Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

February 3, 2020
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	Simón Cantarero, Chair
Rule 5.4: Report from Subcommittee; review of advertising rules to send to Supreme Court as package with Rule 5.4.	Tab 2	Cory Talbot (Chair), Judge Gardner, Simón Cantarero, Gary Sackett, Tim Conde, and Steve Johnson
Rule 8.4 and 14-301: Review Standard 3 and accompanying comment for internal consistency; discuss the use of "Rules" versus "Standards"	Tab 3	Adam Bondy (Chair), Steve Johnson, Dan Brough, Cristie Roach, and Alyson McAllister
Rule 6.5: Review of Subcommittee proposal	Tab 4	Hon. Michael Edwards (Chair), Phillip Lowry, Vanessa Ramos, Joni Jones, and Katherine Venti
Other business: expedited response to legislative requests		Simón Cantarero, Chair

2020 Meeting Schedule:

March 16

April 20

May 18

June 15

July 20 (will likely cancel)

August 17

September 21

October 19

November 16

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

MINUTES OF THE SUPREME COURT'S

ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

November 18, 2019

The meeting commenced at 5:02 p.m.

Committee Members Attending:
Daniel Brough (via telephone)
Simón Cantarero, Chair
Hon. Michael Edwards
Hon. James Gardner
Steven G. Johnson (emeritus)
Joni Jones
Philip Lowry (via telephone)
Alyson Carter McAllister
Hon. Trent Nelson (emeritus) (via telephone)
Vanessa Ramos
Austin Riter (via telephone)
Gary Sackett (emeritus)
Cory Talbot
Katherine Venti
Billy Walker (via telephone)

Guests:
None

Members Excused:
Amy Oliver (jury duty)
Padma Veeru-Collings

Not Present
Adam Bondy
Tim Conde
Cristie Roach
Hon. Darold McDade

Staff:
Keisa Williams

Recording Secretary:
Jurhee Rice

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

I. Welcome and Approval of Minutes

Mr. Cantarero determined quorum and welcomed the committee.

Motion:

Mr. Talbot moved to approve the minutes from the September 16 meeting. Ms. Venti seconded the motion. The motion passed unanimously.

II. Rule 5.4: Report from Subcommittee

The Rule 5.4 subcommittee, chaired by Cory Talbot, believes that the amendments to Rule 5.4 may require an additional amendment to rule 1.1E. The Subcommittee feels that changes to Rule 5.4 is likely in anticipation to the implementation of the Sandbox but would not be applicable to those firms not changing their current practice. The Subcommittee would like to review Rule 1.5(e) regarding reasonable fees. The Subcommittee will meet and discuss concerns regarding Rule 5.4 with Chief Justice Himonas. The Subcommittee will follow up at next meeting in February.

III. Rule 8.4 and 14-301: Review of Standard 3 and accompanying comment for internal consistency: discuss the use of "Rules" versus "Standards"

The subcommittee recommended that court personnel be added but removed venue as it is not necessary. The subcommittee will review Rule 8.4 and 14-301 to find uniformity and determine whether each numbered section should be called a standard. Subcommittee will follow up with update at next meeting in February.

IV. Rule 6.5: Review of Subcommittee Proposal

No meeting of subcommittee. Will table this review until next meeting.
Reconstitution of subcommittee to include: Hon. Michael Edwards, Phillip Lowry, Vanessa Ramos, Joni Jones, and Katherine Venti.
Hon. Michael Edwards will serve as chair for this subcommittee.

The subcommittee will meet and provide an update including proposals ready to vote on and ready to present to the Court at the next meeting in February.

V. Other business

None

VI. Scheduling of Future Meetings

February 03, 2020 at 5:00 p.m.
March 16, 2020 at 5:00 p.m.

VII. Adjournment

The meeting adjourned at 6:29 p.m.

Tab 2

Rule 5.4A. Professional Independence of a Lawyer.

(a) A lawyer or law firm may provide legal services pursuant to sections (b) and (c) of this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer or law firm may share legal fees with a nonlawyer.~~A lawyer or law firm shall not share legal fees with a nonlawyer, except that:~~

~~(1) an agreement by a lawyer with the lawyer's firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;~~

~~(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price; and~~

~~(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and~~

~~(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.~~

(~~b~~c) A lawyer may permit a person to recommend, employ, or pay the lawyer to render legal services for another.~~A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.~~

(~~c~~d) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.~~A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.~~

(~~d~~e) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(~~e~~f) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

Comment

[1] ~~The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.~~ The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client and may not interfere with the lawyer's professional judgment~~. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment~~.

[2] Whether in accepting referrals, fee sharing, or working in a firm where nonlawyers own an interest in the firm or otherwise manage the firm, the lawyer must make certain that the professional core values of protecting the lawyer's professional judgment, ensuring the lawyer's loyalty to the client, and protecting client confidences are not compromised in any way. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.~~The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent)~~

[2a] This Rule is different from the ABA Model Rule.

~~[a] Paragraph (a)(4) of the ABA Model Rule was not adopted because it is inconsistent with the provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees. Rule 5.4(e) addresses a lawyer practicing in a non-profit corporation that serves the public interest. There is no similar provision in the ABA Model Rules.~~

Rule 5.4B. Professional Independence of a Lawyer

(a) Notwithstanding Rule 5.4A, and subject to Utah Supreme Court Standing Order No. 15, a lawyer may provide legal services pursuant to section (b) of this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer may practice law in an organization in which a financial interest is held or managerial authority is exercised by a one or more persons who are nonlawyers, provided that the lawyer shall:

(1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements should not interfere with the lawyer's professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent). This Rule does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of partnering with a lawyer.

[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Rule 5.4A. Professional Independence of a Lawyer.

(a) A lawyer or law firm may provide legal services pursuant to sections (b) and (c) of this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer or law firm may share legal fees with a nonlawyer.

(c) A lawyer may permit a person to recommend, employ, or pay the lawyer to render legal services for another.

(d) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(e) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(f) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided that the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

Comment

[1] The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client and may not interfere with the lawyer's professional judgment.

[2] Whether in accepting referrals, fee sharing, or working in a firm where nonlawyers own an interest in the firm or otherwise manage the firm, the lawyer must make certain that the

professional core values of protecting the lawyer's professional judgment, ensuring the lawyer's loyalty to the client, and protecting client confidences are not compromised in any way. It may be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to disclose client information to third parties, as the lawyer's duty to maintain client confidences would be compromised.

[2a] This Rule is different from the ABA Model Rule.

Rule 5.4B. Professional Independence of a Lawyer

(a) Notwithstanding Rule 5.4A, and subject to Utah Supreme Court Standing Order No. 15, a lawyer may provide legal services pursuant to section (b) of this Rule only if there is at all times no interference with the lawyer's:

(1) professional independence of judgment,

(2) duty of loyalty to a client, and

(3) protection of client confidences.

(b) A lawyer may practice law in an organization in which a financial interest is held or managerial authority is exercised by a one or more persons who are nonlawyers, provided that the lawyer shall:

(1) before accepting a representation, provide written notice to a prospective client that one or more nonlawyers holds a financial interest in the organization in which the lawyer practices or that one or more nonlawyers exercises managerial authority over the lawyer; and

(2) set forth in writing to a client the financial and managerial structure of the organization in which the lawyer practices.

Comments

[1] The provisions of this Rule are to protect the lawyer's professional independence of judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from the disclosure of their confidential information. Where someone other than the client pays the lawyer's fee or salary, manages the lawyer's work, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a), such arrangements should not interfere with the lawyer's professional judgment. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent). This Rule does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not authorize a nonlawyer to practice law by virtue of partnering with a lawyer.

[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(a)(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(a)(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(a)(3) the fee customarily charged in the locality for similar legal services;

(a)(4) the amount involved and the results obtained;

(a)(5) the time limitations imposed by the client or by the circumstances;

(a)(6) the nature and length of the professional relationship with the client;

(a)(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(a)(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(d)(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(d)(2) a contingent fee for representing a defendant in a criminal case.

~~(e) A division of a fee between lawyers who are not in the same firm may be made only if:~~

~~(e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;~~

~~(e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and(e)(3) the total fee is reasonable.~~

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (a)(1) through (a)(8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee but is obligated to return any unearned portion. See Rule1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the

requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

~~Division of Fees~~

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

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

Disputes over Fees

~~[9]~~ [7] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled

to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Rule 7.1. Communications Concerning a Lawyer's Services.

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

(~~a~~i) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(~~b~~ii) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or

(~~c~~iii) contains a testimonial or endorsement that violates any portion of this Rule.

(b) A lawyer shall not interact with a prospective client in a manner that involves coercion, duress, or harassment.

Comment

[1] This Rule governs all communications about a lawyer's services~~, including advertising permitted by Rule 7.2.~~. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] 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; the use of actors or dramatizations to portray the lawyer, law firm, client, or events; the courts or jurisdictions where the lawyer is permitted to practice, and other information that might invite the attention of those seeking legal assistance.

[4] 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.

~~[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.~~5] A lawyer may claim to be certified as a specialist in a field of law if such certification is issued by an American Bar Association-accredited certification program. ~~granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as the Utah State Bar, that has been approved by the state authority to~~

Comment [NS1]: Supreme Court voted for Option 1 but the fees issue needs to be dealt with. Eliminate 7.2(b) or bring substantive comment up into the rule. A lot in comment is operative regulatory language. DONE

~~accredit organizations that certify lawyers as specialists.~~ Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification. A lawyer can communicate practice areas and can state that he or she "specializes" in a field based on experience, training, and education, subject to the "false or misleading" standard set forth in this Rule. ~~Also, a lawyer can communicate about patent and trademark and admiralty practice.~~

[6] ~~There is a potential for abuse when a lawyer, seeking pecuniary gain, contacts a person known to be in need of legal services, especially if the contact is in person or otherwise "live." Unrequested contact may subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.~~ In order to avoid coercion, duress, or harassment, a lawyer should proceed with caution ~~and appropriate boundaries~~ when initiating contact with someone in need of legal services, especially when the contact is "live," whether that be in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection.

[7] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[9] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading.

[10] It is misleading to use the name of a lawyer holding public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not

Comment [NS2]: Rewrite this since Utah doesn't have a state authority. DONE

Comment [NS3]: Rewrite this. The negative implication of this sentence is odd. DONE. Language added to comment 3 re courts or jurisdictions where the lawyer is permitted to practice.

Comment [NS4]: Eliminate comment? DONE. Eliminated first part of comment. Last part of comment clarifies 7.1(b).

practicing with the firm. A firm may continue to use in its firm name the name of a lawyer who is serving in Utah's part-time legislature as long as that lawyer is still associated with the firm.

[11] See Rules 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another); and ~~See also~~ Rule 8.4(e) ~~for the~~ (prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

[~~4a~~12] ~~The Utah Rule is different~~This Rule differs from the ABA Model Rule. ~~Subsections (b), (c), and (c~~d~~) are added to the Rule to give further guidance as to which communications are false or misleading.~~Additional changes have been made to the comments.

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) If the advertisement uses any actors to portray a lawyer, members of the law firm, or clients or utilizes depictions of fictionalized events or scenes, the same must be disclosed.~~

~~(c) All advertisements disseminated pursuant to these Rules shall include the name and office address of at least one lawyer or law firm responsible for their content.~~

~~(d) Every advertisement indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall set forth clearly the client's responsibility for the payment of costs and other expenses.~~

~~(e) A lawyer who advertises a specific fee or range of fees shall include all relevant charges and fees, and the duration such fees are in effect.~~

~~(f) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a~~A ~~lawyer may give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending lawyer's services~~

~~() A~~ ~~lawyer may pay the reasonable cost of advertising permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service plan.~~

~~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, 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 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. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

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

Paying Others to Recommend a Lawyer

[5] Except as permitted by Paragraph (f)this rule, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work. For guidance, a gift or pattern of gifts with a fair market value of more than $100.00, whether an item, a service, cash, a discount, or otherwise may be deemed to be greater than nominal.

[2] Nothing 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 (f), 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, Internet-based advertisements and group advertising. A lawyer may compensatethis Rule is intended to prohibit a lawyer from compensating 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, and any payment to the lead generator is consistent with the lawyer's obligations under these rules. To comply with this 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 Rule 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[63] A lawyer may pay the usual charges of a legal service plan or a lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is an organization that holds itself out to the public to provide referrals to lawyers with appropriate experience in the subject matter of the representation. No fee generating referral may be made to any lawyer or firm that has an ownership interest in, or who operates or is employed by, the lawyer referral service, or who is associated with a firm that has an ownership interest in, or operates or is employed by, the lawyer referral service.

[74] A lawyer who accepts assignments or referral 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 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 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.~~the Rules.

~~[85] For the disciplinary authority and choice of law provisions applicable to advertising, see Rule 8.5.~~

~~[8a] This Rule differs from the ABA Model Rule in that it defines "advertisement" and places some limitations on advertisements. Utah Rule 7.2(b)(2) also differs from the ABA Model Rule by permitting a lawyer to pay the usual charges of any lawyer referral service. This is not limited to not-for-profit services. Comment [6] to the Utah rule is modified accordingly.~~
~~] This Rule differs from the ABA Model Rule.~~

Reserved.

Rule 7.3. 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:~~

~~(a)(1) is a lawyer;~~

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

~~(a)(3) is unable to make personal contact with a lawyer and the lawyer's contact with the prospective client has been initiated by a third party on behalf of the prospective client.~~Reserved.

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

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

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

~~(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from 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 of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). For the purposes of this subsection, "written communication" does not include advertisement through public media, including but not limited to a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, television or webpage.~~

~~(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 other real-time communication 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 when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The 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.~~

~~[3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed 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 to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, live telephone or real-time electronic persuasion that may overwhelm a person's judgment.~~

~~[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person or other real-time communications, will help to ensure 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 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.~~

~~[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or where the lawyer has been asked by a third party to contact a prospective client who is unable to contact a lawyer, for example when the prospective client is incarcerated and is unable to place a call, or is mentally incapacitated and unable to appreciate the need for legal counsel. Nor is there a serious potential for abuse in situations where the lawyer is motivated by considerations other than the lawyer's pecuniary gain, or when the person contacted is also a lawyer. This rule is not intended to prohibit a lawyer from applying for employment with an entity, for example, as in-house counsel. 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 their members or beneficiaries.~~

~~[5a] Utah's Rule 7.3(a) differs from the ABA Model Rule by authorizing in-person or other real-time contact by a lawyer with a prospective client when that prospective client is unable to make personal contact with a lawyer, but a third party initiates contact with a lawyer on behalf of the prospective client and the lawyer then contacts the prospective client.~~

~~[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress or~~

~~harassment within the meaning of Rule 7.3(b)(2), or that involves contact with 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 as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).~~

~~[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 the 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. 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.~~

~~[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.~~

~~[8a] Utah Rule 7.3(c) requires the words "Advertising Material" to be marked on the outside of an envelope, if any, and at the beginning of any recorded or electronic communication, but not at the end as the ABA Model Rule requires. Lawyer solicitations in public media that regularly contain advertisements do not need the " Advertising Material" notice because persons who view or hear such media usually recognize the nature of the communications.~~

~~[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization that 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, live person-to-person contacts or other real-time electronic solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).~~Reserved.

Rule 7.4. Communication of Fields of Practice.

~~(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.~~

~~(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.~~

~~(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or substantially similar designation.~~

~~(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:~~

~~(d)(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and~~

~~(d)(2) the name of the certifying organization is clearly identified in the communication.~~

~~Comment~~

~~[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.~~

~~[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.~~

~~[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.~~ Reserved.

Rule 7.5. Firm Names and Letterheads.

~~(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.~~

~~(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.~~
Reserved.

~~(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.~~

~~(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.~~

~~**Comment**~~

~~[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer who has not been associated with the firm or a predecessor of the firm, or the name of a nonlawyer.~~

~~[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.~~

~~Effective December 19, 2018~~

Rule 7.1. Communications Concerning a Lawyer's Services.

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

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

(ii) is likely to create an unjustified or unreasonable expectation about results the lawyer can achieve or has achieved; or

(iii) contains a testimonial or endorsement that violates any portion of this Rule.

(b) A lawyer shall not interact with a prospective client in a manner that involves coercion, duress, or harassment.

Comment

[1] This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] 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; the use of actors or dramatizations to portray the lawyer, law firm, client, or events; the courts or jurisdictions where the lawyer is permitted to practice, and other information that might invite the attention of those seeking legal assistance.

[4] 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.

[5] A lawyer may claim to be certified as a specialist in a field of law if such certification is issued by an American Bar Association-accredited certification program. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in

Comment [NS1]: Supreme Court voted for Option 1 but the fees issue needs to be dealt with. Eliminate 7.2(b) or bring substantive comment up into the rule. A lot in comment is operative regulatory language. DONE

Comment [NS2]: Rewrite this since Utah doesn't have a state authority. DONE

any communication regarding the certification. A lawyer can communicate practice areas and can state that he or she "specializes" in a field based on experience, training, and education, subject to the "false or misleading" standard set forth in this Rule.

[6] In order to avoid coercion, duress, or harassment, a lawyer should proceed with caution when initiating contact with someone in need of legal services, especially when the contact is "live," whether that be in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection

[7] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[9] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(d), because to do so would be false and misleading.

[10] It is misleading to use the name of a lawyer holding public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not practicing with the firm. A firm may continue to use in its firm name the name of a lawyer who is serving in Utah's part-time legislature as long as that lawyer is still associated with the firm.

[11] See Rules 5.3 (duties of lawyers and law firms with respect to the conduct of non-lawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another); and Rule 8.4(e) (prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law).

[12] This Rule differs from the ABA Model Rule. Additional changes have been made to the comments.

Rule 7.2. Advertising.

Reserved.

Rule 7.3. Solicitation of Clients.

Reserved.

Rule 7.4. Communication of Fields of Practice.

Reserved.

Rule 7.5. Firm Names and Letterheads.

Reserved.

AMERICAN BAR ASSOCIATION

CENTER FOR INNOVATION
STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL REGULATION
STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the majority of middle-income Americans who lack meaningful access to legal services when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve the public.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have been adopted or are under review in a growing number of state supreme courts and that are also under study by state and local bar associations, such as the authorization and regulation of new categories of legal services providers, the reexamination of Rule 5.4 of a jurisdiction's rules of professional conduct, and the reexamination of provisions related to the unauthorized practice of law.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest.

REPORT

I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people below the poverty line and a majority of middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.[1] Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.[2] Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.[3] As a result of these and related problems, the United States ranks 103rd out of 126 countries in terms of the accessibility and affordability of civil legal services.[4]

Traditional solutions to fixing this "access to justice" crisis are not enough. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs (06A112A).[5] These efforts are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.[6]

The legal profession cannot solve these problems alone. The public needs innovative models for delivering competent legal services, and such models require the knowledge and expertise of other kinds of professionals, such as technologists and experts in the design of efficient and user-friendly services.[7] The existing regulatory structure for the legal profession, however, increasingly acts as a barrier to the involvement of other professionals, both within and outside of law firms. Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, have recognized this problem and are working to address it by proposing or adopting substantial regulatory innovations.[8] More U.S. jurisdictions are

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[1] LEGAL SERVS. CORP., JUSTICE GAP REPORT: MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.
[2] NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.
[3] Jack Karp, *No Country For Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019), https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert.
[4] WORLD JUSTICE PROJECT, RULE OF LAW INDEX: CURRENT AND HISTORICAL DATA (2019), https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019/current-historical-data (rankings are available in the downloadable spreadsheet).
[5] AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 06A112A https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
[6] *See, e.g.*, Anna E. Carpenter, et al., *Studying the "New" Civil Judges,* 2018 Wisc. L. Rev. 249, 284 (2018) (noting that "[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se").
[7] *See generally* STANFORD LEGAL DESIGN LAB, http://www.legaltechdesign.com/ (last visited Nov. 4, 2019).
[8] *See, e.g.,* ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS (2019), https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=

considering doing the same. In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise, rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery that improve the quality of justice, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with consumer protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA models rules, such as the Model Rules of Professional Conduct. The ABA should nevertheless play a leadership role by adopting policies that encourage more state-based regulatory innovations, collecting and analyzing the data from those innovations, and using the resulting data to shape future reform efforts, including appropriate changes to or adoption of new ABA model rules and policies.

II. The Need for Regulatory Innovation

The Resolution calls for U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while retaining necessary and appropriate client and public protections.[9] This Resolution is consistent with one of the recommendations of the ABA Commission on the Future of Legal Services (Commission), which recommended that "[c]ourts … consider regulatory innovations in the area of legal services delivery."[10]

2019-10-07-084849-750; THE UTAH WORKGROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf; Press Release, N.M. Admin. Office of the Courts, Supreme Court Work Group to Consider Non-attorney Option for Providing Civil Legal Servs. (May 21, 2019), https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71caea83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf; *Task Force on Access Through Innovation of Legal Services*, CAL. BAR ASS'N, http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services (last visited Nov. 4, 2019); *Special Committee on Technologies Affecting the Practice of Law*, FLA. BAR, https://www.floridabar.org/about/cmtes/cmte-me104/ (last visited Nov. 4, 2019).

[9] *See, e.g.,* AM. BAR ASS'N MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES (2016) (identifying public protections that should be considered when exploring regulatory changes, such as the independence of professional judgment, the protection of privileged and confidential information, and the accessibility of civil remedies for negligence and breach of other duties owed). Innovations must include necessary and appropriate protections for the public. Depending on the type of innovation and services provided, the traditional legal requirements of informed consent, client confidentiality, avoidance of certain conflicts and disclosure of other conflicts and fiduciary obligations may be appropriate but not necessary, while in other situations certain core requirements of professional ethics will be both necessary and appropriate.

[10] AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (Recommendation 2).

As noted above, the evidence is clear that existing solutions to the access to justice crisis are insufficient and that we need new ideas, such as regulatory reforms to unlock new delivery models. Although the need for change is compelling, the evidence does not yet support any particular regulatory innovation. For this reason, the resolution encourages U.S. jurisdictions to consider a few general categories of reform without endorsing any specific changes.

III. Categories of Regulatory Innovation

In general, states are currently considering three broad areas of regulatory reform as part of their efforts to improve the affordability, accessibility, and quality of civil legal services and civil justice.

A. Authorizing and Regulating New Categories of Legal Services Providers

Just as healthcare providers other than doctors can provide services to patients and reduce healthcare costs, legal service providers other than lawyers can do the same. Two major ABA reports recently reached a similar conclusion, recommending that U.S. jurisdictions consider authorizing and appropriately regulating new categories of legal services providers.

In 2014, the ABA Task Force on the Future of Legal Education concluded that a broader array of professionals should be permitted to deliver legal services:

> Broader Delivery of Legal and Related Services: The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive remediation.[11]

More recently, in its final report, the ABA Commission on the Future of Legal Services concluded that it "supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services

[11] ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [hereinafter LEGAL EDUCATION REPORT].

providers (LSPs)."[12] The Commission offered several examples of these efforts:

> Examples of such LSPs include federally authorized legal services providers [such as those who have long represented individuals before the Social Security Administration] and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other in-stances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.[13]

There is not yet sufficient evidence to endorse any particular LSP model, so the Commission merely called for U.S. jurisdictions to consider authorizing new categories of legal services providers:

> The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

The Resolution takes a similar approach and merely encourages U.S. jurisdictions to consider this kind of regulatory reform.

B. Experimenting with Variations to Rule 5.4

Rule 5.4 of the Model Rules of Professional Conduct generally prohibits lawyers from partnering and sharing fees with anyone who is not a lawyer. This prohibition impedes the development of innovative legal service delivery models,[14] especially those

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[12] AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), *supra* at 40-41.

[13] *Id.* Since the Commission's report was written, Utah has created Licensed Paralegal Practitioners starting in 2019 and New Mexico is considering the creation of Limited Licensed Legal Technicians that are similar to those in Washington state.

[14] WILLIAM HENDERSON, STATE BAR OF CAL., LEGAL SERVICES LANDSCAPE REPORT (2018), http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022382.pdf.

that require the active involvement of other kinds of professionals, such as technologists, or that need substantial outside capital to succeed. Modifying Rule 5.4 in ways that do not sacrifice client and consumer protection and that permit other professionals to participate more fully in the development of impactful solutions is another tool that can be available for those who wish to use it.

The growing experience around the world with such arrangements – often called alternative business structures (ABS) – suggests that there is a great deal to gain by experimentation in this area.[15] For this reason, several states recently adopted or are proposing significant liberalization of their versions of Model Rule 5.4.[16]

The ABA Commission on the Future of Legal Services called for this kind of review. In its final report, the Commission recommended "continued exploration" of reforms in this area so that "evidence and data regarding the risks and benefits associated with" ABS can be developed and assessed.

The benefits from such reforms are compellingly stated in a recent book by United States Supreme Court Justice Neil Gorsuch:

> All else being equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local "superstores." Yet Rule 5.4 of the ABA's Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining "any interest" in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can't secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels….
>
> Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer investment since 2007. In the first two years of the program, 386 so-called "alternative business structures" (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50

[15] *Id*.
[16] *See* ABA CTR. FOR INNOVATION, LEGAL INNOVATION REGULATORY SURVEY, http://legalinnovationregulatorysurvey.info/ (last visited Nov. 4, 2019).

> percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it's no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.[17]

On several occasions, the ABA has considered and rejected amendments to Model Rule 5.4 that would have permitted some form of ABS. The primary argument against such changes was that they would have jeopardized a lawyer's professional independence. These concerns, however, fail to recognize that lawyers already exercise professional independence in conceptually similar situations.[18]

Another reason to be skeptical of the concern about professional independence is that there is no evidence of public harm in the increasing number of the countries that now permit lawyers to practice in some form of ABS.[19] The ABA Commission on the Future of Legal Services made a similar observation in its final report:

> The Commission's views [calling for continued exploration of reforms in this area] were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers' ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised." Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS.[20]

Despite the limited risks associated with liberalizing Rule 5.4 to allow lawyers to practice in settings outside the traditional law firm or to seek equity funding from the capital markets and the potential innovations that might accompany it, it is also clear that there is not yet enough data to know what the "model" approach to this subject should be or

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[17] NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 258-60 (2019).

[18] Justice Gorsuch explains:

> For example, we permit third parties (e.g., insurance companies) to pay for an insured's legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden while here, by contrast, they may stand to lose financially. But surely it shouldn't be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when it's in our financial interest.

*Id.*at 260.

[19] ABA COMM'N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER REGARDING ALTERNATIVE BUSINESS STRUCTURES 11 (2016), https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf; LEGAL SERVS. BD., TECHNOLOGY AND INNOVATION IN LEGAL SERVICES 2018, https://www.legalservicesboard.org.uk/research/technology-and-innovation-in-legal-services-2018 (last visited Nov. 4, 2019).

[20] *See* LEGAL EDUCATION REPORT, *supra* note 11, at 42.

what effect ABS will have on addressing the access to justice crisis. For this reason, the resolution does not propose a specific change to Model Rule 5.4 and instead merely encourages jurisdictions to try new approaches so that we can learn from them and assess their impact.

C. New Approaches to the Unauthorized Practice of Law

The resolution also encourages U.S. jurisdictions to develop more permissive approaches to the unauthorized practice of law (UPL). U.S. jurisdictions often define UPL broadly or in such an ambiguous way that prospective innovators do not want to risk developing new services and face allegations that they are engaging in UPL. Appropriate and careful liberalization of UPL provisions can change this dynamic and encourage more innovation.

With appropriate re-regulation, the risks from more permissive UPL rules are small. For example, in the United Kingdom, rather than trying to define the practice of law, the Legal Services Act of 2007 provides that anyone can perform law-related activities unless those activities are specifically "reserved" for authorized professionals. That is, the bu approach relative to the much more restrictive approach in the U.S., where the definition of UPL tends to be so vague that it covers a range of services that could be safely performed by professionals other than lawyers.[21]

Recognizing the problems with existing approaches to UPL and the low risks from careful step-by-step liberalization of existing policies, several U.S. jurisdictions have begun to experiment in this area. For example, Utah has developed a so-called "regulatory sandbox" that will allow new kinds of legal services providers to operate on a pilot basis without concerns that they will be accused of UPL.[22] Other jurisdictions are seeking to expressly recognize that online legal document providers are not engaged in the unauthorized practice of law in exchange for modest regulation or registration requirements.[23]

These developments are still in their infancy in the U.S., so as with other regulatory reforms, it is not possible to identify a model approach. (Indeed, such efforts in the UPL particular context may raise antitrust concerns.)[24] The point of the resolution is to encourage U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while preserving core

[21] Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S. C. L. REV. 429, 431-33 (2016).
[22] Press Release, *Utah Courts, Utah Supreme Court Adopts Groundbreaking Changes to Legal Serv. Regulation* (August 29, 2019), https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/.
[23] Jim Ash, *Board Recommends Voluntary Registration Program for Online Legal Service Providers*, FLA. BAR NEWS (Sept. 25, 2019), https://www.floridabar.org/the-florida-bar-news/board-recommends-voluntary-registration-program-for-online-legal-service-providers/.
[24] ABA CTR. FOR PROF'L RESPONSIBILITY, *FTC Letter Opinions on the Unlicensed Practice of Law* (June 23, 2016), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/ftc/.

protections.[25]

IV. Data Should be Collected and Analyzed

The final part of the resolution calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public. The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public's growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, provide continuing and necessary protections for those in need of legal services, and best serve the public interest.

V. Conclusion

Justice Louis Brandeis once wrote that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[26] The resolution calls for precisely this kind of courageous experimentation. In light of the severe access to justice crisis in the United States, the continued reliance on existing regulatory approaches is not a viable or responsible option.

Respectfully submitted,

Daniel B. Rodriguez
Chair, Center for Innovation
February 2020

[25] *See supra* note 9.
[26] New States Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Center for Innovation

Submitted By: Daniel B. Rodriguez, Harold Washington Professor of Law, Northwestern Pritzker School of Law, Chair, American Bar Association Center for Innovation

1. Summary of the Resolution(s).

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Approval by Submitting Entity.

On November 15, 2019, the Center for Innovation's council voted unanimously (with one abstention) to file this resolution for debate by the American Bar Association's House of Delegates.

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

No.

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

The American Bar Association currently has a policy against lawyers partnering and sharing fees with anyone who is not a lawyer in the course of practicing law. This policy is reflected in Rule 5.4 of the Model Rules of Professional Conduct as well as in resolutions passed by the House of Delegates, including Resolution 10F (00A10F) stating that, "the sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession." Although the present resolution does not alter Model Rule 5.4, the resolution does have the effect of encouraging U.S. jurisdictions to consider alternatives to Model Rule 5.4. In this sense, the resolution has the effect of changing the ABA policy reflected in Resolution 10F (00A10F).

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

Not applicable.

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

ABA entities (e.g., the ABA Center for Innovation and the Standing Committees of the ABA Center for Professional Responsibility) could offer guidance to jurisdictions seeking input on possible regulatory innovations.

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

There are no material implementation costs unless the American Bar Association decides to assist U.S. jurisdictions with the collection and analysis of data associated with any regulatory innovations.

9. Disclosure of Interest. (If applicable)

None.

10. Referrals.

Administrative Law Division
Contact: Linda D. Jellum
Date: Week of 10/21
Status: Under Review

Business Law Section
Contact: Partrick Thomas Clendenen
Date: Week of 11/11
Status: Under Review

Chicago Bar Association
Contact: Jayne Reardon / Lynn Grayson
Date: Week of 11/4
Status: Supporter

Commission on Interest on Lawyers' Trust Accounts
Contact: David S. Houghton
Date: Week of 10/21
Status: Under Review

Coordinating Council for the Center for Professional Responsibility
Contact: Frederic Stephen Ury
Date: Week of 10/21

Ethics and Professional Responsibility, Judges Advisory Committee
Contact: Margaret Kuroda Masunaga
Date: Week of 10/21
Status: Under Review

Judicial Division
Contact: Elizabeth A. Lang Miers
Date: Week of 10/21
Status: Under Review

Law Practice Division
Contact: Thomas C. Grella
Date: Week of 10/21
Status: Under Review

Oregon State Bar
Contact: John Grant
Date: Week of 11/18
Status: Under Review

Section of Litigation
Contact: Barbara J. Dawson
Date: Week of 10/21
Status: Under Review

Standing Committee on the Delivery of Legal Services
Contact: Charles F. Garcia
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Ethics and Professional Responsibility
Contact: Barbara S. Gillers
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Legal Aid and Indigent Defendants
Contact: Theodore A. Howard
Date: Week of 10/21
Status: Under Review

Standing Committee on Professionalism
Contact: Josh Camson
Date: Week of 10/21
Status: Under Review

Standing Committee on Professional Regulation
Contact: Dolores Dorsainvil
Date: Week of 10/21
Status: Cosponsor

Standing Committee on Lawyers' Professional Liability
Contact: Richard A. Simpson
Date: Week of 10/21
Status: Under Review

Standing Committee on Public Protection in the Provision of Legal Services
Contact: Alecia Michelle Ruswinckel
Date: Week of 10/21
Status: Cosponsor

State Bar of Arizona
Contact: Brian Furuya
Date: Week of 10/21
Status: Under Review

Utah State Bar
Contact: Herm Olsen
Date: Week of 10/21
Status: Under Review

Young Lawyers Division
Contact: Joseph Logan Murphy
Date: Week of 11/4
Status: Under Review

11. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Name: Daniel B. Rodriguez
Phone: 619-871-6990
Email: daniel.rodriguez@law.northwestern.edu

12. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting. Be aware that this information will be available to anyone who views the House of Delegates agenda online.

Name: Daniel B. Rodriguez
Phone: 619-871-6990
Email: daniel.rodriguez@law.northwestern.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution.

Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, are proposing or adopting substantial regulatory innovations in order to address the increasingly dire access to justice crisis in the United States. More U.S. jurisdictions are considering doing the same.

The resolution acknowledges this trend and encourages more U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services, while retaining necessary and appropriate client and public protections.

The resolution also encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public.

2. Summary of the issue that the resolution addresses.

Traditional efforts to address the access to justice crisis have proven to be inadequate. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs. These solutions are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.

3. Please explain how the proposed policy position will address the issue.

With necessary and appropriate public protections, regulatory innovations may help to unlock promising new solutions to the access to justice crisis. Because we do not yet know which specific changes to the Model Rules of Professional Conduct or other ABA model polices will prove to be desirable, the resolution does not propose any such changes. Rather, it encourages U.S. jurisdictions to try new approaches and to collect data about those efforts. The data can then be analyzed and used to shape future reform proposals, including appropriate changes to or adoption of new ABA model rules and policies.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

To date, the Center for Innovation has not heard of any opposition to this resolution. Given the new subject matter of the resolution, however, we expect there will be opposition. We are working diligently to answer any concerns or questions that may arise.

Tab 3

1. We need to make a subcommittee recommendation to the RPC committee regarding Rule 8.4(h). We discussed this back in September and we were largely in agreement as to which standards from 14-301 to include in Rule 8.4(h). Here is our proposed language (underlined):
    a. Rule 8.4 Misconduct. It is professional misconduct for a lawyer to:

        . . .

        (h) Egregiously violate, or engage in a pattern of repeated violations of, Standards 1, 3, 4, 5, 6, 7, 8, 11, 13, 15, 17, 18, or 19 ofthe Standards of Professionalism and Civility if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

2. We will also recommend leaving Comment 3 in the form it was circulated for public comments:
    a. [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, color, sex, pregnancy, childbirth or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, disability, sexual orientation, or genetic information, may violate paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec, 34A-5-106(1)(a) (2016) and in federal statutes, and is not meant to be an exhaustive list, as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

3. We will recommend the following version of Comment 4, with the marked changes after the public comments and Supreme Court comments.
    a. [4] The substantive law of antidiscrimination and anti-harassment statutes and case law ~~guides~~ governs the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may ~~engage in conduct undertaken to~~ discuss the benefits and challenges of diversity and inclusion~~, including any benefits and challenges,~~ without violating paragraph (g). Unless otherwise prohibited by law, implementing~~Implementing~~ or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

4. We will recommend leaving Comment 4a in the form it was discussed at the full committee meeting.
    a. [4a] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

5. Finally, we will recommend the following changes to Standard 3 (found in Rule 14-301)
    a. 3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any ~~such participant~~ person unless such matters are directly relevant under controlling substantive law.

        Lawyers shall avoid hostile, demeaning, or humiliating conduct when interacting with ~~all~~ any other counsel, parties, judges, court personnel, witnesses, and ~~other participants in all proceedings~~ others.

        Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; disability; gender, sexual orientation gender identity; or genetic information. The protected classes listed in this Comment are consistent with those

enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; ~~.~~

(g) engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of this paragraph and in applying those statutes, "employer" shall mean any person or entity that employs one or more persons; or

(h) egregiously violate, or engage in a pattern of repeated violations of [Standards/Rules 1,3,4, 5, 6, 7, 8, 11, 13, 15, 17, 18, 19 of] the [Standards] [Rules] of Professionalism and Civility in Rule 14-301 if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.

Comment [NS1]: I thought the committee decided not to make specific reference to individual standards, but perhaps it makes sense to do so.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the

administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race~~,~~; color; sex~~,~~; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion;~~,~~ national origin;~~,~~ disability, ~~age~~, sexual orientation;~~,~~ or genetic information ~~socioeconomic status,~~ may violate ~~violates~~ paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes and is not meant to be an exhaustive list as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

~~[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).~~

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

Comment [NS2]: Should this be [4a]?

[6] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[7]~~[4]~~ A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[8] ~~[5]~~ Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph (g), adds new paragraph (h), and modifies the comments accordingly.

Rule 14-301. ~~Standards~~Rules of Professionalism and Civility.

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating in the legal system. The following ~~standards~~rules are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service.

Lawyers should educate themselves on the potential impact of using digital communications and social media, including the possibility that communications intended to be private may be republished or misused. Lawyers should understand that digital communications in some circumstances may have a widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

We expect judges and lawyers will make mutual and firm commitments to these ~~standards~~rules. Adherence is expected as part of a commitment by all participants to improve the administration of justice throughout this State. We further expect lawyers to educate their clients regarding these ~~standards~~rules and judges to reinforce this whenever clients are present in the courtroom by making it clear that such tactics may hurt the client's case.

Although for ease of usage the term "court" is used throughout, these ~~standards~~rules should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State. Copies may be made available to clients to reinforce our obligation to maintain and foster these ~~standards~~rules. Nothing in these ~~standards~~rules supersedes or detracts from existing disciplinary codes or standards of conduct.

Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

Comment: Lawyers should maintain the dignity and decorum of judicial and administrative proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress

and conduct. When appearing in court, lawyers should dress professionally, use appropriate language, and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about proper courtroom decorum, including proper dress and language, and should, to the best of their ability, prevent clients and witnesses from creating distractions or disruption in the courtroom.

The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best efforts to instruct their clients and witnesses to do the same.

Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond. 3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof. Cond. 1.4(a)(5).

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling substantive law.

Lawyers ~~should~~ shall avoid hostile, demeaning, ~~or~~ humiliating, or discriminatory conduct when interacting ~~words in written and oral communications~~ with any other counsel, parties, judges, court personnel, witnesses, and others. ~~adversaries~~. ~~Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.~~ Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

Comment: Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

~~Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race, religion, gender, sexual orientation,age, handicap, veteran status, or national origin, or casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or~~

Comment [NS1]: Is the committee keeping this language?

Comment [NS2]: Ditto here. Keep? I think we may have decided to move this out of the comment and into the standard itself.

~~manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.~~

~~Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention.~~

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond. 1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof. Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R. Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

Comment: When providing other counsel with a copy of any negotiated document for review, a lawyer should not make changes to the written document in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be sensitive to, and accommodating of, other lawyers' inability to make full use of technology and should provide hard copy drafts when requested and a redline copy, if available.

Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d); R. App. P. 11(f).

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-306(6).

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond. 8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).

11. Lawyers shall avoid impermissible ex parte communications.

Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv. P. 2.9(A); Fed. R. Civ. P. 77(b).

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

Comment: Lawyers should not evade communication with other counsel, should promptly acknowledge receipt of any communication, and should respond as soon as reasonably possible.

Lawyers should only use data-transmission technologies as an efficient means of communication and not to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use of technology is concerned, including honoring reasonable requests to retransmit materials or to provide hard copies.

Lawyers should not request inappropriate extensions of time or serve papers at times or places calculated to embarrass or take advantage of an adversary.

Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Juv. P. 54.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Comment: When scheduling and attending depositions, hearings, or conferences, lawyers should be respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time. Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared. Lawyers who will be late for a scheduled appointment or are aware that another participant will be late, should notify the court, if applicable, and all other participants as soon as possible.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a); R. Juv. P. 20; R. Juv. P. 20A.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A), (D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P. 20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R. Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R. Civ. P. 26(b)(1; R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these ~~Standards~~Rules.

Adopted by Supreme Court order October 16, 2003.

Tab 4

Rule 6.5: Short-term Limited Legal Services ~~Nonprofit & Court-Annexed Limited Legal Services Programs~~

(a) A lawyer who provides short-term limited legal services to a client, normally through a one-time consultation or representation provided through a program sponsored by a nonprofit organization, a government agency, a law school, or a court, without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter~~,under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal servicesto a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter~~:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

(c) Notwithstanding the above, other lawyers in a firm are not disqualified from representing clients whose interests are adverse to a client who received short-term limited legal services from a lawyer in the firm if

(c)(1) the lawyer who provided the services is timely screened from the adverse clients' matters and

(c)(2) receives no fees from those matters.

Comments

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice, a court appearance, or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] ~~A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c).~~ If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

[6] This rule differs from ABA Model Rule 6.5 to the extent that it changes the title, changes paragraph (a), adds new paragraph (c), modifies comments [1] and [2], and contains comment [6].

CPBO | CORPORATE PRO BONO

LIMITED SCOPE REPRESENTATIONS, CONFLICT CHECKS, AND PRO BONO

Ethical rules in many jurisdictions permit attorneys to offer short-term limited legal services to a pro bono client without conducting a fulsome screening for legal conflicts. Limited scope representations often help low-income individuals who cannot afford counsel access legal representation. In a limited scope representation, also referred to as "unbundled" legal services, the client and attorney agree on precisely what focused assistance the attorney will provide to the client, and the client either self-represents or receives help from another attorney for other aspects of the matter. The attorney's assistance may be limited to advising the client during the clinic or consultation, drafting a document, appearing at a court hearing, or assisting the client with legal strategy or guidance on a selected issue or procedure.

Limited scope representations commonly occur during pro bono clinics or hotlines sponsored by a legal services organization, or in meetings at a pro se legal assistance center operated in a courthouse. To facilitate such limited scope representations where conducting a comprehensive conflicts check is not feasible, most jurisdictions within the United States have adopted ethical rules that provide an exception to the rules governing the lawyer's obligation to screen for client conflicts.

ABA Model Rule of Professional Conduct 6.5, Nonprofit and Court-Annexed Limited Legal Services Programs, eases the conflict check obligation on a "lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." The lawyer "is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest," and "subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter."[1]

In summary, if a lawyer does not know of a conflict with the client at the time the lawyer meets the client, the lawyer can proceed with the limited scope representation. This rule makes it possible for lawyers to represent indigent clients who walk into a clinic, call a legal help hotline, or seek help at a pro se legal assistance center. The rule benefits both the lawyer, who would not otherwise be able to provide short-term legal services, and the client, who is able to receive needed legal services while remaining protected against known conflicts.

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[1] Model Rule 1.7 sets forth the ordinary conflict of interest rules for a lawyer's current clients, providing that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," because the representation will be "directly adverse to another client," or "there is a significant risk that it will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer," unless the lawyer reasonably believes the lawyer "will be able to provide competent and diligent representation to each affected client," "the representation is not prohibited by law," the clients are not directly opposed "in the same litigation or other proceeding before a tribunal," and the clients give informed written consent. Model Rule 1.9(a) requires that a "lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Model Rule 1.10 sets forth the rules imputing conflicts of interest among lawyers associated with one another in a law firm.

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Many jurisdictions have adopted Model Rule 6.5 in full force. Other jurisdictions have adopted Model Rule 6.5 with some modifications. Common modifications include:

- Expanding the list of sponsors of the program, such as the clinic or helpline, to include government agencies, bar associations, or accredited law schools.
- Excluding fee-paying clients from the rule and limiting its application to the delivery of pro bono legal services.
- Restricting application of the rule to "one-time" or "initial" consultations.
- Specifying that the client must give informed consent for the limited scope representation.
- Clarifying the application of other rules, such as those concerning confidentiality of client information, to the limited scope representation.

Only two jurisdictions have no rule to govern conflicts in limited scope representations sponsored by nonprofit organizations or courts.

The chart below reviews the rules governing conflict checks for limited scope representations under the auspices of a nonprofit, court, or similar program in all fifty states and the District of Columbia. The chart summarizes whether the jurisdiction has adopted a rule that follows Model Rule 6.5 or whether and how the jurisdiction has modified Model Rule 6.5.

Summary of Rules Easing Conflict Checks for Limited Scope Representations[2]

State	Rule on Easing Conflict Check	Rule Highlights
Alabama	Ala. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Alaska	Alaska R. Prof. Conduct 6.5	Follows Model Rule 6.5
Arizona	Ariz. Ethics R. 6.5	Similar to Model Rule 6.5, but also states that Ethics Rule 1.5 concerning fees does not apply to a pro bono representation under this rule.
Arkansas	Ark. R. Prof. Conduct 6.5	Follows Model Rule 6.5
California	Cal. R. Prof. Conduct 1-650	Similar to Model Rule 6.5, but also includes programs sponsored by a government agency, bar association, or law school.
Colorado	Colo. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Connecticut	Conn. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but also requires that the lawyer obtain the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel.
Delaware	Del. R. Prof. Conduct 6.5	Follows Model Rule 6.5
District of Columbia	D.C. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Florida	Fla. R. Prof. Conduct 4-6.6	Similar to Model Rule 6.5, but also includes programs sponsored by a government agency, bar association, or American Bar Association-accredited law school.
Georgia	Ga. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but restricts the rule to pro bono matters, and provides that the short-term limited legal services will occur "normally through a one-time consultation."
Hawaii	Haw. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Idaho	Idaho R. Prof. Conduct 6.5	Follows Model Rule 6.5
Illinois	Ill. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Indiana	Ind. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Iowa	Iowa R. Prof. Conduct 32:6.5	Follows Model Rule 6.5

[2] Some rules include additional restrictions. See the text of the actual rules for complete information.

State	Rule on Easing Conflict Check	Rule Highlights
Kansas	No rule	N/A
Kentucky	Ky. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Louisiana	La. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Maine	Me. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but provides that the rule does not apply if the lawyer "is aware" the representation involves a conflict of interest or that another lawyer in the lawyer's law firm is disqualified, rather than "knows" about the conflict.
Maryland	Md. R. Prof. Conduct 19-306.5	Follows Model Rule 6.5
Massachusetts	Mass. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Michigan	Mich. R. Prof. Conduct 6.6	Follows Model Rule 6.5
Minnesota	Minn. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but restricts the rule to "a program offering pro bono legal services," and does not specify who must sponsor the program.
Mississippi	Miss. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but restricts the rule to pro bono matters.
Missouri	Mo. R. Prof. Conduct 4-6.5	Follows Model Rule 6.5
Montana	Mont. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Nebraska	Neb. Ct. R. § 3-506.5	Follows Model Rule 6.5
Nevada	Nev. R. Prof. Conduct 6.5	Follows Model Rule 6.5
New Hampshire	N.H. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but restricts the rule to a "one-time consultation" with a client, and also includes programs sponsored by the New Hampshire Bar Association. Clarifies that Rules 1.6 and 1.9(c) (regarding confidentiality of clients' and former clients' information) apply to a limited scope representation under this rule.
New Jersey	N.J. R. Prof. Conduct 6.5	Follows Model Rule 6.5
New Mexico	N.M. R. Prof. Conduct 16-605	Follows Model Rule 6.5
New York	N.Y. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but includes programs sponsored by a government agency or bar association. Additionally requires that lawyers comply with Rule 1.8, have "actual knowledge" and that clients provide "informed consent," among other requirements.

State	Rule on Easing Conflict Check	Rule Highlights
North Carolina	N.C. R. Prof. Conduct 6.5	Follows Model Rule 6.5
North Dakota	N.D. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, and also states that a client who receives short-term limited legal services under Rule 6.5 becomes a former client of the lawyer providing the service for purposes of Rule 1.9, but that no conflict should be imputed to lawyers associated with that lawyer for purposes of Rule 1.10.
Ohio	Ohio R. Prof. Conduct 6.5	Follows Model Rule 6.5
Oklahoma	Okla. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Oregon	Or. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Pennsylvania	Pa. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Rhode Island	R.I. R. Prof. Conduct 6.5	Follows Model Rule 6.5
South Carolina	S.C. R. Prof. Conduct 6.5	Follows Model Rule 6.5
South Dakota	S.D. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Tennessee	Tenn. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Texas	No rule	N/A
Utah	Utah R. Prof. Conduct 6.5	Follows Model Rule 6.5
Vermont	Vt. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Virginia	Va. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Washington	Wash. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but restricts the rules to pro bono matters. Additionally requires that lawyers comply with Rule 1.8, and specifies that lawyers may provide limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral, among other requirements.
West Virginia	W.Va. R. Prof. Conduct 6.5	Follows Model Rule 6.5
Wisconsin	Wis. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but also includes programs sponsored by a bar association or an accredited law school.
Wyoming	Wyo. R. Prof. Conduct 6.5	Similar to Model Rule 6.5, but also includes programs sponsored by the state or county bar association.

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