H

Supreme Court of Utah.
V-1 OIL COMPANY, aka V-1 Propane, Respondent,
v.
DEPARTMENT OF ENVIRONMENTAL QUALITY, Division of Solid and Hazardous Waste; Diane R. Nielsen, in her Capacity as Executive Director; Dennis R. Downs, in his Capacity as Director; Utah Solid and Hazardous Waste Control Board; Kent P. Gray, in his Capacity as Executive Secretary (UST); and David O. McKnight, in his Capacity as Hearing Officer, Petitioners.

No. 950244.
May 20, 1997.

Division of Environmental Response and Remediation (DERR) issued notice of violation and order to comply based on alleged petroleum release from underground storage facility. Following written request for formal agency action, petitioner moved for recusal of presiding officer, and motion was denied. Petitioner subsequently filed petition for extraordinary writ, seeking to compel recusal. The Court of Appeals, 893 P.2d 1093, granted petition with directions. Granting petition for writ of certiorari to review that decision, the Supreme Court, Stewart, Associate Chief Judge, held that Solid and Hazardous Waste Control Board did not violate due process by appointing presiding officer who also worked as part-time staff attorney within DERR, a division charged with investigating and prosecuting violations.

Reversed.

West Headnotes

[1] Mandamus 250 ⇐7

250 Mandamus
250I Nature and Grounds in General
250k7 k. Discretion as to Grant of Writ. Most Cited Cases

Court's decision to grant or deny petition for extraordinary relief in nature of mandamus is discretionary with court to which petition is brought, in sense that it is never matter of right on behalf of applicant.

[2] Certiorari 73 ⇐64(1)

73 Certiorari
73II Proceedings and Determination
73k63 Review
73k64 Scope and Extent in General
73k64(1) k. In General. Most Cited Cases

Mandamus 250 ⇐187.9(1)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k187 Appeal and Error
250k187.9 Review
250k187.9(1) k. Scope and Extent in General. Most Cited Cases

On certiorari or appeal from grant of extraordinary relief, legal reasoning of court granting writ is reviewed for correctness.

[3] Constitutional Law 92 ⇐4327

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4327 k. Hazardous Waste or Materials. Most Cited Cases
(Formerly 92k278.1)

Environmental Law 149E ⇐454

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek450 Administrative Agencies and Proceedings

149Ek454 k. Hearing and Determination. Most Cited Cases

(Formerly 199k25.5(9) Health and Environment)

Solid and Hazardous Waste Control Board did not violate due process by appointing agency employee to preside at formal hearing to decide whether petitioner failed to remediate leakage from one of its underground storage tanks, even though appointed employee also worked as part-time staff attorney within division charged with investigating and prosecuting such violations; appropriate and sufficient separation of functions at individual level was accomplished by segregating employee from contact with investigative and prosecutorial activities. U.S.C.A. Const.Amend. 14; Utah Admin. Code R315-12-10; Code of Jud.Conduct, Canon 3.

[4] Constitutional Law 92 ⚷3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.1)

Requirements of due process depend upon specific context in which they are applied, as due process, unlike some legal rules, is not technical conception with fixed content unrelated to time, place, and circumstances. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚷3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k251.5, 92k251.1)

Determining requirements of due process in any given context involves balancing of three factors: private interests that will be affected by official actions; risk of erroneous deprivation of such interest through procedures used and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including functions involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail. U.S.C.A. Const.Amend. 14.

[6] Administrative Law and Procedure 15A ⚷382.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak382 Nature and Scope
15Ak382.1 k. In General. Most Cited Cases

Administrative Law and Procedure 15A ⚷441

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak441 k. In General. Most Cited Cases

Generally, "legislative" decisions of administrative agency involve development of policies, principles, or rules that typically apply prospectively to large number of parties, whereas "adjudicative" decision attaches legal or other consequences to individualized past conduct.

[7] Constitutional Law 92 ⚷3867

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3867 k. Procedural Due Process in General. Most Cited Cases
(Formerly 92k251.5)

Constitutional Law 92 ⚷3890

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and

Deprivations Prohibited in General
92k3889 Legislative Procedure
92k3890 k. In General. Most Cited Cases
(Formerly 92k251.5)

Constitutional Law 92 ⚿4027

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))

Requirements of due process tend to vary in proportion to degree to which administrative decision is adjudicative in nature, as opposed to legislative; generally, procedural due process applies to adjudicative government decisions and not to legislative ones. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 ⚿4026

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4026 k. Rules and Regulations. Most Cited Cases
(Formerly 92k318(1))

Constitutional Law 92 ⚿4027

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))

Stricter and more specific due process requirements apply to adversarial, adjudicative decision-making by administrative agency than to legislative activities, the most fundamental requirement being opportunity to be heard at meaningful time and in meaningful manner, and necessary corollary to that opportunity is that affected parties must receive adequate notice and must be assured that their concerns will be heard by impartial decision maker. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ⚿3880

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3880 k. Impartiality. Most Cited Cases
(Formerly 92k318(1))

Clear demonstration of partiality apparent on face of record or showing of direct, pecuniary interest automatically requires disqualification of decision maker on due process grounds. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⚿4027

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))

For purposes of determining whether due process requires disqualification of adjudicator in administrative proceeding, presence of clear, substantial pecuniary benefit is one of most evident causes of either conscious or subconscious bias, and is type of temptation that inevitably compromises public confidence in process itself, undermining legitimacy of any decisions so tainted. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿4027

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and

Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))

For purposes of determining whether due process requires disqualification of adjudicator in administrative proceeding, presumed bias is not limited to cases where personal pecuniary benefit is present, but rather, such presumption may also be applied in other circumstances where risk of bias is so great as to offend principles of due process. U.S.C.A. Const.Amend. 14.

[12] Administrative Law and Procedure 15A ⚿314

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak314 k. Bias, Prejudice or Other Disqualification to Exercise Powers. Most Cited Cases

Constitutional Law 92 ⚿4027

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4027 k. Hearings and Adjudications. Most Cited Cases
(Formerly 92k318(1))

Biasing influences on adjudicator in administrative proceeding, which are unacceptable under due process analysis, may arise from adjudicator's preconceived attitudes on disputed points of law or policy, though it is rare that such attitudes are sufficiently severe to justify disqualification. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿4025

92 Constitutional Law
92XXVII Due Process
92XXVII(F) Administrative Agencies and Proceedings in General
92k4025 k. In General. Most Cited Cases
(Formerly 92k318(1))

Adequate separation of functions to satisfy due process concerns in administrative context can be accomplished internally, at individual, rather than at institutional, level. U.S.C.A. Const.Amend. 14.

***1193** Peter Stirba,Benson L. Hathaway, Salt Lake City, for respondent.

Jan Graham, Atty. Gen., Carol Clawson, Solicitor Gen., Laura J. Lockhart, Asst. Atty. Gen., Salt Lake City, for petitioners.

ON CERTIORARI TO THE UTAH COURT OF APPEALS

STEWART, Associate Chief Justice:

The issue before us is whether an administrative agency, in this case the Solid and Hazardous Waste Control Board (the "Board"), can appoint an agency employee to preside at a formal hearing to decide whether a party before that agency, in this case V-1 Oil Company, failed to remediate leakage from one of its underground storage tanks. The officer appointed by the Board to conduct the hearing, David O. McKnight, also worked as a part-time staff attorney within the division that was charged with investigating and prosecuting such violations. Although his duties as staff attorney were structurally segregated from the branch of the division conducting investigations and prosecutions of underground storage leaks, ***1194** V-1 asserted that McKnight was biased and challenged his appointment. The Board refused to order McKnight's recusal. V-1 then petitioned the Utah Court of Appeals for an extraordinary writ. That Court held that McKnight could not sit. *V-1 Oil Co. v. Department of Envtl. Quality,* 893 P.2d 1093, 1097 (Utah.Ct.App.1995) ("*V-1 Oil Co. I* "). We granted a petition for a writ of certiorari to review that decision. 910 P.2d 425 (Utah 1995). We reverse.

I. BACKGROUND

The dispute in this case arose out of a report of contamination by a contractor performing a tank

tightness test at one of V-1's service stations in Salt Lake County. A number of administrative entities within the Department of Environmental Quality ("DEQ") became involved in the investigation of the contamination report. As it is important to an understanding of our holding, we will briefly detail the nature of these entities and their relationship to each other.

The Board is the agency head within DEQ for purposes of the Underground Storage Tank Act ("USTA"), Utah Code Ann. §§ 19-6-401 to -427; Utah Admin. Code R311-210-6(a). The Division of Environmental Response and Remediation ("DERR"), also within DEQ, has a variety of responsibilities relating to compliance issues detailed in the Hazardous Substances Mitigation Act, Utah Code Ann. §§ 19-6-301 to -325, and the USTA. *See id.* § 19-1-105(1)(c). DERR is subdivided into branches, with the Underground Storage Tank Branch being responsible for investigating and prosecuting violations of the USTA.

Any party subject to a USTA enforcement action may petition the Board for a formal adjudication. Utah Code Ann. § 63-46b-3; Utah Admin. Code R311-210-4, -7. The Board may appoint a presiding officer, Utah Admin. Code R311-210-6(2), and that officer is empowered to conduct a full formal hearing. Utah Code Ann. §§ 63-46b-6 to -11. The presiding officer makes findings of fact and conclusions of law but is not authorized to make a final, substantive decision. Utah Admin. Code R311-210-6(b), -17(a). Rather, the presiding officer's recommendations are referred to the Board, which may adopt or reject them in whole or in part, may make an independent determination based on the record, or may remand the matter for evaluation of further evidence. *Id.* R311-210-17.

In this case, a contractor performing a tank tightness test reported contamination from an underground storage tank at one of V-1 Oil's service stations. Following subsequent inspections, the agency sent compliance and reporting schedules to V-1. According to DERR, V-1 did not respond. DERR issued a notice of violation and order to comply, and V-1 requested a formal adjudicative proceeding. The Board granted this request and appointed David O. McKnight as the presiding officer.[FN1]

> FN1. Apparently, McKnight subsequently received a general appointment to "act as presiding officer on all contested orders issued by the DERR's Executive Secretary."

McKnight had previously been hired as a part-time staff attorney for DERR. His responsibilities in that capacity did not involve any of the investigative or prosecutorial work conducted by the Underground Storage Tank Branch. In fact, his work was confined exclusively to a separate branch within DERR. He was thus effectively "walled off" from the investigative and prosecutorial activities related to underground storage tank enforcement conducted by the agency. Nevertheless, on the basis of McKnight's status as a part-time attorney for DERR, V-1 moved for McKnight's recusal, alleging that his employment within DERR created a risk of bias in his role as an adjudicatory officer. At the hearing on the motion, the nature of McKnight's employment by DERR was explained:

> McKnight indicated that he was hired by DERR with the anticipation that he would act as a presiding officer and as a staff attorney. He stated that DERR "hired me with the understanding that I'd be a presiding officer, and then I would help the Agency on matters that would not risk me being in the loop of [underground storage ***1195** tanks] and [leaking underground storage tanks]."

V-1 Oil Co. I, 893 P.2d at 1094 (alterations in original). He further indicated that "in his work as staff attorney he [did] 'not involve [himself] in areas that would risk [his] being exposed to investigations and anything that would lead up to an issuance of an order in underground storage tank matters.' " *Id.* McKnight concluded that V-1's objections to his multiple duties within the agency did

not warrant his recusal. On review, the Board declined to disqualify McKnight, stating that "V-1 ha[d] presented no evidence or suggestion of actual bias on the part of the Presiding Officer, either through his relationship to the Board or his status as an employee of the Division."

V-1 petitioned for an extraordinary writ from the Utah Court of Appeals. The Court of Appeals stated that V-1 had alleged two grounds for McKnight's recusal: (1) actual bias or prejudice, and (2) presumed bias due to his association with DERR as a staff attorney. *V- 1 Oil Co. I,* 893 P.2d at 1096. The Court first held, "Petitioner has not demonstrated actual bias or prejudice." FN2 *Id.* The Court thus limited its treatment to the question of whether "McKnight should be disqualified based upon his employment as a staff attorney by DERR." *Id.* The Court concluded that McKnight's appointment violated "[b]asic considerations of fairness and impartiality in agency proceedings." *Id.*

> FN2. V-1 conceded as much in its hearing before McKnight and does not now contest this holding on appeal.

II. STANDARD OF REVIEW

[1][2] A court's decision to grant or deny a petition for extraordinary relief in the nature of mandamus is discretionary with the court to which the petition is brought, and it is discretionary in the sense that it is "never a matter of right on behalf of the applicant." *Renn v. Board of Pardons,* 904 P.2d 677, 683 (Utah 1995). However, on certiorari or appeal from a grant of extraordinary relief, the legal reasoning of the court granting the writ is reviewed for correctness. *Id.* at 683-85.

III. BIAS AND ADMINISTRATIVE QUASI-JUDICIAL OFFICERS

[3] We begin by examining the foundation of the Court of Appeals' decision. The proper starting point for any analysis of an asserted ethical conflict in an adjudicatory proceeding is by reference to the ethical rules governing that proceeding. In this case, the Utah Administrative Code and the State Officers and Employees Ethics Act provide rules that are directly applicable to administrative adjudicative officers. Chapter 16 of title 67 of the Utah Code imposes ethical constraints on all public officers and is primarily concerned with personal conflicts of interest relating to financial transactions. Neither V-1 nor the Court of Appeals has asserted that any provision of this chapter has been violated.

Rule 315 of the Utah Administrative Code-specifically pertaining to the operation of agencies charged with regulating solid and hazardous waste-speaks more directly to the circumstances of this case. It reads in pertinent part:

> A member of the Board or other Presiding Officer shall disqualify him/herself from performing the functions of the Presiding Officer regarding any matter in which:
>
> (a) He/she [or a closely related] person:
>
> ...;
>
> (2) Has acted as an attorney in the proceeding or served as an attorney for, or otherwise represented a Party concerning the matter in controversy;
>
> ....
>
> (b) The Presiding Officer is subject to disqualification under principles of due process and administrative law.
>
> Utah Admin. Code R315-12-10.

McKnight has not "acted as an attorney" in this proceeding, nor has he "represented a Party concerning the matter in controversy." He is, however, subject to disqualification if the principles of due process applicable to the particular administrative context of this case require it. Because McKnight acted in *1196 an administrative adjudicatory role, ethical rules governing other administrative adjudicative proceedings are relevant to the due process and fairness requirements in this case. The Court of

Appeals held that McKnight should be disqualified because bias had to be presumed under the Utah Code of Judicial Conduct, Canon 3, which states, "A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned." FN3 Even though the Court of Appeals acknowledged that administrative decision makers are not "held to th[e] full standard of the canons," FN4 it apparently construed the language in Canon 3 as a rigid principle of due process that was fully applicable in administrative proceedings. Consequently, the Court held that "McKnight's own characterization of his dual role as presiding officer and DERR staff attorney ... creates the appearance of impropriety that erodes confidence in the basic fairness of the hearing process and must be avoided in quasi-judicial proceedings as diligently as in judicial proceedings." *V- 1 Oil Co. I,* 893 P.2d at 1097.

FN3. Canon 3E continues:

> including but not limited to instances where ... (b) the judge had served as a lawyer in the matter in controversy, *had practiced law with a lawyer who had served in the matter at the time of their association,* or the judge or such lawyer has been a material witness concerning it.
>
> (Emphasis added.)

FN4. For instance, the canons specifically prohibit judges from practicing law, *see* Code of Judicial Conduct Canon 4G, whereas the Utah Administrative Procedures Act carries no such prohibition.

[4][5] In our view, the Court of Appeals' analysis fails to account for relevant distinctions between administrative and judicial proceedings. The requirements of due process depend upon the specific context in which they are applied because "unlike some legal rules due process is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Cafeteria Workers Union v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Determining the requirements of due process in any given context involves a balancing of three factors:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

Administrative agencies engage in a variety of functions. Certain administrative decisions are of a policy-making nature, such as the establishment of regulations pursuant to statutory authority; others resemble judicial decision making, such as the determination of whether a party or an entity has violated a regulation. Commentators tend to categorize administrative decision making as either "legislative" or "adjudicative" in nature. John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis* 1993 Utah L.Rev. 1135, 1160 [hereinafter Allison, *Process-Value Analysis*]. Not all agency actions are easily pigeonholed as either purely legislative or purely adjudicative, however. *Id.* at 1161. Rather, they may fall anywhere along a continuum between the two forms. *Id.*

[6][7] As a general rule, "[l]egislative decisions involve the development of policies, principles, or rules that typically apply prospectively to a large number of parties," whereas "an adjudicative decision attaches legal or other consequences to individualized past conduct." *Id.* at 1160. The requirements of due process tend to vary in proportion to the degree to which an administrative decision is

adjudicative in nature as opposed to legislative. *Id.* at 1160-62. "[A]s a general proposition ... procedural due process applies to adjudicative government decisions and not to legislative ones." FN5 *Id.* at 1162.

> FN5. Various commentators have offered a number of rationales to support this distinction. For instance, legislative decision making tends to affect large groups of people or entities in a similar fashion, thus lessening the likelihood of "individualized oppression" and simultaneously increasing the publicity attending the decision and the likelihood that the affected groups may be able to exercise their collective power to reverse an unjust decision. Allison, *Process-Value Analysis* at 1162. It is also less feasible in a legislative context to provide notice to all affected parties and invite their participation; parties are more inclined to expect rigid adherence to due process protections in an adjudicative context than in a legislative one; and the parties to an adjudicative proceeding are more likely to be privy to, and aware of, the facts relevant to that proceeding than are parties affected by a legislative-type proceeding. *Id.* at 1163. Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.5, at 55 (3d ed. 1994).

***1197** In this case, McKnight's decisions were made as presiding officer in V-1's case. Although those decisions are not final decisions, they are clearly adjudicative in nature. The hearing concerned allegations that V-1 failed to investigate reports of leaking storage tanks and to submit a corrective action plan. If proven, such failures could constitute violations of state and federal regulations and could ultimately result in sanctions.

[8][9] Commentators have noted that accusatory proceedings, due to their similarity in both form and consequence to formal criminal proceedings, require particular attentionto due process concerns. Allison, *Process-Value* at 1180. Therefore, stricter due process requirements apply to adversarial, adjudicative decision making than to legislative-type decision making. The most fundamental requirement in this context is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews,* 424 U.S. at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). As a necessary corollary to this opportunity, affected parties must receive adequate notice, and they must also be assured that their concerns will be heard by an impartial decision maker. *Mathews,* 424 U.S. at 325 n. 4, 332-35, 96 S.Ct. at 898 n. 4, 901-03. "Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decision making." Kenneth C. Davis, Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8, at 67 (3d ed. 1994). Where a party to an adversarial proceeding can demonstrate actual impermissible bias or an unacceptable risk of an impermissible bias on the part of a decision maker, the decision maker must be disqualified.

The latter principle concerns us here. The Court of Appeals' holding was premised on the principle that McKnight's employment with DERR presented an impermissible bias in his role as an adjudicator, thereby violating the due process right of a party to a fair adjudicative proceeding.

There are many different types of bias, however. The Court of Appeals did not address the issue of which types of bias are so harmful as to necessitate disqualification in the administrative context.FN6 A clear demonstration of partiality apparent on the face of the record, *see Bunnell v. Industrial Comm'n,* 740 P.2d 1331, 1333-34 (Utah 1987), or a showing of direct, pecuniary interest, *see Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973), automatically requires disqualification of the decision maker. In *Bunnell,* the rec ***1198** ord indicated that in numerous instances the administrative law judge had

demonstrated active hostility toward the claimant in an employment disability benefits proceeding, while at the same time exhibiting favoritism toward the employer and the employer's counsel. 740 P.2d at 1333-34. We ruled that such an atmosphere of partiality violated fundamental principles of due process. *Id.* at 1334; *see also Local No. 3 v. NLRB,* 210 F.2d 325, 329-30 (8th Cir.1954) (disqualifying examiner who uniformly rejected evidence offered to support company's point of view, while accepting evidence supporting union). *But see NLRB v. Pittsburgh S.S. Co.,* 337 U.S. 656, 659, 69 S.Ct. 1283, 1285, 93 L.Ed. 1602 (1949) (holding "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact").

> FN6. Professors Davis and Pierce have summarized the categories of biasing influences and their consequences as follows:
>
> > (1) A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification. (2) Similarly, a prejudgment about legislative facts that help answer a question of law or policy is not, without more, a disqualification. (3) Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be. (4) A personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism. (5) One who stands to gain or lose by a decision either way has an interest that may disqualify if the gain or loss to the decisionmaker flows fairly directly from her decision.
>
> Davis & Pierce, *Administrative Law Treatise* § 9.8, at 68.

[10] In *Berryhill,* the United States Supreme Court disqualified a state licensing board of optometrists in Alabama, which was composed entirely of independent practitioners, from reviewing the licenses of optometrists who were employed by corporations. The licensing board had interpreted a statute to preclude the practice of optometry by corporate employees. The board commenced administrative proceedings for the purpose of revoking the licenses of corporate-employed optometrists and had also filed a civil suit against them. Because nearly half of the practicing optometrists in Alabama were employed by corporations, it was obvious that the independent optometrists on the licensing board would receive more business, thereby reaping a substantial pecuniary gain, if the corporate-employed optometrists' licenses were revoked. *Berryhill,* 411 U.S. at 578, 93 S.Ct. at 1607-98. The presence of a clear, substantial pecuniary benefit is one of the most evident causes of either conscious or subconscious bias; and perhaps more important, it is the type of temptation that inevitably compromises public confidence in the process itself, undermining the legitimacy of any decision so tainted. Thus, the Supreme Court concluded that disqualifying bias will be presumed whenever the decision maker has a substantial pecuniary interest in the outcome.[FN7] *Id.* at 579-80, 93 S.Ct. at 1698-99; *see also Tumey v. Ohio,* 273 U.S. 510, 531-35, 47 S.Ct. 437, 444-45, 71 L.Ed. 749 (1927) (judge received portion of fines and fees assessed in addition to his salary); *cf. Ward v. Village of Monroeville,* 409 U.S. 57, 57-59, 61-62, 93 S.Ct. 80, 81-83, 83-84, 34 L.Ed.2d 267 (1972) (where mayor had obligation to maintain village finances, a major portion of which were derived from the fines levied by the mayor's court, mayor was disqualified from acting as judge).[FN8]

> FN7. This holding, however, does not create a blanket rule prohibiting *any* personal interest in the outcome of a decision. "Many members of agency boards and

> commissions have some degree of economic interest in the subject they regulate.... General economic interest in the subject matter is [by itself] insufficient to disqualify a decisionmaker." Davis & Pierce, *Administrative Law Treatise* § 9.8, at 73 (citing *Friedman v. Rogers,* 440 U.S. 1, 17-19, 99 S.Ct. 887, 898-99, 59 L.Ed.2d 100 (1979)).
>
> FN8. This case demonstrates that a pecuniary interest need not be personal to justify disqualification, but a nonpersonal pecuniary interest must clearly taint the decision-making process before it will result in disqualification. In *Dugan v. Ohio,* 277 U.S. 61, 63-65, 48 S.Ct. 439, 439-40, 72 L.Ed. 784 (1928), the mayor was only one member of a commission that exercised legislative power and did not participate when the commission exercised executive power. In that case, the mayor was not disqualified from levying fines as a judge.

[11][12] Presumed bias is not limited to cases where a personal pecuniary benefit is present. Such a presumption may also be applied in other circumstances where the risk of bias is so great as to offend principles of due process. For instance, disqualifying bias may be presumed from a prior manifested prejudice against a person or group of persons. *See Berger v. United States,* 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921) (judge disqualified for comments demonstrating prejudice against German-Americans). Unacceptable biasing influences may also arise from an adjudicator's preconceived attitudes on points of law or policy that are topics of dispute before an adjudicator, although such attitudes are rarely severe enough to justify disqualification. *See generally* Davis & Pierce, *Administrative Law Treatise* § 9.8, at 76-81.

***1199** In this case, V-1 objects specifically to the agency practice of allowing an attorney to act as an adjudicator where other persons within the administrative division for which that attorney works have the responsibility for prosecuting the matter at which the adjudicator presides. Although McKnight is not personally involved in investigating or prosecuting any of the cases which he adjudicates, he is employed by the same administrative agency which conducts those activities. This raises a due process issue related to institutional combination of prosecutorial and adjudicative functions.

In a typical adversarial administrative proceeding, agencies perform several different functions. Generally, commentators divide those functions into three categories: investigative, advocatory (or prosecutorial), and adjudicative. Although there is little potential for bias when the investigative and advocatory functions are combined, the potential for impermissible bias when either the investigative or the advocatory function is combined with the adjudicative function is more readily apparent, *see* Allison, *Process-Value Analysis* at 1167-68, particularly as the case becomes more accusatory in nature. *Id.* at 1180. The natural suspicion is that adjudicators may be disposed to act favorably toward their employers. In a formal criminal context, for instance, it would be inappropriate for an adjudicator to be employed as a part-time prosecutor. *Cf. State v. Brown,* 853 P.2d 851, 856-57 (Utah 1992) (holding part-time prosecutor barred from acting as defense counsel).

Nevertheless, examining the question in the criminal context does not answer the question in the administrative context, where "any form of function combination ... occurring alone, without other exacerbating biasing influences, is very unlikely to violate procedural due process." Allison, *Process Value Analysis* at 1145 (citing *Marcello v. Bonds,* 349 U.S. 302, 311, 75 S.Ct. 757, 762-63, 99 L.Ed. 1107 (1955)). In this respect, the analogy to the criminal context cannot be strictly applied. As noted by Professors Davis and Pierce:

> Critics of the U.S. system of administrative justice have long used the strict separation of functions among agencies in our criminal justice system as a paradigm for criticism of the fairness

of administrative adjudication conducted by typical multi-function agencies. The criticism is usually followed by a demand that the legislature assign the functions of investigation, prosecution, and adjudication to separate agencies, or that the courts hold unconstitutional any system of adjudication implemented by a multi-function agency.

Generally, both legislatures and courts have declined to accept these arguments for good reason-the analogy on which they are premised is weak at many points. First, the strict agency-based separation of functions approach we have chosen in the criminal justice context is extremely expensive and inefficient. It may be justified in that context because of the extraordinarily high value we place on avoiding the risk of erroneously incarcerating people. It by no means follows, however, that we should select the least efficient and most costly institutional structure for adjudicating disputes concerning social security benefits, personnel decisions, utility prices, environmental regulation, etc.

Davis & Pierce, *Administrative Law Treatise* § 9.9, at 92 (citations omitted); *see also* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies,* 81 Colum. L.Rev. 759, 768 (1981) [hereinafter Asimow, *Separation of Functions*] ("Separation of functions in administrative agencies is, of necessity, far from the pristine system characteristic of criminal-law enforcement.").

This more lenient treatment of administrative decision making is primarily an acknowledgment of the third factor in the due process analysis set forth by *Mathews v. Eldridge:* "the Government's interest, including the function involved and the fiscal and administrative burdens that ... additional or substitute procedural requirement[s] would entail." 424 U.S. at 335, 96 S.Ct. at 903. Administrative agencies are typically burdened with numerous duties and limited funding. Moreover, to carry out their statutorily***1200** mandated responsibilities with any semblance of unity of purpose, they must be allowed to combine essentially all their functions under the umbrella of a single, or group of, related entities.[FN9] "In the context of an administrative agency or other multifunction decision-making organization ... we must permit certain combinations of functions or else dispense with these organizations altogether. We cannot have it both ways." Allison, *Process-Value Analysis* at 1171. It would be literally impossible for many administrative agencies to function if all their adjudicative activities had to be given the same due process protections as in a criminal trial in terms of a rigid scheme providing for total structural independence of the adjudicator. For example, agency decisions not to issue drivers' licenses, provide unemployment compensation benefits, etc., combine adjudicative and administrative functions in the same person. The paralysis of basic governmental functions and the overwhelming expense caused by imposition of an uncompromising judicial model of complete structured independence of the adjudicator would have disastrous consequences for many essential governmental programs and functions.

FN9. Davis and Pierce are of the opinion that whenever Congress has sought to segregate various functions under wholly separate administrative entities, the result has been disastrous. For example, the

> trio of agencies [charged with resolving occupational safety and health disputes] have performed their mission poorly. The inefficient multi-agency structure Congress chose to implement this regime ranks high on the list of the many explanations for this poor performance. OSHA and OSHRC frequently disagree on issues of law and policy[;] consequently, they expend a considerable portion of their limited resources litigating inter-agency disputes in the federal courts.
>
> Davis & Pierce, *Administrative Law Treatise* § 9.9, at 100; *see also* George

> Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experience,* 39 Admin. L.Rev. 315 (1987). Furthermore, the legislative choice to externally separate functions often has more to do with the political environment in which the agency is constructed than with due process concerns. "If political support for the program is weak and opposition is strong, the opposition can render the program ineffective by building high costs, delay, and inefficiency into the statutorily mandated decisionmaking process." Davis & Pierce, *Administrative Law Treatise* § 9.9, at 100-01.

In fact, institutional combinations of functions afford certain benefits. In performing multiple functions, an agency's rule-making activities inform its adjudicative actions and vice versa. *See SEC v. Chenery Corp.*, 332 U.S. 194, 201-02, 67 S.Ct. 1575, 1579-80, 91 L.Ed. 1995 (1947). The ability of agencies to draw on specialized knowledge gained in a wide spectrum of activities, from rule-making to formal and informal adjudication, allows those agencies to develop an efficient and consistent manner of addressing and resolving the concerns and problems they are charged with administering. Policy is developed and furthered on a relatively unified front rather than through the sometimes arbitrary and conflicting paths often pursued by organizations that are subject to formal separation of legislative, adjudicative, and other functions. Further, the resulting increased efficiency and uniformity can enhance the respect an agency earns from the parties regulated by it and from the general public at large.

[13] This does not mean that the due process concerns arising out of combinations of functions cannot be addressed in the administrative context. Rather, it merely means that adequate separation of functions can be accomplished internally. In particular, the separation takes place at the individual rather than the institutional level. This is essentially the path that has been chosen by Congress in adopting the federal Administrative Procedures Act:

> Early in the administrative era, some observers understandably took a monolithic view of agencies as decision makers, a view necessarily leading to the conclusion that the same decision-making agent is performing all functions. This view generally did not prevail, however. From its inception in 1946, the [Federal Administrative Procedures Act] has clearly recognized the individual as the decision-making agent, at ***1201** least at the staff level, and the statute takes the intermediate approach of limiting certain combinations among these individual functionaries.

Allison, *Process-Value Analysis* at 1172 n. 89 (citation omitted); *see also* Asimow, *Separation of Functions* at 761 ("Congress decided that internal separation of an agency's decisionmaking from its investigative and prosecutorial functions would achieve impartiality without incurring the costs of complete separation."). FN10

> FN10. In this regard, it is worth mentioning that statutory provisions such as the APA are typically more stringent than constitutional requirements. As Davis and Pierce note:
>
> > The Supreme Court's constitutional floor is well below the APA approach to separation of functions. Indeed, the Court has never held an adjudicatory regime unconstitutional on the basis that the functions were insufficiently separated. As a result, Congress has considerable discretion to depart from the APA in either direction [i.e., to require more stringent or less stringent separation of functions within a given agency scheme].
>
> Davis & Pierce, *Administrative Law Treatise* § 9.9, at 98.

In the context of administrative agencies, internal separation of functions allows agencies the flexibility to perform the multitude of duties assigned to them while at the same time adequately protecting due process interests. On this question, Professor Allison observes:

> Despite the psychological effects of participating in an organization, the individual is still intellectually, emotionally, and morally autonomous to a meaningful degree. Moreover, to view the decision-making unit as the organization necessarily leads to the conclusion that the same entity investigates, advocates, and judges. If one is the least bit sensitive to process values, the organization-as-decision maker premise necessarily causes one to condemn the procedure as the worst kind of prejudgment. This view is not only unrealistic in a modern world demanding complex government, but also is unnecessary. Process concerns may be addressed by viewing the individual, or perhaps the small group (such as an advocatory staff), as the decision-making entity and then proceeding to optimize process values from that premise.

Allison, *Process-Value Analysis* at 1171-72 (footnote omitted).

Echoing this sentiment, Professors Davis and Pierce comment:

> Separation of functions can be implemented at the level of individuals rather than at the agency level. To the extent that combining functions creates a conflict of interest, that conflict is largely a function of psychology and human emotions. No one would want the district attorney who prosecutes him to decide whether he is guilty, because district attorneys prefer to "win" rather than to "lose" cases. It is difficult for anyone who has worked long and hard to prove a proposition, e.g., the defendant is guilty, to make the kind of dramatic change in psychological perspective necessary to assess that proposition objectively, e.g., to decide whether the defendant is guilty. That potentially powerful psychological conflict of interest is internal to an individual, however. The potential for conflicts of interest to infect adjudicatory decisionmaking diminishes greatly if functions are separated at the individual level, i.e., an individual cannot both prosecute a case and decide the case. Separating functions within an agency is likely to cause the individuals in the agency to identify more by function than by agency, e.g., "I am an agency prosecutor, or I am an agency adjudicatory decisionmaker."

Davis & Pierce, *Administrative Law Treatise* § 9.9, at 93-94.

Similarly, in *Vali Convalescent & Care Institution v. Industrial Commission,* 649 P.2d 33, 37 (Utah 1982), we endorsed the practice of internal separation of functions as a means of balancing due process concerns within the administrative agency context: "In administrative proceedings, the practice of an agency acting as prosecutor and judge is not unconstitutional, at least if those functions, with respect to discretionary matters, are kept separate within the agency. '[M]any agencies have functioned for years, with the approval of the courts, which combine these roles.' " *Id.* (quoting *Brinkley v. Hassig,* 83 F.2d 351, 357 (10th Cir.1936)). Thus, at least *1202 at the lower levels of an agency's hierarchy,[FN11] internal or individual separation of functions adequately addresses most due process concerns that arise.

> FN11. Numerous cases have made clear that full separation of functions is not required at the highest level of an agency. "[A]gencies perform many interrelated functions and are organizationally complex; it is thus impossible and highly undesirable to insulate adversaries and decisionmakers, particularly agency heads, from one another for all purposes." Asimow, *Separation of Functions* at 765. Under the Federal APA, separation of functions is not required

> at the highest level of the agency, i.e., the cabinet officer, administrator, or collegial body that has overall responsibility for the agency. The APA permits the agency head to decide, for instance, whether to investigate a case, how much of the agency's resources to devote to an investigation, whether to prosecute a case, and how much of the agency's resources to devote to prosecution of a case. Agency heads also decide cases. APA [5 U.S.C.] § 557(b) provides: "On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule." The effect of this provision is to allow agencies to treat ALJ initial decisions as recommendations, with all ultimate decisionmaking power held by the agency head. Most agencies operate in this manner. The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision.
>
> Davis & Pierce, *Administrative Law Treatise,* § 9.9, at 97. A substantially similar process governs the manner in which DERR and the Board conduct hearings in underground storage tank matters.

Within some agencies, separation of functions is achieved by creating essentially a separate adjudicatory department within the agency. These departments are typically composed of administrative law judges who enjoy a degree of autonomy within the agency somewhat comparable to that enjoyed by judges within the regular judicial branch of a traditional tripartite governmental system. The Court of Appeals' opinion appears to treat such a system as the minimum due process requirement for all administrative adjudication.[FN12] *V-1 Oil Co. I,* 893 P.2d at 1097 n. 3. However, such inflexibility fails to account for legitimate efficiency concerns which various administrative agencies confront and does not balance those concerns against the purported harm resulting from a failure to structure an agency in a manner designed to segregate adjudicatory employees completely from all other responsibilities.

> FN12. The Court of Appeals' holding on this matter is not entirely clear. On petition for an extraordinary writ, it simply held that McKnight must recuse himself. In dicta, however, the Court opined that the present system (which allows agencies with investigatory and advocatory duties to employ ALJs or other adjudicatory officers) is problematic. According to the Court of Appeals, those problems are "alleviated somewhat when administrative law judges have exclusively adjudicative functions and do not also undertake work as legal counsel for their employing agency." *V- 1 Oil Co. I,* 893 P.2d at 1097 n. 3. But the clear implication was that the Court of Appeals believed that even that degree of separation would be inadequate. The Court then proceeded to endorse a central panel system of ALJs which would presumably provide thoroughly independent and neutral ALJs to all, or a large group of, administrative agencies. *Id.*

The record reflects that McKnight was hired to function as both an adjudicative officer and a staff attorney because "there may not be a heavy enough case load for a full time presiding officer." Evidently, the purpose behind assigning him multiple functions within the agency was an effort to maximize limited resources. Although we do not have a sufficient record before us to make an independent judgment of the level of efficiency so achieved, the administrative officials who must actually run and staff their organizations are in a far better position to do so than is an appellate court which is largely unfamiliar with the agency's day-to-day operations.

This is not to say that we are not concerned with, or that due process does not demand, serious attention to procedures designed to eliminate bias in accusatory administrative adjudications. Instead, the various procedures designed to address due process concerns must be weighed, along with their costs, against the purported benefits and detriments that their implementation would engender.

In this case, there was no strict segregation of all personnel with adjudicatory responsibilities from all other duties within the division. DERR required McKnight to participate in certain staff attorney functions but took care to ensure that all his staff attorney ***1203** duties related to activities outside the branch of the division responsible for investigating and prosecuting underground storage tank violations. In this regard, the Board determined that McKnight's

> position was implemented in a manner to insure that any staff attorney functions [he] performed would be completely independent of matters that could result in UST [underground storage tank] adjudications. Accordingly, [he] has functioned as a staff attorney on matters such as procurement issues, drafting and reviewing legal documents such as CERCLA cooperative agreements and consent orders, drafting UST administrative adjudicative procedures, and working on standard forms for cost recovery. [He] is kept completely detached from any DERR matters that could result in an UST order on owner/operators of USTs.

V-1 argues that this degree of separation is insufficient, asserting that McKnight

> is paid by the Agency to represent their interests. By assuming the role as the Agency's attorney, Mr. McKnight assumed certain fiduciary duties towards the Agency and his conduct towards his client or employer is governed by strict rules of professional responsibility. Among those duties is the requirement that Mr. McKnight maintain a high degree of loyalty towards the Agency.

This argument misconstrues the nature of McKnight's duties. In fact, the converse is true. His duty of loyalty toward his employer requires him to function as an impartial adjudicator. According to the record, McKnight has no duty of partiality toward the Underground Storage Tank Branch of DERR-from which his activities as an attorney have been specifically segregated; whereas, when the merits of a case require McKnight to make findings and recommendations that are unfavorable to the Underground Storage Tank Branch's position, his failure to do so would constitute a serious breach of loyalty.

If McKnight had actually served as an investigator or advocate in this particular case, V-1's argument would very likely have merit. Where individuals have previously taken on an adversarial role with regard to a particular case, they tend to become psychologically committed to a particular view of contested issues. One commentator has described this as "the will to win." FN13 *See* Asimow, *Separation of Functions* at 770, 788. Where, on the other hand, an individual has not undertaken such a commitment, the risk of a similar bias is minimal. *Id.* at 770. V-1 nevertheless asserts that McKnight's status as a lawyer, as opposed to agency employees who are not lawyers, imposes on him a duty, born of the attorney-client relationship between him and his employer, to act in favor of all the branches and divisions of his employing agency. We find no merit in this argument. FN14 We do not accept the proposition that the employing agency is a client or that McKnight owes the same duty of loyalty to that agency that he would owe to a client.

> FN13. In the criminal context, for instance, prosecutors are likely to be biased because they have a
>
> > personal and professional stake in a particular result, a will to win. If a prosecutor thought that a charge lacked probable cause or that a miscarriage of justice was likely, professional duty

> would require abandonment of the prosecution. Having committed himself intellectually and psychologically, as well as having committed institutional resources to the prosecution, a prosecutor may perceive the issues through a lens that distorts his perceptions in the state's favor.
>
> Asimow, *Separation of Functions* at 788-89.

FN14. Arguably, McKnight's status as an attorney is actually *less* likely to engender concerns about bias. At least one commentator has asserted, "Attorneys and others whose training, experience, and job description require them to present and support positions in a decision-making process undoubtedly may develop a facility for performing the task zealously while remaining personally detached." Allison, *Process-Value Analysis* at 1179.

We therefore hold that DERR accomplished an appropriate and sufficient separation of functions at the individual level by segregating McKnight from contact with the investigative and prosecutorial arm of DERR. In this case, a workable scheme is created within the agency to prevent McKnight from engaging in multiple functions likely to bias his work as an adjudicator. Due process is not violated by allowing ***1204** McKnight to adjudicate V-1's hearing. We accordingly reverse the Court of Appeals' decision.

ZIMMERMAN, C.J., and HOWE, DURHAM, and RUSSON, JJ., concur in Associate Chief Justice STEWART'S opinion.

Utah,1997.
V-1 Oil Co. v. Department of Environmental Quality, Div. of Solid and Hazardous Waste
939 P.2d 1192, 317 Utah Adv. Rep. 11

END OF DOCUMENT

Tab 3

HILDER | MCCOSH PC
ATTORNEYS AT LAW

2319 Foothill Drive, Suite 220
Salt Lake City, UT 84109
Tel: 801-467-0100
Fax: 801-467-0300
www.hildermccosh.com

Direct contact: Cell 801-597-1386
Email: hilder@hildermccosh.com

November 18, 2012

Steven G. Johnson, Esq., Chair
Supreme Court Advisory Committee on the Rules of Professional Conduct
5336 W. Earl Place
Highland, UT 84003

Re: Proposals for Rule Changes or Study, Rules of Professional Conduct, and Rules Governing the Utah State Bar

Dear Mr. Johnson and Committee Members:

I am submitting with this letter a number of suggestions for changes, or further study, to Rules of Professional Conduct, and related Rules Governing the Utah State Bar, that I have come to believe are either necessary, or at least worthy of consideration and discussion or study.

My interest in the topic was not planned. After I retired fifteen months ago from the Third District Court, I imagined that my new career would be primarily mediation and arbitration. I have, in fact, been employed fulltime in both areas since the day I retired, but I have also been asked to represent a number of lawyers in discipline proceedings. To date I have made formal appearances in four State OPC matters and one federal district court disciplinary proceeding. I have also been retained to counsel three additional lawyers during their State proceedings, and I have counseled several lawyers regarding judicial conduct complaints—not the same forum, of course, but a close relative to lawyer discipline.

The extent of my involvement has varied, but at the State level I have appeared at two Screening Panels and one Exception hearing. I have negotiated a diversion in the remaining State matter. I also, of course, handled formal discipline proceedings as a district judge, and I was subpoenaed as a witness in a Panel hearing while still a judge. These experiences have more than piqued my interest. They have given me some concern about certain procedures, inconsistent or ambiguous rules, and a well-intended, but in my experience and opinion flawed, informal process that creates due process concerns with which all lawyers and judges must be concerned.

Be assured that I understand that while my experience with the system is substantially greater than most lawyers, it does not compare to the experience of the OPC lawyers, and the dedicated cadre of lawyers and public members who have worked to create and operate the present discipline structure for years. For this reason I hesitate to proffer suggestions and urge

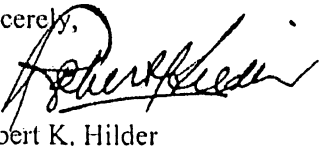
changes, but I have concluded that the best course is to jump in, and test my thoughts with the experts.

As a matter of form, I have decided that the simplest thing is to provide four discrete submissions, which the Committee may shuffle, prioritize, consider, or shred, as they think best. I have included a couple of possibly controversial proposals that are fundamentally policy issues. They deal with the judicial proceedings privilege, and the issue of just what is due the parties in informal proceedings. I do this with full understanding of the Supreme Court's constitutional responsibility in all matters concerning the Bar generally, and discipline in particular. As a former trial judge, I confess that one of my favorite judicial pronouncements is: ". . . knowing that we neither needed nor desired the participation of the district court . . ." In the Matter of the Discipline of Ray M. Harding, Jr., 2004 UT 100, ¶19.

One reads this language with a slightly wry smile when on the bench, but I understand the core truth. The Court absolutely controls the discipline process and outcome. As I set forth in attachment 1, that is both a concern and a protection in the area of due process. It is a concern, because informal proceedings are quick, rather loose in what is received, very limited in pre-hearing options to discover evidence, and although in my three experiences the Panel was intelligent and committed to fairness, the power to impose a public reprimand is a potential career-wrecker. The Supreme Court's conscientious effort to retain final control over all aspects of lawyer discipline is a protection, which they have exercised frequently, to correct an inequitable result, but it comes late, at great emotional and financial cost. I only argue that, to the extent we can make the process fairer, much unneeded pain, some injustice, and widespread lawyer bitterness against the Bar, can be avoided. The Supreme Court's role and authority cannot and will not be impacted by such an effort.

I have copied this letter, with attachments, to Mssrs. Walker and Wahlquist at the OPC, and Bar President Lori Nelson. They are all aware of my interest, and I feel it appropriate to keep them in the loop. Of course, I also copy Ms. Abegglen, Appellate Court Administrator and staff to the Committee. When I made my first contact, I offered to make myself available to the Committee or any member, individually or as a group, if that might be helpful. I remain willing to respond in any forum. To avoid any misunderstanding about my motives, representing lawyers is an insignificant source of my income. In fact, it is a distraction, but one I am committed to.

Sincerely,



Robert K. Hilder

Cc. w/attachments: Billy Walker, Esq. and Todd Wahlquist, Esq., Office of Professional Counsel; President Lori Nelson, Esq.; and Diane Abegglen.

Attachment 1

WHAT PROCESS IS DUE IN THE INFORMAL DISCIPLINE PROCESS?

Submitted by Robert K. Hilder

November 18, 2012

1. **Is a public reprimand a "low level" sanction not entitled to substantial due process protection?**

It is a challenge to tackle due process in the context of informal discipline. The Utah Supreme Court has spoken on the subject with clarity and fairly frequently. For example, in Long v. Committee, the court explained its view on due process:

> It is undisputed that an attorney is entitled to due process in disciplinary actions. The right to due process requires that an individual receive adequate notice of the charges, "and an opportunity to be heard in a meaningful way." But the level of due process required depends on the context of the proceeding. For example, we have explained that "due process is flexible and calls for the procedural protections that the given situation demands." In the context of informal attorney discipline, we have stated that the procedures listed in the RLDD are sufficient to afford due process.

Long v. Committee, 256 P.3d 206, 2011 UT 32, ¶29.

In the same case, the court explained why the flexible due process tended to comparatively limited guarantees in an informal discipline casas opposed to a court proceeding:

> Furthermore, in rejecting Mr. Long's argument that particularized findings of fact are necessary, we note that the nature of a screening panel's role in attorney discipline matters makes such a requirement impractical or infeasible. Screening panels are made up of volunteer attorneys and have only limited powers. For example, screening panels can dismiss cases, issue letters of caution, refer cases to the Committee Chair for recommendations of low-level discipline, or direct the OPC to file a formal case against the respondent for further proceedings in the district court.[26] This system was specifically designed to promote speed and efficiency in low-level attorney discipline cases. Accordingly, a requirement that a screening panel state detailed factual findings would be unnecessarily burdensome in light of the limited function of a screening panel's role in the proceedings.

Id. at ¶36 (emphasis added).

I do not, of course, challenge the court's rationale that flexible due process standards are appropriate. I do question the underlying premise; namely, that all informal discipline cases are, in fact, "low level." The court routinely characterizes disbarment as a "professional death penalty." I have no reason to argue with that characterization, and I would agree that private admonitions, and all sanctions below that level, are truly relatively low level. That is simply not true of public reprimands.

The professional and personal damage wrought by a public reprimand inflicts very substantial wounds, even if they are not always fatal—and sometimes they may, indeed, end a career. If the process due is in fact properly tied to the severity of the discipline, I submit that the line has been drawn one step too high.

The remedy is not solely to move cases that the Panel determines may warrant public reprimand into the formal track. I submit that to make the move to a formal process is a better choice than continuing the present system, but requiring more by way of procedures, and elevating the OPC prosecutorial role to a more legitimate prosecution model, with the appropriate discretion, could also ameliorate the present problems substantially.

2. **The Supreme Court's ultimate authority to substitute its judgment for that of the Screening Panel and Ethics and Discipline Committee is not a sufficient safeguard.**

The Supreme Court's authority, derived from article VIII, section 4 of the Utah Constitution is plenary. It provides that "[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." The court explained in Long its view that its authority is the ultimate check on error at the Committee level:

> Because we are charged with the power to discipline attorneys, conclusory findings of fact do not present the same difficulty in the attorney discipline context as they do in the administrative context. Thus, because we are charged with attorney disciplinary matters, we can make a determination as to whether a Committee's recommendation is appropriate. Based on this different role, we reject Mr. Long's argument that our precedent requires screening panels to make the same detailed findings of fact that are necessary when we review administrative agency determinations.

Long v. Committee, 256 P.3d 206, 2011 UT 32, ¶41 (emphasis added).

The underlined text gives rise to my query: Can the Supreme Court's determination of appropriateness be any better than the quality of the initial proceeding? As it stands today, the Panel process is as good as it can be in light of the constraints on both the Panel and the OPC. I do not pretend to understand all that occurs at the OPC or in the Panel by a long way, but I have learned a few things. For example;

- Although the Supreme Court refers to written findings, conclusions, and recommendations as the Panel's, in the typical case the only thing Panel writes is a summary decision sheet, which is the basis of the final document written by OPC lawyers. The Panel chair is certainly free to edit or modify what the OPC provides, but for the very reasons the court states as justification for relaxed due process, that rarely occurs. The OPC is almost powerless to improve the written product, because OPC counsel may not have communication with the Panel to clarify intent, unless the respondent or his or her lawyer is present—and there is apparently no procedure to permit such a meeting or conference.

- The court suggests that respondents are aware "of the facts forming the basis for each alleged violation of the rules of professional conduct because he received a copy of the

informal complaints and the OPC's findings for each matter." Long at ¶30. That appears to be a belief not confirmed by my experience. For example:

- The OPC, hewing to its apparent view that its job is to provide, but not filter, information, throws pretty much any alleged "fact" into the hopper, and a fact is anything provided through investigation, whether relevant, prejudicial or incredible.

- The OPC may, or may not state the basis for inclusion of a potential rule violation. In my most recent matter, the OPC added one additional rule, barely two weeks before the Panel hearing. The rule was cited. Certainly facts were cited in the original NOIC, but there were no "OPC findings" or any attempt to tie the "facts" in the NOIC to the new rule. When challenged at the hearing, OPC counsel explained—I believe in good faith—that because the Panel may find a violation on any rule, whether referenced in the NOIC or not, it was OPC's responsibility to add any rules that might fit, with or without explanation, at any time.

- Lawyer respondents do not always know specifically what they are facing. The reality of Panel hearings is that, as I saw recently when I accepted a matter after the Panel made its recommendations, that the NOIC and the Panel recommendations were similar only because they both referenced Rules of Professional Conduct. In that matter, the NOIC referenced five Rules as potential conduct issues. The Panel rejected four rules—all but Rule 8.4(a), the ever-present last count, which the rules committee is now re-considering at the direction of the Supreme Court. The Panel found violations of two rules that had never been referenced at any prior time. Presumably that is within the Panel's power, but it is not consistent with the court's statement that due process is satisfied because the respondent knew what he was facing.

- Finally, on this point, and in general terms, the inability to cross-examine and otherwise test evidence against the respondent in a form familiar to lawyers may be enough for private discipline, but it falls short of fair process at some point as the sanctions increase. I suggest the potential of public reprimand is that point.

3. The OPC should either function as a prosecutor, or as staff to the Committee, but it—or at least the same lawyer--cannot do both and ensure fairness

The OPC ostensibly has a "prosecutorial" function, Rule 14-504(b) and (b)(6), and it does in fact screen cases, and dismiss some as frivolous. Beyond these functions, the OPC does not appear to function in any other substantial way as a prosecutor, unless the matter is filed as a formal complaint in district court.

A prosecutor performs an invaluable quasi-judicial function. It is my understanding that OPC lawyers see their role as inherently neutral at the Panel stage (see above); that is, except for an early screening, they exercise no discretion in what they present to the Panel. They make no

judgments regarding the relevance or credibility of evidence. In fact, in my experience they take the neutrality stance so seriously that they will not agree to stipulate to uncontested facts before the Panel, despite the economies that can be achieved and the Rules of Civility and Professionalism that encourage stipulations. That may be what is intended. If so, the role should be reconsidered, and renamed. If, however, prosecution is intended, that fact should be clarified, and the obligations and professional responsibilities of the OPC defined.

Until the OPC role is clarified, they are in a vulnerable and invidious position. On the one hand, acting as secretary to the Committee, Rule 14-503(h), they are more akin to counsel to the OPC than prosecutor, but the court has made it clear that OPC lawyers have no presumptive good faith defense if they do the Committee's bidding, but at the same time violate any rule governing the conduct of lawyers, including Rule 11, Utah Rules of Civil Procedure:

> We also reject the OPC's suggestion that by filing a complaint based on a screening panel's findings and recommendations, it necessarily acts in good faith. Admittedly, RLDD 11(a) requires the OPC to prepare and file a formal complaint "[i]n the event the screening panel finds probable cause to believe that there are grounds for public discipline and that a formal complaint is merited." This directive, however, is subordinate to rule 11 of the Utah Rules of Civil Procedure. See RLDD 17(a) ("Except as otherwise provided in these rules, the Utah Rules of Civil Procedure ... apply in formal discipline actions...."). Thus, the OPC is ultimately prohibited from presenting any pleading or paper to the court with knowledge, information, or a belief that such paper is being presented for an improper purpose, that the claims and other legal contentions are not warranted by existing law, or that the allegations and other factual contentions do not have evidentiary support. See Utah R. Civ. P. 11(b).

And one must ask, if the OPC lawyers are intended to act as prosecutors, are there not ethical standards that should also govern, which standards may well be in conflict with the OPC role as secretary to the Panel. Certainly in Panel hearings, even the configuration around the table tells a story. The Panel sits on one side. The complainant, respondent, and any counsel for those parties sit across the table from the Panel. The OPC lawyer sits at one end, not in any setting that suggests the adversarial system at work, but more like counsel to a board, sitting at the Panel's elbow, to advise. I am not suggesting any of this is intended or nefarious. I am suggesting when all of the factors are considered, more thought needs to be given to appropriate roles and perceptions.

4. The Supreme Court's recent acceptance of substandard adjudication risks fostering an ever-declining professional performance in the discipline system.

The heading to this section is provocative. I apologize for any offense, but consider the evidence, and the handcuffs that have been placed on OPC lawyers as they try to do their work professionally.

The Long case is an exhibit. I have read every decision since the present informal discipline was instituted. While Long is a convenient reference tool, it is consistent with all recent cases addressing informal discipline. In that decision, the court described the Panel's findings, conclusions, and recommendations using the following terms:

- somewhat conclusory (¶30)
- the most conclusory of the panel's findings of fact (¶31)
- Although the findings of fact could have been more particular, the lack of detailed findings (¶32)

Then the court concluded that the standards were nevertheless satisfied. I used this language in an exception hearing. I compared the Long findings with the findings, etc. in the matter I was arguing. It was certainly arguable whether the findings and conclusions in my case were more or less detailed and informative than those in Long, but the OPC response should be troubling to this Committee and the court. Paraphrased, it was that certainly the findings and conclusions could have been better, but the Long standard is the bar the court has set. That appears to be true. The question is, should it be the standard, at least when public reprimand is ordered.

Attachment 2

THE UTAH JUDICIAL PROCEEEDINGS PRIVILEGE: THE CASE FOR EXTENSION OF THE PRIVILEGE TO PROFESSIONAL DISCIPLINE PROCEEDINGS

Submitted by Robert K. Hilder

November 18, 2012

The Judicial Proceedings Privilege

On July 6, 2012, the Utah Supreme Court adopted a newly expansive view of the judicial proceedings privilege. Moss v. Parr Waddoups, 2012 UT 42. The privilege specifically provides an absolute immunity against civil suits. The decision does not expressly encompass professional conduct proceedings or in any way alter the Bar's ability to discipline or sanction lawyers who have engaged in misconduct. In fact, the decision expressly relies on rules of civil procedure, rules of professional conduct, and the court's inherent authority, to "provide adequate safeguards to protect against abusive and frivolous litigation tactics." Moss v. Parr Waddoups, at ¶ 38 (emphasis supplied) (*quoting* Clark v. Druckman, 624 S.E.2d 864, 870 (W.Va. 2005); *accord* Levin Middlebrooks v. U.S. Fire Ins. Co., 639 So.2d 606, 608 (Fla. 1994). It is my submission that the Advisory Committee should consider asking the Supreme Court to look at the judicial proceedings privilege again, this time in the context of bar disciplinary proceedings, and direct that for conduct that indeed fits within the privilege, professional discipline is not warranted.

The Utah court's brief reference to the foregoing precedent makes the case that while the judicial proceedings privilege provides an "extraordinary scope" of immunity, the exceptions for certain classes of [generally egregious] conduct, and the mechanisms that otherwise exist to govern conduct related to judicial proceedings, are sufficient to justify an otherwise absolute privilege. The heart of the analysis, and the reason this Committee should recommend that the Supreme Court eliminate the professional discipline loophole in the privilege, in the absence of "abusive and frivolous litigation tactics," is found in the discussion of the history and policies that support the privilege.[1]

History

The doctrine has been in existence for centuries. *See, e.g.* Cutler v. Dixon, 76 Eng. Rep. 886, 887-88 (K.B. 1585), where the King's Bench rejected an action for words spoken in "course of justice," because such an action would hinder litigation for "those who have just cause for complaint." (*cited in* Loigman v. Twp. Comm. of Middletown, 889 A.2d 426 (N.J. 2006)). Utah's extension of the absolute privilege is brand new: "Whether the privilege extends to conduct as well as statements occurring in the course of judicial proceedings is an issue of first impression in Utah." Moss v. Parr Waddoups, at ¶ 29 (emphasis in original). The once common

[1] In other sections of its decision, the court identifies independent torts such as fraud, bad faith conduct generally, and some forms of abuse of process that forfeit the immunity provided by the privilege. Moss v. Parr Waddoups, at ¶ 37. Such conduct, which forfeits any right to invoke the privilege, obviously is not contemplated by my suggestion regarding extension of the privilege to professional conduct proceedings.

limitation of the privilege to words typically arose in the context of defamation. The privilege historically immunized all participants in a proceeding, including judge, counsel, parties and witnesses. The extension now embraced by the Utah Supreme Court seems mostly, if not entirely, crafted to protect lawyers, and the interests of their clients, in any conduct that "relates to" the proceedings. Id. at ¶ 28.[2]

Policy

To understand why this Committee should recommend, and the Supreme Court direct, extension of the privilege to professional conduct proceedings that might sanction conduct that is otherwise immune, we need to recognize what is at the heart of the Utah court's rationale in Moss v. Parr Waddoups, which is the policies that uphold the privilege. I reference statements of the Utah Supreme Court, and of courts upon which the Utah court relied:

- "The privilege is intended to promote the integrity of the adjudicatory proceeding and its truth finding processes." Moss v. Parr Waddoups, at ¶ 30 (citation omitted).

- "The Restatement (Second) of Torts recognizes that the privilege 'is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.' Restatement (Second) of Torts § 586 cmt a (1977).

- "If an attorney could be held liable to an opposing party for statements made or actions taken in the course of representing his client, he would be forced constantly to balance his own potential exposure against his client's best interests." Moss v. Parr Waddoups, at ¶ 33 (citation omitted).

- "Lawyers . . . must be free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon." Id. at ¶ 36 (citation omitted).

- To hold that the privilege does not apply to conduct, "would invite attorneys to divide their interest between advocating for their client and protecting themselves from a retributive suit." Id. (citation omitted).

Why the Judicial Proceedings Privilege Should Be Extended to Professional Conduct Proceedings That Involve Conduct Absolutely Immune From Civil Suit.

The Committee, and ultimately the Utah Supreme Court, must reconcile Moss v. Parr Waddoups Brown Gee & Loveless, 2012 UT 42, with discipline rules, because the immunity the privilege extends was developed to provide the committed advocate protection, provided she is

[2] While the privilege once covered only in-court proceedings that is no longer the case. The Utah Supreme Court, and other courts on which it relies, use a variety of comprehensively inclusive terms to show the expansion of the privilege. Examples include: "in connection with representing a client in litigation," at ¶ 33; the privilege "must be accorded to any act occurring during the course of a judicial proceeding . . . so long as the act has some relation to the proceeding," at ¶ 32 (emphasis supplied); and "when an attorney is acting in his representative capacity pursuant to litigation, and not solely for his own interests." Taylor v. McNichols, 243 P.3d 642, 658 (Idaho 2010).

acting in the course of a judicial proceeding, and she does not step over the line that defines the privilege's boundaries. The protection provided is meaningless unless it extends beyond the traditional area of civil suits. As Utah's sister jurisdiction, Idaho, cited approvingly, "if the policy [the absolute privilege] is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under another label." Taylor v. McNichols, 243 P.3d 642, 653 (Idaho 2010) (quoting, Rainier's Dairies v. Raritan Valley Farms, 117 A.2d 889, 895 (N.J. 1955)).

The Rainier's court was expanding the privilege beyond defamation cases, not beyond civil suits, but the point remains valid: An absolute immunity that centers explicitly on letting the lawyer do her job without fear of retribution is meaningless if it does not protect against all retribution. The necessary check on misconduct must be grounded on an analysis of the nature and degree of misconduct, and the intent of the actor.

As counsel for lawyers facing discipline over the past year, I have been accused of suggesting that the privilege shields lawyers from all disciplinary proceedings. That is not so. I make no argument that the privilege serves to shut down the disciplinary process entirely—not even substantially. If conduct is abusive or frivolous—or subject to any other clearly stated exception to the privilege—such conduct belongs in the discipline process. All I argue is that the disciplinary rules should not to be used as a back door that eviscerates the privilege, unless that is what the Supreme Court intends.

The facts of Moss v. Parr Waddoups, provide the perfect illustration. Lawyers of distinction, including now Judge Waddoups, and Jonathan Hafen, were sued for allegedly improper actions, including the search of a private home, and seizure of property, in connection with an intellectual property case. There was no search warrant. When the lawyers and deputy sheriff first arrived at the home and sought to enter and seize property, the named defendant was away, and his girlfriend initially resisted the entry. After the officer suggested he could kick the door in, the lawyer wisely sought additional court authority while the officer stayed in place. Whether the authority received was legally sufficient was never decided. The Utah Supreme Court ruled that neither the lawyers nor their firm should be subject to suit under these facts.

The question that should be pondered is whether the Court even considered that the same lawyers could or should now face disciplinary action for their conduct in connection with the intellectual property lawsuit. I submit that was never the intention, but the door is wide open for such action. I have recently had the experiencing of defending two discipline cases where my client's actions in each matter paled against the alleged actions in Moss, but the privilege gave my clients no protection. I submit that the protection for zealous and selfless lawyers intended by the Court is of little benefit if they may still face Bar discipline. The Court's decision in Moss effectively makes that point: "[A]ttorneys must 'be free to use their best judgment in prosecuting or defending a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.'" Moss, at ¶32 (citation omitted; emphasis added).

A professional conduct action is all about misconduct, and it is potentially a much greater source of fear for a lawyer than is a civil lawsuit. Having represented lawyers in four Utah OPC matters, and one federal matter in the last year, and having counseled another three lawyers with

pending maters, I do not exaggerate when I say that, given the choice between facing a civil suit as opposed to an OPC action, I would pay the plaintiff's civil filing fee to avoid the OPC action.

The Exceptions to the Privilege Adequately Protect Against Egregious Misconduct Not Reasonably Related to Representation.

The boundaries of the privilege are now well-surveyed and staked. Abusive or frivolous litigation tactics negate the privilege. Criminal conduct negates the privilege. Fraud or other bad faith conduct negates the privilege. Malicious prosecution negates the privilege, but only if it occurs outside the scope of the proceeding, or if undertaken for the lawyer's own interest. *See*, Moss at ¶¶ 37 & 38.

"[T]he privilege presumptively attaches to conduct and communications made by attorneys on behalf of their clients in the course of judicial proceedings." Moss, at ¶ 36. The question is whether any exception to the privilege applies to overcome the presumption. If the privilege does apply, its scope is absolute. *See, e.g.*, Taylor v. McNichols, 243 P.3d 642, 654 n. 5, & 655 (Idaho 2010). There is a clear boundary. If an exception defeats the application of the privilege, the alternative path is clear, and civil suits may proceed.

In one of my OPC cases the OPC cited Rules 1.1 and 1.2 to demonstrate that the Rules are not foreclosed by the judicial proceedings privilege even when conduct is neither abusive nor frivolous. The OPC is correct, and their argument demonstrates that extending the privilege consistently with the Moss reasoning does no harm to other conduct rules. Rules 1.1 and 1.2, and many others, are not pre-empted, because they address the lawyer's obligations to her client, or they address conduct not related to the lawyer's conduct in relation to a judicial proceeding. The judicial proceedings privilege addresses liability to a third-party, when the lawyer is acting for her client.

The privilege expressly recognizes a lawyer's duty to put her client's interests above her own. If she does that, without resorting to abusive or frivolous tactics, bad faith, criminal conduct, or other defined improper conduct, her fealty to the client will not be punished in a civil suit. I ask why this appropriate and necessary protection should not be extended to lawyer professional conduct proceedings.

Attachment 3

A. MITIGATING AND AGGRAVATING FACTORS SHOULD BE CONSIDERED IN ALL LAWYER DISCIPLINE PROCEEDINGS.

B. THE COMMITTEE SHOULD RECOMMEND RULES THAT REQUIRE A SIMPLIED FORM OF BIFURCATION IN THE INFORMAL PROCESS, OR THAT AT A MINIMUM PANELS SHOULD BE PROVIDED RULES AND METHODS TO AVOID INFECTING THE DISCIPLINE PROCESS WITH IMPROPER OVERLAP BETWEEN DETERMINATION OF MISCONDUCT AND DETERMINATION OF SANCTIONS.

Submitted by Robert K. Hilder

November 18, 2012

A. Mitigation and Aggravation

Rule 14-604 states that "the following factors should be considered in imposing a sanction, after a finding of misconduct." (Emphasis added).

The factors include "the existence of aggravating and mitigating factors."

The instruction seems clear, "should," a form of "shall," is a mandatory term, and the instruction is consistent with principles of fairness and comprehensive adjudication of an appropriate penalty.

The clarity dims; however, in the opening words of Rule 14-607: "After misconduct has been established, aggravating and mitigating factors may be considered and weighed in determining what sanctions to impose." (Emphasis added).

The Chair of the Supreme Court's Committee on Ethics and Discipline recently ruled that the permissive "may" controls, because the rules of construction apply, and Rule 14-604 is general, while Rule 14-607 is specific. It is specific, but primarily as to the types of conduct that can be considered.

I do not criticize the reasoning. I argue that the ruling makes the need for clarity obvious. I also note that in the recent matter of Discipline of Nathan Jardine, the court used "should" language and a reference to Rule 14-604 when discussing mitigation. 2012 UT 67, ¶79. In the following paragraph, addressing aggravation, the court referred to Rule 14-607, but the context was not should vs. may, it was the detailed factors to be considered.

A discipline proceeding may be conducted without reference to mitigating or aggravating circumstances, but I suggest that to make the consideration entirely discretionary robs the process of some of its legitimacy. I submit that the system is not trusted by many lawyers, and every effort should be made to promote fairness in form and substance.

B. Bifurcation: Misconduct, Harm, and Sanction

The formal disciplinary process in district court must be conducted through a bifurcated proceeding. The reason is clear— evidence of prior misconduct, and to some degree evidence of the degree of harm, can taint the adjudicatory integrity of the best-intentioned adjudicator. An experienced judge can compartmentalize effectively, but even she not always. In my Panel experience to date, I have felt that some—certainly not all—panel members get hung up at the outset because they have read or heard very emotional and dark versions of the harm done by the alleged misconduct. The problem is allied to the issue I raise regarding perceptions of the OPC's role as prosecutor, which I address in Attachment 1.

The bifurcation issue exists because there is no discretion exercised by the OPC, and no filtering of evidence that in any other forum would be excluded in the fault ("guilt") phase, because of unfair prejudice, confusion or introduction of bias. My concern is not academic. In a recent proceeding I handled, the Notice of Informal Complaint that was presented to the Panel included, in its earliest paragraphs, highly prejudicial allegations of great harm to a child, which indisputably occurred, if at all, one week before the lawyer's single act of alleged misconduct. In other words, the misconduct, even if it occurred (the NOIC was dismissed following the hearing), could not have had any causal relationship to the alleged harm. Nevertheless, that paragraph stating serious, but irrelevant harm, was one of the first items of substance in the NOIC.

One reason I address mitigation, aggravation, and bifurcation in one section is another real life experience. The Supreme Court makes it clear that criminal analogies are not helpful in arguing due process in discipline proceedings, because they are, in fact, civil. Even in the civil context; however, we are cautioned to avoid conflating concepts, and an apt analogy is found in the Court's fairly frequent recent discussions of the frivolous and bad faith attorney's fee provision formerly found in U.C.A. §78-27-56, and now in §78B-5-805. To award fees, the court must find the action or defense is frivolous or without merit, AND not asserted in good faith. Time and again parties and counsel press the fee claim while utterly failing to establish the absence of the good faith element. The Court has rejected these attempts consistently. See, e,g, Still Standing Stable LLC v. Allen, 122 P.3d 536, 2005 UT 46.

In my one Exception experience, I argued that mitigating factors should have been considered. I was rightly chastised for not recognizing that not all mitigating factors were presented to the Screening Panel, but it was the OPC response to my argument that brought this issue into focus. I was, of course, arguing mitigation in support of a lesser sanction. The OPC argued that mitigation must have been considered, because "it was likely the mitigating circumstances . . . that led the panel to conclude that [lawyer] only acted negligently in violating the rules of professional conduct." Using evidence intended solely to determine the sanction as a basis for a finding of mental state in the determination of liability is conflation defined, but in light of the approach taken by the OPC in not exercising more discretion in what they present,[1] it is almost understandable that the OPC would defend this confusion of process.

[1] The OPC may indeed understand their role correctly, but if so, that is an argument to either change and clarify the role, or to bifurcate proceedings in some way to guard against the harm that does and will result.

The final element that I address under the bifurcation label may be seen in another light, through the lens of causation analysis. The sanction decision "should" consider the potential or actual injury caused by the lawyer's misconduct. Rule 14-604(c). The causation requirement clearly exists, but I submit that because the OPC feels it must put before the Panel everything the complainant or a witness alleges, and leave it to the Panel to decide what it believes—with essentially no advocacy from the designated "prosecutor," causation is likely not consciously considered until well after the Panel has been infected by dispassionate statements of major or minor harm, without benefit of screening for credibility or relevance. One remedy is to separate the harm and causation evidence and adjudication from the conduct evidence.

Attachment 4

RULES 4.1 THROUGH 4.4, RULES OF PROFESSIONAL CONDUCT

Submitted by Robert K. Hilder

November 18, 2012

The rules in Section 4 of the Rules of Professional Conduct seem to me to be tailored to address, as stated, "Transactions with persons other than clients." The four sub-sections each seem to address different classes of persons or entities. If that is the intent, there is a problem in the interpretation of the rules:

Rule 4.1 is straightforward, and I have no experience with misunderstanding of that Rule. Rule 4.2 defines the class clearly: persons (opposing or potentially opposing parties), represented by counsel). Rule 4.3 describes how lawyers must deal with unrepresented persons. It is the last Rule, 4.4, that creates a problem in its application. The title is "Respect for Rights of Third Persons." The rules already talk about represented and unrepresented persons. The content of the rule seems to support that it is concerned with rights of persons not a party to an action or transaction, but who can be drawn in to a conflict through discovery or other processes. Does Rule 4.4 purport to govern lawyer interaction with parties, represented or not? If not, it would be helpful to clarify what is intended. If, as I submit, Rule 4.4 describes a separate class of persons, not parties, with whom lawyers interact, or who they may affect as the lawyer pursues information to aid his client, then it should be clear that for parties to an action or transaction, Rules 4.1, 4.2 and 4.3 apply, but not Rule 4.4.

A third-person is "another person, etc. besides the two principal ones involved." Oxford Am. Dictionary. There are sound policy reasons why a different concern is identified for a third-person, or non-party. An opposing party has engaged in the dispute, either by initiating the suit, or through the exercise of the court's jurisdiction, with all due process protections. He is represented or not, but he is explicitly protected by Rule 4.2 or 4.3. The non-party, third-person, lacks the protection of Rule 4.3, or the shield of the skilled advocate. The first sentence of Comment (1) gives further insight (Duty to subordinate the rights of others—but competing duties must be balanced. "Third person" is specified, because we cannot be assured they can protect themselves without a lawyer or the shield of Rule 4.3).

Whatever was intended, I merely submit that it is not presently clear, and it is subject to being applied unevenly.

Tab 4

AUGUST 2012 AMENDMENTS TO
ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0 Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

Screened

...

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

...

Rule 1.1 Competence

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

Comment

...

Retaining or Contracting With Other Lawyers

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

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

Maintaining Competence

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

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

Comment

...

Communicating with Client

...

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

...

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

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

Comment

...

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

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

[15~~3~~] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

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

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

disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

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

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

Former Client

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

...

Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

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

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

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

Comment

...

Client Confidences, Consent and Notice

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

...

Rule 1.18: Duties to Prospective Client

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

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

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

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

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

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

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

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

Comment

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

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not

occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client," ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

...

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

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

...

Rule 4.4 Respect for Rights of Third Persons

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

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

Comment

...

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

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

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

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

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

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

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

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

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

Comment

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

Nonlawyers Within the Firm

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

Nonlawyers Outside the Firm

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

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

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting

another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

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

...

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

...

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

...

Rule 7.1 Communications Concerning a Lawyer's Services

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

Comment

...

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

...

Rule 7.2 Advertising

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

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

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

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

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

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

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

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

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

Comment

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are ~~is~~ now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income;

prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~ a solicitation ~~of a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that is not initiated by the prospective client~~.

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

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

the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

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

...

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

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

(1) is a lawyer; or

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

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

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

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

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

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

Comment

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

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

upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

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

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

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

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

Rule 7.3(b).

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

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

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

...

AUGUST 2012 AMENDMENTS
TO OTHER ABA POLICIES

ABA Model Rule on Practice Pending Admission [NEW]

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

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

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

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

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

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

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

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

   h. pays any annual client protection fund assessment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

ABA Model Rule on Admission by Motion

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

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

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

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

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

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

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

105A Revised

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

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

Rule 1.0 Terminology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

Screened

...

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

...

Rule 1.1 Competence

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

Comment

...

Maintaining Competence

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

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

Comment

...

Communicating with Client

...

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

...

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

Comment

...

Acting Competently to Preserve Confidentiality

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

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

...

Rule 4.4 Respect for Rights of Third Persons

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

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

Comment

...

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

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

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

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

Rule 1.18: Duties to Prospective Client

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

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

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

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

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

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

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

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

Comment

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

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

...

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

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

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

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

...

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

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

(1) is a lawyer; or

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

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

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

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

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

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

Comment

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

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

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

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

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

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

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

[~~78~~] 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.

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

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

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

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

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

Client-Lawyer Relationship
Rule 1.1 Competence

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

Comment
...

Retaining or Contracting With Other Lawyers

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

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

Maintaining Competence

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

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance~~ts~~

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

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

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

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

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

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

Comment

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

Nonlawyers Within the Firm

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

Nonlawyers Outside the Firm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

...

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

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

ABA Model Rule on Practice Pending Admission

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

a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;
b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;
c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;
d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;

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

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

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

h. pays any annual client protection fund assessment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

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

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

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

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

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

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

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

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

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

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

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

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

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

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

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

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

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

Comment

...

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

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

...

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

...

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

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

ABA Model Rule on Admission by Motion

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

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

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

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

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

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

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

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

105F Revised

AMERICAN BAR ASSOCIATION

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

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

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

Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

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

Comment

...

Detection of Conflicts of Interest

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

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

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

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

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

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

Acting Competently to Preserve Confidentiality

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

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

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

Former Client

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

Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

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

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

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

Comment

...

Client Confidences, Consent and Notice

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

...