



SERVED  
CV-14-261

*President*

**JIM SIMPSON**

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SUPREME COURT OF APPEALS  
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2014 MAR 19 P 2:15  
LESLIE W. STEEN, CLERK

March 19, 2014

Mr. Leslie W. Steen, Clerk  
Arkansas Supreme Court  
Justice Building  
625 Marshall Street  
Little Rock, AR 72201

Re: Arkansas Bar Association – Petition Addressing Proposed Changes  
to the Rules of Professional Conduct

Dear Mr. Steen:

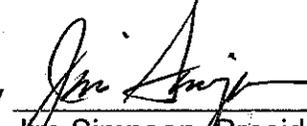
On behalf of the over 5,000 members of the Arkansas Bar Association, please find enclosed herein the original and seven (7) copies of the Association's Petition. Upon filing, please return a file-marked copy to the attention of Ms. Karen Hutchins at the Arkansas Bar Association. A self-addressed stamped envelope is enclosed for your convenience. Also enclosed is a check for \$165.00 for the filing fee.

Thank you for your prompt assistance in this matter.

Sincerely,

ARKANSAS BAR ASSOCIATION

By

  
Jim Simpson, President

Enclosures

cc: Ms. Karen Hutchins  
Ms. Lorrie Trogden  
Mr. Charles Harwell  
Mr. Brian Ratcliff

SERVED  
CV-14- 261

IN THE SUPREME COURT OF ARKANSAS

THE ARKANSAS BAR ASSOCIATION  
PETITIONERS NO.: \_\_\_\_\_

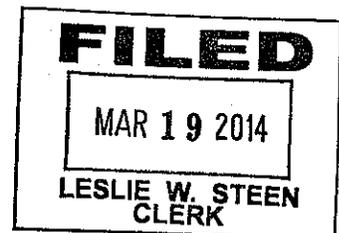
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PETITION

The Arkansas Bar Association, acting through its President Jim Simpson, and with the authority from the House of Delegates (House of Delegates) of the Association, and its Professional Ethics Committee (the Committee), in an effort to assist the Court in discharging its authority and responsibility under Amendment 28 to the Constitution of the State of Arkansas to regulate the practice of law, submit these proposed changes to the Rules of Professional Conduct for the Bar of Arkansas.

I.

The Arkansas Rules of Professional Conduct were first adopted by the Supreme Court, effective January 1, 1986, replacing the Code of Professional Responsibility. Over the years other changes have been made, most notably the revision of the advertising and solicitation rules in 1997. Following two years of study, the current version of the Arkansas Rules of Professional



Conduct was adopted by the Supreme Court, effective May 1, 2005.

## II.

Since then the American Bar Association (ABA) has made changes to the Model Rules; some of those changes were a result of the work of the ABA Commission on Ethics 20/20. It has long been the approach of the Arkansas Bar Association to follow the Model Rules, unless strong reasons exist to take a different approach in Arkansas. The Committee decided to study all the changes in the Model Rules since 2005 and to determine whether to make recommendations for changes in the Arkansas Rules.

## III.

The Petitioners respectfully move the Court to adopt the Rules of Professional Conduct as proposed below. As a preliminary note, the Committee considers these recommendations to be non-controversial. Many recommendations involve cleaning up language, inserting references to the new technology of the past decade, and adjusting to changes in the profession itself. Attached to this report as Exhibit A are the recommended changes (deleted language is stricken; new language is underlined). The recommended changes are summarized as follows:

1) Rule 1.0 (terminology): addition of language on e-mail and electronic matter. This recommendation arises from the ABA August 2012 Amendments.

2) Rule 1.1 (competence): two new comments on using lawyers outside the firm. This recommendation arises from the ABA August 2012 Amendments.

3) Rule 1.4 (communication): change language from telephone calls to communications. This recommendation arises from the ABA August 2012 Amendments.

4) Rule 1.6 (confidentiality): A provision is added that permits some disclosure of information to detect and resolve conflicts of interests, and a provision requiring reasonable efforts to prevent the inadvertent or unauthorized disclosure of confidentiality. Three explanatory Comments are added. This recommendation arises from the ABA August 2012 Amendments.

5) Rule 1.8(c) (gift to lawyer): the word "spouse" is inserted. The word was inadvertently omitted in 2005. This recommendation arises from the Director of the Office of the Committee on Professional Conduct and is motivated by the prior omission.

6) Rule 1.17 (sale of law practice): cross - references are inserted. This recommendation arises from the ABA August 2012 Amendments.

7) Rule 1.18 (duties to prospective client): Clarifying language and a comment are inserted. It removes any protection for a client who communicates with a lawyer "for the purpose of disqualifying the lawyer." This recommendation arises from the ABA August 2012 Amendments.

8) Rule 4.4 (respect for rights of third persons): the language is expanded and clarified to cover electronically stored information. This recommendation arises from the ABA August 2012 Amendments.

9) Rule 5.3 (responsibilities regarding non-lawyer assistance): two comments are added, discussing the use of non-lawyers outside the firm, such as investigative services, document management companies, and printing and scanning services. This recommendation arises from the ABA August 2012 Amendments.

10) Rule 5.5 (unauthorized practice of law): minor changes in language. This recommendation arises from the ABA August 2012 Amendments.

11) Rules 7.1 - 7.3 (advertising and solicitation): after a two year study and report by a special committee, these Rules were adopted in 1999. Both lawyers supporting advertising and lawyers opposing advertising were on the ad hoc committee; neither camp was totally satisfied by the language; both camps compromised. The Arkansas Rules thus departed from the Model Rules. When the Professional Ethics Committee reviewed the Model Rules from 2002 to 2005, it decided not to recommend any changes in the Arkansas Rules.

The Committee made the same decision in 2013: it is not wise or appropriate to reopen the entire issue of advertising and solicitation. Admittedly the current language contains some ambiguities and inconsistencies. For example, what is an endorsement? What is a testimonial? What is a dramatization? When can a client's name be used in advertising? However, Director of the Office of the Committee on Professional Conduct, Stark Ligon, a member of the Committee, indicated that the current language has not created any enforcement difficulty for the Committee on Professional Conduct. Accordingly, the Committee's recommended changes are minor and, we believe, non-controversial.

Changes: language on electronic communications and email is clarified or added; Comment 2 to Rule 7.1 on truthful statements in advertising (such as achievements on behalf of prior clients) is inserted; Rule 7.3 (a) is rewritten for clarity; the term "prospective client" is removed because it is inconsistent with Rule 1.18; Comment 1 to Rule 7.3 clarifies what is and is not an improper solicitation. These recommendation arise from the ABA August 2012 Amendments.

## V.

The Committee met on March 13, 2012; February 27, 2013; April 17, 2013; and May 3, 2013. Different committee members prepared and presented the recommendations from the ABA, and reported on the changes that would be made in the Arkansas Rules. At the last meeting a majority of the members participated, and unanimously approved the these recommendations. The work of the Committee was achieved by the active participation of its members and the expertise they brought to the task - Mr. Brad L. Hendricks, Chair, Mr. Howard W. Brill, Mr. Larry W. Burks, Ms. Suzanne G. Clark, Ms. Edie Ervin, Mr. Andrew Bost Faulkner, Mr. Gregory B. Graham, Mr. Paul W. Keith, Ms. Valerie L. Kelly, Mr. R. Stark Ligon, Mr. John G. Lile, III, Col. William A. Martin, Ms. Ashley Dawn O'Neal, Ms. Constance Brown Phillips, Mr. John L. Rush, Mr. James E. Smith, Jr., Ms. Michelle M. Strause, Mr. R. Keith Vaughan, and Mr. Kent R. Walker.

## VIII.

In addition to the unanimity of the Committee, the Arkansas Bar Association Board of Governors and the House of Delegates passed these recommendations unanimously. This unanimity within the Association is in contrast to prior efforts to modify the Rules of Professional Conduct, which were not unanimous.

## IX.

The Arkansas Bar Association, its House of Delegates, and the Committee have worked diligently to create a proposal that we believe will positively impact the Rules of Professional Conduct and accommodate the changes in the profession itself. We petition the Court to adopt the proposed changes herein contained.

Respectfully submitted,

ARKANSAS BAR ASSOCIATION  
2224 Cottdale Lane  
Little Rock, AR 72202



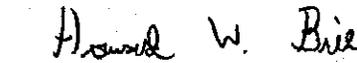
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Jim Simpson, President  
Arkansas Bar Association



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Brad L. Hendricks  
Committee Chair



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Professor Howard W. Brill  
Committee Member

1 **Rule 1.0: Terminology**

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

6  
7 (b) "Confirmed in writing," when used in reference to the informed  
8 consent of a person, denotes informed consent that is given in writing by  
9 the person or a writing that a lawyer promptly transmits to the person  
10 confirming an oral informed consent. See paragraph (e) for the definition  
11 of "informed consent." If it is not feasible to obtain or transmit the writing  
12 at the time the person gives informed consent, then the lawyer must obtain  
13 or transmit it within a reasonable time thereafter.

14  
15 (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law  
16 partnership, professional corporation, sole proprietorship or other  
17 association authorized to practice law; or lawyers employed in a legal  
18 services organization or the legal department of a corporation or other  
19 organization.

20  
21 (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under  
22 the substantive or procedural law of the applicable jurisdiction and has a  
23 purpose to deceive.

24  
25 (e) "Informed consent" denotes the agreement by a person to a  
26 proposed course of conduct after the lawyer has communicated adequate  
27 information and explanation about the material risks of and reasonably  
28 available alternatives to the proposed course of conduct.

29  
30 (f) "Knowingly," "known," or "knows" denotes actual knowledge of  
31 the fact in question. A person's knowledge may be inferred from  
32 circumstances.

33  
34 (g) "Partner" denotes a member of a partnership, a shareholder in a  
35 law firm organized as a professional corporation, or a member of an

36 association authorized to practice law.

37  
38 (h) "Reasonable" or "reasonably" when used in relation to conduct by  
39 a lawyer denotes the conduct of a reasonably prudent and competent  
40 lawyer.

41  
42 (i) "Reasonable belief" or "reasonably believes" when used in  
43 reference to a lawyer denotes that the lawyer believes the matter in  
44 question and that the circumstances are such that the belief is reasonable.

45  
46 (j) "Reasonably should know" when used in reference to a lawyer  
47 denotes that a lawyer of reasonable prudence and competence would  
48 ascertain the matter in question.

49  
50 (k) "Screened" denotes the isolation of a lawyer from any  
51 participation in a matter through the timely imposition of procedures  
52 within a firm that are reasonably adequate under the circumstances to  
53 protect information that the isolated lawyer is obligated to protect under  
54 these Rules or other law.

55  
56 (l) "Substantial" when used in reference to degree or extent denotes a  
57 material matter of clear and weighty importance.

58  
59 (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration  
60 proceeding or a legislative body, administrative agency or other body  
61 acting in an adjudicative capacity. A legislative body, administrative  
62 agency or other body acts in an adjudicative capacity when a neutral  
63 official, after the presentation of evidence or legal argument by a party or  
64 parties, will render a binding legal judgment directly affecting a party's  
65 interests in a particular matter.

66  
67 (n) "Writing" or "written" denotes a tangible or electronic record of a  
68 communication or representation, including handwriting, typewriting,  
69 printing, photostating, photography, audio or video recording and  
70 electronic communications e-mail. A "signed" writing includes an electronic

71 sound, symbol or process attached to or logically associated with a writing  
72 and executed or adopted by a person with the intent to sign the writing.

73

74 *Comment:*

75

76 *Confirmed in Writing*

77

78 [1] If it is not feasible to obtain or transmit a written confirmation at  
79 the time the client gives informed consent, then the lawyer must obtain or  
80 transmit it within a reasonable time thereafter. If a lawyer has obtained a  
81 client's informed consent, the lawyer may act in reliance on that consent so  
82 long as it is confirmed in writing within a reasonable time thereafter.

83

84 *Firm*

85

86 [2] Whether two or more lawyers constitute a firm within paragraph  
87 (c) can depend on the specific facts. For example, two practitioners who  
88 share office space and occasionally consult or assist each other ordinarily  
89 would not be regarded as constituting a firm. However, if they present  
90 themselves to the public in a way that suggests that they are a firm or  
91 conduct themselves as a firm, they should be regarded as a firm for  
92 purposes of the Rules. The terms of any formal agreement between  
93 associated lawyers are relevant in determining whether they are a firm, as  
94 is the fact that they have mutual access to information concerning the  
95 clients they serve. Furthermore, it is relevant in doubtful cases to consider  
96 the underlying purpose of the Rule that is involved. A group of lawyers  
97 could be regarded as a firm for purposes of the Rule that the same lawyer  
98 should not represent opposing parties in litigation, while it might not be so  
99 regarded for purposes of the Rule that information acquired by one lawyer  
100 is attributed to another.

101

102 [3] With respect to the law department of an organization, including  
103 the government, there is ordinarily no question that the members of the  
104 department constitute a firm within the meaning of the Rules of  
105 Professional Conduct. There can be uncertainty, however, as to the identity

106 of the client. For example, it may not be clear whether the law department  
107 of a corporation represents a subsidiary or an affiliated corporation, as well  
108 as the corporation by which the members of the department are directly  
109 employed. A similar question can arise concerning an unincorporated  
110 association and its local affiliates.

111  
112 [4] Similar questions can also arise with respect to lawyers in legal aid  
113 and legal services organizations. Depending upon the structure of the  
114 organization, the entire organization or different components of it may  
115 constitute a firm or firms for purposes of these Rules.

116  
117 *Fraud*

118  
119 [5] When used in these Rules, the terms "fraud" or "fraudulent" refer  
120 to conduct that is characterized as such under the substantive or procedural  
121 law of the applicable jurisdiction and has a purpose to deceive. This does  
122 not include merely negligent misrepresentation or negligent failure to  
123 apprise another of relevant information. For purposes of these Rules, it is  
124 not necessary that anyone has suffered damages or relied on the  
125 misrepresentation or failure to inform.

126  
127 *Informed Consent*

128  
129 [6] Many of the Rules of Professional Conduct require the lawyer to  
130 obtain the informed consent of a client or other person (e.g., a former client  
131 or, under certain circumstances, a prospective client) before accepting or  
132 continuing representation or pursuing a course of conduct. See e.g., Rules  
133 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such  
134 consent will vary according to the Rule involved and the circumstances  
135 giving rise to the need to obtain informed consent. The lawyer must make  
136 reasonable efforts to ensure that the client or other person possesses  
137 information reasonably adequate to make an informed decision. Ordinarily,  
138 this will require communication that includes a disclosure of the facts and  
139 circumstances giving rise to the situation, any explanation reasonably  
140 necessary to inform the client or other person of the material advantages

141 and disadvantages of the proposed course of conduct and a discussion of  
142 the client's or other person's options and alternatives. In some  
143 circumstances it may be appropriate for a lawyer to advise a client or other  
144 person to seek the advice of other counsel. A lawyer need not inform a  
145 client or other person of facts or implications already known to the client or  
146 other person; nevertheless, a lawyer who does not personally inform the  
147 client or other person assumes the risk that the client or other person is  
148 inadequately informed and the consent is invalid. In determining whether  
149 the information and explanation provided are reasonably adequate,  
150 relevant factors include whether the client or other person is experienced in  
151 legal matters generally and in making decisions of the type involved, and  
152 whether the client or other person is independently represented by other  
153 counsel in giving the consent. Normally, such persons need less  
154 information and explanation than others, and generally a client or other  
155 person who is independently represented by other counsel in giving the  
156 consent should be assumed to have given informed consent.

157  
158 [7] Obtaining informed consent will usually require an affirmative  
159 response by the client or other person. In general, a lawyer may not assume  
160 consent from a client's or other person's silence. Consent may be inferred,  
161 however, from the conduct of a client or other person who has reasonably  
162 adequate information about the matter. A number of Rules require that a  
163 person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a  
164 definition of "writing" and "confirmed in writing," see paragraphs (n) and  
165 (b). Other Rules require that a client's consent be obtained in a writing  
166 signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of  
167 "signed," see paragraph (n).

168  
169  
170  
171

172 *Screened*

173  
174  
175

[8] This definition applies to situations where screening of a  
personally disqualified lawyer is permitted to remove imputation of a

176 conflict of interest under Rules 1.11, 1.12 or 1.18.

177

178 [9] The purpose of screening is to assure the affected parties that  
179 confidential information known by the personally disqualified lawyer  
180 remains protected. The personally disqualified lawyer should acknowledge  
181 the obligation not to communicate with any of the other lawyers in the firm  
182 with respect to the matter. Similarly, other lawyers in the firm who are  
183 working on the matter should be informed that the screening is in place  
184 and that they may not communicate with the personally disqualified  
185 lawyer with respect to the matter. Additional screening measures that are  
186 appropriate for the particular matter will depend on the circumstances. To  
187 implement, reinforce and remind all affected lawyers of the presence of the  
188 screening, it may be appropriate for the firm to undertake such procedures  
189 as a written undertaking by the screened lawyer to avoid any  
190 communication with other firm personnel and any contact with any firm  
191 files or other materials information, including information in electronic  
192 form, relating to the matter, written notice and instructions to all other firm  
193 personnel forbidding any communication with the screened lawyer relating  
194 to the matter, denial of access by the screened lawyer to firm files or other  
195 materials relating to the matter and periodic reminders of the screen to the  
196 screened lawyer and all other firm personnel.

197

198 [10] In order to be effective, screening measures must be implemented as  
199 soon as practical after a lawyer or law firm knows or reasonably should  
200 know that there is a need for screening.

201

202

1 **Rule 1.1: Competence**

2  
3 **A lawyer shall provide competent representation to a client.**  
4 **Competent representation requires the legal knowledge, skill,**  
5 **thoroughness and preparation reasonably necessary for the**  
6 **representation.**

7  
8 *Comments:*

9  
10 *Legal Knowledge and Skill*

11  
12 [1] In determining whether a lawyer employs the requisite  
13 knowledge and skill in a particular matter, relevant factors include the  
14 relative complexity and specialized nature of the matter, the lawyer's  
15 general experience, the lawyer's training and experience in the field in  
16 question, the preparation and study the lawyer is able to give the matter  
17 and whether it is feasible to refer the matter to, or associate or consult with,  
18 a lawyer of established competence in the field in question. In many  
19 instances, the required proficiency is that of a general practitioner.  
20 Expertise in a particular field of law may be required in some  
21 circumstances.

22  
23 [2] A lawyer need not necessarily have special training or prior  
24 experience to handle legal problems of a type with which the lawyer is  
25 unfamiliar. A newly admitted lawyer can be as competent as a practitioner  
26 with long experience. Some important legal skills, such as the analysis of  
27 precedent, the evaluation of evidence and legal drafting, are required in all  
28 legal problems. Perhaps the most fundamental legal skill consists of  
29 determining what kind of legal problems a situation may involve, a skill  
30 that necessarily transcends any particular specialized knowledge. A lawyer  
31 can provide adequate representation in a wholly novel field through  
32 necessary study. Competent representation can also be provided through  
33 the association of a lawyer of established competence in the field in  
34 question.

35

36 [3] In an emergency a lawyer may give advice or assistance in a  
37 matter in which the lawyer does not have the skill ordinarily required  
38 where referral to or consultation or association with another lawyer would  
39 be impractical. Even in an emergency, however, assistance should be  
40 limited to that reasonably necessary in the circumstances, for ill-considered  
41 action under emergency conditions can jeopardize the client's interest.

42  
43 [4] A lawyer may accept representation where the requisite level of  
44 competence can be achieved by reasonable preparation. This applies as  
45 well to a lawyer who is appointed as counsel for an unrepresented person.  
46 See also Rule 6.2.

47  
48 *Thoroughness and Preparation*

49  
50 [5] Competent handling of a particular matter includes inquiry into  
51 and analysis of the factual and legal elements of the problem, and use of  
52 methods and procedures meeting the standards of competent practitioners.  
53 It also includes adequate preparation. The required attention and  
54 preparation are determined in part by what is at stake; major litigation and  
55 complex transactions ordinarily require more extensive treatment than  
56 matters of lesser complexity and consequence. An agreement between the  
57 lawyer and the client regarding the scope of the representation may limit  
58 the matters for which the lawyer is responsible. See Rule 1.2(c).

59  
60  
61  
62 *Retaining or Contracting With Other Lawyers*

63  
64 [6] Before a lawyer retains or contracts with other lawyers outside  
65 the lawyer's own firm to provide or assist in the provision of legal services  
66 to a client, the lawyer should ordinarily obtain informed consent from the  
67 client and must reasonably believe that the other lawyers' services will  
68 contribute to the competent and ethical representation of the client. See

69 also Rules 1.2 (allocation of authority), 1.4 (communication with client),  
70 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice  
71 of law). The reasonableness of the decision to retain or contract with other  
72 lawyers outside the lawyer's own firm will depend upon the circumstances,  
73 including the education, experience and reputation of the nonfirm lawyers;  
74 the nature of the services assigned to the nonfirm lawyers; and the legal  
75 protections, professional conduct rules, and ethical environments of the  
76 jurisdictions in which the services will be performed, particularly relating  
77 to confidential information.

78  
79 [7] When lawyers from more than one law firm are providing legal  
80 services to the client on a particular matter, the lawyers ordinarily should  
81 consult with each other and the client about the scope of their respective  
82 representations and the allocation of responsibility among them. See Rule  
83 1.2. When making allocations of responsibility in a matter pending before a  
84 tribunal, lawyers and parties may have additional obligations that are a  
85 matter of law beyond the scope of these Rules.

86  
87  
88  
89  
90

### 91 *Maintaining Competence*

92  
93 {6} [8] To maintain the requisite knowledge and skill, a lawyer should  
94 keep abreast of changes in the law and its practice, including the benefits  
95 and risks associated with relevant technology, engage in continuing study  
96 and education, and comply with all continuing legal education  
97 requirements to which the lawyer is subject.

98

1 **Rule 1.17: Sale of Law Practice**

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

6  
7 (a) The seller ceases to engage in the private practice of law, or in  
8 the area of practice that has been sold, in the State in which the practice has  
9 been conducted;

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

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

14 (1) the proposed sale;

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

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

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

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

27 (e) In every instance in which a law practice in its entirety is sold,  
28 the selling attorney, or the legal representative thereof, in the case of a  
29 deceased, disabled or disappeared attorney, shall within twenty (20) days of  
30 the completion of the sale, file an affidavit with the Committee on  
31 Professional Conduct that he or she has complied with the requirements of  
32 notice contained within this provision, to include proof of publication,  
33 along with a list of clients so notified and an exemplar of such notice. Such

34 affidavit shall also contain the address where communications may  
35 thereafter be directed to the affiant.

36 *Comment:*

37 [1] The practice of law is a profession, not merely a business. Clients are  
38 not commodities that can be purchased and sold at will. Pursuant to this Rule,  
39 when a lawyer or an entire firm ceases to practice, or ceases to practice in an  
40 area of law, and other lawyers or firms take over the representation, the  
41 selling lawyer or firm may obtain compensation for the reasonable value of  
42 the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

43  
44 *Termination of Practice by the Seller*

45  
46 [2] The requirement that all of the private practice, or all of an area of  
47 practice, be sold is satisfied if the seller in good faith makes the entire practice,  
48 or the area of practice, available for sale to the purchasers. The fact that a  
49 number of the seller's clients decide not to be represented by the purchasers  
50 but take their matters elsewhere, therefore, does not result in a violation.  
51 Return to private practice as a result of an unanticipated change in  
52 circumstances does not necessarily result in a violation. For example, a lawyer  
53 who has sold the practice to accept an appointment to judicial office does not  
54 violate the requirement that the sale be attendant to cessation of practice if the  
55 lawyer later resumes private practice upon being defeated in a contested or a  
56 retention election for the office or resigns from a judiciary position.

57  
58 [3] The requirement that the seller cease to engage in the private practice  
59 of law does not prohibit employment as a lawyer on the staff of a public  
60 agency or a legal services entity that provides legal services to the poor, or as  
61 in-house counsel to a business.

62  
63 [4] The Rule permits a sale of an entire practice attendant upon retirement  
64 from the private practice of law within the jurisdiction. Its provisions,  
65 therefore, accommodate the lawyer who sells the practice upon the occasion of  
66 moving to another state.

67  
68 [5] This Rule also permits a lawyer or law firm to sell an area of practice. If  
69 an area of practice is sold and the lawyer remains in the active practice of law,  
70 the lawyer must cease accepting any matters in the area of practice that has

71 been sold, either as counsel or co-counsel or by assuming joint responsibility  
72 for a matter in connection with the division of a fee with another lawyer as  
73 would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a  
74 substantial number of estate planning matters and a substantial number of  
75 probate administration cases may sell the estate planning portion of the  
76 practice but remain in the practice of law by concentrating on probate  
77 administration; however, that practitioner may not thereafter accept any estate  
78 planning matters. Although a lawyer who leaves a jurisdiction or geographical  
79 area typically would sell the entire practice, this Rule permits the lawyer to  
80 limit the sale to one or more areas of the practice, thereby preserving the  
81 lawyer's right to continue practice in the areas of the practice that were not  
82 sold.

83

#### 84 *Sale of Entire Practice or Entire Area of Practice*

85

86 [6] The Rule requires that the seller's entire practice, or an entire area of  
87 practice, be sold. The prohibition against sale of less than an entire practice  
88 area protects those clients whose matters are less lucrative and who might find  
89 it difficult to secure other counsel if a sale could be limited to substantial fee-  
90 generating matters. The purchasers are required to undertake all client matters  
91 in the practice or practice area, subject to client consent. This requirement is  
92 satisfied, however, even if a purchaser is unable to undertake a particular  
93 client matter because of a conflict of interest.

94

#### 95 *Client Confidences, Consent and Notice*

96

97 [7] Negotiations between seller and prospective purchaser prior to  
98 disclosure of information relating to a specific representation of an identifiable  
99 client no more violate the confidentiality provisions of Model Rule 1.6 than do  
100 preliminary discussions concerning the possible association of another lawyer  
101 or mergers between firms, with respect to which client consent is not required.  
102 See Rule 1.6(b)(7). Providing the purchaser access to client-specific detailed  
103 information relating to the representation, such as the client's file, and to the  
104 file, however, requires client consent. The Rule provides that before such  
105 information can be disclosed by the seller to the purchaser the client must be  
106 given actual written notice of the contemplated sale, including the identity of  
107 the purchaser and must be told that the decision to consent or make other

108 arrangements must be made within 90 days. If nothing is heard from the client  
109 within that time, consent to the sale is presumed.

110  
111 [8] A lawyer or law firm ceasing to practice cannot be required to remain in  
112 practice because some clients cannot be given actual notice of the proposed  
113 purchase. Since these clients cannot themselves consent to the purchase or  
114 direct any other disposition of their files, the Rule requires an order from a  
115 court having jurisdiction authorizing their transfer or other disposition. The  
116 Court can be expected to determine whether reasonable efforts to locate the  
117 client have been exhausted, and whether the absent client's legitimate interests  
118 will be served by authorizing the transfer of the file so that the purchaser may  
119 continue the representation. Preservation of client confidences requires that  
120 the petition for a court order be considered in camera.

121  
122 [9] All the elements of client autonomy, including the client's absolute right  
123 to discharge a lawyer and transfer the representation to another, survive the  
124 sale of the practice or area of practice.

125  
126 *Fee Arrangements between Client and Purchaser*

127  
128 [10] The sale may not be financed by increases in fees charged the clients of  
129 the practice. Existing agreements between the seller and the client as to fees  
130 and the scope of the work must be honored by the purchaser.

131  
132 *Other Applicable Ethical Standards*

133  
134 [11] Lawyers participating in the sale of a law practice or a practice area are  
135 subject to the ethical standards applicable to involving another lawyer in the  
136 representation of a client. These include, for example, the seller's obligation to  
137 exercise competence in identifying a purchaser qualified to assume the  
138 practice and the purchaser's obligation to undertake the representation  
139 competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and  
140 to secure the client's informed consent for those conflicts that can be agreed to  
141 (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed  
142 consent); and the obligation to protect information relating to the  
143 representation (see Rules 1.6 and 1.9).

144

145 [12] If approval of the substitution of the purchasing lawyer for the selling  
146 lawyer is required by the rules of any tribunal in which a matter is pending,  
147 such approval must be obtained before the matter can be included in the sale  
148 (see Rule 1.16).

149

150 *Applicability of the Rule*

151

152 [13] This Rule applies to the sale of a law practice by representatives of a  
153 deceased, disabled or disappeared lawyer. Thus, the seller may be represented  
154 by a non-lawyer representative not subject to these Rules. Since, however, no  
155 lawyer may participate in a sale of a law practice which does not conform to  
156 the requirements of this Rule, the representatives of the seller as well as the  
157 purchasing lawyer can be expected to see to it that they are met.

158

159 [14] Admission to or retirement from a law partnership or professional  
160 association, retirement plans and similar arrangements, and a sale of tangible  
161 assets of a law practice, do not constitute a sale or purchase governed by this  
162 Rule.

163

164 [15] This Rule does not apply to the transfers of legal representation  
165 between lawyers when such transfers are unrelated to the sale of a practice or  
166 an area of practice.

167

168

169

170

1 **Rule 1.18: Duties to Prospective Client**

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

6  
7 (b) Even when no client-lawyer relationship ensues, a lawyer  
8 who has had ~~discussions with~~ learned information from a prospective  
9 client shall not use or reveal information learned in the consultation,  
10 except as Rule 1.9 would permit with respect to information of a former  
11 client.

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

22  
23 (d) When the lawyer has received disqualifying information as  
24 defined in paragraph (c), representation is permissible if:

25  
26 (1) both the affected client and the prospective client have given  
27 informed consent, confirmed in writing, or:

28  
29 (2) the lawyer who received the information took reasonable  
30 measures to avoid exposure to more disqualifying information than was  
31 reasonably necessary to determine whether to represent the  
32 prospective client; and

33  
34 (i) the disqualified lawyer is timely screened from any  
35 participation in the matter and is apportioned no part of the fee  
36 therefrom; and

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

40 *Comment:*

41  
42 [1] Prospective clients, like clients, may disclose information to a  
43 lawyer, place documents or other property in the lawyer's custody, or rely  
44 on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a  
45 prospective client usually are limited in time and depth and leave both the  
46 prospective client and the lawyer free (and sometimes required) to proceed  
47 no further. Hence, prospective clients should receive some but not all of the  
48 protection afforded clients.

49  
50 [2] ~~Not all persons who communicate information to a lawyer are~~  
51 ~~entitled to protection under this Rule.~~ A person becomes a prospective  
52 client by consulting with a lawyer about the possibility of forming a client-  
53 lawyer relationship with respect to a matter. Whether communications,  
54 including written, oral, or electronic communications, constitute a  
55 consultation depends on the circumstances. For example, a consultation is  
56 likely to have occurred if a lawyer, either in person or through the lawyer's  
57 advertising in any medium, specifically requests or invites the submission  
58 of information about a potential representation without clear and  
59 reasonably understandable warnings and cautionary statements that limit  
60 the lawyer's obligation, and a person provides information in response. See  
61 also Comment [4]. In contrast, a consultation does not occur if a person  
62 provide information to a lawyer in response to advertising that merely  
63 describes the lawyer's education, experience, areas of practice, and contact  
64 information, or provides legal information of general interest. A person-  
65 ~~who communicates~~ Such a person communicates information unilaterally  
66 to a lawyer, without any reasonable expectation that the lawyer is willing  
67 to discuss the possibility of forming a client-lawyer relationship, and is thus  
68 not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover,  
69 a person who communicates with a lawyer for the purpose of disqualifying  
70 the lawyer is not a "prospective client."

71  
72 [3] It is often necessary for a prospective client to reveal information  
73 to the lawyer during an initial consultation prior to the decision about  
74 formation of a client-lawyer relationship. The lawyer often must learn such  
75 information to determine whether there is a conflict of interest with an  
76 existing client and whether the matter is one that the lawyer is willing to  
77 undertake. Paragraph (b) prohibits the lawyer from using or revealing that

78 information, except as permitted by Rule 1.9, even if the client or lawyer  
79 decides not to proceed with the representation. The duty exists regardless  
80 of how brief the initial conference may be.

81  
82 [4] In order to avoid acquiring disqualifying information from a  
83 prospective client, a lawyer considering whether or not to undertake a new  
84 matter should limit the initial consultation interview to only such  
85 information as reasonably appears necessary for that purpose. Where the  
86 information indicates that a conflict of interest or other reason for non-  
87 representation exists, the lawyer should so inform the prospective client or  
88 decline the representation. If the prospective client wishes to retain the  
89 lawyer, and if consent is possible under Rule 1.7, then consent from all  
90 affected present or former clients must be obtained before accepting the  
91 representation.

92  
93 [5] A lawyer may condition ~~conversations~~ a consultation with a  
94 prospective client on the person's informed consent that no information  
95 disclosed during the consultation will prohibit the lawyer from  
96 representing a different client in the matter. See Rule 1.0(e) for the  
97 definition of informed consent. If the agreement expressly so provides, the  
98 prospective client may also consent to the lawyer's subsequent use of  
99 information received from the prospective client.

100  
101 [6] Even in the absence of an agreement, under paragraph (c), the  
102 lawyer is not prohibited from representing a client with interests adverse to  
103 those of the prospective client in the same or a substantially related matter  
104 unless the lawyer has received from the prospective client information that  
105 could be significantly harmful if used in the matter.

106  
107 [7] Under paragraph (c), the prohibition in this Rule is imputed to  
108 other lawyers as provided in Rule 1.10, but, under paragraph (d)(1),  
109 imputation may be avoided if the lawyer obtains the informed consent,  
110 confirmed in writing, of both the prospective and affected clients. In the  
111 alternative, imputation may be avoided if the conditions of paragraph  
112 (d)(2) are met and all disqualified lawyers are timely screened and written  
113 notice is promptly given to the prospective client. See Rule 1.0(k)  
114 (requirements for screening procedures). Paragraph (d)(2)(i) does not  
115 prohibit the screened lawyer from receiving a salary or partnership share

116 established by prior independent agreement, but that lawyer may not  
117 receive compensation directly related to the matter in which the lawyer is  
118 disqualified.

119  
120 [8] Notice, including a general description of the subject matter about  
121 which the lawyer was consulted, and of the screening procedures  
122 employed, generally should be given as soon as practicable after the need  
123 for screening becomes apparent.

124  
125 [9] For the duty of competence of a lawyer who gives assistance on  
126 the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's  
127 duties when a prospective client entrusts valuables or papers to the  
128 lawyer's care, see Rule 1.15.

129  
130  
131  
132

1 **Rule 1.4: Communication**

2  
3 (a) A lawyer shall:

4  
5 (1) promptly inform the client of any decision or circumstance  
6 with respect to which the client's informed consent, as defined in Rule  
7 1.0(e), is required by these Rules.

8  
9 (2) reasonably consult with the client about the means by  
10 which the client's objectives are to be accomplished;

11  
12 (3) keep the client reasonably informed about the status of the  
13 matter;

14  
15 (4) promptly comply with reasonable requests for  
16 information; and

17  
18 (5) consult when the lawyer knows that the client expects  
19 assistance not permitted by the Rules of Professional Conduct or other  
20 law.

21  
22 (b) A lawyer shall explain a matter to the extent reasonably  
23 necessary to permit the client to make informed decisions regarding the  
24 representation.

25  
26 (c) A lawyer shall promptly notify a client in writing of the actual  
27 or constructive receipt by the attorney of a check or other payment  
28 received from an insurance company, an opposing party, or from any  
29 other source which constitutes the payment of a settlement, judgment, or  
30 other monies to which the client is entitled.

31  
32 *Comment:*

33  
34 [1] Reasonable communication between the lawyer and the client is  
35 necessary for the client effectively to participate in the representation.  
36

37 *Communicating with Client*

38

39 [2] If these Rules require that a particular decision about the  
40 representation be made by the client, paragraph (a)(1) requires that the  
41 lawyer promptly consult with and secure the client's consent prior to taking  
42 action unless prior discussions with the client have resolved what action  
43 the client wants the lawyer to take. For example, a lawyer who receives  
44 from opposing counsel an offer of settlement in a civil controversy or a  
45 proffered plea bargain in a criminal case must promptly inform the client of  
46 its substance unless the client has previously indicated that the proposal  
47 will be acceptable or unacceptable or has authorized the lawyer to accept or  
48 to reject the offer. See Rule 1.2(a).

49

50 [3] Paragraph (a)(2) requires the lawyer to reasonably consult with  
51 the client about the means to be used to accomplish the client's objectives.  
52 In some situations - depending on both the importance of the action under  
53 consideration and the feasibility of consulting with the client - this duty  
54 will require consultation prior to taking action. In other circumstances, such  
55 as during a trial when an immediate decision must be made, the exigency  
56 of the situation may require the lawyer to act without prior consultation. In  
57 such cases the lawyer must nonetheless act reasonably to inform the client  
58 of actions the lawyer has taken on the client's behalf. Additionally,  
59 paragraph (a)(3) requires that the lawyer keep the client reasonably  
60 informed about the status of the matter, such as significant developments  
61 affecting the timing or the substance of the representation.

62

63 [4] A lawyer's regular communication with clients will minimize the  
64 occasions on which a client will need to request information concerning the  
65 representation. When a client makes a reasonable request for information,  
66 however, paragraph (a)(4) requires prompt compliance with the request, or  
67 if a prompt response is not feasible, that the lawyer, or a member of the  
68 lawyer's staff, acknowledge receipt of the request and advise the client  
69 when a response may be expected. ~~Client telephone calls should be~~  
70 ~~promptly returned or acknowledged.~~ A lawyer should promptly respond  
71 to or acknowledge client communications.-

72

73 *Explaining Matters*

74

75 [5] The client should have sufficient information to participate  
76 intelligently in decisions concerning the objectives of the representation  
77 and the means by which they are to be pursued, to the extent the client is  
78 willing and able to do so. Adequacy of communication depends in part on  
79 the kind of advice or assistance that is involved. For example, when there is  
80 time to explain a proposal made in a negotiation, the lawyer should review  
81 all important provisions with the client before proceeding to an agreement.  
82 In litigation a lawyer should explain the general strategy and prospects of  
83 success and ordinarily should consult the client on tactics that are likely to  
84 result in significant expense or to injure or coerce others. On the other  
85 hand, a lawyer ordinarily will not be expected to describe trial or  
86 negotiation strategy in detail. The guiding principle is that the lawyer  
87 should fulfill reasonable client expectations for information consistent with  
88 the duty to act in the client's best interests, and the client's overall  
89 requirements as to the character of representation. In certain circumstances,  
90 such as when a lawyer asks a client to consent to a representation affected  
91 by a conflict of interest, the client must give informed consent, as defined in  
92 Rule 1.0(e).

93

94 [6] Ordinarily, the information to be provided is that appropriate for  
95 a client who is a comprehending and responsible adult. However, fully  
96 informing the client according to this standard may be impracticable, for  
97 example, where the client is a child or suffers from diminished capacity. See  
98 Rule 1.14. When the client is an organization or group, it is often impossible  
99 or inappropriate to inform every one of its members about its legal affairs;  
100 ordinarily, the lawyer should address communications to the appropriate  
101 officials of the organization. See Rule 1.13. Where many routine matters are  
102 involved, a system of limited or occasional reporting may be arranged with  
103 the client. Practical exigency may also require a lawyer to act for a client  
104 without prior consultation.

105

106 *Withholding Information*

107  
108 [7] In some circumstances, a lawyer may be justified in delaying  
109 transmission of information when the client would be likely to react  
110 imprudently to an immediate communication. Thus, a lawyer might  
111 withhold a psychiatric diagnosis of a client when the examining  
112 psychiatrist indicates that disclosure would harm the client. A lawyer may  
113 not withhold information to serve the lawyer's own interest or convenience  
114 or the interests or convenience of another person. Rules or court orders  
115 governing litigation may provide that information supplied to a lawyer  
116 may not be disclosed to the client. Rule 3.4(c) directs compliance with such  
117 rules or orders.  
118

1 **Rule 1.6: Confidentiality of Information**

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

6 (b) A lawyer may reveal such information to the extent the lawyer  
7 reasonably believes necessary:

8 (1) to prevent the commission of a criminal act;

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

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

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

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

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

25  
26  
27 (7) to detect and resolve conflicts of interest between  
28 lawyers in different firms, but only if the revealed information would  
29 not compromise the attorney-client privilege or otherwise prejudice the  
30 client.

31  
32 (c) A lawyer shall make reasonable efforts to prevent the  
33 inadvertent or unauthorized disclosure of, or unauthorized access to,  
34 information relating to the representation of a client.

35  
36 (ed) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the  
37 lawyer from giving notice of the fact of withdrawal, and the lawyer may  
38 also withdraw or disaffirm any opinion, document, affirmation or the like.  
39

40 *Comment:*

41  
42 [1A] The lawyer is part of a judicial system charged with upholding the  
43 law. One of the lawyer's functions is to advise clients so that they avoid any  
44 violation of the law in the proper exercise of their rights. The observance of the  
45 ethical obligation of a lawyer to hold inviolate confidential information of the  
46 client not only facilitates the full development of facts essential to proper  
47 representation of the client but also encourages people to seek early legal  
48 assistance.

49  
50 [1] This Rule governs the disclosure by a lawyer of information relating  
51 to the representation of a client during the lawyer's representation of the  
52 client. See Rule 1.18 for the lawyer's duties with respect to information  
53 provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's  
54 duty not to reveal information relating to the lawyer's prior representation of a  
55 former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect  
56 to the use of such information to the disadvantage of clients and former  
57 clients.

58  
59 [2] A fundamental principle in the client-lawyer relationship is that, in  
60 the absence of the client's informed consent, the lawyer must not reveal  
61 information relating to the representation. See Rule 1.0(e) for the definition of  
62 informed consent. This contributes to the trust that is the hallmark of the  
63 client-lawyer relationship. The client is thereby encouraged to seek legal  
64 assistance and to communicate fully and frankly with the lawyer even as to  
65 embarrassing or legally damaging subject matter. The lawyer needs this  
66 information to represent the client effectively and, if necessary, to advise the  
67 client to refrain from wrongful conduct. Almost without exception, clients  
68 come to lawyers in order to determine their rights and what is, in the complex  
69 of laws and regulations, deemed to be legal and correct. Based upon  
70 experience, lawyers know that almost all clients follow the advice given, and  
71 the law is upheld.

72  
73 [3] The principle of client-lawyer confidentiality is given effect by related  
74 bodies of law: the attorney-client privilege, the work product doctrine and the  
75 rule of confidentiality established in professional ethics. The attorney-client  
76 privilege and work-product doctrine apply in judicial and other proceedings  
77 in which a lawyer may be called as a witness or otherwise required to produce

78 evidence concerning a client. The rule of client-lawyer confidentiality applies  
79 in situations other than those where evidence is sought from the lawyer  
80 through compulsion of law. The confidentiality rule, for example, applies not  
81 only to matters communicated in confidence by the client but also to all  
82 information relating to the representation, whatever its source. A lawyer may  
83 not disclose such information except as authorized or required by the Rules of  
84 Professional Conduct or other law. See also Scope.

85  
86 [4] Paragraph (a) prohibits a lawyer from revealing information relating  
87 to the representation of a client. This prohibition also applies to disclosures by  
88 a lawyer that do not in themselves reveal protected information but could  
89 reasonably lead to the discovery of such information by a third person. A  
90 lawyer's use of a hypothetical to discuss issues relating to the representation is  
91 permissible so long as there is no reasonable likelihood that the listener will be  
92 able to ascertain the identity of the client or the situation involved.

93  
94 *Authorized Disclosure*

95  
96 [5] Except to the extent that the client's instructions or special  
97 circumstances limit that authority, a lawyer is impliedly authorized to make  
98 disclosures about a client when appropriate in carrying out the representation.  
99 In some situations, for example, a lawyer may be impliedly authorized to  
100 admit a fact that cannot properly be disputed or to make a disclosure that  
101 facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the  
102 course of the firm's practice, disclose to each other information relating to a  
103 client of the firm, unless the client has instructed that particular information be  
104 confined to specified lawyers.

105  
106 *Disclosure Adverse to Client*

107  
108 [6] Although the public interest is usually best served by a strict rule  
109 requiring lawyers to preserve the confidentiality of information relating to the  
110 representation of their clients, the confidentiality rule is subject to limited  
111 exceptions. For instance, in becoming privy to information about a client, a  
112 lawyer may foresee that the client or a third person intends to commit a crime  
113 and may reveal that information to prevent the crime. The overriding value of  
114 life and physical integrity permits disclosure reasonably necessary to prevent  
115 death or bodily harm. Other future harms as a result of a criminal act, such as

116 fraud, damage to economic interests, or loss of property which are reasonably  
117 certain to occur, also permit disclosure if necessary to eliminate the threat.  
118 Several situations must be distinguished.

119  
120 (a) First, the lawyer may not counsel or assist a client in conduct that is  
121 criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under  
122 Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special  
123 instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in  
124 criminal or fraudulent conduct.

125  
126 (b) Second, the lawyer may have been innocently involved in past  
127 conduct by the client that was criminal or fraudulent. In such a situation the  
128 lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or  
129 fraudulent conduct requires knowing that the conduct is of that character.

130  
131 (c) Third, the lawyer may learn that a client, or a third person, intends  
132 prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer  
133 has professional discretion to reveal information in order to prevent the crime  
134 which the lawyer reasonably believes is intended by the client or a third  
135 person. It is, of course, sometimes difficult for a lawyer to "know" when such a  
136 purpose will actually be carried out, for the client or the third person may  
137 have a change of mind.

138  
139 (d) The lawyer's exercise of discretion requires consideration of such  
140 factors as the nature of the lawyer's relationship with the client and with those  
141 who might be injured by the client, the lawyer's own involvement in the  
142 transaction and factors that may extenuate the conduct in question. Where  
143 practical, the lawyer should seek to persuade the client to take suitable action.  
144 In any case, a disclosure adverse to the client's interest should be no greater  
145 than the lawyer reasonably believes necessary to the purpose. A lawyer's  
146 decision not to take preventive action permitted by paragraph (b)(1), (b)(2) or  
147 (b)(3) does not violate this Rule.

148  
149 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality  
150 that permits the lawyer to reveal information to the extent necessary to enable  
151 affected persons or appropriate authorities to prevent the client from  
152 committing a fraud, as defined in Rule 1.0 (d), that is reasonably certain to  
153 result in injury to the financial or property interests of another and in

154 furtherance of which the client has used or is using the lawyer's services. Such  
155 a serious abuse of the client-lawyer relationship by the client forfeits the  
156 protection of this Rule. The client can, of course, prevent such disclosure by  
157 refraining from the wrongful conduct. Although paragraph (b)(2) does not  
158 require the lawyer to reveal the client's misconduct, the lawyer may not  
159 counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule  
160 1.2 (d). See also Rule 1.16 with respect to the lawyer's obligation or right to  
161 withdraw from the representation of the client in such circumstances, and  
162 Rule 1.13 (c), which permits the lawyer, where the client is an organization, to  
163 reveal information relating to the representation in limited circumstances.

164  
165 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not  
166 learn of the client's crime or fraud until after it has been consummated.  
167 Although the client no longer has the option of preventing disclosure by  
168 refraining from the wrongful conduct, there will be situations in which the  
169 loss suffered by the affected person can be prevented, rectified or mitigated. In  
170 such situations, the lawyer may disclose information relating to the  
171 representation to the extent necessary to enable the affected person to prevent  
172 or mitigate reasonably certain losses or to attempt to recoup their losses.  
173 Paragraph (b)(3) does not apply when a person who has committed a crime or  
174 fraud thereafter employs a lawyer for representation concerning that offense.

175  
176 [9] A lawyer's confidentiality obligations do not preclude a lawyer from  
177 securing confidential legal advice about the lawyer's personal responsibility to  
178 comply with these Rules. In most situations, disclosing information to secure  
179 such advice will be impliedly authorized for the lawyer to carry out the  
180 representation. Even when the disclosure is not impliedly authorized,  
181 paragraph (b)(4) permits such disclosure because of the importance of a  
182 lawyer's compliance with the Rules of Professional Conduct.

183  
184 [10] Where a legal claim or disciplinary charge alleges complicity of the  
185 lawyer in a client's conduct or other misconduct of the lawyer involving  
186 representation of the client, the lawyer may respond to the extent the lawyer  
187 reasonably believes necessary to establish a defense. The same is true with  
188 respect to a claim involving the conduct or representation of a former client.  
189 Such a charge can arise in a civil, criminal, disciplinary or other proceeding  
190 and can be based on a wrong allegedly committed by the lawyer against the  
191 client or on a wrong alleged by a third person, for example, a person claiming

192 to have been defrauded by the lawyer and client acting together. The lawyer's  
193 right to respond arises when an assertion of such complicity has been made.  
194 Paragraph (b)(5) does not require the lawyer to await the commencement of  
195 an action or proceeding that charges such complicity, so that the defense may  
196 be established by responding directly to a third party who has made such an  
197 assertion. The right to defend also applies, of course, where a proceeding has  
198 been commenced.

199  
200 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove  
201 the services rendered in an action to collect it. This aspect of the rule expresses  
202 the principle that the beneficiary of a fiduciary relationship may not exploit it  
203 to the detriment of the fiduciary.

204  
205 [12] Other law may require that a lawyer disclose information about a  
206 client. Whether such a law supersedes Rule 1.6 is a question of law beyond the  
207 scope of these Rules. When disclosure of information relating to the  
208 representation appears to be required by other law, the lawyer must discuss  
209 the matter with the client to the extent required by Rule 1.4. If, however, the  
210 other law supersedes this Rule and requires disclosure, paragraph (b)(6)  
211 permits the lawyer to make such disclosures as are necessary to comply with  
212 the law.

213 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need  
214 to disclose limited information to each other to detect and resolve conflicts of  
215 interest, such as when a lawyer is considering an association with another  
216 firm, two or more firms are considering a merger, or a lawyer is considering  
217 the purchase of a law practice. See Rule 1.17, Comment [7]. Under these  
218 circumstances, lawyers and law firms are permitted to disclose limited  
219 information, but only once substantive discussions regarding the new  
220 relationship have occurred. Any such disclosure should ordinarily include no  
221 more than the identity of the persons and entities involved in a matter, a brief  
222 summary of the general issues involved, and information about whether the  
223 matter has terminated. Even this limited information, however, should be  
224 disclosed only to the extent reasonably necessary to detect and resolve  
225 conflicts of interest that might arise from the possible new relationship.  
226 Moreover, the disclosure of any information is prohibited if it would  
227 compromise the attorney-client privilege or otherwise prejudice the client  
228 (e.g., the fact that a corporate client is seeking advice on a corporate takeover  
229 that has not been publicly announced; that a person has consulted a lawyer

230 about the possibility of divorce before the person's intentions are known to the  
231 person's spouse; or that a person has consulted a lawyer about a criminal  
232 investigation that has not led to a public charge). Under those circumstances,  
233 paragraph (a) prohibits disclosure unless the client or former client gives  
234 informed consent. A lawyer's fiduciary duty to the lawyer's firm may also  
235 govern a lawyer's conduct when exploring an association with another firm  
236 and is beyond the scope of these Rules.

237 [14] Any information disclosed pursuant to paragraph (b)(7) may be  
238 used or further disclosed only to the extent necessary to detect and resolve  
239 conflicts of interest. Paragraph (b)(7) does not restrict the use of information  
240 acquired by means independent of any disclosure pursuant to paragraph  
241 (b)(7). Paragraph (b)(7) also does not affect the disclosure of information  
242 within a law firm when the disclosure is otherwise authorized, see Comment  
243 [5], such as when a lawyer in a firm discloses information to another lawyer in  
244 the same firm to detect and resolve conflicts of interest that could arise in  
245 connection with undertaking a new representation.

246  
247 [1315] A lawyer may be ordered to reveal information relating to the  
248 representation of a client by a court or by another tribunal or governmental  
249 entity claiming authority pursuant to other law to compel the disclosure.  
250 Absent informed consent of the client to do otherwise, the lawyer should  
251 assert on behalf of the client all nonfrivolous claims that the order is not  
252 authorized by other law or that the information sought is protected against  
253 disclosure by the attorney-client privilege or other applicable law. In the event  
254 of an adverse ruling, the lawyer must consult with the client about the  
255 possibility of appeal to the extent required by Rule 1.4. Unless review is  
256 sought, however, paragraph (b)(6) permits the lawyer to comply with the  
257 court's order.

258  
259 [1416] Paragraph (b) permits disclosure only to the extent the lawyer  
260 reasonably believes the disclosure is necessary to accomplish one of the  
261 purposes specified. Where practicable, the lawyer should first seek to  
262 persuade the client to take suitable action to obviate the need for disclosure. In  
263 any case, a disclosure adverse to the client's interest should be no greater than  
264 the lawyer reasonably believes necessary to accomplish the purpose. If the  
265 disclosure will be made in connection with a judicial proceeding, the  
266 disclosure should be made in a manner that limits access to the information to  
267 the tribunal or other persons having a need to know it and appropriate

268 protective orders or other arrangements should be sought by the lawyer to the  
269 fullest extent practicable.

270  
271 [1517] Paragraph (b) permits but does not require the disclosure of  
272 information relating to a client's representation to accomplish the purposes  
273 specified in paragraphs (b)(1) through (b)(6). In exercising the discretion  
274 conferred by this Rule, the lawyer may consider such factors as the nature of  
275 the lawyer's relationship with the client and with those who might be injured  
276 by the client, the lawyer's own involvement in the transaction and factors that  
277 may extenuate the conduct in question. A lawyer's decision not to disclose as  
278 permitted by paragraph (b) does not violate this Rule. Disclosure may be  
279 required, however, by other Rules. Some Rules require disclosure only if such  
280 disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1  
281 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances  
282 regardless of whether such disclosure is permitted by this Rule. See Rule  
283 3.3(c).

284  
285 *Acting Competently to Preserve Confidentiality*

286  
287 ~~[16] A lawyer must act competently to safeguard information relating to~~  
288 ~~the representation of a client against inadvertent or unauthorized disclosure~~  
289 ~~by the lawyer or other persons who are participating in the representation of~~  
290 ~~the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and~~  
291 ~~5.3.~~

292  
293 [18] Paragraph (c) requires a lawyer to act competently to safeguard  
294 information relating to the representation of a client against unauthorized  
295 access by third parties and against inadvertent or unauthorized disclosure by  
296 the lawyer or other persons who are participating in the representation of the  
297 client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.  
298 The unauthorized access to, or the inadvertent or unauthorized disclosure of,  
299 information relating to the representation of a client does not constitute a  
300 violation of paragraph (c) if the lawyer has made reasonable efforts to prevent  
301 the access or disclosure. Factors to be considered in determining the  
302 reasonableness of the lawyer's efforts include, but are not limited to, the  
303 sensitivity of the information, the likelihood of disclosure if additional  
304 safeguards are not employed, the cost of employing additional safeguards, the  
305 difficulty of implementing the safeguards, and the extent to which the

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

317  
318 [1719] When transmitting a communication that includes information  
319 relating to the representation of a client, the lawyer must take reasonable  
320 precautions to prevent the information from coming into the hands of  
321 unintended recipients. This duty, however, does not require that the lawyer  
322 use special security measures if the method of communication affords a  
323 reasonable expectation of privacy. Special circumstances, however, may  
324 warrant special precautions. Factors to be considered in determining the  
325 reasonableness of the lawyer's expectation of confidentiality include the  
326 sensitivity of the information and the extent to which the privacy of the  
327 communication is protected by law or by a confidentiality agreement. A client  
328 may require the lawyer to implement special security measures not required  
329 by this Rule or may give informed consent to the use of a means of  
330 communication that would otherwise be prohibited by this Rule. Whether a  
331 lawyer may be required to take additional steps in order to comply with other  
332 law, such as state and federal law that govern data privacy, is beyond the  
333 scope of these Rules.

334  
335 *Former Client*

336  
337 [1820] The duty of confidentiality continues after the client-lawyer  
338 relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the  
339 prohibition against using such information to the disadvantage of the former  
340 client.

341

1 **Rule 1.8: Conflict of Interest: Current Clients: Specific Rule**

2  
3  
4 **(c) A lawyer shall not solicit any substantial gift from a client,**  
5 **including a testamentary gift, or prepare on behalf of a client an**  
6 **instrument giving the lawyer or a person related to the lawyer any**  
7 **substantial gift unless the lawyer or other recipient of the gift is related**  
8 **to the client. For purposes of this paragraph, related persons include the**  
9 **spouse or a person within the third degree of relationship to the lawyer**  
10 **or the client. The following persons are relatives within the third degree**  
11 **of relationship:**

12 **Great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child,**  
13 **grandchild, great-grand child, nephew or niece.**

14

1 **Rule 1.18: Duties to Prospective Client**

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

6  
7 (b) Even when no client-lawyer relationship ensues, a lawyer  
8 who has ~~had discussions with~~ learned information from a prospective  
9 client shall not use or reveal information learned in the consultation,  
10 except as Rule 1.9 would permit with respect to information of a former  
11 client.

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

22  
23 (d) When the lawyer has received disqualifying information as  
24 defined in paragraph (c), representation is permissible if:

25  
26 (1) both the affected client and the prospective client have given  
27 informed consent, confirmed in writing, or:

28  
29 (2) the lawyer who received the information took reasonable  
30 measures to avoid exposure to more disqualifying information than was  
31 reasonably necessary to determine whether to represent the  
32 prospective client; and

33  
34 (i) the disqualified lawyer is timely screened from any  
35 participation in the matter and is apportioned no part of the fee  
36 therefrom; and

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

40 *Comment:*

41  
42 [1] Prospective clients, like clients, may disclose information to a  
43 lawyer, place documents or other property in the lawyer's custody, or rely  
44 on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a  
45 prospective client usually are limited in time and depth and leave both the  
46 prospective client and the lawyer free (and sometimes required) to proceed  
47 no further. Hence, prospective clients should receive some but not all of the  
48 protection afforded clients.

49  
50 [2] ~~Not all persons who communicate information to a lawyer are~~  
51 ~~entitled to protection under this Rule. A person becomes a prospective~~  
52 client by consulting with a lawyer about the possibility of forming a client-  
53 lawyer relationship with respect to a matter. Whether communications,  
54 including written, oral, or electronic communications, constitute a  
55 consultation depends on the circumstances. For example, a consultation is  
56 likely to have occurred if a lawyer, either in person or through the lawyer's  
57 advertising in any medium, specifically requests or invites the submission  
58 of information about a potential representation without clear and  
59 reasonably understandable warnings and cautionary statements that limit  
60 the lawyer's obligation, and a person provides information in response. See  
61 also Comment [4]. In contrast, a consultation does not occur if a person  
62 provide information to a lawyer in response to advertising that merely  
63 describes the lawyer's education, experience, areas of practice, and contact  
64 information, or provides legal information of general interest. A person-  
65 ~~who communicates~~ Such a person communicates information unilaterally  
66 to a lawyer, without any reasonable expectation that the lawyer is willing  
67 to discuss the possibility of forming a client-lawyer relationship, and is thus  
68 not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover,  
69 a person who communicates with a lawyer for the purpose of disqualifying  
70 the lawyer is not a "prospective client."

71  
72 [3] It is often necessary for a prospective client to reveal information  
73 to the lawyer during an initial consultation prior to the decision about  
74 formation of a client-lawyer relationship. The lawyer often must learn such  
75 information to determine whether there is a conflict of interest with an  
76 existing client and whether the matter is one that the lawyer is willing to  
77 undertake. Paragraph (b) prohibits the lawyer from using or revealing that

78 information, except as permitted by Rule 1.9, even if the client or lawyer  
79 decides not to proceed with the representation. The duty exists regardless  
80 of how brief the initial conference may be.

81  
82 [4] In order to avoid acquiring disqualifying information from a  
83 prospective client, a lawyer considering whether or not to undertake a new  
84 matter should limit the initial consultation interview to only such  
85 information as reasonably appears necessary for that purpose. Where the  
86 information indicates that a conflict of interest or other reason for non-  
87 representation exists, the lawyer should so inform the prospective client or  
88 decline the representation. If the prospective client wishes to retain the  
89 lawyer, and if consent is possible under Rule 1.7, then consent from all  
90 affected present or former clients must be obtained before accepting the  
91 representation.

92  
93 [5] A lawyer may condition ~~conversations~~ a consultation with a  
94 prospective client on the person's informed consent that no information  
95 disclosed during the consultation will prohibit the lawyer from  
96 representing a different client in the matter. See Rule 1.0(e) for the  
97 definition of informed consent. If the agreement expressly so provides, the  
98 prospective client may also consent to the lawyer's subsequent use of  
99 information received from the prospective client.

100  
101 [6] Even in the absence of an agreement, under paragraph (c), the  
102 lawyer is not prohibited from representing a client with interests adverse to  
103 those of the prospective client in the same or a substantially related matter  
104 unless the lawyer has received from the prospective client information that  
105 could be significantly harmful if used in the matter.

106  
107 [7] Under paragraph (c), the prohibition in this Rule is imputed to  
108 other lawyers as provided in Rule 1.10, but, under paragraph (d)(1),  
109 imputation may be avoided if the lawyer obtains the informed consent,  
110 confirmed in writing, of both the prospective and affected clients. In the  
111 alternative, imputation may be avoided if the conditions of paragraph  
112 (d)(2) are met and all disqualified lawyers are timely screened and written  
113 notice is promptly given to the prospective client. See Rule 1.0(k)  
114 (requirements for screening procedures). Paragraph (d)(2)(i) does not  
115 prohibit the screened lawyer from receiving a salary or partnership share

116 established by prior independent agreement, but that lawyer may not  
117 receive compensation directly related to the matter in which the lawyer is  
118 disqualified.

119  
120 [8] Notice, including a general description of the subject matter about  
121 which the lawyer was consulted, and of the screening procedures  
122 employed, generally should be given as soon as practicable after the need  
123 for screening becomes apparent.

124  
125 [9] For the duty of competence of a lawyer who gives assistance on  
126 the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's  
127 duties when a prospective client entrusts valuables or papers to the  
128 lawyer's care, see Rule 1.15.

129  
130

1 **Rule 4.4: Respect for Rights of Third Persons**

2  
3 (a) In representing a client, a lawyer shall not use means that  
4 have no substantial purpose other than to embarrass, delay, or burden a  
5 third person, or use methods of obtaining evidence that violate the legal  
6 rights of such a person.

7  
8 (b) A lawyer who receives a document or electronically stored  
9 information relating to the representation of the lawyer's client and  
10 knows or reasonably should know that the document or electronically  
11 stored information was inadvertently sent shall promptly notify the  
12 sender.

13  
14 *Comment:*

15  
16 [1] Responsibility to a client requires a lawyer to subordinate the  
17 interests of others to those of the client, but that responsibility does not  
18 imply that a lawyer may disregard the rights of third persons. It is  
19 impractical to catalogue all such rights, but they include legal restrictions  
20 on methods of obtaining evidence from third persons and unwarranted  
21 intrusions into privileged relationships, such as the client-lawyer  
22 relationship.

23  
24 [2] Paragraph (b) recognizes that lawyers sometimes receive a  
25 documents or electronically stored information that was were- mistakenly  
26 sent or produced by opposing parties or their lawyers. A document or  
27 electronically stored information is inadvertently sent when it is  
28 accidentally transmitted, such as when an email or letter is misaddressed or  
29 a document or electronically stored information is accidentally included  
30 with information that was intentionally transmitted. If a lawyer knows or  
31 reasonably should know that such a document or electronically stored  
32 information was sent inadvertently, then this Rule requires the lawyer to  
33 promptly notify the sender in order to permit that person to take protective  
34 measures. Whether the lawyer is required to take additional steps, such as  
35 returning the original document or deleting the document or electronically  
36 stored information, is a matter of law beyond the scope of these Rules, as is

37 the question of whether the privileged status of a document or  
38 electronically stored information has been waived. Similarly, this Rule does  
39 not address the legal duties of a lawyer who receives a document that the  
40 lawyer knows or reasonably should know may have been ~~wrongfully~~  
41 inappropriately obtained by the sending person. For purposes of this Rule,  
42 "document or electronically stored information" includes, in addition to  
43 paper documents, email and other forms of electronically stored  
44 information, including embedded data (commonly referred to as  
45 "metadata"), that is e-mail or other electronic modes of transmission subject  
46 to being read or put into readable form. Metadata in electronic documents  
47 creates an obligation under this Rule only if the receiving lawyer knows  
48 that the metadata was inadvertently sent to the receiving lawyer.

49  
50 [3] Some lawyers may choose to return a document or delete  
51 electronically stored information unread, for example, when the lawyer  
52 learns before receiving it ~~the document~~ that it was inadvertently sent to the  
53 ~~wrong~~ address. Where a lawyer is not required by applicable law to do so,  
54 the decision to voluntarily return such a document or delete electronically  
55 stored information is a matter of professional judgment ordinarily reserved  
56 to the lawyer. See Rules 1.2 and 1.4.

57

1 **Rule 5.3: Responsibilities Regarding Nonlawyer Assistances-**

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

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

9  
10 (b) a lawyer having direct supervisory authority over the nonlawyer  
11 shall make reasonable efforts to ensure that the person's conduct is  
12 compatible with the professional obligations of the lawyer; and

13  
14 (c) a lawyer shall be responsible for conduct of such a person that  
15 would be a violation of the Rules of Professional Conduct if engaged in by a  
16 lawyer if:

17  
18 (1) the lawyer orders or, with the knowledge of the specific  
19 conduct, ratifies the conduct involved; or

20  
21 (2) the lawyer is a partner or has comparable managerial  
22 authority in the law firm in which the person is employed, or has the direct  
23 supervisory authority over the person, and knows of the conduct at a time  
24 when its consequences can be avoided or mitigated but fails to take  
25 reasonable remedial action.

26  
27 *Comment:*

28 [1] [2] Paragraph (a) requires lawyers with managerial authority within  
29 a law firm to make reasonable efforts to ~~establish internal policies and~~  
30 ~~procedures designed to provide~~ ensure that the firm has in effect measures  
31 giving reasonable assurance that nonlawyers in the firm and nonlawyers  
32 outside the firm who work on firm matters will act in a way compatible with  
33 the professional obligations of the lawyer. ~~with the Rules of Professional~~  
34 ~~Conduct.~~ See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who  
35 have supervisory authority over the work of a ~~nonlawyer~~ such nonlawyers  
36 within or outside the firm. Paragraph (c) specifies the circumstances in which

37 a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within  
38 or outside the firm that would be a violation of the Rules of Professional  
39 Conduct if engaged in by a lawyer.

40

#### 41 *Nonlawyers Within the Firm*

42

43 [2] [4] Lawyers generally employ assistants in their practice, including  
44 secretaries, investigators, law student interns, and paraprofessionals. Such  
45 assistants, whether employees or independent contractors, act for the lawyer  
46 in rendition of the lawyer's professional services. A lawyer must give such  
47 assistants appropriate instruction and supervision concerning the ethical  
48 aspects of their employment, particularly regarding the obligation not to  
49 disclose information relating to representation of the client, and should be  
50 responsible for their work product. The measures employed in supervising  
51 nonlawyers should take account of the fact that they do not have legal training  
52 and are not subject to professional discipline.

53

#### 54 *Nonlawyers Outside the Firm*

55

56 [3] A lawyer may use nonlawyers outside the firm to assist the lawyer  
57 in rendering legal services to the client. Examples include the retention of an  
58 investigative or paraprofessional service, hiring a document management  
59 company to create and maintain a database for complex litigation, sending  
60 client documents to a third party for printing or scanning, and using an  
61 Internet-based service to store client information. When using such services  
62 outside the firm, a lawyer must make reasonable efforts to ensure that the  
63 services are provided in a manner that is compatible with the lawyer's  
64 professional obligations. The extent of this obligation will depend upon the  
65 circumstances, including the education, experience and reputation of the  
66 nonlawyer; the nature of the services involved; the terms of any arrangements  
67 concerning the protection of client information; and the legal and ethical  
68 environments of the jurisdictions in which the services will be performed,  
69 particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2

70 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality),  
71 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized  
72 practice of law). When retaining or directing a nonlawyer outside the firm, a  
73 lawyer should communicate directions appropriate under the circumstances to  
74 give reasonable assurance that the nonlawyer's conduct is compatible with the  
75 professional obligations of the lawyer.

76  
77 [4] Where the client directs the selection of a particular nonlawyer  
78 service provider outside the firm, the lawyer ordinarily should agree with the  
79 client concerning the allocation of responsibility for monitoring as between the  
80 client and the lawyer. See Rule 1.2. When making such an allocation in a  
81 matter pending before a tribunal, lawyers and parties may have additional  
82 obligations that are a matter of law beyond the scope of these Rules.

83

1 **Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

2  
3 (a) A lawyer shall not practice law in a jurisdiction in violation of  
4 the regulation of the legal profession in that jurisdiction, or assist another in  
5 doing so.

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

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

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

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

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

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

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

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

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

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

40 *Comment:*

41 [1] A lawyer may practice law only in a jurisdiction in which the lawyer  
42 is authorized to practice. A lawyer may be admitted to practice law in a  
43 jurisdiction on a regular basis or may be authorized by court rule or order or  
44 by law to practice for a limited purpose or on a restricted basis. Paragraph (a)  
45 applies to unauthorized practice of law by a lawyer, whether through the  
46 lawyer's direct action or by the lawyer assisting another person. For example,  
47 a lawyer may not assist a person in practicing law in violation of the rules  
48 governing professional conduct in that person's jurisdiction.

49 [2] The definition of the practice of law is established by law and varies  
50 from one jurisdiction to another. Whatever the definition, limiting the practice  
51 of law to members of the bar protects the public against rendition of legal  
52 services by unqualified persons. This Rule does not prohibit a lawyer from  
53 employing the services of paraprofessionals and delegating functions to them,  
54 so long as the lawyer supervises the delegated work and retains responsibility  
55 for their work. See Rule 5.3.

56 [3] A lawyer may provide professional advice and instruction to  
57 nonlawyers whose employment requires knowledge of the law; for example,  
58 claims adjusters, employees of financial or commercial institutions, social  
59 workers, accountants and persons employed in government agencies. Lawyers  
60 also may assist independent nonlawyers, such as paraprofessionals, who are  
61 authorized by the law of a jurisdiction to provide particular law-related  
62 services. In addition, a lawyer may counsel nonlawyers who wish to proceed  
63 pro se.

64  
65 [4] Other than as authorized by law or this Rule, a lawyer who is not  
66 admitted to practice generally in this jurisdiction violates paragraph (b)(1) if  
67 the lawyer establishes an office or other systematic and continuous presence in  
68 this jurisdiction for the practice of law. Presence may be systematic and  
69 continuous even if the lawyer is not physically present here. Such a lawyer

70 must not hold out to the public or otherwise represent that the lawyer is  
71 admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).  
72

73 [5] There are occasions in which a lawyer admitted to practice in another  
74 United States jurisdiction, and not disbarred or suspended from practice in  
75 any jurisdiction, may provide legal services on a temporary basis in this  
76 jurisdiction under circumstances that do not create an unreasonable risk to the  
77 interests of their clients, the public or the courts. Paragraph (c) identifies four  
78 such circumstances. The fact that conduct is not so identified does not imply  
79 that the conduct is or is not authorized. With the exception of paragraphs  
80 (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or  
81 other systematic and continuous presence in this jurisdiction without being  
82 admitted to practice generally here.  
83

84 [6] There is no single test to determine whether a lawyer's services are  
85 provided on a "temporary basis" in this jurisdiction, and may therefore be  
86 permissible under paragraph (c). Services may be "temporary" even though  
87 the lawyer provides services in this jurisdiction on a recurring basis, or for an  
88 extended period of time, as when the lawyer is representing a client in a single  
89 lengthy negotiation or litigation.  
90

91 [7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice  
92 law in any United States jurisdiction, which includes the District of Columbia  
93 and any state, territory or commonwealth of the United States. The word  
94 "admitted" in paragraph (c) contemplates that the lawyer is authorized to  
95 practice in the jurisdiction in which the lawyer is admitted and excludes a  
96 lawyer who while technically admitted is not authorized to practice, because,  
97 for example, the lawyer is on inactive status.  
98

99 [8] Paragraph (c)(1) recognizes that the interests of clients and the public  
100 are protected if a lawyer admitted only in another jurisdiction associates with  
101 a lawyer licensed to practice in this jurisdiction. For this paragraph to apply,  
102 however, the lawyer admitted to practice in this jurisdiction must actively  
103 participate in and share responsibility for the representation of the client.  
104

105 [9] Lawyers not admitted to practice generally in a jurisdiction may be  
106 authorized by law or order of a tribunal or an administrative agency to appear  
107 before the tribunal or agency. This authority may be granted pursuant to

108 formal rules governing admission pro hac vice or pursuant to informal  
109 practice of the agency. Under paragraph (c)(2), a lawyer does not violate this  
110 Rule when the lawyer appears before a tribunal or agency pursuant to such  
111 authority. To the extent that a court rule or other law of this jurisdiction  
112 requires a lawyer who is not admitted to practice in this jurisdiction to obtain  
113 admission pro hac vice before appearing before a tribunal or administrative  
114 agency, this Rule requires the lawyer to obtain that authority.

115  
116 [10] Paragraph (c)(2) also provides that a lawyer rendering services in  
117 this jurisdiction on a temporary basis does not violate this Rule when the  
118 lawyer engages in conduct in anticipation of a proceeding or hearing in a  
119 jurisdiction in which the lawyer is authorized to practice law or in which the  
120 lawyer reasonably expects to be admitted pro hac vice. Examples of such  
121 conduct include meetings with the client, interviews of potential witnesses,  
122 and the review of documents. Similarly, a lawyer admitted only in another  
123 jurisdiction may engage in conduct temporarily in this jurisdiction in  
124 connection with pending litigation in another jurisdiction in which the lawyer  
125 is or reasonably expects to be authorized to appear, including taking  
126 depositions in this jurisdiction.

127  
128 [11] When a lawyer has been or reasonably expects to be admitted to  
129 appear before a court or administrative agency, paragraph (c)(2) also permits  
130 conduct by lawyers who are associated with that lawyer in the matter, but  
131 who do not expect to appear before the court or administrative agency. For  
132 example, subordinate lawyers may conduct research, review documents, and  
133 attend meetings with witnesses in support of the lawyer responsible for the  
134 litigation.

135  
136 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in  
137 another jurisdiction to perform services on a temporary basis in this  
138 jurisdiction if those services are in or reasonably related to a pending or  
139 potential arbitration, mediation, or other alternative dispute resolution  
140 proceeding in this or another jurisdiction, if the services arise out of or are  
141 reasonably related to the lawyer's practice in a jurisdiction in which the lawyer  
142 is admitted to practice. The lawyer, however, must obtain admission pro hac  
143 vice in the case of a court-annexed arbitration or mediation or otherwise if  
144 court rules or law so require.

145

146 [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to  
147 provide certain legal services on a temporary basis in this jurisdiction that  
148 arise out of or are reasonably related to the lawyer's practice in a jurisdiction  
149 in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3).  
150 These services include both legal services and services that nonlawyers may  
151 perform but that are considered the practice of law when performed by  
152 lawyers.

153  
154 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or  
155 be reasonably related to the lawyer's practice in a jurisdiction in which the  
156 lawyer is admitted. A variety of factors evidence such a relationship. The  
157 lawyer's client may have been previously represented by the lawyer, or may  
158 be resident in or have substantial contacts with the jurisdiction in which the  
159 lawyer is admitted. The matter, although involving other jurisdictions, may  
160 have a significant connection with that jurisdiction. In other cases, significant  
161 aspects of the lawyer's work might be conducted in that jurisdiction or a  
162 significant aspect of the matter may involve the law of that jurisdiction. The  
163 necessary relationship might arise when the client's activities or the legal  
164 issues involve multiple jurisdictions, such as when the officers of a  
165 multinational corporation survey potential business sites and seek the services  
166 of their lawyer in assessing the relative merits of each. In addition, the services  
167 may draw on the lawyer's recognized expertise developed through the regular  
168 practice of law on behalf of clients in matters involving a particular body of  
169 federal, nationally-uniform, foreign, or international law.

170  
171 [15] Paragraph (d) identifies two circumstances in which a lawyer who is  
172 admitted to practice in another United States jurisdiction, and is not disbarred  
173 or suspended from practice in any jurisdiction, may establish an office or other  
174 systematic and continuous presence in this jurisdiction for the practice of law  
175 as well as provide legal services on a temporary basis. Except as provided in  
176 paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in  
177 another jurisdiction and who establishes an office or other systematic or  
178 continuous presence in this jurisdiction must become admitted to practice law  
179 generally in this jurisdiction.

180  
181 [16] Paragraph (d)(1) applies to a lawyer who is employed by a client to  
182 provide legal services to the client or its organizational affiliates, i.e., entities  
183 that control, are controlled by, or are under common control with the

184 employer. This paragraph does not authorize the provision of personal legal  
185 services to the employer's officers or employees. The paragraph applies to in-  
186 house corporate lawyers, government lawyers and others who are employed  
187 to render legal services to the employer. The lawyer's ability to represent the  
188 employer outside the jurisdiction in which the lawyer is licensed generally  
189 serves the interests of the employer and does not create an unreasonable risk  
190 to the client and others because the employer is well situated to assess the  
191 lawyer's qualifications and the quality of the lawyer's work.

192  
193 [17] If an employed lawyer establishes an office or other systematic  
194 presence in this jurisdiction for the purpose of rendering legal services to the  
195 employer, the lawyer may be subject to registration or other requirements,  
196 including assessments for client protection funds and mandatory continuing  
197 legal education.

198  
199 [18] Paragraph (d)(2) recognizes that a lawyer may provide legal  
200 services in a jurisdiction in which the lawyer is not licensed when authorized  
201 to do so by federal or other law, which includes statute, court rule, executive  
202 regulation or judicial precedent.

203  
204 [19] A lawyer who practices law in this jurisdiction pursuant to  
205 paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of  
206 this jurisdiction. See Rule 8.5(a).

207  
208 [20] In some circumstances, a lawyer who practices law in this  
209 jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client  
210 that the lawyer is not licensed to practice law in this jurisdiction. For example,  
211 that may be required when the representation occurs primarily in this  
212 jurisdiction and requires knowledge of the law of this jurisdiction. See Rule  
213 1.4(b).

214  
215 [21] Paragraphs (c) and (d) do not authorize communications advertising  
216 legal services to ~~prospective clients~~ in this jurisdiction by lawyers who are  
217 admitted to practice in other jurisdictions. Whether and how lawyers may  
218 communicate the availability of their services to ~~prospective clients~~ in this  
219 jurisdiction is governed by Rules 7.1 to 7.5.

220  
221

1  
2 **Rule 7.1: Communications Concerning a Lawyer's Services**  
3

4 **A lawyer shall not make a false or misleading communication**  
5 **about the lawyer or the lawyer's services. A communication is false or**  
6 **misleading if it:**

7  
8 **(a) contains a material misrepresentation of fact or law, or omits a**  
9 **fact necessary to make the statement considered as a whole not materially**  
10 **misleading;**

11  
12 **(b) is likely to create an unjustified expectation about the results**  
13 **the lawyer can achieve, or states or implies that the lawyer can achieve**  
14 **results by means that violate the rules of professional conduct or other**  
15 **law;**

16  
17 **(c) compares the lawyer's services with other lawyers' services,**  
18 **unless the comparison can be factually substantiated; or**

19  
20 **(d) contains a testimonial or endorsement.**  
21

22 ***Comment:***  
23

24 [1] This Rule governs all communications about a lawyer's services,  
25 including advertising permitted by Rule 7.2. Whatever means are used to  
26 make known a lawyer's services, statements about them should be truthful.  
27 The prohibition in paragraph (b) of statements that may create "unjustified  
28 expectations" would ordinarily preclude advertisements about the results  
29 obtained on behalf of a client, such as the amount of a damage award or the  
30 lawyer's record in obtaining favorable verdicts, and advertisements containing  
31 client endorsements. Such information may create the unjustified expectation  
32 that similar results can be obtained for others without reference to the specific  
33 factual and legal circumstances.  
34

35 [2] Truthful statements that are misleading are also prohibited by this  
36 Rule. An advertisement that truthfully reports a lawyer's achievements on  
37 behalf of clients or former clients may be misleading if presented so as to lead  
38 a reasonable person to form an unjustified expectation that the same results

39 could be obtained for other clients in similar matters without reference to the  
40 specific factual and legal circumstances of each case. Similarly, an  
41 unsubstantiated comparison of the lawyer's services or fees with the services  
42 or fees of other lawyers may be misleading if presented with such specificity  
43 as would lead a reasonable person to conclude that the comparison can be  
44 substantiated. The inclusion of an appropriate disclaimer or qualifying  
45 language may preclude a finding that a statement is likely to create unjustified  
46 expectations or otherwise mislead the public.

47

1  
2 **Rule 7.2: Advertising**  
3

4 (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may  
5 advertise services through public media, such as a telephone directory, legal  
6 directory, newspaper or other periodical, outdoor advertising, radio or  
7 television, or through written or electronic communication.  
8

9 (b) A copy or recording of an advertisement or communication shall  
10 be kept for five years after its last dissemination along with a record of  
11 when and where it was used.  
12

13 (c) A lawyer shall not give anything of value to a person for  
14 recommending the lawyer's services, except that a lawyer may pay the  
15 reasonable cost of advertisements or communications permitted by this rule  
16 and may pay the usual charges for not-for-profit lawyer referral service or  
17 other legal service organization; and may pay for a law practice in  
18 accordance with Rule 1.17.  
19

20 (d) Any communication made pursuant to this Rule shall include  
21 the name of at least one lawyer who is licensed in Arkansas and who is  
22 responsible for its content, and shall disclose the geographic location of the  
23 office or offices of the attorney or the firm in which the lawyer or lawyers  
24 who actually perform the services advertised principally practice law.  
25

26 (e) Advertisements may include photographs, voices or images of  
27 the lawyers who are members of the firm who will actually perform the  
28 services. If advertisements utilize actors or other individuals, those persons  
29 shall be clearly and conspicuously identified by name and relationship to  
30 the advertising lawyer or law firm and shall not mislead or create an  
31 unreasonable expectation about the results the lawyer may be able to  
32 obtain. Clients or former clients shall not be used in any manner whatsoever  
33 in advertisements. Dramatization in any advertisement is prohibited.  
34

35 *Comment:*  
36

37 [1] To assist the public in learning about and obtaining legal services,  
38 lawyers should be allowed to make known their services not only through

39 reputation but also through organized information campaigns in the form of  
40 advertising. Advertising involves an active quest for clients, contrary to the  
41 tradition that a lawyer should not seek clientele. However, the public's need to  
42 know about legal services can be fulfilled in part through advertising. This  
43 need is particularly acute in the case of persons of moderate means who have  
44 not made extensive use of legal services. The interest in expanding public  
45 information about legal services ought to prevail over considerations of  
46 tradition. Nevertheless, advertising by lawyers entails the risk of practices that  
47 are misleading, overreaching, or unduly intrusive.

48  
49 [2] This Rule permits public dissemination of information concerning a  
50 lawyer's name or firm name, address, email address, website, and telephone  
51 numbers; the kinds of services the lawyer will undertake; the basis on which  
52 the lawyer's fees are determined, including prices for specific services and  
53 payment and credit arrangements; a lawyer's foreign language ability; names  
54 of references and, with their consent, names of clients regularly represented;  
55 and other information that might invite the attention of those seeking legal  
56 assistance.

57  
58 [3] Questions of effectiveness and taste in advertising are matters of  
59 speculation and subjective judgment. Some jurisdictions have had extensive  
60 prohibitions against television and other forms of advertising, against  
61 advertising going beyond specified facts about a lawyer, or against  
62 "undignified" advertising. Television, the Internet and other forms of  
63 electronic communication are is now among one of the most powerful media  
64 for getting information to the public, particularly persons of low and moderate  
65 income; prohibiting television, Internet, and other forms of electronic  
66 advertising, therefore, would impede the flow of information about legal  
67 services to many sectors of the public. Limiting the information that may be  
68 advertised has a similar effect and assumes that the bar can accurately forecast  
69 the kind of information that the public would regard as relevant. But see Rule  
70 7.3(a) for the prohibition against a solicitation through a real-time electronic  
71 exchange initiated by the lawyer.

72  
73 [4] Neither this Rule nor Rule 7.3 prohibits communications authorized  
74 by law, such as notice to members of a class in class action litigation.

75  
76 *Record of Advertising*

77  
78 [5] Paragraph (b) requires that a record of the content and use of  
79 advertising be kept in order to facilitate enforcement of this Rule. It does not  
80 require that advertising be subject to review prior to dissemination. Such a  
81 requirement would be burdensome and expensive relative to its possible  
82 benefits, and may be of doubtful constitutionality.

83  
84 *Paying Others to Recommend a Lawyer*

85  
86 [6] A lawyer is allowed to pay for advertising permitted by this Rule,  
87 and for the purchase of a law practice in accordance with Rule 1.17, but  
88 otherwise is not permitted to pay another person for channeling professional  
89 work. This restriction does not prevent an organization or person other than  
90 the lawyer from advertising or recommending the lawyer's services. Thus, a  
91 legal aid agency or prepaid legal services plan may pay to advertise legal  
92 services provided under its auspices. Likewise, a lawyer may participate in  
93 not-for-profit lawyer referral programs and pay the usual fees charged by  
94 such programs. Paragraph (c) does not prohibit paying regular compensation  
95 to an assistant, such as a secretary, to prepare communications permitted by  
96 this Rule.

97  
98 [7] Paragraph (e) of this Rule is designed to ensure that the advertising is  
99 not misleading and does not create unreasonable or unrealistic expectations  
100 about the results the lawyer may be able to obtain in any particular case, and  
101 to encourage a focus on providing useful information to the public about legal  
102 rights and needs and the availability and terms of legal services. Thus, the  
103 Rule allows all lawyer advertisements in which the lawyer personally appears  
104 to explain a legal right, the services the lawyer is available to perform, and the  
105 lawyer's background and experience. Regardless of medium, a lawyer's  
106 advertisement should provide only useful, factual information presented in a  
107 nonsensational manner.

1  
2 **Rule 7.3: ~~Direct Contact with Prospective~~ Solicitation of Clients**

3  
4 ~~(a) A lawyer shall not solicit, by any form of direct contact, in person or~~  
5 ~~otherwise, professional employment from a prospective client with~~  
6 ~~whom the lawyer has no family or prior professional relationship~~  
7 ~~when a significant motive for the lawyer's doing so is the lawyer's~~  
8 ~~pecuniary gain.~~

9  
10 (a) A lawyer shall not by in-person, live telephone or real-time  
11 electronic contact solicit professional employment when a  
12 significant motive for the lawyer's doing so is the lawyer's  
13 pecuniary gain, unless the person contacted:

- 14 (1) Is a lawyer; or  
15 (2) Has a family, close personal, or prior professional  
16 relationship with the lawyer.

17  
18 (b) Notwithstanding the prohibitions described in Paragraph (a), a  
19 lawyer may solicit professional employment from anyone a ~~prospective~~  
20 ~~client~~ known to be in need of legal services in a particular matter by written  
21 communication. Such written communication shall:

22  
23 (1) include on the bottom left hand corner of the face of the  
24 envelope the word "Advertisement" in red ink, with type twice as large as  
25 that used for the name of the addressee;

26 (2) only be sent by regular mail;

27  
28 (3) not have the appearance of legal pleadings or other official  
29 documents;

30  
31 (4) plainly state in capital letters "ADVERTISEMENT" on each  
32 page of the written communication;

33  
34 (5) begin with the statement that "If you have already retained a  
35 lawyer, please disregard this letter";

36  
37 (6) include the following statement in capital letters: "ANY  
38 COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF  
39

40 ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT  
41 COMMITTEE ON PROFESSIONAL CONDUCT, C/O CLERK, ARKANSAS  
42 SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK,  
43 ARKANSAS 72201"; and,  
44

45 (7) shall comply with all applicable rules governing lawyer  
46 advertising.  
47

48 (c) In death claims, the written communication permitted by  
49 paragraph (b) shall not be sent until 30 days after the accident.  
50

51 (d) Any written communication prompted by a specific occurrence  
52 involving or affecting the intended recipient of the communication or a  
53 family member shall disclose how the lawyer obtained the information  
54 prompting the communication.  
55

56 (e) Even when otherwise permitted by this rule, a lawyer shall not  
57 solicit professional employment from a prospective client by written or  
58 recorded communication or by in-person or telephone contact if:  
59

60 (1) the subject of the solicitation ~~prospective client~~ has made  
61 known to the lawyer a desire not to be solicited by the lawyer;  
62

63 (2) the solicitation involves coercion, duress, harassment,  
64 fraud, overreaching, intimidation, or undue influence; or  
65

66 (3) the subject of the solicitation ~~prospective client~~ is known  
67 to the lawyer to be represented in connection with the matter concerning the  
68 solicitation by counsel, except where the subject ~~prospective client~~ has  
69 initiated the contact with the lawyer.  
70

71 (f) Notwithstanding the prohibitions in paragraph (a), a lawyer may  
72 participate with a prepaid group legal service plan operated by an  
73 organization not owned or directed by the lawyer which uses in-person or  
74 telephone contact to solicit memberships or subscriptions for the plan from  
75 persons who are not known to need legal services in a particular matter  
76 covered by the plan.  
77

78 *Comment:*

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116

[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.

[12] There is a potential for abuse when a solicitation involves inherent ~~in~~ direct in-person or live telephone 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 a ~~the~~ lay 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 overreaching.

[23] This potential for abuse inherent in direct in-person, ~~or~~ live telephone or real-time electronic contact-solicitation of prospective clients justifies its prohibition, particularly since lawyers ~~lawyer~~ advertising and ~~written communication permitted under Rule 7.2 offer~~ have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These form of communications and solicitations make it possible for the public ~~Advertising and written communications which may be mailed make it possible for 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 public ~~prospective client~~ to direct in-person or telephone persuasion that may overwhelm a ~~person's~~ the client's judgment.

117 [34] The use of general advertising and written communications to  
118 transmit information from lawyer to the public prospective client, rather than  
119 direct in-person, ~~or live telephone~~ or real-time solicitation contact, will help to  
120 assure that the information flows cleanly as well as freely. The contents of  
121 advertisements and communications permitted under Rule 7.2 are  
122 permanently recorded so that they cannot be disputed and may be shared  
123 with others who know the lawyer. This potential for informal review is itself  
124 likely to help guard against statements and claims that might constitute false  
125 and misleading communications, in violation of Rule 7.1. The contents of  
126 direct in-person, live telephone or real-time electronic contact conversations  
127 ~~between a lawyer to a prospective client~~ can be disputed and are not subject to  
128 third-party scrutiny. Consequently, they are much more likely to approach  
129 (and occasionally cross) the dividing line between accurate representations  
130 and those that are false and misleading.

131  
132 [45] There is far less likelihood that a lawyer would engage in abusive  
133 practices against a former client, or a person with whom the lawyer has close  
134 personal or family relationship, or in situations ~~where the lawyer is an~~  
135 ~~individual with whom the lawyer has a prior personal or professional~~  
136 ~~relationship or where the lawyer is motivated by considerations other than the~~  
137 lawyer's pecuniary gain. Nor is there a serious potential for abuse when the  
138 person contacted is a lawyer. Consequently, the general prohibition in Rule  
139 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those  
140 situations.

141  
142 [56] But even permitted forms of solicitation can be abused. Thus, any  
143 solicitation which contains information which is false or misleading within the  
144 meaning of Rule 7.1, which involves coercion, duress, harassment, fraud,  
145 overreaching, intimidation, or undue influence within the meaning of Rule  
146 7.3(e)(2), or which involves contact with someone ~~a prospective client~~ who has  
147 made known to the lawyer a desire not to be solicited by the lawyer within the  
148 meaning of Rule 7.3(e)(1) is prohibited. Moreover, if after sending a letter or  
149 other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives  
150 no response, any further effort to communicate with the recipient of the  
151 communication ~~prospective client~~ may violate the provisions of Rule 7.3(e).

152  
153 [67] Letters of solicitation and their envelopes should be clearly marked  
154 "Advertisement." This will avoid the recipient perceiving that he or she needs

155 to open the envelope because it is from a lawyer or law firm, only to find he or  
156 she is being solicited for legal services. With the envelope and letter marked  
157 "Advertisement," the recipient can choose to read the solicitation, or not to  
158 read it, without fear of legal repercussions.

159  
160 [78] Paragraph (c) allows targeted mail solicitation of potential plaintiffs  
161 or claimants in wrongful death causes of action, but only if mailed at least  
162 thirty days after the incident. This restriction is reasonably required by the  
163 sensitized state of the potential clients who may be grieving the loss of a  
164 family member, and the abuses which experience has shown exist in this type  
165 of solicitation.

166  
167 [89] In addition, the lawyer or law firm should reveal the source of  
168 information used to determine that the recipient has a potential legal problem.  
169 Disclosure of the information source will help the recipient to understand the  
170 extent of knowledge the lawyer or law firm has regarding his or her particular  
171 situation and will avoid misleading the recipient into believing that the lawyer  
172 has particularized knowledge about the recipient's matter if the lawyer does  
173 not.

174  
175 [910] Lawyers who use direct mail to solicit employment from accident  
176 victims or their survivors normally find the names of these persons, whom  
177 they believe may need legal services, in accident reports, newspaper reports,  
178 television or radio news, or other publicly available information. Some  
179 accident victims later die from their injuries after the preparation of reports  
180 and news dissemination. In the event of such a death, an attorney, who relies  
181 in good faith upon all the reasonably and publicly available information which  
182 creates the appearance the victim is still alive at the time the lawyer sends a  
183 letter soliciting employment, is not in violation of the prohibition against  
184 sending written communications within thirty days in cases which may be the  
185 basis of wrongful death claims.

186  
187 [1011] This Rule is not intended to prohibit a lawyer from contacting  
188 representatives of organizations or groups that may be interested in  
189 establishing a group or prepaid legal plan for their members, insured's,  
190 beneficiaries or other third parties for the purpose of informing such entities of  
191 the availability of and details concerning the plan or arrangement which the  
192 lawyer or lawyer's firm is willing to offer. This form of communication is not

193 directed to people who are seeking legal service for themselves. a prospective  
194 ~~client.~~ Rather, it is usually addressed to an individual acting in a fiduciary  
195 capacity seeking a supplier of legal services for others who may, if they  
196 choose, become prospective clients of the lawyer. Under these circumstances,  
197 the activity which the lawyer undertakes in communicating with such  
198 representatives and the type of information transmitted to the individual are  
199 functionally similar to and serve the same purpose as advertising permitted  
200 under Rule 7.2.

201  
202 [412] The requirement in Rule 7.3(b) that certain communications be  
203 marked "Advertisement" does not apply to communications sent in response  
204 to requests of potential clients or their spokespersons or sponsors. General  
205 announcements by lawyers, including changes in personnel or office location,  
206 do not constitute communications soliciting professional employment from a  
207 client known to be in need of legal services within the meaning of this Rule.

208  
209 [4213] Paragraph (f) of this Rule would permit an attorney to participate  
210 with an organization which uses personal contact to solicit members for its  
211 group or prepaid legal service plan, provided that the personal contact is not  
212 undertaken by any lawyer who would be a provider of legal services through  
213 the plan. The organization referred to in paragraph (f) must not be owned by  
214 or directed (whether as manager or otherwise) by any lawyer or law firm that  
215 participates in the plan. For example, paragraph (f) would not permit a lawyer  
216 to create an organization controlled directly or indirectly by the lawyer and  
217 use the organization for the in-person or telephone solicitation of legal  
218 employment of the lawyer through memberships in the plan or otherwise. The  
219 communication permitted by these organizations also must not be directed to  
220 a person known to need legal services in a particular matter, but is to be  
221 designed to inform potential plan members generally of another means of  
222 affordable legal services. Lawyers who participate in a legal service plan must  
223 reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2  
224 and 7.3(e). See 8.4(a).

225