SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
ONE RODNEY SQUARE
P.O. BOX 636
WILMINGTON, DELAWARE 19899-0636
TEL: (302) 651-3000
FAX: (302) 651-3001
www.skadden.com

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DIRECT DIAL
302-651-3140
DIRECT FAX
888-574-3140
EMAIL ADDRESS
KAREN.VALIHURA@SKADDEN.COM

December 13, 2012

VIA U.S. MAIL AND EMAIL

The Honorable Randy J. Holland
Supreme Court of Delaware
34 The Circle
P.O. Box 369
Georgetown, Delaware 19947

Re: Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct – Ethics 20/20 Proposals

Dear Justice Holland:

The Permanent Advisory Committee (the "Committee") has been asked for its recommendation on a series of proposals formulated by the ABA's Ethics 20/20 Commission. A copy of the proposed resolutions (without the accompanying ABA reports) is attached hereto in the Compendium behind Exhibit A.

A. Brief Background

The ABA Commission on Ethics 20/20 (the "Commission") was established to update the ABA's Model Rules of Professional Responsibility. On August 28, 2012, the Delaware Supreme Court asked for the Committee's recommendation on six proposals: 105A-F. Exhibit B sets forth blacklined provisions of the Delaware Lawyers Rules of Professional Conduct ("DLRPC") showing changes that would be made to the DLRPC if each resolution were adopted.

B. Committee Process

The Committee Chair received the Court's request on August 28, 2012. That day, the Chair created five subcommittees as follows:

1. **Technology and Confidentiality – 105A**

   Robert Beste (Chair)
   Karen Valihura
   Diane Coffey

2. **Prospective Clients/Advertising – 105B**

   Bernie O'Donnell (Chair)
   Gary Aber
   Kate Aaronson

3. **Retaining Lawyers/Outsourcing – 105C**

   Tasha Stevens (Chair)
   Jeff Young

4. **Practice Pending Admission and Admission by Motion – 105D/105E**

   Betsy McGeever (Chair)
   Dan Lyons
   Paul Wallace
   Karen Valihura

5. **Conflicts/Disclosure – 105F**

   Clay Jester (Chair)
   Beth Christman
   Fred Iobst

The various subcommittees met separately to study the proposals and prepared reports and recommendations that were submitted to the full Committee. The reports and recommendations of the subcommittees are attached as Exhibits C-G.

The full Committee met on November 9, 2012 to consider the various subcommittee reports which had been distributed in advance of the meeting.

At the meeting of the full Committee on November 9, each Subcommittee made a presentation.

With respect to 105A, the Committee wished to consider in greater detail issues involving metadata and any related case law. Mr. Beste reported that the Subcomittee had some concern about the lack of bright lines in defining what is

"reasonable," especially when it comes to the issue of an inadvertent disclosure of information via email. Nevertheless, the Subcommittee felt that requiring lawyers to take reasonable precautions against inadvertent disclosure was prudent. The Committee agreed that it would consider 105A further. Diane Coffey offered to undertake additional research on the metadata issues.

After a full discussion led by Subcommittee Chair Bernie O'Donnell, the Committee was comfortable voting to approve 105B. The Subcommittee's report is attached hereto as Exhibit D.

With respect to 105C, the Committee had a full discussion of outsourcing and wished to consider the proposal further. The Committee discussed a number of issues related to outsourcing not only domestically, but also internationally as seen with the emergence of companies such as Pangea3 which, for example, offers legal outsourcing services both in the United States and India. The Chair commented on a presentation that she had attended hosted by the University of Pennsylvania Law School's Institute for Law and Economics on October 18, 2012. The speaker was the Chief Executive Officer and founder of Pangea3 who explained how he and others founded Pangea3 after seeing the potential for growth in that area. The Committee discussed a number of issues raised when in-house corporate departments and law firms outsource legal services, and was of the view that further research would be helpful in order to better understand the issues presented in the outsourcing context.

The Committee received a full report on 105D and 105E from the 105D/E Subcommittee. The Subcommittee report is attached hereto as Exhibit F. The Subcommittee noted that it had met a number of times and had spoken with various Delaware lawyers and judges about the proposals. After a full discussion, and based upon the reasons contained in the Subcommittee report which was presented and fully discussed, the Committee voted to reject both 105D and 105E.

The key reasons for rejection of those proposals were a lack of perceived need, particularly in view of the relatively liberal granting of *pro hac vice* applications by the Delaware courts, and the fact that certain unique situations have been addressed in Delaware Supreme Court Rule 55 as noted in the Subcommittee's report. Other key considerations were the perceived importance of knowledge of Delaware law and practice, and concerns about the additional burdens that could be placed on the lawyer disciplinary system if the proposals were adopted.

Finally, the Committee heard a presentation on 105F from the 105F Subcommittee. Its report is attached hereto as Exhibit G. The Committee was of the view that the rule seeks to formalize the practice that already largely exists with regard to addressing conflicts when a lawyer seeks to move from one firm to another.

Accordingly, based on the discussion and the Subcommittee's recommendation, the Committee voted to adopt 105F.

The chart below shows the various subcommittees' recommendations as of November 9, as well as the recommended action by the full Committee:

Proposal	**Subcommittee Recommendation**	**Recommended Action by Full Committee**
105A	Adopt	Tabled
105B	Adopt	Approved
105C	Adopt	Tabled
105D	Reject	Rejected
105E	Reject	Rejected
105F	Adopt	Approved

The Chair then set December 4, 2012 for a second meeting of the full Committee to consider further 105A and 105C and to address any additional comments related to any of the proposals. The intervening time would be used to conduct additional research on the open items.

In advance of the December 4, meeting, Diane Coffey prepared a memorandum reflecting further research on the metadata issue related to the 105A proposal. On November 28, the Chair circulated that memorandum (attached as Exhibit H) to the full Committee.

On December 3, the Chair sent additional research materials and a memorandum to the full Committee on outsourcing and metadata. These materials are attached hereto as Exhibit I.

At the second meeting of the full Committee on December 4, the Committee reconsidered 105A and 105C in light of the additional research it had received.

The Committee received a full report from the 105A Subcommittee on issues related to metadata, inadvertent disclosure, and intentional mining of metadata.

The Committee further considered the proposed addition of Rule 4.4(c), which is described in greater detail in Exhibit H. The Committee was of the view that recommending rules in excess of those contained in the ABA proposals exceeded the scope of the Supreme Court's request. In addition, the Committee expressed concern that proposed Rule 4.4(c) was not consistent with the position that the ABA has taken and would lead to boilerplate cautionary language in all communications sent or received by lawyers. After a full discussion, the Committee voted to adopt 105A as proposed by the ABA and without modification.

Next, the Committee received a full report from the 105C Subcommittee on issues related to outsourcing. The Committee was of the view that 105C provided helpful clarifications with regard to client consent, the clear allocation of responsibility in the outsourcing context, and additional guidance relating to the unauthorized practice of law. After full discussion and the Subcommittee's recommendation, the Committee voted to adopt 105C.

The Chair thanked the Committee members for their hard work and the Subcommittee Chairs for leading additional research and discussion on the proposals.

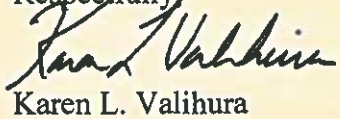
CONCLUSION

In summary, the final recommendations of the Committee are as follows:

Proposal	Subcommittee Recommendation	Recommended Action by Full Committee
105A	Adopt	Adopt
105B	Adopt	Adopt
105C	Adopt	Adopt
105D	Reject	Reject
105E	Reject	Reject
105F	Adopt	Adopt

We appreciate the opportunity to serve the Court.

Respectfully,



Karen L. Valihura

cc: Via U.S. Mail:

The Honorable Myron T. Steele, Chief Justice
The Honorable Carolyn Berger
The Honorable Jack B. Jacobs
The Honorable Henry DuPont Ridgely

Via Email:

Gary W. Aber, Esquire
Kate Aaronson, Esquire
Robert K. Beste, Jr., Esquire

Beth H. Christman, Esquire
Frederick W. Iobst, Esquire
Clay T. Jester, Esquire
Edmond D. Lyons, Jr., Esquire
Elizabeth McGeever, Esquire
Bernard J. O'Donnell, Esquire
Tasha Marie Stevens, Esquire
Paul R. Wallace, Esquire
Diane M. Coffey, Esquire
Jeffrey A. Young, Esquire

EXHIBIT A

EXHIBIT A

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

Rule 1.0 Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

Screened

...

[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.

...

Rule 1.1 Competence

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

Comment

...

Maintaining Competence

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

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

Comment

...

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 promptly respond to or acknowledge client communications.

...

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

Comment

...

Acting Competently to Preserve Confidentiality

[16] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ 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, confidential information **relating to the representation of a client** does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of

disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

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

...

Rule 4.4 Respect for Rights of Third Persons

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

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

Comment

...

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is

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

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

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

Rule 1.18: Duties to Prospective Client

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

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

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

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

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

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

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

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

Comment

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

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

...

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

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

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

...

Rule 7.1 Communications Concerning a Lawyer's Services

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

COMMENT

...

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

...

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
(3) pay for a law practice in accordance with Rule 1.17; and
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and
(ii) the client is informed of the existence and nature of the agreement.

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

105B

Comment

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

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

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

...

Paying Others to Recommend a Lawyer

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

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

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

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

...

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

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

(1) is a lawyer; or

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

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

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

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

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

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

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

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

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

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

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

Comment

...

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

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

Client-Lawyer Relationship
Rule 1.1 Competence

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

Comment

...

Retaining or Contracting With Other Lawyers

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

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

Maintaining Competence

[~~6~~8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, **(as adopted in Resolution 105A Rule 1.1 Comment [6])** engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance~~ts~~

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

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

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

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

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

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

Comment

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

Nonlawyers Within the Firm

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

Nonlawyers Outside the Firm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5. **(As adopted in Resolution 105B Rule 5.5 Comment [21]).**

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 5-6, 2012

RESOLUTION

RESOLVED, That the American Bar Association adopts the Model Rule on Practice Pending Admission as follows:

ABA Model Rule on Practice Pending Admission

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

   a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;
   b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;
   c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;
   d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;
   e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;
   f. associates with a lawyer who is admitted to practice in this jurisdiction;
   g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and
   h. pays any annual client protection fund assessment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

FURTHER RESOLVED, That the American Bar Association amends the black letter and Comment to Rule 5.5 of the ABA *Model Rules of Professional Conduct* dated August 2012, as follows (insertions <u>underlined</u>, deletions ~~struck through~~):

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Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

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

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

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

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

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

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that ~~provide legal services in this jurisdiction that~~:

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

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

Comment

...

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction. **(As adopted in Resolution 105C Rule 5.5 Comment [1])**

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

...

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

...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5. **(As adopted in Resolution 105B Rule 5.5 Comment [21]).**

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

RESOLVED, That the American Bar Association amends the *ABA Model Rule for Admission by Motion*, dated August 2012, as follows (additions underlined, deletions ~~struck through~~):

ABA Model Rule on Admission by Motion

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

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

2. For purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed

pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

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

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

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

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

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as follows:

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

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

(7) to detect and resolve conflicts of interest ~~between lawyers in different firms~~ 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. (As adopted in Resolution 105A Rule 1.6 (c)).

Comment

...

Detection of Conflicts of Interest

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

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

[15~~3~~] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.

Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16~~4~~] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17~~5~~] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18~~6~~] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ 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, ~~confidential~~ information **relating to the representation of a client** does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. **(As adopted in Resolution 105A Rule 1.6 Comment [16]).**

[19~~7~~] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules. **(As adopted in Resolution 105A Rule 1.6 Comment [17]).**

Former Client

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

Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

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

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

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

Comment

...

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the

possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation, ~~and to~~ such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

EXHIBIT B

EXHIBIT B

The Proposed Changes and Potential Impact on DLRPC

The following is a marked-to-show changes draft of the six proposals showing how the proposals would change the Delaware Lawyers Rules of Professional Conduct:

1. 105A

Rule 1.0 Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or 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

. . .

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

. . .

Rule 1.1 Competence

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

COMMENT

. . .

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

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

COMMENT

. . .

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

. . .

Rule 1.6 Confidentiality of information

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

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

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

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

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

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

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

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

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

COMMENT

. . .

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

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

. . .

Rule 4.4 Respect for rights of third persons

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

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

COMMENT

. . .

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

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

2. 105-B

Rule 1.18 Duties to prospective client

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

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

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

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

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

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

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

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

COMMENT

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

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who~~ A person becomes a prospective client by consulting with

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

. . .

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

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

. . .

Rule 5.5 Unauthorized practice of law; multijurisdictional practice of law

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

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

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

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

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

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

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

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

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

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

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

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

COMMENT

. . .

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

Rule 7.1 Communications concerning a lawyer's services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a

material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

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[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.

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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) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may:

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

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

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

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

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through

advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

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

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

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[5] *Paying Others to Recommend a Lawyer.* ~~Lawyers~~ – Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business development staff and website designers. ~~See Rule 5.3 for the~~ Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is

consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers ~~who prepare marketing materials for them.~~); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

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

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

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Rule 7.3 ~~Direct contact with prospective~~ Solicitation of clients

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

(1) is a lawyer; or

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

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

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

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

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

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

COMMENT

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

[2] There is a potential for abuse ~~inherent in~~ when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with ~~a prospective~~

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

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

[~~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~~their members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the ~~prospective client~~ recipient of the communication may violate the provisions of Rule 7.3(b).

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

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

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

3. 105-C

Rule 1.1 Competence

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

COMMENT

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

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

[~~6~~8] *Maintaining competence.* -- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 5.3 Responsibilities regarding non-lawyer assistan~~ts~~ce

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

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

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

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

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

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

COMMENT

[1] ~~[2]~~ Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ 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 act in a way compatible with the ~~Rules of Professional Conduct.~~ professional obligations of the lawyer. 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~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

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

[3] *Nonlawyers outside the firm.* -- A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the

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

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

Rule 5.5 Unauthorized practice of law; multijurisdictional practice of law

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

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

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

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

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

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

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

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another

jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

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

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

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

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

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

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4. 105-D

ABA Model Rule on Practice Pending Admission[1]

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

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

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

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

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

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

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

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

(h) pays any annual client protection fund assessment.

(2) A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office

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[1] The Delaware Supreme Court Rules do not currently provide for an analogous procedure. However, Supreme Court Rules 55 and 55.1 provide for limited permission to practice in certain public programs and limited permission to practice of in-house counsel, respectively. *See* Sup. Ct. R. 55, 55.1. Thus, if the Supreme Court were to adopt this Rule, the Rule may replace Rules 55 and 55.1 in their entirety.

or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

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

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

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

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

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

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

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

(5) The authority in this Rule shall terminate immediately if:

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

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

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must

disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

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

Rule 5.5 Unauthorized practice of law; multijurisdictional practice of law

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

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

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

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

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

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

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

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

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

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

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

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

COMMENT

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

. . .

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

5. 105-E

ABA Model Rule on Admission by Motion[2]

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

(a) have been admitted to practice law in another state, territory, or the District of Columbia;

(b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;

(c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;

(d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

(e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;

(f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and

(g) designate the Clerk of the jurisdiction's highest court for service of process.

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

(a) representation of one or more clients in the private practice of law;

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[2] The Delaware Supreme Court Rules do not currently provide for admission by motion. Thus, if the Supreme Court were to adopt this Rule, the Court would need to adopt both the underlying rule providing for admission by motion (shown in black and red text), as well as the modifications approved by the ABA (shown in blue text).

(b) service as a lawyer with a local, state, territorial or federal agency, including military service;

(c) teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) service as a judge in a federal, state, territorial or local court of record;

(e) service as a judicial law clerk; or

(f) service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

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

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

6. 105-F

Rule 1.6 Confidentiality of information

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

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

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

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

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

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

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

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

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

COMMENT

. . .

[14] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new

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

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

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

[~~15~~17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3.

Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[~~16~~18] *Acting competently to preserve confidentiality.* -- A lawyer must act competently to safeguard information relating to the representation of a client 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.

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

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

Rule 1.17 Sale of law practice

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold in the jurisdiction in which the practice has been conducted;

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

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

(1) the proposed sale;

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

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

In a matter of pending litigation, if a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of

an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

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

(e) The seller shall make appropriate arrangements for the maintenance of records specified in Rule 1.15(d).

COMMENT

. . .

[7] *Client Confidences, Consent and Notice.* -- 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)(7). Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation~~ and to~~, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

. . .

EXHIBIT C

MEMORANDUM

TO: Permanent Advisory Committee on the Delaware Lawyers' Rule of Professional Conduct ("Advisory Committee")

FROM: Robert K. Beste, Jr., Chair
Karen Valihura
Diane Coffey

SUBJECT: ABA Model Rules of Professional Conduct
Resolution 105A – Proposed Amendments to Rules and Comments:
Rule 1.0 (Terminology), Rule 1.1 (Competence), Rule 1.4 (Communication),
Rule 1.6 (Confidentiality of Information), and
Rule 4.4 (Respect for Rights of Third Persons)

DATE: November 5, 2012

I. INTRODUCTION

This Memorandum is prepared by the members of a subcommittee of the Permanent Advisory Committee on Delaware Lawyers' Rules of Professional Conduct. This subcommittee was requested to review Resolution 105A, adopted by the House of Delegates at the ABA Annual Meeting in Chicago, amending the above-referenced Rules and comments; and to determine whether, in light of this resolution, and others, there should be any modifications made to the Delaware Lawyers' Rules of Professional Conduct.

An effort was made by the subcommittee to determine if any state has adopted the changes to the rules discussed in Resolution 105A. It does not appear that, as of this date, any state has approved or rejected the changes in Resolution 105A. This is probably not significant at this early date, since it appears at best, to take a year for states to adopt changes once proposed.

Contact was made with representatives of the National Association of Attorneys General ("NAAG"), which had not been contacted by the ABA to request a position, and NAAG has not developed a position regarding Resolution 105A. The subcommittee also approached the

National District Attorney Association, but is unable as yet to determine from it whether that association has reviewed or taken a position on Resolution 105A.

As explained below, with some concerns regarding the changes to Rule 1.6(c) and related comments, this subcommittee believes the Advisory Committee should recommend the adoption of the amendments referenced in Resolution 105A.

II. PROPOSED CHANGES TO RULES AND COMMENTS

A. RULE 1.0 (TERMINOLOGY)

The only change suggested for Rule 1.0 is in subsection (n), to assure the Rule encompasses the full range of ways in which lawyers use technology. Therefore, "e-mail" is replaced with "electronic communications." The subcommittee certainly believes this suggested change is appropriate.

A change is also suggested to Comment 9 of Rule 1.00. This comment addresses Rule 1.0(k), and elaborates on the definition of a "screen," to assure that adequate measures are taken to prevent a screened lawyer's access to all information and documentation, "including information in electronic form." The subcommittee believes this change appropriately broadens the scope of the screen, so confidential information in any form is not accessible, and approval is recommended.

B. RULE 1.1 (COMPETENCE)

Rule 1.1 requires a lawyer to provide competent representation. This resolution seeks to change Comment 6 to Rule 1.1, to make clear such competent representation also requires that the attorney keep abreast of benefits of risks associated with relevant technology. This committee believes these changes are certainly appropriate and warranted, since advances in technology are

a part of the tools used by lawyers, and there is no reason not to require lawyers to be informed regarding such tools.

C. RULE 1.4 (COMMUNICATION)

Resolution 105A proposes to amend Comment 4 to Rule 1.4, by striking the clause that requires an attorney to return or acknowledge client telephone calls promptly, to replace it with language that requires a lawyer to promptly respond to or acknowledge all client communications, including telephone and electronic communications. With changes in technology and increased use of electronic communication by both lawyers and clients, this committee believes this change is certainly warranted and recommended.

D. RULE 1.6 (CONFIDENTIALITY OF INFORMATION)

Resolution 105A proposes to add a new subsection (c) to Rule 1.6, to provide:

> (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.

Additionally, Resolution 105A recommends changes to Comments 16 and 17 to Rule 1.6, which also address the inadvertent disclosure or unauthorized access of information relating to the representation of a client. The focus of the proposed amendment to Rule 1.6(c) and the Comments, appears to require "reasonable efforts" to prevent inadvertent disclosure or unauthorized access to information relating to the representation of a client.

The ABA Commission on Ethics 20/20 ("Commission") recommended the changes and indentifies three basic types of problems intended to be addressed, for unintended disclosure. Those are: (1) e-mails sent to the wrong person; (2) information accessed without authority, such as a third person hacking into a law firm's computer network; or (3) when employees or other personnel release it without authority. The Commission noted that Rule 1.6(c) was not intended

to mean a lawyer engages in unprofessional conduct every time a client's confidences are subject to unauthorized access or are disclosed inadvertently, and points out that Comment 16 makes this point explicitly. The report finds that, in reality, disclosures, particularly of electronic data, will occur, even if all reasonable precautions are taken. The Commission believed however, it was important to state in the rule itself that lawyers have a duty to take reasonable precautions, even if those reasonable precautions will not always guarantee protection. The Commission also considered offering more detailed guidance or "bright line" tests, but felt that rapid advances in technology would require such guidance to change too frequently.

The ABA Business Law Section (the "BLS"), in a report dated April 14, 2012, recognized it is difficult to quantify what efforts, if any, are "reasonable" to prevent these types of errors. For example, could the failure to take very simple steps such as "posting a small caution label on the computer" be considered unreasonable? Though the comments contain limited guidance on "reasonable efforts" to prevent inadvertent disclosure, the ABA Section of Science & Technology Law (the "SSTL") indicated that lawyers must "ensure that any electronic communications between the law firms [are] 'scrubbed' so as to avoid any inadvertent disclosures in the form of metadata or other hidden but discoverable coding. Memorandum from SSTL for ABA Commission on Ethics 20/20, at 4 (Apr. 4, 2012).

By contrast, *unauthorized* disclosure occurs when "someone [] intended to disclose the information but was not authorized to do so." Letter from BLS, at 2-3 (Apr. 4, 2012). This type of disclosure generally addresses an attorney's failure to monitor or supervise non-lawyers and junior attorneys. *Id.* at 3. Like the vague standard for determining reasonable efforts to prevent inadvertent disclosure, it is difficult to assess what level of supervision constitutes "reasonable efforts" here. *Id.*

Finally, disclosure of information through *unauthorized access* addresses theft of information, ranging from "snooping and eavesdropping, to failure to shred documents properly, to physical loss of a laptop or memory drive, to highly organized and expert computer hacking." *Id*. As amended, Comment 16 to Model Rule 1.6 lists factors to consider when evaluating the reasonableness of a lawyer's actions:

- 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).

MODEL RULES OF PROF'L CONDUCT R. 1.6, comment 16 (2012). Notwithstanding this guidance, the BLS criticized the absence of specific, affirmative minimum requirements in the proposed changes and final amendments to Model Rule 1.6:

> Despite considerable new legislation . . . and significant activity of the FTC in investigating and prosecuting businesses for inadequate efforts in preventing data breaches, we still don't know what constitute "reasonable efforts" in data security against unauthorized disclosures. The "reasonable efforts" standard in the Model Rules won't be any easier for lawyers to assess.

Letter from BLS, at 3 (Apr. 4, 2012); *but see* Memorandum from SSTL, at 5 (Apr. 4, 2012) ("Industry best practices required to create a secure system are published and are well-known.").

More specifically, the intersection of technology and confidentiality primarily implicates data security. One immediate concern is whether a lawyer's method of storing client information is sufficiently secure. Memorandum from ABA Standing Committee on Client Protection for ABA Commission on Ethics 20/20, at 2-3 (Dec. 13, 2010). For example, it is becoming

increasingly common for lawyers to use "cloud" computing rather than more traditional "lawyer-controlled" data storage. *Id.* at 1. In 2010, the ABA Standing Committee on Client Protection (the "CPC") encouraged the ABA Commission on Ethics 20/20 (the "Ethics 20/20 Commission) to "develop a set of criteria that reflects a best practices standard." Memorandum from CPC, at 2-3 (suggesting that the Ethics 20/20 Commission could maintain a list of vendors that met the stated criteria). The CPC acknowledged that "a law office's size, resources, practice areas, and clientele may" may affect its internal business decisions regarding the storage of client information, but stressed that "there should be a minimum standard of practice." *Id.* at 1. Even so, the CPC indicated that price should be considered when assessing security measures. *See id.* at 1-2; *see also* Memorandum from ABA Section of Real Property, Trust and Estate Law for Ethics 20/20 Commission, at 2 (Aug. 11, 2011) ("[T]he anticipated cost of preserving confidentiality versus the expected benefit of the steps required to preserve confidentiality should be a factor considered in determining the reasonableness of the lawyer's efforts to preserve confidentiality."); *but see* Memorandum from SSTL, at 7 (Apr. 4, 2012) ("Cost should not be an excuse not to implement a necessary security control if a risk to confidential client information exists"). The ABA Section of Real Property, Trust and Estate Law (the "SPL") further suggested that a client's willingness to bear the additional costs of "extraordinary protections, not generally commercially available" should also be considered. Memorandum from SPL, at 2 (Aug. 11, 2011).

The second major concern is the scope of a lawyer's duty to guard against breaches of data security such as computer hacking. Unlike the other comments, the SSTL's comment offered detailed guidance and strict standards for "reasonable efforts." Of note, the SSTL relied heavily on guidance from the National Institute of Standards and Technology publications, and

indicated those publications provide the necessary guidance on industry standards for data security.

The SSTL indicated "[l]aw firms *must* develop and implement a broad-based, balanced information security program that addresses the management, operational, and technological aspects of protecting the confidentiality, integrity, and availability of information systems." Memorandum from SSTL, at 4 (Apr. 4, 2012) (citing National Institute of Standards and Technology (NIST) special publications, *available at* http://csrc.nist.gov/publications/PubsSPs.html) (*See* Tab 6 for a list of available publications) (emphasis added). The SSTL further explained the necessary steps to protect client information, including identifying and categorizing the sensitivity of the data and information to be protected, conducting a risk assessment, creating a security plan, and continuously monitoring the system to ensure that all patches are up to date, only known devises are on the system, and sensitive data is not being transmitted. *Id.* at 5; *id.* at 7-8 (discussing five factors listed in Comment 16). Finally, the SSTL made clear the necessary steps are *all* necessary. *Id.* ("This is not a 'pick and choose' exercise of selecting a few security controls from among those that are necessary . . . .").[1]

As reflected in the various reports referenced above, the issue is not entirely clear, and all are not in agreement, and definitions and "bright line" tests may be desired, for what is, or is not, reasonable. However, that may be a difficult task over which others have wrestled without success, and it is unlikely this Committee will resolve it. However, Comments 16 and 17 to the current rules do seem to impart some degree of reasonableness for inadvertent disclosure or access to information. This subcommittee feels that, at least by adding subsection (c) to Rule 1.6, the reasonableness requirement is actually set forth in the Rule and not just the Comment.

[1] The subcommittee wishes to express its gratitude to Jessica Raatz at Skadden, Arps, Slate, Meagher & Flom, LLP, for substantially all of the research in this Memorandum.

Nonetheless, the subcommittee does wish to express some concern that there is no objective or "bright line" test; and the adoption of this new Rule could result in too technical an interpretation, or overzealous prosecution or litigation. Perhaps it could be suggested that the Rule be adopted, but that the Comments could suggest the steps a lawyer must take in given circumstances, is the product of a subjective analysis of the peculiar circumstances that may exist from time to time, and some presumptive language that good faith efforts by an attorney are sufficient to withstand an attack concerning a breach of ethics.

E. RULE 4.4 (RESPECT FOR RIGHTS OF THIRD PERSONS)

Existing Rule 4.4(b) requires a lawyer who receives a document, which the lawyer reasonably knows was inadvertently sent to him, must notify the sender of its receipt. Resolution 105A seeks to amend Rule 4.4, to make clear the duties of the lawyer extend not just to documents, but also to "electronically stored information."

An amendment is also sought to Comment 2 to Rule 4.4, to mirror the rule change to include "electronic stored information." The proposed change to Comment 2 for Rule 4.4, also specifically addresses the issue of metadata, and requires the triggering of the notification duties under the Rule, only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent. Once again, all of these changes are deemed appropriate by the subcommittee, in light of technology changes. With respect to the metadata issue, this subcommittee agrees there should be no obligation for the receiving lawyer to do an inspection or analysis to determine whether metadata is inappropriately sent. It is noted in the report of the ABA Commission on Ethics 20/20, that the new language about metadata does not resolve the question of whether a lawyer should be allowed to look at metadata in the absence of consent of the sending party, or court authority to do so. Several ethics opinions by the ABA and Maryland

and Vermont, have concluded Rule 4.4 does not prohibit a lawyer from reviewing metadata in the absence of consent or a court order. However, other ethics opinions in other states (Alabama, Arizona, Florida, Maine, New Hampshire and New York) have reached a contrary conclusion, and found a lawyer should not be permitted to look at the metadata of an opposing party, unless consent or a court order has been obtained. The amendments do not resolve this dispute, but make clear that, if a lawyer uncovers metadata and knows the sending lawyer did not intend to send it, Rule 4.4(b)'s notification requirement is triggered.

Proposed Resolution 105A further suggests changes to Comment 3 to Rule 4.4, clarifying a lawyer may delete electronically stored information which was inadvertently received. It is not necessary to return the electronically stored information, such as one might return a document that was inadvertently received.

The subcommittee believes these changes to Rule 4.4 and its comments, are entirely appropriate and merely reflect changing technology, and extension of existing rules to such new technology.

III. SUMMARY

This subcommittee believes many of the proposed changes to both the Rules and Comments, are merely to update the Code to more reasonably reflect current technology, and should be adopted. The issue of metadata, as discussed in the analysis of Rule 4.4 above, is an open question, and is not necessarily fully resolved here. There is some concern expressed by the subcommittee that the existing Rules as a whole, prescribe wrongful conduct. These new rules seem to be moving in the direction of requiring specific affirmative conduct on behalf of lawyers; and, if this were considered to be a trend, may not be appropriate. The "reasonableness" issue in Rule 1.6 may deserve some further definition and presumptive language, but it does

overall state a degree of reasonableness that is found throughout the Rules of Ethics, as well as the law in general. We cannot expect a “bright line” test in this area. Other than the minor areas identified above, this subcommittee believes Resolution 105A should be approved.

EXHIBIT D

To: Karen L. Valihura, Chair, Ethics Advisory Committee

From: Kate Aaronson, Gary Aber; Bernard O'Donnell

Date: November 9, 2012

Re: Proposed Revisions to ABA Model Code and Comments: Technology and Client Development

Our sub-committee reviewed the proposed revisions to the ABA Model Rules on Advertising and Client Development. We saw no reason why the proposed revisions should not be adopted for Delaware. Their intent is to revise language in the Rules and Comments to apply to more modern technology in Internet communication, particularly lead generation advertising (pay-per-click) and real time webpage advertising (presumably Facebook and similar networking sites).

Following is our summary of what the proposed revisions to the Model Rules and Comments provide.

TECHNOLOGY AND CLIENT DEVELOPMENT

RULE 7.2 ADVERTISING

ABA Commission concluded that "no new restrictions on lawyer advertising are required." (Report, p. 1).

- Prohibition against false and misleading advertising already exists.

- Comment revision applicable to online advertising and other forms of electronic communications that are used to attract new clients.

Lawyer paying for a recommendation is prohibited. Revision to Comment 5 intended "to clarify when a lawyer's online communications constitute the type of 'solicitations' that are governed by Rule 7.3 of the

Model Rules of Professional Conduct (Direct Contact with Prospective Clients).” (Executive Summary, p. 13).

- Currently “unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services.”
- Revision to Comment 5 intended to “clarify when the prohibition against paying for a recommendation is triggered.”
- Concerning Internet lead generators, the issue is whether the lead generator is “recommending” the lawyer for whom the lead is generated.
- Revision to definition of “recommendation” as a “communication … [that] endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.” (Report, p. 4).
- Reminder that, although lawyer can pay fee to lead generator for client lead, it cannot be contingent on use of lawyer’s services.
- Explains that lawyer cannot pay lead generator if lead generator “states, implies, or creates a reasonable impression that it is recommending the lawyer, is making a referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.” (Report, p. 5).
- If there might be confusion about whether there is a recommendation, lead generator should affirmatively state that it is not recommending the lawyer, is not getting paid for the lead, or that it has not analyzed the person’s legal problems. (Report, p. 5).
- Enables lawyers to use Internet development tools while “ensuring that the public is not misled and that the restrictions on fee sharing with non-lawyers are observed.” (Exec. Summ, p. 13).

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

Changes title of Rule from “Direct Contact with Prospective Clients” to “Solicitation of Clients.”)

Prior ethics opinions considered e-mail a solicitation, but not websites. Currently, technology permits attorneys to maintain networking pages like websites and also control viewers and enter conversations with viewers on those webpages. (Report, p. 7).

Revision to Comment 1 explains that a prohibited "targeted communication" occurs when a lawyer initiates the communication directed to a specific person "that offers to provide, or can reasonably be understood as offering to provide, legal services."

A response to a request for information and an advertisement that is not directed to specific people are not "solicitations." Advertisements that are generated in response to internet based research are not solicitations.

Clarifying language in renumbered Comment 3 "makes clear" that lawyers do not violate Rule "if they are responding to a request for information," including an online request. (Report, p. 7-8).

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

Revises the definition of a "prospective client" by replacing the word "discussion" with the word "consults."

Current Rule 1.18 speaks in terms of a "discussion" and does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship." (Exec. Summ., p. 13).

This rule modification "proposes to clarify when electronic communications give rise to a professional client-lawyer relationship." (Exec. Summ., p. 13).

- Designed to help lawyers avoid the inadvertent creation of lawyer – client relationships in electronic media and communications, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.
- A prospective lawyer – client relationship can arise with internet communications even when a verbal discussion has not taken place.
- "Consults" makes this point more clearly than the word "discusses" and anticipates future methods of communication between lawyers and the public. (Report, p. 2).

New language in Comment 3 gives lawyers and possible clients more guidance as to when a "consultation" occurs.

- A consultation can occur, and a prospective client relationship can arise, if a lawyer specifically invites the submission of information about a potential representation without providing clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.
- Retain the idea that unilateral communications from a person to a lawyer are not sufficient to give rise to a prospective client relationship, even if the information is submitted through a lawyer's website.
- A consultation does not occur, and a prospective client relationship does not arise, if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest.
- Revising "discussion" to "consults," together with the new Comment language, "will give lawyers more guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship." (Report, pp. 2-3).

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES (ADVERTISING)

Revision to Comment 3 changing reference to "prospective client" to "the public" because prospective client is defined in Rule 1.18 "and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover." (Ex. Summ., p. 13).

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW' MULTIJURISDICTONAL PRACTICE OF LAW

Removes reference in Comment to "prospective clients" to conform with Rule 1.18.

EXHIBIT E

FUQUA, YORI AND WILLARD, P.A.

ATTORNEYS AT LAW

JAMES A. FUQUA, JR.
JAMES A. YORI
TIMOTHY G. WILLARD
TASHA MARIE STEVENS

26 THE CIRCLE
P.O. BOX 250
GEORGETOWN, DELAWARE 19947
PHONE 302-856-7777
FAX 302-856-2128
www.fywlaw.com

20245 BAY VISTA ROAD, UNIT 203
REHOBOTH BEACH, DE 19971
PHONE 302-227-7727
FAX 302-227-2226

MEMORANDUM

To: Karen L. Valihura, Chair and
Permanent Ethics Advisory Committee

From: Tasha Marie Stevens and Jeffrey A. Young

Date: November 2, 2012

RE: Ethics 20/20 Proposals
Resolution 105c: Outsourcing Subcommittee Recommendation

Our subcommittee was assigned to review Resolution 105c: Outsourcing, which primarily would include amending the comments to Rules 1.1, 5.3 and 5.5 of the Model Rules of Professional Conduct to identify guidelines and factors for a lawyer's consideration when he or she utilizes the services of lawyers associated with other firms and non-lawyers inside or outside of his/her own firm. The comments specifically focus on supervision and allocation of those providing services, the need to consult with or obtain permission from the client, and the allocation of responsibility between the lawyer and client as to oversight of the performance of those services. The amendments are relevant to the practice of law on a large and small scale in an age where outsourcing of duties has become more commonplace as a more cost effective option to provide services to clients.

The proposed comments were a collaborative effort of representatives of numerous ABA sections and the National Organization of Bar Counsel, and no minority views or opposition were raised through the various avenues where feedback could be submitted.

Our subcommittee recommends that the resolution be adopted and the rules be amended, as it provides additional general guidance to practitioners in the area of outsourcing.

EXHIBIT F

MEMORANDUM

TO: Permanent Advisory Committee on the
Delaware Lawyers Rules of Professional Conduct

FROM: Dan Lyons
Betsy McGeever, Chair
Karen Valihura
Paul Wallace

SUBJECT: ABA Model Rules of Professional Conduct 105D and 105E

DATE: October 24, 2012

I. BACKGROUND

We were appointed as a subcommittee of the Permanent Advisory Committee to review ABA Model Rules of Professional Conduct 105D (Practice Pending Admission) and 105E (Admission by Motion). The subcommittee reviewed the Model Rules and accompanying commentary and examined similar rules adopted in other jurisdictions. We also interviewed a diverse cross section of members of the Delaware Bar including lawyers in small, medium and large law firms, a solo practitioner, judges and a member of the Board of Bar Examiners. We met three times to discuss the proposals. As explained in greater detail below, the subcommittee does not recommend that Delaware adopt either Rule 105D or Rule 105E.

II. SUMMARY OF MODEL RULES 105E AND 105D

ABA Model Rule 105E, adopted by the ABA House of Delegates in 2002, allows a lawyer in one U.S. jurisdiction to seek admission in another U.S. jurisdiction by motion without sitting for the new jurisdiction's bar examination. As amended in August, 2012, a lawyer may qualify for admission by motion after having actively practiced law for three of the past five years.[1]

[1] Prior to August, 2012, the "time in practice" requirement was five of the last seven years.

Model Rule 105D, adopted by the ABA House of Delegates in August, 2012, enables lawyers to practice in a new jurisdiction for up to one year while the lawyer pursues admission in the new jurisdiction through one of the procedures authorized by the new jurisdiction such as passage of the bar examination or, if available, admission by motion. Model Rule 105D contains a number of conditions on practice pending admission, including: (1) the lawyer must have practiced in another jurisdiction for three of the five past years; (2) the lawyer must not be disbarred, suspended or the subject to discipline; (3) the lawyer must not have previously been denied admission to practice in the new jurisdiction; (4) the lawyer must notify the new jurisdiction's disciplinary and licensing authorities; (5) the lawyer must reasonably expect to fulfill all of the new jurisdiction's admission requirements; and (6) the lawyer must associate with another lawyer who is licensed to practice in the new jurisdiction.

III. THE SUBCOMMITTEE'S RECOMMENDATION AND THE REASONS FOR IT

The subcommittee recommends that Delaware not adopt either Model Rule 105D or Rule 105E. There are several reasons for the subcommittee's recommendation. First, the subcommittee members and the members of the Delaware judiciary and bar that they surveyed do not perceive any need for such rules. As to Model Rule 105D, this may be because Delaware has long had a limited-practice-prior-to-admission rule specifically tailored to an identified need, *i.e.*, that certain public service firms and government agencies must have the in-court services of newly-hired attorneys immediately.[2] Through its research and surveys, the subcommittee could identify no need for modification of these Model Rule 105D-type rules. As to Model Rule 105E, the lack of a perceived need may be due, in part, to Delaware's relatively liberal and frequently

[2] *See* Del. Supr. Ct. R. 55 (2012) (identifying those entities which may utilize limited-practice attorneys prior to admission); Del. Bd. Bar Ex. R. 42-51 (2012) (setting forth requirements for such limited-practice permission including intent to sit for bar examination and supervision by an experienced Delaware practitioner).

used pro hac admission procedures that enable out-of-state attorneys to represent their clients in judicial proceedings in Delaware courts.[3]

Second, Rule 105E's admission by motion procedure does not require the lawyer seeking admission in Delaware to maintain an office in Delaware. Members of the judiciary and the bar expressed concerns regarding regulation of such attorneys. The oversight of a significant number of Delaware lawyers who are not present in Delaware would be difficult and could tax the resources of the judiciary, the Office of Disciplinary Counsel and members of the bar who participate in the disciplinary and bar admission processes.

Third, the consensus of the Delaware practitioners that the subcommittee surveyed was that knowledge of Delaware law and Delaware procedure is important to competent representation. The ABA Commission on Ethics 20/20 that proposed Model Rule 105E felt differently pointing, among other things, to the fact that an increasing number of jurisdictions use the Uniform Bar Examination.[4] Delaware is not one of these jurisdictions. To the contrary, the Delaware bar examination tests extensively on Delaware law and procedure in eight essay questions. In addition, unlike other jurisdictions, Delaware requires all applicants for admission to the bar to serve a clerkship in the State of Delaware aggregating substantially full-time service for at least five months under the direct and constant supervision of a preceptor.[5] During this

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[3] We characterize Delaware's pro hac procedure as liberal because, unlike other jurisdictions, Delaware does not limit pro hac admission to a very small number as does Florida. *See* Fla. R. Jud. Admin. 2.510(a). Nor does Delaware require pro hac admittees to obtain a local business license as the Philadelphia Court of Common Pleas Commerce Division does. *See* Court of Common Pleas Trial Division–Civil Complex Litigation Center at the Philadelphia Courts, available at http://www.courts.phila.gov/common-pleas/trial/civil/clc.asp; *see also* Pro Hac Vice Order of the Court of Common Pleas of Philadelphia County First Judicial District of Pennsylvania, Civil Trial Division, available at http://www.courts.phila.gov/pdf/forms/civil/PRO-HAC-VICE-ORDER.pdf. Unlike Montana, Delaware does not limit pro hac admission to two per firm for the lifetime of the firm. *See* 2009 Amend. R. for Admission to the Bar of Mont. R. IV(D)(10).

[4] ABA Commission on Ethics 20/20 Report on Model Rule 105E at 3.

[5] Del. Supr. Ct. R. 52(a)(8).

period, the applicant must complete a list of legal activities relating to the practice of law in Delaware. The clerkship and the preceptor sponsorship are a "meaningful part of the admission process rather than a pro forma exercise."[6] Moreover, the clerkship requirements are intended to make the clerkship a meaningful teaching mechanism to help ensure that an applicant's preparation for admission includes a bona fide exposure to the practical aspects of law practice and the traditions of the Delaware bar.[7]

Fourth, the subcommittee noted that the ABA Commission on Ethics 20/20 has encouraged all U.S. jurisdictions to adopt Model Rules 105D and 105E. A comparison of the state versions of the ABA's Model Rule on Admission by Motion (attached as Exhibit A) reveals, however, that only a small number of states have adopted the model rule without changing it. Eleven states, including Maryland, New Jersey, Florida and California, have not adopted any admission by motion rule. Most of the states that have adopted an admission by motion rule impose conditions on its use. Virginia, for example, requires applicants to establish an office in Virginia for the full-time practice of law from such office. Alabama requires applicants to become permanent residents of Alabama or to certify their intent to maintain and conduct the primary practice of law in Alabama. In South Carolina, admission by motion is available only for deans and tenured professors of the University of South Carolina Law School or the Charleston School of Law.

In short, states that have admission by motion rules have tailored the rules to meet the state's needs. Should a need be identified in Delaware, the subcommittee recommends that any

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[6] The Board of Bar Examiners' Memorandum to all Preceptors re: Preceptor Duties (Jan. 3, 2012) at 1.

[7] *Id; see also* Hon. Randy J. Holland, *The Delaware Clerkship Requirement: A Long-Standing Tradition* (Nov. 2009) at 34.

rule that is adopted always be tailored to that specific need.[8] For example, during the course of its work, the subcommittee heard that there may be a need to allow spouses of military stationed in Delaware to practice in Delaware on a temporary basis. If that is correct, then a rule could be adopted that addresses that specific need. Idaho, for example, has a such a rule that grants a provisional bar membership to those attorney spouses who: (1) otherwise meet the qualifications for Idaho bar admission; (2) are in the State of Idaho due to military orders; (3) are members in good standing in another jurisdiction, when admission to that jurisdiction was obtained by passing a written examination; (4) have an Idaho Bar member as a supervising attorney; (5) comply with all CLE requirements in accordance with Idaho Supreme Court Rules; and (6) agree that the provisional bar membership expires when the military orders in the State of Idaho are completed.[9] And Hawaii, for example, has a rule that allows full-time active-duty uniformed-service judge advocates to apply for limited admission without examination to represent certain active-duty enlisted military personnel and their dependents.[10]

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[8] *See*, *e.g.*, Del. Supr. Ct. R. 55.3 (eff. Oct. 23, 2012) (allowing for limited permission to practice for certain Assistant United States Attorneys in aid of state Attorney General in state prosecutions).

[9] Idaho Bar Comm. R. 229 (eff. July 1, 2012).

[10] Haw. Supr. Ct. R. 1.7 (amend. eff. July 1, 2011).

EXHIBIT A

Comprehensive Guide to

Bar Admission Requirements 2012

NATIONAL CONFERENCE OF BAR EXAMINERS

AND

AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR

National Conference of Bar Examiners

Section of Legal Education and Admissions to the Bar

CHART 11: Admission on Motion/Fees

Note: As used in this chart, "on motion" denotes admission without any additional testing except, where required, the MPRE.

Jurisdiction	Do your rules provide for admission on motion?		What is the number of years of practice required for admission on motion?	Your definition of practice for purposes of admission on motion includes:					Must an applicant for admission on motion be a graduate of an ABA-approved law school?		Admission on motion fee
	Yes	No		Law teaching	Gov't agency	Military	In-house corporate	Judicial court of record	Yes	No	
Alabama	X		5 of past 6	X	X	X	X	X	X		$1,300
Alaska	X		5 of past 7	X	X	X	X	X	X		$1,500
Arizona	X		5 of past 7	X	X	X	X		X		$1,800
Arkansas	X		5 of past 7	X	X	X	X	X	X		$1,500
California		X									
Colorado	X		5 of past 7	X	X	X	X	X	X		$800
Connecticut	X		5 of past 10	X	X	X	X	X		X	$1,800
Delaware		X									
Dist. of Columbia	X		None							X	$400**
Florida		X									
Georgia	X		5 of past 7	X	X	X	X	X	X		$600‡
Hawaii		X*		X					X		
Idaho	X		Varies	X	X	X	X	X	X		$800
Illinois	X		5 of past 7	X	X	X	X	X	X		$1,250
Indiana	X		5 of past 7	X	X	X	X	X		X	$800†
Iowa	X		5 of past 7	X	X	X	X	X		X	$625
Kansas	X		5 of past 7	X	X	X	X	X	X		$1,250
Kentucky	X		5 of past 7	X	X	X	X	X	X		$1,200
Louisiana		X									
Maine	X		5 of past 7	X	X	X	X	X	X		$600**
Maryland		X									
Massachusetts	X		5 of past 7	X	X	X	X	X		X	$1,015**
Michigan	X		3 of past 5	X	X	X	X	X	X		$600**
Minnesota	X		5 of past 7	X	X	X	X	X	X		$950
Mississippi	X		5	X	X	X	X	X	X		$1,500**
Missouri	X		5 of past 10	X	X	X	X	X	X		$1,240
Montana		X									
Nebraska	X		Varies	X	X	X	X		X		$700 / $950
Nevada		X									
New Hampshire	X		5 of past 7	X	X	X	X	X		X	$1,000
New Jersey		X*		X			X		X		
New Mexico		X									
New York	X		5 of past 7	X	X	X	X	X	X		$400
North Carolina	X		4 of past 6	X	X	X	X	X	X		$2,000
North Dakota	X		4 of past 5	X	X	X	X	X	X		$400**
Ohio	X		5 of past 10	X	X	X	X	X	X		$1,250**
Oklahoma	X		5 of past 7	X	X	X	X	X	X		$1,500**
Oregon	X		5 of past 7	X	X	X	X	X		X	$625‡
Pennsylvania	X		5 of past 7	X	X	X	X	X	X		$1,000
Rhode Island		X									
South Carolina		X*		X					X		$400
South Dakota	X		Past 5		X	X	X	X	X		$450‡
Tennessee	X		5 of past 7	X	X	X	X	X	X		$800‡
Texas	X		5 of past 7	X	X	X	X	X	X		$890
Utah	X		Varies	X	X	X	X	X	X		$850
Vermont	X		5 of past 10		X	X	X			X	$600**
Virginia	X		5 of past 7		X	X	X	X	X		$1,500
Washington	X		Varies	X	X	X	X	X		X	$920†
West Virginia	X		5 of past 7	X	X	X		X		X	$1,000**
Wisconsin	X		3 of past 5	X	X	X	X	X		X	$850
Wyoming	X		5 of past 7	X	X		X	X	X		$600**
Guam		X*			X				X		$325†
Northern Mariana Islands		X									
Palau		X*			X						
Puerto Rico		X									
Virgin Islands		X*			X					X	none

*Although admission on motion is generally unavailable, it is permitted on a limited basis.

**Plus NCBE report fee † Includes NCBE report fee

‡ Plus other fees (such as for separate character and fitness applications and/or investigations)

See supplemental remarks.

Do your rules provide for admission on motion?

Alabama Effective in September 2006, a lawyer who actively practiced 5 of the past 6 years who becomes a permanent resident or certifies the intention to maintain and conduct the primary practice of law may be admitted without examination.

Arizona Arizona began admission on motion in 2011. Must have actively practiced 5 of past 7 years, at least 1,000 hours each year, and held an active law license in good standing for that duration. Professorship recognition requires full-time law school professorship. Active practice cannot have constituted unauthorized practice where it occurred. Applicant must have been admitted by bar examination in a reciprocal jurisdiction to qualify. Applicant may not have failed the bar examination in Arizona within past 5 years. Prior members of the State Bar of Arizona are not eligible for admission on motion.

District of Columbia Attorney who has been a member in good standing of the bar for 5 years; or attorney, with J.D. from ABA-approved law school, admitted by examination in jurisdiction, having attained 133 scaled MBE score and 75 scaled MPRE score, can be admitted without examination.

Hawaii Full-time faculty members at the University of Hawaii Law School who graduated from an ABA-approved law school and who have been admitted to practice in another U.S. jurisdiction are eligible. In addition, full-time active-duty uniformed-service judge advocates may apply for limited admission without examination to represent, without additional compensation, certain active-duty enlisted military personnel and their dependents. Attorneys who are graduates of ABA-accredited law schools, actively licensed to practice law in another U.S. jurisdiction, and employed by a civil legal service provider recognized by the IRS as a 501(c)(3) nonprofit organization that is eligible to receive funds from the Indigent Legal Assistance Fund may apply for limited admission.

Iowa Applicants who have failed 5 or more bar examinations are not eligible for admission on motion.

Nevada Admission on motion is unavailable. Admission by certification is allowed for faculty of the National Judicial College, Boyd Law School, in-house corporate, and some government agencies.

New Jersey Law professors who have taught law full-time for the previous 5 years at 1 of the 3 New Jersey law schools can be admitted on motion. In addition, the law professor must have a J.D. or LL.B. degree from an ABA-approved law school and be admitted by examination in at least 1 other U.S. jurisdiction. In-house counsel applicants should refer to rule pertaining to admission to practice.

North Dakota If application is based on MBE scaled score of 150 or above or UBE scaled score of 260 or above and admitted in the jurisdiction of examination, active practice not required. Evidence of MBE score or UBE score and completed application must be received within 2 years of the exam date.

Pennsylvania An applicant must have graduated from a law school that was approved by the ABA at the time of the applicant's matriculation or graduation.

South Carolina Admission on motion only for dean or a tenured professor of the University of South Carolina School of Law or the Charleston School of Law.

Virginia An applicant must intend, promptly after being admitted to practice in Virginia without examination, to establish his or her office in Virginia and to practice full-time from such Virginia office.

Washington All motion applicants are admitted based on the same rules and conditions as those of the jurisdiction from which they are applying.

Guam Only government attorneys may be admitted temporarily without written examination and only for the purposes of government employment. Government attorneys applying for temporary admission must still undergo a character and fitness investigation. Attorneys admitted under this rule are only granted temporary admission for a maximum of 5 years.

Northern Mariana Islands Government attorneys may be admitted temporarily without written examination and only for the purposes of government employment. Government attorneys applying for temporary admission must still undergo a character and fitness investigation. Attorneys admitted under this rule are only granted temporary admission for a maximum of 4 years.

Virgin Islands On motion of authorized departments or agencies, an attorney may be specially admitted to practice law before the VI Supreme Court and the Superior Court, without written examination and as an employee of the department or agency. Once admitted, the specially admitted government attorney must take the Virgin Islands Bar Exam within 2 years and pass within 3 years; otherwise the special admission automatically expires.

What is the number of years of practice required for admission on motion?

Idaho Motion applicants must have been substantially engaged in the active practice of law for length required in originating jurisdiction but no less than 3 of the past 5 years.

Maine Lawyers from New Hampshire and Vermont may be admitted after 3 years of practice; all other lawyers must have practiced 5 of past 7 years.

Massachusetts Board requires proof that the applicant has been actively engaged in the practice of law for 5 out of the past 7 years immediately preceding the application.

Minnesota Applicant must have been lawfully engaged in the practice of law for at least 60 of the 84 months immediately preceding the application. The practice of law professors, military lawyers, and federal government lawyers which takes place outside a state where licensed is considered the lawful practice of law. Practice which occurs outside of a jurisdiction where licensed is also considered the lawful practice of law so long as such practice is authorized by the jurisdiction in which the practice takes place.

Mississippi Practice requirement is determined by the applicant's originating jurisdiction with a minimum of 5 years of active practice in the originating jurisdiction in which the applicant was licensed and in good standing.

Nebraska Admission without examination if applicant has actively practiced law 5 of 7 years preceding application, and has received his/her first professional degree from an ABA-approved law school. Or admission without examination if applicant has passed a bar examination equivalent to Nebraska exam, was admitted to practice, and has first degree from an ABA-approved law school.

New Hampshire Lawyers from Maine and Vermont may be admitted after 3 years of practice; all other lawyers must have practiced 5 of past 7 years.

Utah Practice requirement is determined by the applicant's originating jurisdiction with a minimum of 3 years of practice in the originating jurisdiction during the 4 years preceding the filing of the application.

Vermont Lawyers from New Hampshire and Maine may be admitted after 3 years of practice; all other lawyers must have practiced 5 of the past 10 years unless current jurisdiction requires fewer than 5 years.

Washington Both the length of active practice and the type of practice permitted are determined by the requirements of the applicant's originating jurisdiction. Motion applicants must show that they have the same length and type of practice that would be required of applicants from Washington who seek admission in the originating jurisdiction.

West Virginia Rules are silent as to whether in-house corporate experience qualifies as active practice of law.

Wisconsin Applicants who failed the Wisconsin bar exam are not eligible for admission on motion.

Wyoming Has engaged in the active, authorized practice of law for a minimum of 300 hours per year for 5 of 7 years immediately preceding the date of the application.

Must an applicant for admission on motion be a graduate of an ABA-approved law school?

Connecticut Must be a graduate of a law school approved by bar examining committee.

Indiana Effective January 1, 2009, graduation from an ABA-accredited law school is no longer required of applicants for a Business Counsel License. Graduation from an ABA-accredited law school is still required of applicants for a Provisional License.

Maine If the applicant graduated from a law school in the United States, that law school must be ABA-approved. Applicants who graduated from law schools in other English-speaking common-law countries may be eligible if they pursued a course of study substantially equivalent to that of a law school approved by the ABA.

Massachusetts Must be ABA-approved or authorized by a state statute to grant the degree of bachelor of laws or J.D. at the time of graduation.

Michigan Applicant must have a J.D. from a reputable and qualified law school. Law schools fully or provisionally approved by the ABA on the date the applicant's degree is conferred are considered to be reputable and qualified.

Mississippi Applicant must have a J.D. from an ABA-approved law school unless applicant comes from a reciprocal jurisdiction that does not require it.

New Hampshire Foreign law school graduates who meet other requirements and who are licensed in another state are eligible for admission on motion. Graduates of 2 non-ABA-approved schools in Massachusetts are also eligible.

West Virginia Must be ABA-approved or its equivalent.

CHART 12: Reciprocity, Comity, and Attorneys' Exams

Jurisdiction	Is admission on motion based on reciprocity (that is, is it limited to candidates from some or all jurisdictions offering admission on motion)?		If state of initial admission requires examination of all applicants, do you require examination of attorney applicants?		Is an attorney initially admitted by diploma privilege eligible for admission on motion?		Attorneys' Exams: Does your jurisdiction offer an Attorneys' Exam?		Attorneys' Exams: To qualify for the Attorneys' Exam, must an applicant be a graduate of an ABA-approved school?	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Alabama	X		X			X		X		
Alaska	X		X			X		X		
Arizona	X					X		X		
Arkansas	X			X	X			X		
California							X			X
Colorado	X		X		X			X		
Connecticut	X		X		X			X		
Delaware								X		
District of Columbia		X		X	X			X		
Florida								X		
Georgia	X			X		X	X		X	
Hawaii								X		
Idaho	X			X		X		X		
Illinois		X		X	X			X		
Indiana		X		X	X			X		
Iowa		X		X	X			X		
Kansas	X		X			X		X		
Kentucky	X		X		X			X		
Louisiana								X		
Maine	X		X		X		X			X
Maryland							X			X
Massachusetts		X		X	X			X		
Michigan		X		X	X			X		
Minnesota		X		X	X			X		
Mississippi	X		X		X			X		
Missouri	X			X	X			X		
Montana								X		
Nebraska		X		X	X			X		
Nevada								X		
New Hampshire	X		X			X		X		
New Jersey		X	X			X		X		
New Mexico								X		
New York	X			X	X			X		
North Carolina	X		X		X			X		
North Dakota		X		X	X			X		
Ohio		X		X		X		X		
Oklahoma	X		X		X			X		
Oregon	X			X		X		X		
Pennsylvania	X			X	X			X		
Rhode Island							X			X
South Carolina						X		X		
South Dakota	X		X		X			X		
Tennessee		X		X	X			X		
Texas		X		X	X			X		
Utah	X		X			X	X			X
Vermont		X		X	X			X		
Virginia	X		X			X		X		
Washington	X		X		X			X		
West Virginia	X		X		X			X		
Wisconsin		X		X	X			X		
Wyoming	X		X			X		X		
Guam					X		X		X	
Northern Mariana Islands							X		X	
Palau								X		
Puerto Rico								X		
Virgin Islands								X		

See supplemental remarks.

Is admission on motion based on reciprocity (that is, is it limited to candidates from some or all jurisdictions offering admission on motion)?

Georgia If the applicant's "sending" jurisdiction's admission on motion rule is more restrictive than Georgia's, then the applicant's admission in Georgia would be governed by the same requirements that apply to an applicant from Georgia seeking admission in the applicant's jurisdiction.

Mississippi Provided that the laws from the state from which the applicant comes grant similar privileges to attorney applicants from Mississippi.

Oregon Provided that the laws from the state from which the applicant comes grant similar privileges to attorney applicants from Oregon. Attorneys who are licensed in Washington, Idaho, Utah, or Alaska and apply for admission on motion on or before December 31, 2015, need only demonstrate active, substantial, and continuous practice of law for 3 of the preceding 5 years prior to filing the application. For all other states, attorneys must have lawfully engaged in practice for 5 of 7 years preceding application.

Vermont New Hampshire and Maine attorneys may be admitted after 3 years of practice.

Wyoming Admission on motion is limited to jurisdictions that would admit a Wyoming attorney on motion without any additional examination, including, but not limited to, the MPRE.

If state of initial admission requires examination of all applicants, do you require examination of attorney applicants?

California Attorney applicants who have been admitted as active members in good standing 4 or more years may qualify to take the Attorneys' Exam, which is the written portion of the general bar exam (2 days out of 3). All other attorney applicants must take the general bar exam.

Georgia Attorney from a nonreciprocal state may sit for the Attorneys' Exam.

Maine Attorney from a nonreciprocal state may be eligible to sit for the Attorneys' (modified) exam.

Rhode Island Must sit for 3 local questions, 1 MPT question, and 6 MEE questions.

Is an attorney initially admitted by diploma privilege eligible for admission on motion?

Arkansas Provided the applicant is a graduate of an ABA-approved law school.

Connecticut Provided the applicant is a graduate of an ABA- or committee-approved law school.

Mississippi Provided that the laws from the state from which the applicant comes grant similar privileges to attorney applicants from Mississippi.

Ohio Applicant who has been admitted in another jurisdiction by diploma privilege is eligible for admission without examination only if applicant has also taken and passed the bar examination and been admitted as an attorney-at-law in the highest court of another state or the District of Columbia.

Tennessee Must file a petition with the Board setting forth reasons why he/she should be admitted; a hearing is held in response.

To qualify for the Attorneys' Exam, must an applicant be a graduate of an ABA-approved law school?

Maine If applicant is not a graduate of an ABA-approved law school, the applicant must have engaged in the practice of law for 3 years in the U.S. jurisdiction where admitted.

Maryland If the attorney applicant has practiced law for 10 years, or 5 years in the immediate past 10 years, following admission by examination in another jurisdiction, applicant is eligible for special attorney exam and need not be a graduate of an ABA-approved law school.

Rhode Island Applicants who have not graduated from an ABA-approved law school may sit for the Attorneys' Examination provided they have been engaged in the active practice of law for 5 out of the 10 years immediately preceding the filing of the bar application.

Utah May sit for the Attorneys' Exam if applicant is a graduate of an ABA-approved law school, has been licensed for 5 years, and has been in active practice for 4 of the 5 years preceding application. Applicant from a non-ABA-approved law school may sit for the Attorneys' Exam if he or she meets all requirements including having been licensed for 10 years and in active practice for 10 of the 11 years preceding the filing of the application.

CHART 13: Other Licenses and Registrations/Fees

	Does your jurisdiction license, register, or certify the following on a special basis (that is, other than via the regular examination or motion process)?											
	Foreign legal consultants			Corporate counsel not admitted in-state			Legal service lawyers			Pro bono lawyers		
Jurisdiction	Yes	No	Application Fee	Yes	No	Application Fee	Yes	No	Application Fee	Yes	No	Application Fee
Alabama		X		X		$300		X			X	
Alaska	X		$1,000		X		X		$0		X	
Arizona	X		$525†	X		$345	X		$0	X		$0
Arkansas		X			X			X			X	
California	X		$370	X		$1,244	X		$1,244		X	
Colorado		X		X		$725		X		X		$50
Connecticut	X		$500	X		$1,000		X			X	
Delaware	X		$100	X		$80	X		$90–$150		X	
Dist. of Columbia	X		$450*		X			X			X	
Florida	X		$500*	X		$1,300	X		$1,600–$3,000		X	
Georgia	X		$1,000		X			X			X	
Hawaii	X		$300		X			X			X	
Idaho	X		$690	X		$690		X			X	
Illinois	X		$800	X		$1,250	X		$100		X	
Indiana	X		$800		X			X			X	
Iowa	X		$1,000	X		$200		X			X	
Kansas		X		X		$1,250		X			X	
Kentucky		X		X		$1,000	X		$100	X		$100
Louisiana	X		$175	X		$300		X			X	
Maine		X			X			X			X	
Maryland		X		X		$175	X		$10		X	
Massachusetts	X		$510	X		$220–$300		X			X	
Michigan	X		$600*		X			X			X	
Minnesota	X		$1,200	X		$700–$950	X		$75		X	
Mississippi		X			X			X			X	
Missouri	X		$1,400		X			X			X	
Montana		X			X			X			X	
Nebraska		X		X		$700		X			X	
Nevada		X		X		$250	X		$250	X		$250
New Hampshire		X			X			X			X	
New Jersey	X		$475	X		$750	X		$0	X		$0
New Mexico	X		$800		X		X		$0		X	
New York	X		$0	X		$0	X				X	
North Carolina	X		$1,500		X			X			X	
North Dakota	X		$380	X		$380	X		$380		X	
Ohio	X		$550	X		$350	X		$300		X	
Oklahoma		X		X		$750*		X			X	
Oregon	X		$850	X		$850		X		X		$250
Pennsylvania	X		$650	X		$650	X		$200		X	
Rhode Island		X		X		$200	X		$200		X	
South Carolina	X		$1,000	X		$400	X		$0	X		$0
South Dakota		X			X		X		$300–$450		X	
Tennessee		X		X		$750		X			X	
Texas	X		$950†		X			X			X	
Utah	X		$850	X		$850		X			X	
Vermont		X			X			X			X	
Virginia	X		$600*	X		$150		X			X	
Washington	X		$1,220		X			X		X		$300
West Virginia		X			X		X		$0*		X	
Wisconsin		X		X		$250		X			X	
Wyoming		X			X			X			X	
Guam		X			X			X			X	
N. Mariana Islands		X			X		X		$200		X	
Palau		X			X		X				X	
Puerto Rico		X			X			X			X	
Virgin Islands		X			X			X			X	

*Plus NCBE report fee †Plus other fees

See supplemental remarks.

Does your jurisdiction license, register, or certify any categories of practitioners on a special basis (that is, other than via the regular examination or motion process)?

Alaska A person who is admitted and in good standing in another state may work for Alaska Legal Services indefinitely if he/she has not failed the Alaska bar exam.

Arizona Corporate counsel must register with the State Bar of Arizona; registration process does not constitute licensure for practice of law in Arizona. Pursuant to Arizona Supreme Court Rule 38(d), (e), and (f), limited practice in law school clinical programs, legal services organizations, and pro bono legal services organizations is allowed through registration with the Clerk of the Supreme Court. These programs do not constitute licensure to practice law in Arizona.

California The State Bar of California's Multijurisdictional Practice program permits qualified non-California attorneys to practice a limited scope of law in California. An attorney who is licensed to practice law in a U.S. jurisdiction may apply to be registered in the In-House Counsel Program or the Legal Services Attorney Program. Attorneys registered in these programs are not required to take the California bar exam but must submit an application for a moral character determination.

Colorado Corporate Counsel must register with the Office of Attorney Regulation.

Delaware Active attorneys may register as private legal service lawyers or government/corporate counsel. Private legal service lawyer fees are graduated based on years of admission elsewhere.

Florida There is not a separate fee, but authorized legal aid practitioners must file a bar application and make arrangements, including payment of applicable fees, to take the next available Florida Bar Examination. The graduated bar examination fee for attorneys is based on years of admission elsewhere.

Indiana Offers a "Business Counsel License."

Iowa Any attorney not admitted in Iowa, but who maintains an office or a systematic and continuous presence in the state for the practice of law as house counsel, must register with the Supreme Court.

Kansas Temporary admission on motion without examination of attorneys performing restricted legal services for single employers.

Kentucky Legal service and pro bono admissions are limited to certain employees of an organized public defender or legal services program in Kentucky. The license is limited to a period of 18 months.

Maryland Special license for attorneys who are associated with an organized legal services program that is sponsored or approved by Legal Aid Bureau, Inc., enabling them to practice law in Maryland for a period not to exceed 2 years. Corporate counsel may advise their employers without admission.

Minnesota A temporary legal services license may be applied for when an applicant has accepted employment in Minnesota with a legal services program. The license authorizes practice solely on behalf of the indigent clients of the designated legal services program and is valid for a period of 15 months. A house counsel license may be applied for on a temporary or permanent basis. A house counsel license is limited as to duration and scope of practice. Applicant must have been actively and lawfully engaged in the practice of law for at least 3 of the previous 5 years.

Nevada Must be employed by a legal aid bureau, public defender, or district attorney agency on a full-time basis, or employed as in-house counsel.

New Jersey An attorney who is in good standing in another jurisdiction may practice law in New Jersey for up to 2½ years with an approved legal services program. In-house counsel not admitted to the bar of New Jersey are required to obtain a limited license to practice law. Legal Services employment rule permits house counsel working in New Jersey to provide pro bono representation under the supervision of Legal Services of New Jersey, Inc.

New Mexico Supreme Court has approved a 1-year limited license for government attorneys and a limited license for legal services attorneys.

New York An attorney who has not failed the New York bar exam may be admitted for up to a period of 18 months if employed by a government agency or legal services program to appear solely on behalf of clients of the program.

Oklahoma Must be admitted in a reciprocal state; permit renewed each year through state bar.

Rhode Island The Rhode Island Supreme Court rules allow out-of-state attorneys to practice law in Rhode Island as in-house counsel upon registering with the Court. In-house counsel attorneys may only practice law in Rhode Island on behalf of the corporation and cannot appear in court or in agency or

municipal proceedings on behalf of the corporation without first obtaining pro hac vice admission.

South Carolina Limited licenses for in-house counsel, law school clinic program teachers. Limited license for retired or inactive lawyers to participate in the provision of legal services by approved legal services organizations or the pro bono program of the South Carolina Bar.

South Dakota Must be employed by a bar association, sponsored or governmentally funded legal aid bureau, or public defender agency. Admission is effective until the earliest of (1) failure to sit for first bar exam subsequent to order of admission, (2) announcement of bar exam results, (3) termination of employment, or (4) termination of admission by the Supreme Court.

Tennessee As of January 1, 2011, Tennessee will permit registration of in-house counsel only (MJP).

Washington Permits house counsel practice without registration if admitted to practice in another U.S. jurisdiction. Permits limited license for indigent representation (temporary, while awaiting exam and results), emeritus/pro bono (volunteers with legal services organizations), law school clinic faculty, military lawyers, and foreign house counsel.

West Virginia An indigent legal services or public defender program attorney may be admitted for up to 36 months without taking the bar examination or qualifying for admission on motion upon showing good moral character and fitness and admission in good standing in another jurisdiction.

Wisconsin Counsel not admitted in Wisconsin, but admitted in any other jurisdiction, must register with the Board within 60 days of hire as in-house/corporate counsel. After 3 years from date of registration, the attorney is eligible for admission on proof of practice. For attorneys who filed within 90 days of the effective date of the rule (January 1, 2009), all prior service may be counted for admission based on proof of practice.

Northern Mariana Islands Attorneys employed by the government or by Micronesian Legal Services are admitted on a limited basis without written examination. Limited admission carries a term of 4 years.

Palau An attorney employed on salary by national government or any state government of Palau or by Micronesian Legal Services may practice law for a period of up to 4 years without taking the bar exam.

EXHIBIT G

MEMORANDUM

TO: Karen L. Valihura

FROM: Clay T. Jester

CC: Frederick W. Iopst and Beth H. Christman

DATE: October 31, 2012

RE: Proposed Amendments to Rule 1.6 and Comments (Confidentiality) and Comment to Rule 1.17 (Sale of Law Practice)

Attached please find the submission of written recommendations of our sub-committee (conflicts/disclosure-105F) concerning Proposed Amendments to Rule 1.6 and Comments (Confidentiality) and Comment to Rule 1.17 (Sale of Law Practice).

After review of the related materials all of the members of our sub-committee agreed that the proposed Amendments are appropriate and should be recommended.

Fred graciously agreed to draft the attached recommendations of our committee and worked through Hurricane Sandy and its aftermath to do so.

CTJ/rjd
F:\CTJ\CTJ Misc\DSBA\Family Law Section\2012\M to Karen Valihura 121031.DOC

Re: Proposed Amendments to Rule 1.6 and Comments (Confidentiality) and Comment to Rule 1.17 (Sale of Law Practice)

Recommendation: Approval of suggested changes to DE Rules and Comments as proposed by the ABA Commission on Ethics 20/20 for the Model Rules and for reasons presented in the materials

The changes proposed concern potential conflicts of interest arising from a lawyer's change of employment or from changes in the composition or ownership of a law firm. The new Rule 1.6(b)(7) provides a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary 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. Further, new Rule 1.6(c) provides 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.

As new Comments [13] and [14] to Rule 1.6 make clear, when lawyers are considering changing firms or a lawyer is considering the purchase of a law practice, lawyers in different firms may need to disclose limited information about clients to each other to detect and resolve potential conflicts of interest. 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. Disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. Under those circumstances, disclosure is prohibited unless the client or former client gives informed consent.

New Comments [18] and [19] address the duty of a lawyer to safeguard competently information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by other lawyers or persons subject to the lawyer's supervision. The Comment enumerates factors to be considered in determining the reasonableness of of the lawyer's efforts to prevent access or disclosure. If the lawyer has made reasonable efforts to prevent access or disclosure, there is no violation of Rule 1.6(c).

Comment [7] to Rule 1.17 Sale of Law Practice has been amended to conform to and to cross-reference the changes in Rule 1.6 noted above.

The Report on these Rule and Comment changes points out correctly, in our view, that these proposed amendments would codify what has long been common practice and acknowledged as essential in ethics opinions (particularly Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility (2009)). Further, the Report addresses carefully and thoroughly the concerns raised about these changes. It explains that, given the importance of the issue and the increasing frequency with which it is arising, rule changes providing a firmer doctrinal basis for these disclosures and more readily available guidance on the limitations on such disclosures is warranted. We agree.

EXHIBIT H

TO: **Karen L. Valihura, Esquire**
Robert K. Beste, Esquire
FROM: **Diane M. Coffey**
RE: **Proposed Rule 4.4(c); Metadata**
DATE: **November 27, 2012**

MEMORANDUM

I. PROPOSED RULE

Proposed Rule 4.4(c): A lawyer shall not, without leave of the court, take steps to uncover metadata when the sender has expressly indicated, either orally or in writing, an intent to remove the metadata and the lawyer knows or reasonably should know that the metadata contains attorney work product or attorney-client confidences.

II. METADATA DEFINED

Metadata is often described as "data about data." The Sedona Conference Commentary on Ethics and Metadata, 1 (March 2012). Such metadata can include creation date, hidden text, formatting codes, formulae, and even previous revisions of the document. *Id.*; Oregon Legal Ethics Assistance for OSB Members, Formal Opinion No. 2011-187. Some writers—and courts—have taken the view that there are no fewer than seven different types of metadata. Sedona Conference. For the purposes of this analysis and this proposed rule, the distinction lies not between types of metadata, but rather in what type of information is contained within the metadata, regardless of form.

III. CURRENT STATE OF LAW

A. Other Jurisdictions

Seven states have prohibited a lawyer from examining a file for metadata: Alabama, Arizona, Florida, Maine, New Hampshire, New York and North Carolina. Andrew M. Perlman, The Legal Ethics of Metadata Mining, 43 Akron L. Rev. 785, 788 (2010); North Carolina State

Bar 2009 Formal Ethics Opinion 1, *Review and Use of Metadata* (January 15, 2010). These states generally "argue that metadata mining would damage the attorney-client relationship because clients would be less willing to communicate with counsel out of fear that their communications could not be adequately safeguarded." Perlman at 789. They further argue that "when a lawyer intentionally transmits an electronic document," he "plainly does not intend the [opposing] lawyer to receive the 'hidden' material or information." *Id.*

The American Bar Association, the Maryland State Bar Association, and the Vermont State Bar Association, however, permit mining for metadata. *Id.* These jurisdictions "emphasize that most metadata does not contain protected information and is thus unlikely to affect the attorney-client relationship." *Id.* They also say that "the sending attorney can take measures to extract metadata, so if an attorney distributes an electronic document with the metadata intact, it is reasonable to conclude that the sending attorney intended to include the metadata and make it available for review." *Id.* These jurisdictions have "concluded that metadata mining should be handled in the same way as inadvertent disclosures more generally;" because a lawyer has "the discretion to review misdirected documents . . . a lawyer should have the same discretion to review a document's metadata." *Id.*

The Bar of the District of Columbia has stated that "[a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent." *Id.* at 790. Colorado allows "metadata mining unless the receiving attorney is notified by the sender prior to the recipient's review of the metadata that the metadata contains confidential information. *Id.* The West Virginia Bar has stated that

> if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product or confidences. If, however, the recipient is not sure

> whether the disclosure of metadata was inadvertent, the lawyer is encouraged . . . to seek clarification from the sender before reviewing the metadata.

Id. The Pennsylvania Bar Association uses "a case-by-case inquiry [which depends] on a number of factors, including whether the lawyer could use the metadata as a matter of substantive law . . . , the potential effect on the client's matter if the lawyer reviews the metadata, and the client's views about metadata mining." *Id.*

Oregon and Washington use similar language. Oregon allows the review of metadata "as long as special software is not used to thwart the sender's reasonable efforts to remove or screen metadata." *Metadata Ethics Opinions Around the U.S.*, American Bar Association, http://www.abanet.org/tech/ltrc/fyidocs/metadatachart.html (last visited November 19, 2012). Washington allows the review of metadata "as long as special software is not used to recover metadata that is not readily accessible." *Id.*

B. Delaware Court of Chancery

The Delaware Court of Chancery has only addressed metadata on a limited basis, and did not mention the ethical repercussions of metadata mining. In *Ryan v. Gifford*, the Court of Chancery stated that "metadata may be especially relevant in a case such as this where the integrity of dates entered facially on documents authorizing the award of stock options is at the heart of the dispute." CIV.A. 2213-CC, 2007 WL 4259557 at 1 (Del. Ch. 2007) (*see attached*). The relevance of the metadata was apparent because the parties in *Ryan* "undoubtedly reviewed metadata as part of their investigation into backdating problems." *Id.* Because the parties reviewed metadata, the "asserted burdensomeness of producing documents in native file format" was undermined. *Id.* The court ordered the metadata to be produced because "plaintiffs ha[d] clearly shown a particularized need for the native format of electronic documents with original metadata." *Id.* Further, the court deferred ruling on the discoverability of some of the metadata

so that an in camera review could be conducted to determine whether the metadata was opinion work product, or simply work product in which disclosure could be compelled based on substantial need and undue hardship. *Id.* at 4.

In *Kinexus Rep. LLC v. Advent Software, Inc.*, the court "decline[d] to hold that the Court of Chancery Rules governing document production in 2005 required an OCR format or native file format, including metadata, without a particularized showing of need." CIV. A. 1161-CC, 2008 WL 4379607 at 3 (Del. Ch. 2008). Again, here, the court did not mention the ethical repercussions of metadata mining.

IV. REASONING

A. The Problem with a Flat Ban on the Review of Metadata

As discussed above, there are a number of different types of metadata, all of which serve different purposes, both in the storing/filing of documents and also with respect to discovery and litigation issues. The review of certain kinds of metadata is helpful and necessary and should be allowed; indeed, many businesses—including law firms—have complex servers and file storing systems that rely on the use of certain metadata to file, index, and search for documents. Similarly, many e-mail servers monitor the metadata embedded in both incoming and outgoing e-mail attachments for security purposes. These uses are vital to maintaining a useful and efficient system for storing electronic documents.

Additionally, courts have recognized the usefulness of the review of some metadata in certain situations. As described above, the Delaware Court of Chancery has held that disclosure of metadata can be compelled. The U.S. District Court for the District of Delaware has recently revised its default standard for discovery, requiring that certain forms of metadata be disclosed. *Revised Default Standard for Discovery, Including Discovery of Electronically Stored*

Information, District of Delaware, 6 (Dec. 8, 2011). While these court decisions do not concern the ethics of mining or reviewing metadata, they do lend support to the notion that not all review of metadata is problematic. Therefore a flat ban on the review of metadata would not only chill the discovery process, but it would create an ethical rule that is potentially at odds with existing discovery rules. With this in mind, in the discovery context, parties are encouraged to agree ahead of time on what metadata will be exchanged. This recommendation is also supported by federal guidelines, which "expect" parties to reach agreements on the parameters of discovery. *Id.* at 1. This proposed rule further encourages parties to agree upon precisely which metadata is "fair game," thereby avoiding both discovery and ethical violations.

However, while the review of many types of metadata is productive and should be allowed; the review and/or "mining" of metadata that includes attorney work product or privileged information should not be allowed. The question then becomes which framework to use in the governance of the review of metadata.

B. The Rules Governing Inadvertent Disclosure Do Not Adequately Address the Emerging Issues with Metadata

Some situations involving the review of metadata are appropriately governed by the rules for inadvertent disclosures. For example, Lawyer A has been editing a word document using the "track changes" feature and then electronically sends Lawyer B the document but forgets to turn off the track changes feature, such that when Lawyer B opens the document, she can immediately see some of the revisions to the document. This situation fits nicely into the rules for inadvertent disclosure because it is the electronic equivalent of the classic example of accidentally faxing the marked-up version instead of the final version. Since Lawyer A did not intend to leave the hidden data from the track changes feature in the document, and since Lawyer

B did not have to take any steps to uncover the metadata, this situation is appropriately governed by the existing rules regarding inadvertent disclosures.

Certain situations, however, differ enough from the classic fax machine example that they are not adequately governed by inadvertent disclosure rules. For example, Lawyer A again uses the track changes feature in a word document, but this time makes sure to turn the feature off before sending to Lawyer B, turns the word document into a PDF file and tells Lawyer B he is not disclosing the metadata for this document. Lawyer B then uses a third party program to uncover the content of the comments made in the track changes feature. Some writers argue that this too would be covered under inadvertent disclosure, as Lawyer A did not intend for such hidden embedded metadata to be part of the document. While it is true that Lawyer A did not intend for such metadata to still be part of the document, the key difference is that Lawyer B took additional steps to uncover the embedded metadata. In the classic example, Lawyer B did not take additional steps to uncover the physical document that showed up in the fax machine.

In the instant example, Lawyer A took actions to prevent the review of the metadata in the document and expressed his intent to Lawyer B. Therefore, if Lawyer B knows or reasonably should know that the metadata from the track changes function contains either attorney work product or otherwise privileged information, he may not attempt to review the metadata.

The overarching problem with applying the inadvertent disclosure rules in this case is that of "unringing the bell." Once the information has been seen by the opposing attorney, the damage may have already been done. Therefore, this rule specifically seeks to prevent attorneys from intentionally seeking out information that they know they are not intended to see. As such, the rules governing inadvertent disclosures are inadequate because, in many cases, they may not impose a duty until after the metadata has been reviewed.

C. Why Work-Product is an Appropriate Framework

As discussed above, the specific problem that this rule seeks to address is that of an attorney taking steps to uncover metadata that contains information that he would not otherwise be entitled to review. The work-product doctrine in the discovery context provides a useful framework with which to evaluate these metadata issues. The theory underlying the work-product doctrine in the discovery context is that a lawyer's thoughts, mental impressions, and other work on a matter should not be discoverable, since it would discourage attorneys from memorializing their work product. This theory is amplified in the metadata issue at hand. Not only is the sender's work product at issue, but the sender has taken steps to try to prevent that work product from being seen. If the courts have not been willing to allow access to such work product in the discovery context, there is no reason that receiving attorneys should be allowed to go rummaging through metadata to find it.

However, even the rules of discovery allow for the discovery of work product when there is substantial need and undue hardship. Such an exception is appropriate in the case of metadata as well. This situation will be governed in the same manner as it would in the discovery context. If an attorney believes that there is both a substantial need to review the metadata and that the absence of reviewing such metadata will create an undue burden, the proper course of action is filing a motion to compel, not engaging in self-help. Absent leave of the court, an attorney should not engage in his own review of metadata that he knows or reasonably should know contains work-product or other privileged information if the sending attorney has expressed an intent to conceal such metadata.

V. CONCLUSION

Although the existing rules for inadvertent disclosure provide some guidance, they do not sufficiently address whether lawyers can actively mine for metadata in certain situations. The proposed rule builds upon the work product doctrine, while not intruding on normal discovery procedures. The above proposed rule should adequately address the emerging issue of how attorneys should handle metadata, while encouraging attorneys to work together to address these concerns.

EXHIBIT I

M E M O R A N D U M

December 3, 2012

TO: Karen Valihura

FROM: Jessica Raatz

RE: November 9, 2012 Meeting Follow-Up Research

Following the November 9, 2012 meeting of the Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct (the "Committee"), you asked me to research issues related to ABA Proposals 105A and 105C including: (1) whether the Delaware courts have addressed metadata in the context of unauthorized disclosure; and (2) whether there is additional guidance from either in-state or out-of-state resources addressing the ethical implications of the international outsourcing.

Proposal 105A: Metadata

The memorandum from Diane Coffey gives a comprehensive overview of the inadvertent disclosure of metadata. *See* Memorandum from Diane M. Coffey to Karen L. Valihura & Robert K. Beste (Nov. 27, 2012) (hereinafter "Memo"). The two cited Delaware cases, *Ryan v. Gifford*, C.A. No. 2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007), and *Kinexus Rep. LLC v. Advent Software, Inc.*, C.A. No. 1161-CC, 2008 WL 4379607 (Del. Ch. Sept. 22, 2008), are also the most relevant Delaware cases that I found in the course of my

research.[1] For reference, the attached chart summarizes the different state approaches to metadata mining, which are also addressed in the Memo. *See* Tab 1.

Proposal 105C: Outsourcing

***Overview*:** Outsourcing refers to "using any third party to provide services previously provided by full-time employees." *See* K. William Gibson, *Outsourcing Legal Services Abroad*, LAW PRACTICE, 47 (July-Aug. 2008). Law firms engage third-parties directly and indirectly for both legal and non-legal work on temporary and long-term bases:

> Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and prepare motion papers in U.S. litigation.

See ABA, Formal Op. 08-451, *Lawyer's Obligations When Outsourcing Legal and Non-legal Support Services*, 1-2 (Aug. 5, 2008).

While domestic outsourcing has been common practice in the legal industry for decades, offshore outsourcing is a relatively new phenomenon. *See* Gibson, at 47 (noting that the legal services outsourcing industry in India has grown from $146 million in 2006 to $640 million in 2010); Patrick Poole, *Outsourcing Legal Work, Part I: Who's Sending What Where?*, OUTSOURCING, TECHNOLOGY (Mar. 1, 2012) (noting that the global legal services outsourcing

[1] Of note, other Delaware cases discuss metadata in the evidentiary context. *See, e.g.*, *Aequitas Solutions, Inc. v. Anderson*, C.A. No. 7249-ML, 2012 WL 5304155, at *3 (Del. Ch. Oct. 25, 2012) (noting that lack of metadata in produced documents was sufficient to show that the documents might have been fabricated); *Gen. Video Corp. v. Kertesz*, C.A. Nos. 2991-VCP, 3111-VCP, 2008 WL 3876199, at *5 n.41 (Del. Ch. Dec. 17, 2008) (relying on metadata to determine whether computer files were accessed by automated back-up system in the ordinary course, or specifically targeted and copied).

market is expected to be worth $2.4 billion by 2012).[2] Though offshore services began with administrative tasks, the industry is moving to increasingly sophisticated services, from technology support and data storage to purely legal services such as document review, contract drafting, due diligence, and legal research. *See* Fronterion LLC, *Ten for 2012: Top Ten Trends for Legal Outsourcing in 2012*, at 3 (2011). This trend has also led the rise of legal process outsourcing ("LPO") firms that specialize in connecting domestic law firms with offshore service providers. *See* Poole, at 1. In some instances, LPO firms even provide U.S.-lawyer review of outsourced work. *Id.*

***Foreign Outsourcing and the Rules of Professional Conduct*:** My research did not identify a single published opinion addressing legal malpractice relating to offshore outsourcing, in Delaware or otherwise. That said, Delaware courts have sanctioned both out-of-state and Delaware counsel in the context of domestic outsourcing arrangements. *See, e.g.*, *Manning v. Vellardita*, C.A. No. 6812, 2012 WL 1072233, at *4 (Del. Ch. Mar. 28, 2012) (finding that out-of-state counsel's conduct Court fell short of the "full and candid disclosures this Court expects of attorneys practicing within its jurisdiction," and referring the matter to home state disciplinary counsel); *In re Member of the Bar*, C.A. No. 313, 2006, 2006 WL 3169511 (Del. Nov. 1, 2006) (privately admonishing Delaware lawyer for allowing non-lawyer mortgage broker to receive and disburse funds in connection with refinancing of real property); *In re Member of the Bar*, No. 46, 2005 (Del. Bd. Prof'l Responsibility May 10, 2006); *see also* Ch. Ct. Guidelines R. 1 (describing the role of Delaware counsel); *cf. Lillis v. AT&T Corp.*, C.A. No. 717-VCL, 2009 WL 663946, at *2 (Del. Ch. Feb. 25, 2009) ("Delaware local counsel does not exist simply to act as a mailbox for out-of-state counsel.").

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[2] *Available at* http://www.legalethicsinmotion.com/category/outsourcing/ (accessed November 15, 2012).

Notwithstanding the lack of case law specifically addressing foreign outsourcing, several state disciplinary offices, local bar associations, and the ABA have issued opinions discussing the ethical implications of outsourcing legal services.[3] Every opinion has concluded that a lawyer may outsource legal work and meet his or her professional obligations. *See* Mark Ross, *Whitepaper: Ethics of Legal Outsourcing*, INTEGREON, 4 (2012). The overarching consensus is that "the ethical obligations of the outsourcing lawyer remain unchanged regardless of who performs what work, where and when. At the end of the day (whatever the time zone), it is the supervising lawyer who is responsible for the work." *See* Devika Kewalramani, *How to Outsource Legal Work – Ethically: Authorities Weigh In*, MOSES & SINGER LLP, 6 (Aug. 24, 2011).

***Best Practices Guidelines*:** Several commentators have issued "best practices" guidelines for foreign outsourcing of legal work. The guidelines generally advise that the U.S. attorney or firm use "reasonable efforts to ensure that an outsourcing vendor is providing competent legal representation," including, but not limited to:

- Conducting due diligence on the personnel and the company hiring the personnel;
- Conducting due diligence on the country where the LPO group is located;
- Making at least one site visit and have ongoing conference calls with team leaders and key personnel;
- Developing written procedures and protocols that the LPO group must follow;

[3] *See* Ass'n of the Bar of the City of N.Y. Comm'n on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006); Los Angeles County Bar Ass'n, Op. 518 (2006); North Carolina State Bar, Formal Ethics Op. 12 (2007); San Diego County Bar Ass'n Legal Ethics Op. 2007-1 (2007); Florida Bar Op. 07-2 (2008); ABA Committee on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008).

- Carefully considering both data security and physical location security issues; and

- Making sure that the client understands and agrees specifically to the type of work that is being outsourced and the identity and quality of the LPO group.

See Patrick Poole, *Outsourcing Legal Work, Part III: Best Practices When Hiring LPO Firms*, OUTSOURCING, TECHNOLOGY (Mar. 1, 2012) (citing Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, THE BOSTON BAR JOURNAL, 25-29 (Winter 2011)).[4]

***Proposed Rule Changes*:** The proposed changes to Rule 5.3 (responsibilities regarding nonlawyer assistance) provide additional guidance on a lawyer's obligations when outsourcing *non-legal* services while the proposed changes to Rules 1.1 (competence) and 5.5 (unauthorized practice of law) directly address a lawyer's obligations when outsourcing *legal* services. The proposed changes generally update the Rules of Professional Conduct to reflect the current state of the law. Of note, however, the proposed revision to Comment 6 of Rule 1.1 is especially relevant to foreign outsourcing. Specifically, the proposed revision provides, in relevant part:

> 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***.

See ABA Resolution 105C, Rule 1.1, cmt. 6 (Aug. 5-6, 2012) (emphasis added). In the ordinary course, a lawyer is not currently obligated to inform a client that legal work is being performed by a contract attorney. This proposed change recognizes, however, that the relationship between a hiring firm and its overseas contract attorneys is generally more attenuated than the relationship

[4] *Available at* http://www.legalethicsinmotion.com/2012/04/outsourcing-legal-work-part-iii-best-practices-when-hiring-lpo-firms-by-patrick-poole/ (accessed November 15, 2012).

between the firm and its domestic contract attorneys. *See* ABA, Formal Op. 08-451, *Lawyer's Obligations When Outsourcing Legal and Non-legal Support Services*, 5 (Aug. 5, 2008) (explaining that earlier policy was predicated on a high degree of supervision and control by the hiring attorney "so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct").

Tab 1

SUMMARY OF STATE METADATA ETHICS OPINIONS

Jurisdiction / Source	What is the Sender's Duty When Transmitting Metadata?	May the Recipient Review or "Mine" Metadata?	Must the Recipient Notify Sender if Metadata is Found?
ABA American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-442 Formal Opinion 05-437	**NONE** No explicit duty regarding metadata is imposed, but a number of methods for eliminating metadata (including "scrubbing," negotiating a confidentiality agreement, or sending the file in a different format) are suggested for attorneys who are "concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata." [06-442] Presumably, a lawyer's general duties with regard to the confidentiality of client information under Rule 1.6 apply to metadata.	**YES** After noting that some authorities have found metadata mining "ethically impermissible," the Committee states that it "does not share such a view, but instead reads the recent addition of Rule 4.4(b) identifying the sole requirement of providing notice to the sender of the receipt of inadvertently sent information, as evidence of the intention to set no other specific restrictions on receiving lawyer's conduct found in other Rules." [06-442]	**YES**, if lawyer knows or reasonably should know that transmission was inadvertent. ABA Formal Opinion 05-437 cites the Rule 4.4(b) provision that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." [05-437] The Opinion goes on to state that Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly" but "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer." [05-437]
ALABAMA Alabama State Bar Office of General Counsel Formal Opinion 2007-02	**REASONABLE CARE** The Alabama State Bar Commission found that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." [2007-02] The Commission went on to specify that the relevant factors in determining whether reasonable care was exercised "include steps taken by the attorney to prevent the disclosure of metadata, the nature and scope of the metadata revealed, the subject matter of the document, and the intended recipient." [2007-02]	**NO** The Commission found that "the receiving lawyer also has an ethical obligation to refrain from mining an electronic document." [2007-02] The Commission then went on to provide that "mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." [2007-02]	**NOT ADDRESSED**

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ARIZONA State Bar of Arizona Ethics Committee Ethics Opinion 07-03	**REASONABLE CARE** In discussing the issue, the State Bar of Arizona Ethics Committee cited a comment Arizona Ethical Rule 1.6 providing that when "transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients" and that "'reasonable' in the circumstances depends on the sensitivity of the information, the potential consequences of its inadvertent disclosure, whether further disclosure is restricted by statute, protective order, or confidentiality agreement, and any special instructions given by the client." [07-03] The Committee concluded by stating that lawyers "must take reasonable care not to violate any duty of disclosure to which the lawyer or the lawyer's client is subject." [07-03]	**NO** Arizona's Committee stated that lawyers "should refrain from conduct that amounts to an unjustified intrusion into the client-lawyer relationship that exists between the opposing party and his or her counsel" and in its conclusion provided that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it." [07-03]	**YES** The Committee noted that metadata "may be discovered by the recipient through inadvertent or relatively innocent means" and they "do not mean to imply that all such activity necessarily rises to the level of ethical concern." Nonetheless, they stated that if a recipient "discovers metadata by any means, and knows or reasonably should know that the sender did not intend to transmit the information, the recipient has a duty to follow the procedures set forth in [Ethical Rule] 4.4(b)." [07-03] Ethical Rule 4.4(b) requires that the recipient in such a situation "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." [ER 4.4(b)]
COLORADO Colorado Bar Association Ethics Committee Ethics Opinion 119	**REASONABLE CARE** The Colorado Bar Association Ethics Committee provided that the sending lawyer must "use reasonable care to ensure that metadata that contain Confidential Information are not disclosed to a third party," and later states that the "Sending Lawyer may not limit the duty to exercise reasonable care in preventing the transmission of metadata that contain Confidential Information by remaining ignorant of technology relating to metadata or failing to obtain competent computer support." [119]	**YES**, unless sender notifies recipient of inadvertent transmission of confidential information before recipient views metadata. According to Ethics Opinion 119, "a Receiving Lawyer generally may ethically search for and review metadata embedded in an electronic document that the Receiving Lawyer receives from opposing counsel or other third party." [119] If, however, the recipient is notified by the sender *before the recipient*	**YES** When the "Receiving Lawyer knows or reasonably should know that a Sending Lawyer (or non-lawyer) has transmitted metadata that contain Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived." In that situation, the recipient "must promptly notify the Sending Lawyer (or non-lawyer sender)." [119]

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		examines the metadata that confidential information was inadvertently transmitted in the metadata, then the "Receiving Lawyer must not examine the metadata and must abide by the Sending Lawyer's instructions regarding the disposition of the metadata." [119]	
FLORIDA The Florida Bar Ethics Department Ethics Opinion 06-02	**REASONABLE CARE** "It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications." [06-02]	**NO** "It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient." [06-02]	**YES** "If the recipient lawyer inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient, the lawyer must 'promptly notify the sender.'" [06-02]
MAINE Maine Board of Overseers of the Bar Professional Ethics Commission Opinion #196	**REASONABLE CARE** "...the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information." [196] This duty "requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information." [196]	**NO** "...we find that an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated." [196]	**NOT ADDRESSED** Maine's Commission does not provide explicit guidance on this question, though it does favorably reference the Florida approach to confidential metadata, which includes a requirement that the recipient notify sender of inadvertently transmitted metadata. [196]

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MARYLAND Maryland State Bar Association - Committee on Ethics Ethics Docket No. 2007-09 (MSBA Members Only)	**REASONABLE CARE** Note: the Maryland opinion is set "in the context of litigation," but given the "relatively recent growth of electronic discovery, technology associated therewith, and developing rules of procedure and case law" and the corresponding lack of precedent, the "scope of this Question will be general in nature." [2007-09] The Maryland Committee went on to state that "absent an agreement with the other parties (such as is contemplated in proposed Federal [Rules] 16(b)(5) and (6)), the sending attorney has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery." The Committee adds a caveat that not "every inadvertent disclosure of privileged or work product material would constitute a violation of Rules 1.1 and/or 1.6 since each case would have to be evaluated based on the facts and circumstances applicable thereto." [2007-09]	**YES** "Subject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata." [2007-09]	**NO** The Committee stated that, because Maryland's Rules of Professional Conduct had not been amended to include ABA Model Rule 4.4(b), they "do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials." Nevertheless, the Committee stated that "the receiving attorney can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate." [2007-09]
MINNESOTA Lawyers Professional Responsibility Board Opinion No. 22	**REASONABLE CARE** "A lawyer has a duty under the Minnesota Rules of Professional Conduct (MRPC), not to knowingly reveal information relating to the representation of a client, except as otherwise provided by the Rules, and a duty to act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure. *See* Rules 1.1, 1.6, MRPC. The lawyer's duties with respect to such information extends to	**FACT SPECIFIC** Opinion 22 does not establish a bright-line rule regarding the mining of metadata. Instead, the Board wrote that the opinion "is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this opinion." [No. 22]	**YES** "If a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC." [No. 22]

	and includes metadata in electronic documents. Accordingly, a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents." [No. 22]		
NEW HAMPSHIRE New Hampshire Bar Association - Ethics Committee Opinion 2008-2009/4	**REASONABLE CARE** Identifying that the "[e]xchange of electronic documents is an essential part of modern law practice," the New Hampshire Bar Association's Ethics Committee held that "a sending lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against disclosure of metadata that might contain confidential communication." [2008-2009/4] The committee added that "what constitutes reasonable care will depend upon the facts and circumstances" and therefore "there can be no *per se* rule on transmission of metadata." [2008-2009/4]	**NO** "The objective standard dictates a conclusion that receipt of confidential information in the form of metadata is the result of inadvertence, just as receipt of attorney notes stapled to a draft document would necessarily be the result of inadvertence. As a result, Rule 4.4(b) imposes an obligation on the receiving lawyer to refrain from reviewing the metadata." [2008-2009/4]	**YES** "To the extent that metadata is unintentionally reviewed, receiving lawyers should abide by the directives set forth in Rule 4.4(b)." [2008-2009/4] New Hampshire's Rule 4.4(b) provides that a "lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal." [NHRPC 4.4(b)]
NEW YORK New York State Bar Association - Committee on Professional Ethics Opinion 749 Opinion 782 Association of the Bar of the City of New York - Committee on Professional and Judicial Ethics	**REASONABLE CARE** The New York State Bar Association's Committee on Professional Ethics noted generally that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances." The extent of reasonable care "will vary with the circumstances."[782]	**NO** The Committee held that "in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of these Disciplinary Rules." [749]	**YES** The ABCNY's Committee on Professional and Judicial Ethics concluded that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected ... is not barred, at least as an ethical matter, from using the information," but also stated that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to

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Formal Opinion 2003-04	With regard specifically to metadata, the NYSBA Committee concluded its opinion by stating that "[l]awyers have a duty under DR 4-101 to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets." [782]		promptly take whatever steps he or she feels are necessary to prevent any further disclosure." [2003-04]
NORTH CAROLINA North Carolina State Bar Ethics Committee 2009 Formal Ethics Opinion 1	**REASONABLE CARE** Citing to comment [20] of North Carolina's Rule 1.6, the North Carolina State Bar's Ethics Committee declared that "a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients." The stated that reasonableness "depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata." [2009 Formal Ethics Opinion 1]	**NO** Addressing this question, the Committee states flatly that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship." [2009 Formal Ethics Opinion 1]	**YES** After stating that lawyers may not mine electronic documents for metadata, the Committee continued to write that "if a lawyer unintentionally views confidential information within metadata, the lawyer must notify thesender and may not subsequently use the information revealed without the consent of the other lawyer or party." [2009 Formal Ethics Opinion 1]
OREGON Legal Ethics Assistance for OSB Members Formal Opinion No. 2011-187	**REASONABLE CARE** Addressing this question, Oregon begins by noting that Oregon RPC 1.1 and 1.6, when read together, "indicate that a lawyer is responsible for acting competently to safeguard information	**YES**, as long as special software is not used to thwart the sender's reasonable efforts to remove or screen metadata. Oregon states that the applicable rule "does not require the receiving lawyer to return the document unread or to	**NO** Oregon notes that, because the sender has an obligation to exercise reasonable care to avoid sending confidential information, the receiving lawyer "could reasonably conclude that the metadata

	relating to the representation of a client in communications with others," and that a lawyer communicating electronically must "maintain at least a basic understanding of the technology and the risks of revealing metadata" or must "obtain and utilize adequate technology support." With this established the opinion then goes on to state that a lawyer "must use reasonable care to avoid the disclosure of confidential client information, particularly where the information could be detrimental to a client." For electronic documents, this "includes taking steps to prevent the inadvertent disclosure of metadata, to limit the nature and scope of the metadata revealed, and to control to whom the document is sent." Oregon also notes that reasonable care "will change as technology evolves." [Formal Opinion No. 2011-187]	comply with a request by the sender to return the document." Instead, the opinion suggests that this is a "matter of professional judgment reserved to the lawyer," but that the lawyer should "consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata." Finally, Oregon says that using special software to mine for metadata "when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute 'conduct involving dishonesty, fraud, deceit or misrepresentation'." [Formal Opinion No. 2011-187]	was intentionally left in." Therefore, "there is no duty under Oregon RPC 4.4(b) to notify the sender of the presence of metadata." [Formal Opinion No. 2011-187]
PENNSYLVANIA Pennsylvania Bar Association - Committee on Legal Ethics and Professional Responsibility Formal Opinion 2009-100 (PBA Members Only)	**REASONABLE CARE** The Pennsylvania Committee "believes that the Pennsylvania Rules of Professional Conduct require that the responsibility of keeping client confidences is primarily that of the sending attorney" and thus the "transmitting attorney has a duty of reasonable care to remove unwanted metadata from electronic documents before sending them to a third party." [2009-100]	**CASE-BY-CASE** The Pennsylvania Committee does not take a definitive stance on the mining of metadata. Rather, it suggests that attorneys must determine whether to use metadata on a case-by-case basis, factoring in their duties to the client under Rules 1.1, 1.2, and 1.4. Those "duties must be evaluated in light of relevant substantive and procedural law." [2009-100] The Committee concludes that a receiving lawyer: "(a) must then determine whether he or she may use the data received as a	**YES** In its opinion, the Committee noted that "attorneys in Pennsylvania who receive inadvertently disclosed documents have an ethical obligation to promptly notify the sender." And thus, if the recipient of an electronic document "concludes that the disclosure of metadata was inadvertent, the lawyer must promptly notify the sender of the receipt of the materials containing metadata." [2009-100]

		matter of substantive law; (b) must consider the potential effect on the client's matter should the lawyer do so; and, (c) should advise and consult with the client about the appropriate course of action under the circumstances." [2009-100]	
VERMONT Vermont Bar Association Professional Responsibility Section Ethics Opinion 2009-1	**REASONABLE CARE** Citing the "virtually unanimous" view on the topic amongst other bar associations, Vermont "agrees that, based upon the language of the [Vermont Rules of Professional Conduct[, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product document is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file." [2009-01]	**YES** After reviewing other opinions, "the Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata." The Section suggests that such a rule would limit "the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." [2009-01] The Section does not address whether inadvertent disclosure via metadata constitutes a waiver of a document's privileged status. That is a "question of substantive law" and the Section's research did not reveal "any case law in Vermont addressing the impact of inadvertent disclosure of privileged documents." [2009-01]	**YES** The Section states that, under VRPC Rule 4.4(b), "Vermont lawyers are subject to the obligation to notify opposing counsel if they receive documents that they know or reasonably should know were inadvertently disclosed." [2009-01]

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WASHINGTON WSBA Rules of Professional Conduct Committee Advisory Opinion 2216 (2012)	**REASONABLE CARE** Washington's Rules of Professional Conduct Committee stated that the sending lawyer "must make reasonable efforts to ensure that electronic metadata reflecting protected information is not disclosed in conjunction with the exchange of documents related to the presentation--i.e. that it is not reasily accessible to the receiving party." The Committee noted that this could be accomplished by disclosing documents in hard copy, via fax, PDF, "or by 'scrubbing' the metadata from electronic documents using software utilities designed for that purpose." [Advisory Opinion 2216]	**YES,** as long as special software is not used to recover metadata that is not readily accessible. The Washington Committee begins by stating that under the applicable ethical rules the recipient "is not required to refrain from reading the document, nor is [the recipient] required to return the document to [the sender]," though it's possible that the recipient may be "under a legal duty separate and apart from the ethical rules to take additional steps with respect the document." The Committe then discusses the use of "special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed'." The Committee writes that using such software would run contrary to Washington RPC 4.4(a), 8.4(d), and the public policy of preserving confidentiality between attorney and client. Thus, the Comittee writes that "the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules." [Advisory Opinion 2216]	**YES** The opinion states that upon discovering the presence of metadata, the receiving lawyer "has an ethical duty to 'promptly notify' [the sender] that the disclosed document contains readily accessible metadata." [Advisory Opinion 2216]
WASHINGTON, D.C. D.C. Bar - Legal Ethics Committee D.C. Opinion 341	**REASONABLE CARE** Outside of a discovery/subpoena context, lawyers transmitting documents have an obligation under Washington, D.C. rules "to take reasonable steps to maintain the confidentiality of the documents in their possession," which "includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either a confidence or	**NO**, if actual knowledge that metadata was sent inadvertently. While identifying that the exchange of metadata is most often "mutually helpful or otherwise harmless," the Washington, D.C. Committee concluded that "[w]here there is ... actual prior knowledge by the receiving lawyer as to the inadvertence of the sender, then notwithstanding the negligence or even ethical lapse of the	**YES**, if the recipient has actual knowledge that transmission of metadata was inadvertent. The receiving lawyer in such a situation must consult "with the sending lawyer to determine whether the metadata includes privileged or confidential information" and "comply with the instructions of the sender" if that is the

	a secret and to employ reasonably available technical means to remove such metadata before sending the document." [341]	sending lawyer, the receiving lawyer's duty of honesty requires that he refrain from reviewing the metadata until he has consulted with the sending lawyer to determine whether the metadata includes privileged or confidential information." If such information is present, "the receiving lawyer should comply with the instructions of the sender." [341] The Committee also specifies that a receiving lawyer has "actual prior knowledge if he is told by the sending lawyer of the inadvertence" before reviewing the document, or if the receiving lawyer "immediately notices upon review of the metadata that it is clear that protected information was unintentionally included." [341]	case. [341] If the recipient is "uncertain whether the sender intended to include particular information" he or she "should contact the sending lawyer to inquire." [341]
WEST VIRGINIA West Virginia Bar Association, Lawyer Disciplinary Board L.E.O. 2009-01	**REASONABLE CARE** A lawyer's duties under Rule 1.1 and Rule 1.6 "includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either confidential or privileged, and to employ reasonable means to remove such metadata before sending the document. Accordingly, lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures." [2009-01]	**NO**, if actual knowledge that metadata was sent inadvertently. The Board stated that "if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review metadata before consulting with the sending lawyer to determine whether the metadata includes work-product confidences." [2009-01] However, the Board also noted that "[i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue." [2009-01]	**YES**, if the recipient lawyer has actual knowledge that the metadata was inadvertently sent. In that case the lawyer "should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences." [2009-01] The Board also noted that when there is doubt as to whether metadata was sent inadvertently, "it is always safer to notify the sender before searching electronic documents for metadata." [2009-01]

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WISCONSIN State Bar of Wisconsin Ethics Committee Ethics Opinion EF-12-01	**REASONABLE CARE** Noting that lawyers regularly transmit "electronic documents containing information relating to the representation of their clients," the Wisconsin Ethics Committee stated that the Bar's rules regarding confidentiality and competence "require lawyers to stay reasonably informed about the types of metadata that are included in electronic documents they generate and take steps, when necessary, to remove the metadata." The Committee reviewed other ethics opinions regarding metadata and agreed "that Wisconsin lawyers likewise have a duty to take reasonable precautions to avoid disclosure of confidential information contained in metadata." The Committee stated that the specific precautions would "vary according to the circumstances of each use," and in some cases metadata may be of no importance or may be appropriately and deliberately left intact Lawyers are also required "to familiarize themselves sufficiently with the technological means to detect and remove, when necessary, metadata from electronic documents or obtain assistance of someone possessing such knowledge." The Committee declined to address specific methods of metadata removal. [EF-12-01]	**YES** Reviewing other bar opinions regarding metadata, the Committee noted that there is a "pronounced split regarding whether it is permissible for lawyers to mine for and use metadata received from opponents or third parties." That split was apparently echoed within the Committee, with a minority arguing that "because the only metadata worth searching for consists of another's property whose value may be diminished, destroyed or misappropriated by the very act of discovery, searching for metadata is either potentially dishonest (if the information is material) or pointless (if it is not)." Nevertheless, the majority of the Committee determined that applicable Wisconsin rules "do not prohibit lawyers from searching for and reviewing metadata included in an electronic document." The Committee adds one final cautionary note regarding lawyers who appear in multiple jurisdictions. Given that rules for other courts may prohibit reviewing metadata without the sender's approval, and because "it is difficult to shield oneself from information once discovered," the Committee provided that a lawyer who deliberately searches for metadata before such a tribunal could be "courting a violation" of Wisconsin's prohibition on the knowing violation of a tribunal's rules. [EF-12-01]	**YES** The Committee wrote that "absent circumstances indicating otherwise, a receiving lawyer should normally assume that any metadata of material significance that is exposed in an opposing counsel's electronic document was inadvertently transmitted." As such, Wisconsin's enactment of MRPC Rule 4.4(b) regarding Respect for Rights of Third Parties applies, and a "lawyer who chooses to review a document for metadata, and discovers metadata of material significance, must notify the sender of the discovery of the metadata." The Committee stresses, however, that the Rules do not impose "any duty beyond notification of the sender." The Committee also added that the duty of notification "supersedes the duty of confidentiality," meaning that "a lawyer discovering metadata of material significance must notify the sender even if the lawyer's client instructs the lawyer not to provide such notification." [EF-12-01]

*Excerpted from http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html, accessed November 28, 2012.

Tab 2

***Law Practice* Magazine**

LAW PRACTICE
THE BUSINESS OF PRACTICING LAW

THE INTERNATIONAL ISSUE

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FEATURES

OUTSOURCING SPOTLIGHT

Outsourcing Legal Services Abroad

By K. William Gibson

A *Time* magazine headline screams "Call My Lawyer ... In India." *Legal Affairs* asks "Are Your Lawyers in New York or New Delhi?" A recent New York conference offers "Effective Strategies for Managing Offshore Outsourced Relationships." The largest American and European law firms are setting up shop in India, the Philippines and elsewhere, or sending higher and higher levels of legal work to outsourcing companies in those countries. Why is all this work going overseas? Clients are tightening their belts and want their law firms, regardless of their size, to look for cost-saving strategies as well. Whether you want to get in the outsourcing game or not, understanding how the game is played will help you navigate in the times ahead.

Until recently, discussions about the outsourcing trend in the legal community took place mainly online, particularly among bloggers. But with the subject having moved beyond the blogs to *Time* and other mainstream media such as the *Wall Street Journal* and the *New York Times*, it appears that the "trend" has morphed into a full-blown phenomenon.

How big of a phenomenon is it? According to ValueNotes, an Indian research company that tracks legal process outsourcing, revenue from legal services outsourcing in India alone is slated to grow by almost a half-billion dollars by the decade's close—from $146 million for the calendar year 2006 to $640 million by the end of 2010. The industry employed around 7,500 people in the legal offshoring space in India as of year-end 2006, and that number is expected to reach 32,000 by the close of 2010.

But what exactly is legal outsourcing and the market realities behind it? Let's take a look.

Process, Parameters and Drivers: An Overview

According to attorney Ron Friedmann, formerly of Prism Legal Consulting and now working with Integreon, a legal process outsourcing company, "Outsourcing refers to using any third party to provide services previously provided by full-time employees."

Outsourcing may be done domestically or the work may be sent overseas. The term offshoring is often used to refer to outsourcing to a non-domestic provider. Friedmann also describes a variation, known as insourcing, a term for "shifting work to an owned-and-operated facility that is centralized and physically separate from the rest of the organization."

Outsourcing of legal services involves a mix of domestic outsourcing, sending work offshore to be done by third-party contractors, and sending work offshore to be done by overseas employees of the law firm that is sending the work. Law firms, particularly large ones in high-cost locations such as New York City, often outsource to lower-wage domestic locations within the United States by setting up facilities or sending work to third parties. That kind of outsourcing doesn't generate headlines, though.

The newsworthy side involves work that is flowing to low-wage regions in Asia, such as India, Bangladesh and the Philippines. Why these countries? For one thing, they have educated, English-speaking workforces. But U.S. law firms, and corporations for that matter, would not be tapping into those countries' workforces if there also weren't opportunities for significant cost savings. Those cost savings result, not surprisingly, from the fact that the workers in these offshore countries get paid a fraction of what American workers get for the same work.

Other market realities factor in as well. U.S. corporations that historically have given their legal work to U.S. law firms are now sending that work offshore—and some corporate legal departments have gone so far as to set up their own operations overseas or to establish direct relationships with -Indian law firms. In the bargain, the corporations are demanding reduced rates for the work that they are not sending overseas. That, of course, puts more pressure on U.S. firms to find ways to get work done for those clients at a lower cost. In response, U.S. law firms are now outsourcing everything from office support services to high-level legal work. ValueNotes' most recent study focuses on eight broad segments:

- Legal transcription
- Document review
- Litigation support
- Legal research
- Intellectual property
- Contract-related services
- Secretarial and legal publishing services

And there's no shortage of providers wanting to take that work. Indeed, an Internet search on "legal outsourcing" will generate advertisements from a very long list of law firms and legal process outsourcing companies in India and elsewhere, all ready and willing to handle everything from low-level clerical work to high-level patent application processing.

In addition, recent changes in federal rules regarding high-volume litigation seem to have spurred an increase in work flowing overseas. In the April 3, 2008, *Time* magazine article, "Call My Lawyer … In India," Suzanne Barlyn writes that recent amendments to the Federal Rules of Civil Procedure regarding electronic discovery are "boosting momentum" in legal outsourcing because document review costs "about $1 per page in India but can range from $7 to $10 per page in the U.S." The same article quotes the general counsel of -Chicago-based company TransUnion as saying that "Indian attorneys are currently reviewing more than a million litigation e-mails for the company, which costs less than $10 per hour."

Who's Leading the Developments

Not surprisingly, the short answer to the question of who's turned the trend into a phenomenon is the large U.S. and international law firms and their corporate clients. The reasons are many, but it essentially boils down to the fact that they have the critical mass to justify the time and expense of everything necessary—from selecting and developing relationships with outsourcing companies, deciding what work will be outsourced, setting up systems and procedures to coordinate the work-flow processes, and setting up the technical infrastructure (both at home and abroad) to support the flow of information and documents.

Of course, even among firms of big size and scale, there are those that remain reluctant to outsource any of their work processes, much less outsource that work to foreign countries. And among the firms that do outsource work overseas, there are some that don't want anyone to know that they are doing so.

"A challenge for us as a legal outsourcing provider," Friedmann says, "is that our customers don't want to go on record. Most will serve as references late in the selling cycle in a peer conversation with our prospective client law firms. We see signs that firms are becoming more open, though—for example, firms that have freely talked to the press about their outsourcing or offshoring."

Unlike some firms that don't want to talk about their outsourcing, Clifford Chance, which is one of the largest international firms, acknowledges its use of alternate ways to get work done. According to Sally Fiona King, chief operating officer for the firm's Americas region, Clifford Chance uses a "follow the sun approach." That approach includes a "mixture of onshoring, offshoring and outsourcing," with all hubs using "consistent processes, templates and house styles."

The Clifford Chance approach to outsourcing is elaborate and comprehensive. King reports that in 2007 her firm "formed a Global Shared Service Center in Delhi, India." This facility is a "Clifford Chance facility—with, importantly, our employees—and built at our speed," King says, adding that the facility "helps us consolidate some global functions and improves our efficiency and business continuity capability." By setting up its own facility, King says that her firm must deal directly with issues such as "recruitment, motivation, training, language, and maintaining the feel of one firm. However, we already do that in 20 countries,

so India is just another part of our global expansion."

According to King, for many industries shifting work to India means dealing with stateside implications, such as reduction in staff, retention issues and morale. However, Clifford Chance's existing global footprint and single-firm approach has helped ease those burdens for the firm. "I think we've benefited enormously from the fact that our offices in New York and Washington have been working with colleagues in London, Hong Kong, Moscow and so on for some time. Adding another office in India is just the latest step in our efforts to … improve the legal services we provide to our worldwide clients."

Some of the services Clifford Chance's Indian operations provide include IT applications deployment, packaging, online services and IT administrative tasks, as well as invoice payments and expense payments and processing. King reports that the firm plans to outsource additional accounting functions this year, including "reporting and month-end close."

Clifford Chance also outsources some of its document production requirements to an outsourcing firm in Mumbai, India (formerly Bombay). The firm has hubs in New York and London that are operated by Clifford Chance employees and housed in its offices; these hubs work in concert with the hub in Mumbai. What's been most essential to making these operations flow? "I believe communication has been the key to our efforts in India," says King. "It is important to obtain partnership buy-in and support, and open and honest communication is critical."

Who Else Is in the Game, and How They're Playing

Of course, not all outsourcing efforts are as elaborate and expansive as those undertaken by Clifford Chance and other big firms. And yes, there are even opportunities for midsize and smaller firms to get in the game and reduce certain costs through outsourcing—and some are doing exactly that. Maryland lawyer Richard Granat is one example.

Granat operates a solo "virtual" law firm and is also the president of Epoq US, a Web-enabled document assembly software company. He has used temporary paralegals for many years to do a variety of legal support tasks, from automated legal support to estate tax forms. Today he's using a firm in India that is staffed with graduate attorneys to do some of that work for both of his

businesses.

"Through my virtual law firm operation," he says, "I have used an Indian firm to do legal analysis for clients that I'm working with, and the results have been excellent—and it costs about 50 percent less than the cost of a U.S. paralegal. Since the person doing the work is an attorney trained in English common law, the quality of the work is often better." And he's getting similar results for the Epoq legal software company, using the same group in India to help automate documents.

"We've also assigned basic legal research," Granat says, "as in compiling statutory materials on a particular subject for every jurisdiction. This work has been excellent and our cost is about $12 an hour, and that cost includes the cost of online legal research services. This cost is less than it would cost [to have the work done by] a U.S. law student, and the work is more reliable." While he feels more hesitant about sending more specialized legal services overseas at present, he does foresee an expansion in how smaller U.S. firms will use the Indian outsourcing firms to serve their needs and increase their efficiency going forward. (See the sidebar on page 53 for more. Also see the page 50 story for a midsize firm's experience in using outsourcing.)

So how would a firm proceed in embarking on outsourcing to an offshore company? Many that are outsourcing work are doing so through third-party legal process outsourcing (LPO) firms, such as the one that Ron Friedmann works with—and the LPOs come in multiple sizes and flavors, like law firms themselves, so there are choices for firms of all sizes. The LPO hires the employees, secures the facility and sets up the work processes. U.S. firms thus avoid the higher costs of running their own operations in whatever area—although clearly the U.S. law firms may not have as much overall control over the operations and processes as they would if the workers and the facilities were their own.

To date, the growth in legal outsourcing has largely been in the moving of back-office operations. But as they grow more comfortable with sending tasks such as information technology and accounting overseas, some firms are moving to outsourcing not only for work that is done by support staff, but for higher-level work that has always been done by the firm's domestic attorneys—both associates and partners.

It seems that once firms find that they can outsource repetitive

clerical and support tasks done by lower-wage domestic employees, they begin to look for ways to outsource work being done at home by their higher-salaried technicians and professionals, including the lawyers. In fact, LPOs firms often "get their foot in the door" by working on clerical tasks. Once they establish a successful relationship with the U.S. law firm, they are then in a position to "sell up."

However, as ValueNotes CEO Arun Jethmalani points out in her company's report *Offshoring Legal Services to India*, "While most vendors start by offering lower-value services and gradually move up the value chain by demonstrating domain skills and gaining client confidence, there are others who focus on specific high-end services or niches." Adds the report's co-author Neeraja Kandala, chiming in on the service areas that are going to increase: "High-volume services like document review, e-discovery, legal publishing, as well as niche areas in intellectual property and contract services, will drive future growth in legal services offshoring," she predicts.

Enter the Regulators

Not surprisingly, with the increase in outsourcing, bar associations and other regulatory agencies have begun to look at the ethics issues involved. Among those weighing in to provide some guidance to lawyers about outsourcing legal work are bar associations from Los Angeles and San Diego to Florida and New York. Most of the ethics opinions address issues such as when a lawyer must advise a client that the client's work is being outsourced, as well as issues relating to fees that may or may not be charged to clients for work that is being done elsewhere.

In 2006 the ethics committee of the New York City Bar was among the first to issue a formal opinion on outsourcing. The question was whether a New York lawyer may "ethically outsource legal support services overseas" to either a "foreign lawyer" or "a layperson" and, if so, what ethical considerations must be addressed. The opinion says that "outsourcing is ethically permitted" and then lays out a list of conditions and ethical considerations, including the obligation to supervise the people doing the work, to advise the client (and get the client's permission) when the work is being outsourced, and to have a conflicts-checking system in place.

The New York City Bar also went a step further, weighing in on the "duty to bill appropriately for outsourcing overseas" by saying that "absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service" (citing ABA formal opinion 93-379 (1993)).

Billing is also among the issues covered in a proposed advisory opinion on outsourcing from the Florida Bar's ethics committee, which was affirmed by the committee in January of this year. That opinion covers a range of other issues as well, including the unauthorized practice of law, conflicts, supervision and confidentiality.

To what extent this and other ethics opinions in various jurisdictions may put a damper on outsourcing—particularly by limiting firms' ability to improve the spread between what they pay for services and what they charge their clients—isn't yet clear. For today, though, as indicated by the numbers cited earlier, the outsourcing movement keeps picking up steam.

What Waits in the Times Ahead

So where might things go from here? More growth in outsourcing may well result from the financial challenges that law firms are facing currently and will continue to face during the next several years. Consider how economic downturn results in lower revenue for many types of practices, and this at a time when clients are putting even more pressure on billing rates and overall legal expenses. Combine that with higher costs of doing business (including first-year associates making $165,000 at the largest domestic firms) and the idea of shipping work elsewhere to be done at lower cost begins to sound appealing.

Many of the big players are already in the game. But just when and how other firms will approach the idea of sending work overseas remains to be seen. We'll simply have to stay tuned.

About the Author

K. William Gibson *is a personal injury lawyer and arbitrator in Clackamas, OR. He is a member of the Law Practice Editorial Board and is leading a delegation of lawyers to India in November to explore the issue of legal services outsourcing.*

Tab 3

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 08-451 **August 5, 2008**

Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services

A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them.

In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.[1]

Many lawyers engage other lawyers or nonlawyers, as independent contractors, directly or through intermediaries, on a temporary or an ongoing basis, to provide various legal and nonlegal support services. Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2008. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
321 N. Clark Street, Chicago, Illinois 60610-4714 Telephone (312)988-5300
CHAIR: Steven C. Krane, New York, NY ❑ T. Maxfield Bahner, Chattanooga, TN ❑ Amie L. Clifford, Columbia, SC ❑ Edwin L. Felter, Jr., Denver, CO ❑ Terrence M. Franklin, Los Angeles, CA ❑ Susan R. Martyn, Toledo, OH ❑ Robert H. Mundheim, New York, NY ❑ Arden J. Olson, Eugene, OR ❑ Mary Robinson, Downers Grove, IL ❑ Sylvia E. Stevens, Lake Oswego, OR ❑
CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel
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prepare motion papers in U.S. litigation.

The outsourcing trend is a salutary one for our globalized economy. Labor costs vary greatly across the United States and throughout the rest of the world. Outsourcing affords lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing the outsourced services can do so at lower rates than the lawyer's own staff. In addition, the availability of lawyers and nonlawyers to perform discrete tasks may, in some circumstances, allow for the provision of labor-intensive legal services by lawyers who do not otherwise maintain the needed human resources on an ongoing basis. A small firm might not regularly employ the lawyers and legal assistants required to handle a large, discovery-intensive litigation effectively. Outsourcing, however, can enable that firm to represent a client in such a matter effectively and efficiently, by engaging additional lawyers to conduct depositions or to review and analyze documents, together with a temporary staff of legal assistants to provide infrastructural support.

There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as required by Rule 1.1. Comment [1] to Rule 1.1 further counsels:

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

There is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary "legal knowledge, skill, thoroughness and preparation." One lawyer may choose to do all of the work herself. Another may delegate tasks to a team of subordinate lawyers and nonlegal staff. Others may decide to outsource tasks to independent service providers that are not within their direct control. Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.

However, Rules 5.1 and 5.3 impose additional obligations on lawyers who have "direct supervisory authority" over other lawyers and nonlawyers. Rule 5.1(b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Correlatively, Rule 5.3(b) requires lawyers who employ, retain, or associate with nonlawyers to "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." These provisions apply regardless of

whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm.[2]

The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and nonlawyers working for her in an effective manner.

At a minimum, a lawyer outsourcing services for ultimate provision to a client should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.

When engaging lawyers trained in a foreign country, the outsourcing lawyer first should assess whether the system of legal education under which the lawyers were trained is comparable to that in the United States. In some nations, people can call themselves "lawyers" with only a minimal level of training. Also, the professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States, and whether the nation's disciplinary enforcement system is effective in policing

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2. Although Comment [1] to Rule 5.1 states that "[p]aragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers *in a firm*" (emphasis supplied), we do not believe that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within "firms" as defined in Rule 1.0(c). A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm. As discussed below, the contrary is true in many respects.

its lawyers. The lack of rigorous training or effective lawyer discipline does not mean that individuals from that nation cannot be engaged to work on a particular project. What it does mean is that, in such circumstances, it will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers – perhaps viewing them as nonlawyers – before relying upon their work in rendering legal services to the client.

Consideration also should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality. Similarly, the judicial system of the country in question should be evaluated to assess the risk of loss of client information or disruption of the project in the event that a dispute arises between the service provider and the lawyer and the courts do not provide prompt and effective remedies to avert prejudice to the client.

There are several additional considerations that must be taken into account under the Model Rules. First, at the outset, it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps to obtain the client's informed consent to the engagement of lawyers or nonlawyers who are not directly associated with the lawyer or law firm that the client retained. In Formal Opinion 88-356,[3] we opined that when a lawyer engaged the services of a temporary lawyer, a form of outsourcing, an obligation to advise the client of that fact and to seek the client's consent would arise if the temporary lawyer was to perform independent work for the client without the close supervision of the hiring lawyer or another lawyer associated with her firm. Relying on Rule 1.2(a), requiring lawyers to consult with clients as to the means by which the clients' objectives are to be pursued, Rule 1.4, relating to client communication, and Rule 7.5(d), prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact, we concluded that clients are entitled to know who or what entity is representing them, and thus could veto the lawyer's use of a temporary lawyer.

Relatedly, the lawyer may not make affirmative misrepresentations to the client regarding the status of lawyers and nonlawyers who are not in the lawyer's employ under Rule 7.1, requiring truthfulness in communications regarding lawyer services, and Rule 8.4(c), prohibiting dishonesty, fraud, deceit, or misrepresentation.

We recognize that Formal Opinion 88-356 held that the client ordinarily is not entitled to notice that its legal work is being performed by a temporary lawyer. We stated that "[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to

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3. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers).

the representation is inherent in the act of retaining the firm." However, that statement was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct. That ordinarily will not be the case in an outsourcing relationship, particularly in a relationship involving outsourcing through an intermediary that itself has the employment relationship with the lawyers or nonlawyers in question.

Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The implied authorization of Rule 1.6(a) and its Comment [5] thereto to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.

Also, the outsourcing lawyer should be mindful of the obligation to "act competently to safeguard information relating to the representation of a client 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."[4] This requires the lawyer to recognize and minimize the risk that any outside service provider may inadvertently – or perhaps even advertently – reveal client confidential information to adverse parties or to others who are not entitled to access.[5] Written confidentiality agreements are, therefore, strongly advisable in outsourcing relationships. Likewise, to minimize the risk of potentially wrongful disclosure, the outsourcing lawyer should verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters; in such an instance, the outsourcing lawyer could choose another provider.

Second, the fees charged by the outsourcing lawyer must be reasonable and otherwise comply with the requirements of Rule 1.5. In Formal Opinion No. 00-420,[6] we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between

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4. Rule 1.6, cmt. 16.

5. Cf. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 95-398 (Oct. 27, 1995) (Access of Nonlawyers to a Lawyer's Data Base).

6. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 00-420 (Nov. 29, 2000) (Surcharge to Client for Use of a Contract Lawyer).

the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract.[7] The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.

Finally, the outsourcing lawyer must be mindful of the admonition of Rule 5.5(a) to avoid assisting others to "practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction...." This Committee lacks the authority to express an opinion as to whether the provision of legal services by any particular lawyer, nonlawyer, or intermediary constitutes the unauthorized practice of law. Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer. We note only that if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).

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7. See ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 93-379 (Dec. 6, 1993) (Billing for Professional Fees, Disbursements and Other Expenses).

Tab 4

FRONTERION LLC
Presents

TEN for 2012

Ten for 2012

Top Ten Trends for Legal Outsourcing in 2012

Fronterion L.L.C. is an international management consultancy which focuses exclusively on advising law firms and corporations on outsourced legal services. We assist our clients to capitalize on a changing legal landscape and confidently engage in legal outsourcing initiatives based on unrivalled industry insight.

For more information on how these emerging trends will impact your organization in coming year or regarding Fronterion, contact info@fronterion.com or +1.312.473.4887.

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Ten for 2012:

Top Ten Trends for Legal Outsourcing in 2012

An insider's guide to the changing dynamics set to impact the legal outsourcing field in the coming year.

The emergence of legal process outsourcing (LPO) has reshaped the profession and pushed the boundaries of the delivery of legal services. In 2012, LPO will continue to have a significant impact on all legal professionals – both competitively and in terms of how they practice law.

For the third year in a row, Fronterion is releasing its highly anticipated report, *Fronterion Ten for 2012: Top 10 Trends in Legal Outsourcing for 2012*. Countless hours of research and consulting experience by Fronterion professionals – including direct interactions with vendors and buyers of LPO services – have gone into this year's trending report.

The result is a vital guide to the trends impacting the LPO landscape in the coming year. Past trending projections have been reported in the *ABA Journal*, *Legal Technology News*, *Lawyers Weekly* and many other publications.

As the LPO industry continues its evolution from a niche practice to game-changer and as numerous challenges lie ahead, 2012 is poised to be another dynamic year.

The Top Ten Trends for 2012 are:

1. **Profitability Squeeze for LPO**
2. **Growth Beyond Litigation Support**
3. **Technology and LPO Combine**
4. **Adoption of LPO Techniques**
5. **Law Firm Insurers Target LPO**
6. **Changes in the Executive Ranks**
7. **LPO Faces Formidable Competition**
8. **Winner-take-all Mentality**
9. **Changing Professional Guidelines**
10. **Evolution of the Law Firm-Client Relationship**

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#1 Profitability Squeeze for LPO

The shrinking gap between wages in the developing and developed countries and accelerating growth of onshore LPO services will combine to squeeze margins for LPO vendors in 2012.

Wage inflation abroad and soft labor markets domestically in the United States and United Kingdom have significantly narrowed the cost differential for the legal professionals performing LPO services. Fronterion has observed that offshore LPOs charge clients $25-35 per hour for basic legal services while contract review attorneys in the U.S., particularly in the Midwest, often are charging comparable rates of $25-30 per hour, according to sources cited by *The Wall Street Journal*. Similarly, in the U.K., comparable rates for legal professionals are seen in many areas outside of London.

The soft labor rates in the domestic legal sector place a natural cap on the amount LPO vendors can charge their clients, despite the increasingly expensive wages they pay their offshore staff. This squeeze in profitability is only set to increase in 2012 as the newly minted law graduates in the U.S. and U.K., who flocked to law schools during the downturn, are now seeking to join the workforce.

These challenges for the offshore model are not limited to the LPO industry. GE Chairman Jeff Immelt was reported in a separate article by *The Wall Street Journal* to say that the costs of running a U.S.-based call center had narrowed to 10% from a similar venture in India. The *Aon Hewitt Annual India Salary Increase Survey* projects 13% wage inflation in 2011, which potentially will increase with higher double-digit wage inflation in India in the coming year.

While a significant portion of the value proposition for LPO lies beyond basic labor arbitrage, most legal professionals, all things being equal, prefer to keep legal work domestically. For example, challenges with the offshore LPO model – such as professional obligations, client comfort, time zone differentials, language barriers and data protection concerns – are easily sidestepped when using domestic legal vendors.

As a result, the adoption of onshore or domestic LPO services represents a major growth segment for the LPO industry. But the pervasiveness of onshore LPO delivery in 2012 may hamper the overall LPO industry as vendors struggle to 1) convey a compelling value proposition opposed to law firms setting up their own domestic outsourcing centers (see Trend 4), and 2) remain profitable given

1. O'Connell, Vanessa. "Lawyers Settle... for Temp Jobs." *The Wall Street Journal* 15 June 2011.
2. Beckett, Paul. "GE's Immelt on the Frustrations of India." *The Wall Street Journal*. 14 Mar. 2011.
3. Aon Hewitt. *Aon Hewitt Annual India Salary Increase Survey*. 2011.
4. Lamont, James. "India Struggles to Cap Wage Inflation." *The Financial Times* 12 May 2011.

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lower margins on more expensive legal personnel domestically and abroad.

In 2011, for the first time, fast-growing LPO firms began to feel this pressure, exacerbated by the challenging economic climate. Fronterion observed that some LPO vendors froze hiring, or even shed jobs, as a result. This trend will continue to have an impact in 2012.

#2 Growth Beyond Litigation Support

The unsustainable concentration on litigation support services presents one of the most fundamental challenges facing the LPO industry in 2012.

Helping clients prepare for large-scale litigation was one of the first outsourced legal services to gain widespread adoption and remains by far the most popular. But in the coming year, LPO vendors more than ever, will seek to diversify service lines – from contract management to due diligence on M&A transactions – as legal professionals become more comfortable with LPO collaboration both on and offshore. This ability to integrate LPO beyond litigation support services provides one of the greatest opportunities for the LPO industry to secure its place in the legal landscape.

Litigation support is the easiest service line to outsource in part because it is the most readily broken down into discrete legal tasks through what is known as legal disaggregation. Also, litigation support has a clear value proposition and requires limited day-to-day oversight and integration by law firms.

While LPO vendors have historically offered a broad suite of legal services, significant client adoption of non-litigation support services has proven to be problematic. Expanding service adoption in 2012 will be an uphill battle for LPO vendors, but worth the effort. Failing to make this expansion and provide a progressive value proposition to clients, the LPO industry faces the risk of commoditization and stagnation. Furthermore, future advances in e-discovery technology or changes in disclosure requirements could make LPO litigation support services, which employs scores of legal professionals manually reviewing documents, obsolete.

#3 Technology and LPO Combine

In the coming year, legal technology platforms will be increasingly bundled together with traditional LPO offerings,

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combing two of the most important trends shaping the legal profession today. This means using software systems as well as low-cost human labor to provide cheaper and more efficient legal services.

As technology is increasingly paired with manpower, 2012 represents a year of both opportunity and challenge for LPOs. Advances in legal technology will create opportunities for greater legal service disaggregation, expanding the scope of LPO offerings. But in the long-term, certain manual LPO services may become automated or eliminated altogether by computer programs which cost less than even the cheapest worker. In addition, LPOs still largely operate on a similar hourly model as law firms and traditional legal staffing firms. This hourly-billing model is increasingly under threat from alternative billing methods and may give way to bundled technology-service models.

Bundling LPO services with technology offerings will be an essential differentiator for outsourcers in 2012, but LPOs should be wary of over-committing to a single technology platform or deviating from their primary focus of delivering process-driven legal support services, as opposed to technology development. Examples of technology applications LPOs might use include contract management repositories, document review platforms, or legal research technologies, which can trawl through thousands of documents for key themes and phrases.

#4 Adoption of LPO Techniques

The broad adoption of LPO techniques in 2012 comes as a supreme validation of the LPO approach and will more than ever reshape the practice of law.

In 2012, Fronterion projects a definitive shift as law firms and legal professionals across the board act more like LPO vendors. That means replicating LPO-like approaches based on process, reporting and rigorous project management. LPO techniques deliver more scalable and transparent services through better management and consistent quality.

The start of this trend has already been seen in 2011 with a number of law firms making landmark announcements concerning their establishment of wholly-owned captive centers in their own jurisdictions using LPO techniques. Law firm clients often find it attractive to have an integrated LPO-based captive center within the law firm – confident

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that all of their interests are covered under the umbrella of the law firm's professional obligations, and perhaps more importantly, the law firm's professional liability policies. The question remains, how much depth of experience and appetite do law firms have to adopt these process-driven techniques?

The adoption of LPO techniques is not limited to law firms as traditional legal vendors augment existing operations with LPO techniques and corporate legal departments expand offshore back office centers to include legal functions based on an LPO model.

#5 Law Firm Insurers Target LPO

As outsourcing becomes more common, the unique nature of LPO services creates new risks for legal professionals that will be addressed by law firm insurers in the coming year.

The malpractice lawsuit against a prominent AmLaw firm in 2011 is one of the first public examples of the risks posed by using third-party legal vendors. In 2012, Fronterion sees a growing focus on vendor risk as the primary driver for insurers taking a holistic view of law firms' sourcing initiatives as primary professional liability policies may not be suitable for these new exposures.

Firms revisiting or renewing professional liability policies in the coming year may find new exclusions, and possibly new products specifically tailored for a law firm's use of third-party legal vendors. Additionally, law firms may be required to adopt a similar rationalization of e-discovery technology vendors. A firm-wide or enterprise approach instead of piecemeal outsourcing can both reduce the risks by imbedding systems that allow greater control and supervision of offsite lawyers.

See the *Fronterion Law Firm Liability Report* for more details on this trend. (www.fronterion.com/liability)

#6 Changes in the Executive Ranks

The shifting skill set required for leading an LPO in this evolving industry, along with growing pressure on existing management to produce results, will drive changes in executive ranks at many LPO vendors in the coming year.

Fronterion observed significant personnel changes at nearly all the

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major vendors in the last two quarters of 2011 and expects this trend to continue or accelerate in 2012.

The primary driver for this trend is the transition to more operationally-minded leadership, with new executives focusing on improving efficiency and profitability, opposed to the entrepreneurial focus of leaders at many LPO vendors today.

Additional drivers for executive changes include greater competitive pressure from mainstream legal vendors (see Trend 7) and expectations from owners on firm profitability, as opposed to top line revenue growth.

Investment timelines will also play a part in this trend next year. Institutional investors backing many of the major LPOs want to see profitable growth. Otherwise, investors may seek exit opportunities as they near the end of the typical investment cycle.

Even if founders remain in place, they may find themselves supported by a changing demographic of leaders within their organization as the required skill sets for the industry continue to evolve.

#7 LPO Faces Formidable Competition

As LPO achieves greater acceptance in the coming year, LPO vendors face intense competition from more formidable mainstream legal vendors.

Sending legal work offshore or to one of the many onshore LPO centers located domestically will become significantly less novel than in years past. As corporate clients grow to expect value-based options, law firms will preemptively use LPOs and increasingly include LPO vendors in client request for proposal (RFP) responses.

This represents a major milestone for the industry and expanding opportunities for growth. But, the proliferation of LPO also presents a new set of challenges for vendors. While the practice is much more widely accepted, LPOs are now competing against established, well-capitalized legal service vendors such as staffing firms and discovery vendors, as well as law firms with specialized delivery centers.

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#8 Winner-take-all Mentality

As the LPO industry matures in 2012, the industry will continue to coalesce around an inner-circle of LPO vendors.

Fronterion does not expect a radical restructuring of the LPO industry in the coming year, but we do expect to see client consolidation as cash flows dry up for LPO vendors not in the inner-circle.

The 2012 economic climate will make it unlikely that new stand-alone LPO vendors will attract the additional capital required to compete with existing industry heavyweights. In 2012, most major LPO vendors will have been established for eight to ten years and will have received some portion of external financing. Furthermore, legal professionals are less concerned with price, but are highly sensitive to an LPO vendor's track record and market positioning.

This environment will make it much harder for newcomers to enter the LPO scene and may well lead to the exit of fringe players outside the inner core of LPO firms. It will take a very inventive and well-funded start-up to break into this hierarchy and have an impact on the LPO industry. We expect the most movement in the industry to come from existing LPO vendors or established legal vendors expanding into LPO service lines.

#9 Changing Professional Guidelines

U.S. law firms, and even more so those in the U.K., are evolving toward greater openness to alternative legal service delivery and LPO-inspired approaches – driven by technology and a fundamentally changing legal profession.

Next year U.S. and U.K. professional and regulatory bodies are due to publish the results of studies on the impact of outsourcing. Many important areas are yet to be addressed. How should the relationship between a law firm, client and an LPO work? How can a law firm bill a client for work undertaken by an outsourced lawyer? What happens when things go wrong? While regulators have been slow to offer tangible guidance to legal professionals wrestling with the radical changes reshaping the legal profession, outsourcing will increasingly come under the spotlight in 2012.

Specifically in the U.S., the American Bar Association (ABA) is reportedly

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presenting recommendations for modifications to professional guidelines to the ABA House of Delegates in August of 2012. While in the U.K., the Solicitors Regulation Authority (SRA) has not specifically released a timeline to address outsourced legal services, it is confronting many new issues with the adoption of the Legal Services Act and may be required to provide additional guidance in the coming year. The arrival of the Legal Services Act in the U.K. will allow, in theory, a host of new competitors to traditional law firms. It could also release a flood of investment into the legal industry and accelerate the modernization of legal services.

Furthermore, as LPO continues to achieve global adoption, the ripples of LPO also may lead to new professional guidance in additional jurisdictions such as India and Australia.

#10 Evolution of the Law Firm-Client Relationship

The injection of a third-party legal vendor into what was a straightforward law firm-client relationship is set to result in significant changes in the coming year.

The growing sophistication and autonomy of legal vendors, such as LPOs, are primary drivers for the shift in the law firm-client relationship structure. Previously, legal vendors were directly engaged and overseen by the law firm, in the case with legal staffing firms, literally in the offices of the law firm.

In the coming year, however, in-house legal departments will increasingly contract directly with legal vendors creating conflicting concerns for law firms. For example, how can law firms oversee, and be responsible for, services provided by a vendor with which the firm is not even contractually engaged? These new structural relationships and resulting work products are often beyond what the law firms' insurance policies were designed to cover (see Trend 5).

Fronterion also has found that some corporate in-house lawyers actually prefer to tap the expertise of LPO providers directly. For example, due to the LPO vendors' focus and service volumes, they have increasingly demonstrated superior expertise compared to their law firm counterparts for certain tasks, like searching documents for key words and phrases.

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These developments will continue to create fundamental questions around the role of the law firm. For example, is the role of the law firm to act purely as a legal specialist or are the responsibilities of the law firm to be taken more broadly so that the firm acts like a general contractor coordinating inputs from various other law firms and legal outsourcing vendors?

While many factors will dictate the degree of changes to the law firm-client relationship, it is certain that this relationship structure will be very different at the end of 2012 than when the year began.

About Fronterion

Fronterion can help you recognize how these emerging trends will impact your organization and discover opportunities to thrive in a changing legal landscape.

Fronterion is the foremost legal consulting firm exclusively focused on advising law firms and corporate counsel on outsourced legal services. Working with some of the largest law firms in the world, Fronterion helps clients structure and implement highly innovative legal outsourcing engagements.

Fronterion provides leading-edge webinars, training workshops, compliance audits, industry research and advisory services to legal professionals seeking to capitalize on the pervasive impact of outsourced legal services.

For more information about Fronterion, contact media@fronterion.com. Additional resources are available at www.fronterion.com and www.fronterion.com/TenFor2012

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