurisdiction.~~

~~[4]~~ When lawyers appear or anticipate appearing before a tribunal or administrative agency with authority to admit the lawyer to practice pro hac vice, their conduct is governed by paragraphs (a) and (c)(1) and not by (c)(2). Paragraph (c)(2) authorizes a lawyer to engage in certain conduct other than making or preparing for appearances before such a tribunal. For example, paragraph (c)(2)(A) recognizes that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that these clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client without violating this Rule. The lawyer may also act on behalf of the client's commonly owned organizational affiliates ~~but only in connection with the client's matters.~~

~~[5]~~[6] Paragraph (c)(2)(2)(B) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the lawyer is either admitted generally or expects to be admitted pro hac vice.

~~[6]~~[7] Paragraph (c)(3)(2)(C) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in ~~this jurisdiction~~ North Carolina if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, and if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

~~[7]~~[8] Paragraph (c)(4)(2)(D) recognizes that association with a lawyer licensed to practice in ~~this jurisdiction~~ North

Carolina is likely to protect the interests of both clients and the public. The lawyer admitted to practice in ~~this jurisdiction~~ North Carolina, however, may not serve merely as a conduit for an out-of-state lawyer but must actively participate in and share actual responsibility for the representation of the client. If the admitted lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.

[9] Paragraphs (d) and (e) identify three circumstances in which a lawyer who is admitted to practice in another jurisdiction, or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in North Carolina for the practice of law. Except as provided in these paragraphs, a lawyer who is admitted to practice law in another jurisdiction and who desires to establish an office or other systematic or continuous presence in North Carolina must be admitted to practice law generally in North Carolina.

[10] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[11] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

~~[8]~~[12] Paragraph ~~(e)(2)(F)~~ permits a lawyer who is awaiting admission by comity to practice on a provisional and limited basis if certain requirements are met. As used in this paragraph, the term "professional relationship" refers to an employment or partnership arrangement.

~~[9]~~[13] ...

~~[10]~~[14] Lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*. However, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

~~[11]~~[15] Paragraphs (g) and (h) clarify the limitations on employment of a disbarred or suspended lawyer. In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended ~~attorney lawyer~~ in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed ~~attorney lawyer~~ in the firm must take full responsibility for, and employ independent judgment in, adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as ~~an attorney a lawyer~~ or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended ~~attorney lawyer~~ should have no communications or dealings with, or on behalf of, clients represented by such disbarred or suspended ~~attorneys lawyer~~ or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing ~~attorney lawyer~~ or law firm should perform no services for clients represented by the disbarred or suspended ~~attorney lawyer~~ during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended ~~attorney lawyer~~ is not acting as ~~an attorney a lawyer~~, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended ~~attorney's lawyer's~~ status with the law firm. Additionally, a disbarred or suspended ~~attorney lawyer~~ should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended ~~attorney lawyer~~ would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

~~[12]~~[16] ~~An attorney A lawyer~~ or law firm should not employ a disbarred or suspended ~~attorney lawyer~~ who was associated with such ~~attorney lawyer~~ or firm at any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the ~~attorney lawyer~~. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

Rule 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services....

(b)...

Comment

[1] ...

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

[4] ...

Rule 7.2 Advertising

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

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

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

(2) pay the usual charges of a not-for-profit lawyer referral service that complies with Rule 7.2(d), or a prepaid or group legal services plan that complies with Rule 7.3(d); and

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

(c) ...

Comment

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television, the Internet, and other forms of electronic communication ~~is now one of among~~ the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.1(b) for the disclaimer required in any advertisement that contains a dramatization: ~~Electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But and~~ see Rule 7.3(a) for the prohibition against ~~the a~~ solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer ~~that is not initiated by the prospective client~~.

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

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(3), lawyers ~~Lawyers~~ are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ Internet-based

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

[6] A lawyer may pay the usual charges of a prepaid or group legal services plan or a not-for-profit lawyer referral service. A legal services plan is defined in Rule 7.3(d). Such a plan assists ~~prospective clients~~ people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~lawyers~~ the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit lawyer referral service.

[7] A lawyer who accepts assignments or referrals from a prepaid or group legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations....Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such communication must be in conformity with these Rules....

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

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

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

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

- (1) the ~~potential client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from ~~a potential client~~ anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice) subject to the following requirements:

- (1) Written Communications. ...
- (d) ...

(e) For purposes of this rule, a potential client is a person with whom a lawyer would like to form a client-lawyer relationship.

Comment

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

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

over-reaching.

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

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

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

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

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

[Re-numbering remaining paragraphs]

Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. ...

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

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

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

Comment

....

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

....