

AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

**Rule 1.0 Terminology**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Comment

### Screened

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement,

reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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### **Rule 1.1 Competence**

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

#### **Comment**

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#### **Maintaining Competence**

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

### **Rule 1.4 Communication**

#### **(a) A lawyer shall:**

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
- (3) keep the client reasonably informed about the status of the matter;**
- (4) promptly comply with reasonable requests for information; and**
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

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

#### **Comment**

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#### **Communicating with Client**

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[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with

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the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly respond to or acknowledge client communications.

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## Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

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

## Comment

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## Acting Competently to Preserve Confidentiality

[16] Paragraph (c) requires a lawyer must to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of



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

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

...

#### **Rule 4.4 Respect for Rights of Third Persons**

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

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

#### **Comment**

...

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

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

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

## REPORT

### **Introduction**

Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. One of the objectives of the ABA Commission on Ethics 20/20 has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology, and to update the Model Rules of Professional Conduct to reflect the realities of a digital age.

The Commission's recommendations in this area take two forms. First, the Commission has asked the ABA Center for Professional Responsibility to work with relevant entities within the Association to create a centralized user-friendly website with continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers' use of technology, including information about the latest data security standards. The Commission concluded that this web-based resource is critical given that rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology. The ABA's Legal Technology Resource Center and Law Practice Management Section's eLawyering Task Force have developed excellent technology-related resources, but those resources exist in different places on the ABA website. The Commission found that lawyers are seeking a website that serves as a centralized and continuously updated resource on these issues.

The Commission believes that the information contained on this website should be presented in such a way that lawyers who may not have extensive knowledge about technology and associated ethics issues can easily understand the information. For example, this resource should identify the key issues that lawyers should consider when using technology in their practices, such as the administrative, technical, and physical safeguards that should be employed. The resource should also highlight additional cutting-edge and more sophisticated topics. The website also should include regularly updated information about security standards, including the identification of standards-setting organizations, so that lawyers can more easily determine whether the technology that they employ is compliant with those standards.

Second, the Commission is proposing to amend several Model Rules of Professional Conduct and their Comments. Unlike the proposed website, which can be regularly updated in light of new technology and changing security concerns, the Rule and Comment-based proposals necessarily offer more general guidance and do not offer advice regarding the use of any particular type of technology.

The Commission identified six areas that would benefit from this guidance. First, the Commission concluded that technology has raised new issues for law firms that employ screens pursuant to Model Rules 1.10, 1.11, 1.12, and 1.18. The Commission determined that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Commission is proposing an amendment to address this point in Comment [9] of Model Rule 1.0 (Terminology), which concerns the definition of a screen under Model Rule 1.0(k).

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Second, the Commission determined that the definition of a “writing” in Model Rule 1.0(n) does not reflect the full range of ways in which lawyers use technology to memorialize an understanding. Thus, the Commission is recommending that the word “e-mail” be replaced by “electronic communications.”

Third, the Commission concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Commission is recommending an amendment to Comment [6] of Model Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology.

Fourth, the Commission is proposing a change to the last sentence of Comment [4] to Model Rule 1.4, which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Commission proposes to replace that admonition with the following language: “A lawyer should promptly respond to or acknowledge client communications.” Although not related to a lawyer’s confidentiality obligations, the Commission nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fifth, the Commission is proposing to add a new paragraph to Model Rule 1.6 (Confidentiality of Information). Proposed new Model Rule 1.6(c) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent or unauthorized disclosures as well as from unauthorized access. This duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6. The Commission also concluded that the Comments should be amended to offer lawyers more guidance about how to comply with this obligation.

Finally, the Commission is proposing new language to clarify the scope of Model Rule 4.4(b), which concerns a lawyer’s obligations upon receiving inadvertently sent confidential information. The current provision describes the receipt of “documents” containing such information, but confidential information can also take the form of electronically stored information. Thus, the Commission is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to give lawyers more guidance as to when notification requirement of Model Rule 4.4(b) is triggered.

The Commission concluded that these amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology’s many benefits. The proposals also update the language of the Model Rules to ensure that they reflect the realities of 21<sup>st</sup> century law practice. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

## **I. Model Rule 1.0(k) (Terminology; Screening)**

Model Rule 1.0 is the Terminology Section of the Model Rules. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer's access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Commission concluded and heard that greater clarity and specificity is needed. To that end, the Commission is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

## **II. Model Rule 1.0(n) (Terminology; Writing)**

The word "writing" is another defined term that should be updated in light of changes in technology. Currently, Model Rule 1.0(n) defines "writing" or "written" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." The Commission concluded that this definition is not sufficiently expansive given the wide range of methods that lawyers now use (or are likely to use in the near future) when memorializing an agreement, such as written consents to conflicts of interest. The Commission, therefore, proposes to replace the word "e-mail" with "electronic communications."

## **III. Model Rule 1.1 (Competence)**

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent.

## IV. Model Rule 1.4 (Communication)

Model Rule 1.4 describes a lawyer's duty to communicate with clients, and the last sentence of Comment [4] to Model Rule 1.4 currently instructs lawyers that "[c]lient telephone calls should be promptly returned or acknowledged." Clients, however, now communicate with lawyers in an increasing number of ways, including by email and other forms of electronic communication, and a lawyer's obligation to respond should exist regardless of the medium that is used. Accordingly, the Commission proposes to replace the last sentence of Comment [4] with the following language: "A lawyer should promptly respond to or acknowledge client communications." The Commission concluded that this language more accurately describes a lawyer's obligations in light of changes in technology and evolving methods of communication.

## V. Model Rule 1.6 (Duty of Confidentiality)

Currently, Model Rule 1.6(a) states that a lawyer has a duty not to reveal a client's confidential information, except for the circumstances described in Model Rule 1.6(b). The Rule, however, does not indicate what ethical obligations lawyers have to *prevent* such a revelation. Although this obligation is described in Comments [16] and [17], the Commission concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Model Rule 1.6(c).

The idea of explaining a lawyer's duty to safeguard information within the black letter of the Rule is not new. The proposed Model Rule 1.6(c) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Commission concluded that a similar provision should appear in Model Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

To be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The

reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances.

The Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available. Nevertheless, the Commission is proposing new language to Comment [16] to identify several factors that lawyers should consider when determining whether their efforts are reasonable, including the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). Moreover, as explained above, the Commission has recommended that the ABA create a centralized website that contains continuously updated and detailed information about data security.

In addition to setting out the factors that lawyers need to consider when securing their clients' confidences, the proposed Comment language recognizes that some clients might require the lawyer to implement special security measures not required by the Rule or may give informed consent to the use of security measures that would otherwise be prohibited by the Rule. A nearly identical observation appears in Comment [17] in the context of security measures that lawyers might have to employ when transmitting confidential information. The Commission concluded that a similar thought should be expressed in the context of Comment [16], which pertains to the storage of such information.

Finally, the Commission's research revealed that there has been a dramatic growth in federal, state, and international laws and regulations relating to data privacy. The Commission found that this body of law increasingly applies to lawyers and law firms and that lawyers need to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence to the end of Comment [16] and Comment [17] that would remind lawyers that other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Model Rules of Professional Conduct. Other Comments in the Model Rules instruct lawyers to consult law outside of the ethics rules, and the Commission concluded that a lawyer's duty of confidentiality is another area where other legal obligations have become sufficiently important and common that lawyer should be expressly reminded to consider those obligations, both when storing confidential information (Comment [16]) and when transmitting it (Comment [17]).

## **VI. Model Rule 4.4 (Respect for Rights of Third Persons)**

Technology has increased the risk that confidential information will be inadvertently disclosed, and Model Rule 4.4(b) addresses one particular ethics issue associated with this risk. Namely, it provides that, if lawyers receive documents that they know or reasonably should know were inadvertently sent to them, they must notify the sender.

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The Commission concluded that the word “document” is inadequate to express the various kinds of information that can be inadvertently sent in a digital age. For example, confidential information can now be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata). To make clear that the Rule applies to those situations, the Commission is proposing that the word “document” be replaced with a phrase that is commonly used in the context of discovery – “document or electronically stored information.”

In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, the last sentence of Comment [2] addresses the issue of metadata. The Comment states that the receipt of metadata (i.e., data embedded in electronic information, such as the date an electronic document was created) triggers the notification duties of the Rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

The new language about metadata does not resolve a more controversial question: whether a lawyer should be permitted to look at metadata in the absence of consent or court authority to do so. Several ethics opinions, including ABA Formal Opinion 06-442, have concluded that Rule 4.4 does not prohibit a lawyer from reviewing metadata under those circumstances,<sup>1</sup> but other ethics opinions have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party’s metadata in the absence of consent or a court order.<sup>2</sup> The Commission’s proposal does not resolve this issue, but merely recognizes that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances (e.g., with the opponent’s or a court’s permission). The Commission’s proposal makes clear that, under those circumstances, if a lawyer uncovers metadata that the lawyer knows the sending lawyer did not intend to include, Model Rule 4.4(b)’s notification requirement is triggered.

The Commission is also proposing to define the phrase “inadvertently sent.” The phrase is ambiguous and potentially misleading, because, for example, it could be read to exclude information that is *intentionally* sent, but to the wrong person. To ensure that the purpose of the Model Rule is clear, the Commission proposes to add the following sentence: “A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.”

## VII. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients’ confidential information and that reasonable safeguards are ethically required.

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<sup>1</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006); Md. St. Bar Ass’n. Comm. on Ethics, Docket No. 2007-09 (2007); Vt. State Bar Ass’n Ethics Comm., Ethics Op. 01 (2009).

<sup>2</sup> See, e.g., Ala. St. Bar Office of Gen. Counsel, Formal Op. 02 (2007); State Bar of Ariz. Ethics Comm., Ethics Op. 03 (2007); Fla. State Bar Prof’l Ethics Comm., Formal Op. 02 (2006); Me. Bd. of Overseers of the Bar Prof’l Ethics Comm’n, Ethics Op. 196 (2007); N.H. Bar Ass’n. Ethics Comm., Advisory Op. 4 (2008-2009); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 749 at \*3 (2001); NYCLA Comm. on Prof’l Ethics, Ethics Op. 738 (2008).



The Commission's proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology's many benefits. The proposals also update the language of the Model Rules so that it reflects the way that law is practiced in the 21<sup>st</sup> century. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

## GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution.

**Resolution 105a: Technology and Confidentiality**

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."

- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.
- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

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

No.

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

The adoption of this Resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last “global” review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new

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ethics issues relating to technology and confidentiality. Resolution 105a, if adopted, would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these increasingly important issues.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the

National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution(s)

#### **Resolution 105a: Technology and Confidentiality**

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."
- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of

changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.

- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

## 2. Summary of the Issue that the Resolution Addresses

The ABA's last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105a addresses the ethical issues associated with technology and confidentiality of client information. Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. Resolution 105a provides lawyers with more guidance regarding their ethical obligations when using this technology and updates the Model Rules of Professional Conduct to reflect the realities of a digital age. Resolution 105a offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

## 3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105a updates the Model Rules of Professional Conduct to reflect a lawyer's ethical duties in a digital age. For example, the black letter of Model Rule 1.6(a) does not currently describe what, if any, ethical obligations lawyers have to prevent unauthorized or inadvertent disclosure of, or unauthorized

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access to, confidential client information. Rather, the Rule only instructs lawyers not to “reveal” that information. Thus, the black letter of the Rule does not offer lawyers any guidance regarding their ethical obligations when using technology (e.g., smart phones, laptops, or other mobile devices) to store or transmit confidential information. New paragraph (c) in Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) and new language in Comment [16] will help lawyers understand their ethical duty to take reasonable measures to protect a client’s confidential information. New Comment language would identify various factors that lawyers need to take into account when determining whether their precautions are reasonable but make clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

Resolution 105a also updates Model Rules 1.0 (Terminology), 1.1 (Competence), 1.4 (Communication), and 4.4 (Respect for Rights of Third Persons) so that lawyers understand how technology is transforming their ethical obligations. For example, the Commission’s proposal to amend the Comment to Model Rule 1.1 makes explicit that which has been long implicit in the Rules. Namely, the duty of competence, which requires a lawyer to stay abreast of developments in the law and its practice, encompasses staying abreast of the risks and benefits associated with relevant technology (e.g., how technology used by a lawyer impacts the duty to protect confidential client information).

## 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105a as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105a relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral



comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

RESOLUTION

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

- 4  
5 (a) the black letter and Comments to Model Rule 1.0 (Terminology);  
6 (b) the Comments to Model Rule 1.1 (Competence);  
7 (c) the Comments to Model Rule 1.4 (Communication);  
8 (d) the black letter and Comments to Model Rule 1.6 (Confidentiality of Information); and  
9 (e) the black letter and Comments to Model Rule 4.4 (Respect for Rights of Third Parties).

10  
11 ...

12  
13 **Comment**

14 ...

15  
16 **Acting Competently to Preserve Confidentiality**

17 [16] Paragraph (c) requires a lawyer must to act competently to safeguard information  
18 relating to the representation of a client against unauthorized access by third parties and against  
19 inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are  
20 participating in the representation of the client or who are subject to the lawyer's supervision. See  
21 Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of,  
22 confidential information relating to the representation of a client does not constitute a violation of  
23 paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors  
24 to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited  
25 to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not  
26 employed, the cost of employing additional safeguards, the difficulty of implementing the  
27 safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent  
28 clients (e.g., by making a device or important piece of software excessively difficult to use). A client  
29 may require the lawyer to implement special security measures not required by this Rule or may give  
30 informed consent to forgo security measures that would otherwise be required by this Rule. Whether  
31 a lawyer may be required to take additional steps to safeguard a client's information in order to  
32 comply with other law, such as state and federal laws that govern data privacy or that impose  
33 notification requirements upon the loss of, or unauthorized access to, electronic information, is  
34 beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers  
35 outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

36 ...

37  
38 **Comment**

39 ...

40 [3] Some lawyers may choose to return a document or delete electronically stored  
41 information unread, for example, when the lawyer learns before receiving it the document that it was  
42 inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so,  
43 the decision to voluntarily return such a document or delete electronically stored information is a  
44 matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED

AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

**Rule 1.18: Duties to Prospective Client**

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

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

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

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

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

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

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

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

## Comment

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

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

...

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

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

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

...

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

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

#### **COMMENT**

...

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

...

### **Rule 7.2 Advertising**

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

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

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

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

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

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

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

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

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

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## Comment

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

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

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

...

### Paying Others to Recommend a Lawyer

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

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

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

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

...

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

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

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

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

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

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

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

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

## Comment

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

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

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



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

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

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

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

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

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

## **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

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

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

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

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

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

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

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

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

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

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

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

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

**Comment**

...

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



## REPORT

### **I. Introduction**

Lawyers regularly use the Internet to disseminate information about the law and legal services as well as to attract new clients. In general, this development has had the salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers. One of the goals of the ABA Commission on Ethics 20/20 has been to ensure that lawyers continue to provide this valuable information in a manner that is consistent with their ethical obligations.

As a result of its examination of these issues, the Commission concluded that no new restrictions on lawyer advertising are required. For example, the Commission concluded that Model Rule 7.1's prohibition against false and misleading communications is readily applicable to online advertising and other forms of electronic communications that are used to attract new clients. Thus, the Commission concluded that there is no need to develop new or different restrictions with regard to those communications. The Commission determined, however, that some Model Rules – specifically Model Rules 1.18 (Duties to Prospective Clients), 7.2 (Advertising), and 7.3 (Direct Contact with Prospective Clients) – have unclear implications for new forms of marketing and that lawyers would benefit from several clarifying amendments.<sup>1</sup> As a result of these proposed changes, a conforming amendment also needs to be made to Comment [3] of Model Rule 7.1.

First, the Commission is proposing amendments to Model Rule 1.18 (Duties to Prospective Clients) and its Comments that would clarify when electronic communications give rise to a prospective client-lawyer relationship. The proposed amendments are designed to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.

Second, the Commission is proposing amendments to the Comments to Model Rule 7.2 (Advertising). The Commission found that there is considerable confusion concerning the kinds of Internet-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a “recommendation.” To address this ambiguity, the Commission is proposing to define a “recommendation” in a Comment. Additional language in the same Comment would make clear that payments for “lead

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<sup>1</sup> The Commission has asked the ABA Center for Professional Responsibility to develop an informational report about the constitutional limitations on lawyer advertising rules in the Internet context. The Commission concluded that such a report would be desirable in light of recent court decisions holding that some states have imposed unconstitutional restrictions on lawyers' marketing-related communications. The informational report will explain the constitutional issues at stake and encourage jurisdictions to develop regulations that are more uniform and constitutionally defensible. The Commission also concluded that Model Rule 7.1 (Communications Concerning a Lawyer's Services), if read literally, could apply to lawyers' communications about their services even when those communications appear on lawyers' personal networking sites and are accessible only to close friends or family. Thus, the informational report would address these concerns. The Commission also has identified and referred to the Standing Committee on Ethics and Professional Responsibility several related topics that are not amenable to treatment in the Model Rules, but that would be more usefully addressed in a Formal Ethics Opinion.

generation,” including online lead generation, are permissible as long as the generator of the lead complies with certain requirements.

Third, the Commission is proposing amendments to Model Rule 7.3 (Direct Contact with Prospective Clients) that would change the title of the Rule and clarify when a lawyer’s online communications constitute “solicitations” that are governed by the Rule. For example, a new Comment would explain that communications in response to a request for information, such as requests for proposals and advertisements generated in response to Internet searches, are not “solicitations.”

Finally, the Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

## II. Proposed Amendments to Model Rule 1.18 (Prospective Clients)

Model Rule 1.18 was proposed by the ABA Commission on Evaluation of the Model Rules of Professional Conduct (Ethics 2000 Commission) and was adopted by the ABA House of Delegates in 2002. The purpose of the Rule is to identify a lawyer’s duties to prospective clients.

Critical to the application of Model Rule 1.18 is the definition of a “prospective client.” The Commission concluded that the definition must be sufficiently flexible to address the increasing volume of electronic communications that lawyers now receive from people who seek legal services. In a recently released Formal Ethics Opinion, the ABA Standing Committee on Ethics and Professional Responsibility identified the circumstances under which these communications might give rise to a prospective client-lawyer relationship,<sup>2</sup> and the Commission concluded that lawyers and the public would benefit from a codification of elements of that Formal Opinion.

First, the Commission concluded that the definition of a “prospective client” needs to be updated in light of the various new ways in which lawyers and the public interact, including online. Thus, the Commission is proposing to replace the word “discusses” in paragraph (a) of Model Rule 1.18 with the word “consults.” This change would make clear what the Formal Opinion concluded: a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place.<sup>3</sup> The word “consults” makes this point more clearly than the word “discusses” and anticipates future methods of interaction between lawyers and the public.

The Commission is also proposing new Comment language that would elaborate on the meaning of the word “consults” and give lawyers more guidance about how to avoid the creation of an inadvertent client-lawyer relationship. The Comment emphasizes that such a consultation

<sup>2</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010).

<sup>3</sup> *Id.* at 4.

can occur, and a prospective client relationship can arise, if a lawyer specifically invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.

At the same time, the Commission sought to retain the idea that unilateral communications from a person to a lawyer are not sufficient to give rise to a prospective client relationship, even if the information is submitted through a lawyer's website. For example, the Comment explains that a consultation does not occur, and a prospective client relationship does not arise, if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. The proposal, therefore, is consistent with ABA Formal Opinion 10-457, which reached a similar conclusion.<sup>4</sup> In sum, the word "consults," when paired with the proposed new Comment language, will give lawyers more guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship.

For similar reasons, the Commission proposes to replace the phrase "had discussions with a prospective client" in paragraph (b) with the phrase "learned information from a prospective client." The Commission is proposing conceptually similar changes in Comments [4] and [5].

Finally, the Commission proposes to add a sentence at the end of Comment [2] to make clear that a person is not owed any duties under Model Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent. Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior, which is commonly referred to as "taint shopping."<sup>5</sup> In fact, some states have incorporated this concept into their own versions of Model Rule 1.18.<sup>6</sup> The Commission concluded that the concept deserved expression in Comment [2] given the ease with which technology makes this "taint shopping" possible.

### III. Proposed Amendments to Model Rule 7.2 (Advertising)

Model Rule 7.2(b) currently prohibits a lawyer from giving anything of value for recommending the lawyer's services. The Rule, however, creates exceptions that permit a lawyer to pay for the "reasonable costs" of advertising and the "usual charges" of non-profit or state-qualified lawyer referral services. In practical effect, the Model Rule has been interpreted to mean that a lawyer may divide client fees with non-profit or approved referral services, but may only pay set costs to advertising programs, such as the cost of a television commercial or a newspaper advertisement.

Prior to the Internet, this dichotomy between advertising and lawyer referral services was not difficult to understand. For example, payments to television stations to run a commercial or

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<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g.,* N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-02 (2006); Va. State Bar, Ethics Op. 1794 (2004).

<sup>6</sup> N.Y. Rules of Prof'l Conduct R. 1.18(e)(2).

payments to a phone book company to run a Yellow Pages advertisement were clearly permissible, whereas sharing fees with a for-profit referral service was clearly impermissible.

The Internet has blurred these lines, and it is highly likely that continued technological innovation will make the lines even less clear. For example, new marketing methods have emerged, such as those provided by Legal Match, Total Attorneys, Groupon, and Martindale-Hubbell's Lawyers.com that do not fit neatly into existing categories. Although the particular models vary, lawyers often pay these entities a fee for each client lead that is generated. An important question in this context is whether the lead generator is "recommending" the lawyer for whom the lead is generated. If so, any payments from the lawyer would violate Rule 7.2(b). The problem is that the existing version of Model Rule 7.2 does not clearly resolve this issue.<sup>7</sup>

To address this ambiguity, the Commission examined the original purpose of the restrictions contained in Model Rule 7.2(b). One important goal was to prohibit payments to people (e.g., "runners" or "cappers") who might engage in conduct that the lawyer was not permitted to employ, such as engaging in in-person solicitations or using false or misleading tactics. *See also* Rule 8.4(a) (prohibiting the violation of the Rules of Professional Conduct "through the acts of another"). Another reason for the restriction is that nonlawyers typically do not have the expertise to know which lawyers are best able to handle a particular matter. A recommendation, therefore, can give the public a false impression about the appropriateness of using a specific lawyer. The Commission concluded that it should propose clarifying language regarding the scope of Model Rule 7.2 that is consistent with these rationales for the Rule, while not unreasonably limiting lawyers' ability to use new client development tools.

## A. The Commission's Proposal

To clarify the scope of Model Rule 7.2's prohibition against paying for a recommendation, the Commission proposes to define the word "recommendation" in Comment [5]. The word would be defined as a "communication . . . [that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

This new definition would permit lawyers to use lead generation services, such as those that are increasingly prevalent online, but would require lawyers to ensure that the lead generators do not engage in the kind of conduct that the Model Rule was intended to prohibit. Namely, the definition would make clear that lawyers cannot pay lead generators who endorse or vouch for the lawyer's credentials, abilities, competence, character, or other professional qualities. This restriction is consistent with the idea that nonlawyers do not have the necessary expertise to know which lawyer has the necessary professional qualities to handle a particular matter.

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<sup>7</sup> A related question is whether such fees would be considered an impermissible form of fee sharing under Rule 5.4. There is considerable case law and numerous ethics opinions that define a "legal fee" for purposes of Rule 5.4, and the Commission concluded that no additional guidance is necessary to address the issue. *See, e.g.,* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 (1988); Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Formal Op. 00-10 (2000); Va. State Bar, Ethics Op. 1712 (1998).



The Commission concluded that there are other possible concerns associated with lead generation that should also be identified. First, the proposed Comment explains that, even if a lead generator does not “recommend” the lawyer, the lawyer’s use of the lead generator must be consistent with Model Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer). The reference to Model Rule 1.5(e) acknowledges that the lead generator may be another lawyer, *see* Model Rule 7.2(b)(4), in which case the restrictions on fee divisions in Rule 1.5(e) must be observed. The reference to Model Rule 5.4 is intended to remind lawyers that, although the lawyer can pay a fee to a nonlawyer for a client lead, the fee should typically not be contingent on a person’s use of the lawyer’s service. Such a fee would constitute an impermissible sharing of fees with nonlawyers under Model Rule 5.4(a). Moreover, the reference to Rule 5.4 is intended to remind lawyers that a nonlawyer lead generator should not in any way direct or regulate how the lawyer’s work is performed. *See* Model Rule 5.4(c).

Second, in order to ensure that the public is not misled, the proposed Comment language reminds lawyers that they should not use a lead generator unless the lead generator’s communications are consistent with Model Rule 7.1, which prohibits false or misleading communications. To comply with this obligation, the Comment explains that a lawyer should not pay a lead generator if the lead generator states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.

The Commission considered whether to require lead generators to state affirmatively that they are not recommending the lawyer and have not analyzed a person’s legal needs. The Commission concluded that lead generation takes many forms, and some of those forms will not require any affirmative statements from the lead generator in order to prevent misunderstandings. For example, “pay-per-click” advertising is a form of lead generation where a lawyer pays a fee to a nonlawyer (e.g., Google) each time someone clicks on the lawyer’s advertisement and is taken to the lawyer’s website. When someone clicks on such an advertisement, there is typically no reason to believe that the provider of the “pay-per-click” service (in this example, Google) is recommending the lawyer or that the provider of the service has, in some way, analyzed the person’s legal needs. The Commission concluded that, under these circumstances, it would be unnecessary to require the lead generator to state affirmatively that it is not recommending the lawyer or that it has not analyzed a person’s legal needs. It would be obvious from the context that the lead generator has not done so.

For these reasons, the Commission concluded that it would be more appropriate to state generally that lead generators should not state, imply, or create a reasonable impression that they are recommending the lawyer, have made the referral without payment from the lawyer, or have analyzed a person’s legal problems when determining which lawyer should receive the referral. In some circumstances, this requirement might mean that the lead generator has to make affirmative statements (e.g., that it is not recommending the lawyer, that it is getting paid for the lead, or that it has not analyzed the person’s legal problems). In other circumstances, however, where there is no reasonable likelihood of confusion (e.g., typical “pay-per-click” advertising), no such affirmative statements should be necessary.

Finally, the Commission is retaining the existing word “channeling” in Comment [5]. The Commission had considered deleting the word, because it is ambiguous and does not appear in the black letter. The Commission heard concerns, however, that some forms of lead generation might be problematic, even if no “recommendation” (as that word would be defined) is made. For example, someone might be paid to distribute a lawyer’s business cards to accident victims without actually “recommending” the lawyer in explicit terms. Such a person would be “channeling” professional work without “recommending” the lawyer. The Commission concluded that such activities would be prohibited as in-person solicitations under Model Rule 7.3 and that the word “channeling” will serve as a reminder about Rule 7.3’s restrictions. In sum, the retention of the word “channeling” is only intended as a reminder that lawyers should not use others to engage in forms of client development that violate Model Rule 7.3.

## **B. Alternate Approaches Considered**

The Commission considered several alternatives to amending Model Rule 7.2 and paid particular attention to one that would have had more significant implications than the approach that the Commission decided to propose. In particular, the Commission considered eliminating altogether Model Rule 7.2(b)’s prohibition against paying nonlawyers for recommendations. Such a change would have enabled lawyers to pay for such recommendations as long as the nonlawyers’ methods were consistent with the lawyer’s own ethical obligations. *See* Model Rule 8.4(a). For example, a lawyer under this alternate approach would have been permitted to pay a for-profit referral service for recommending the lawyer, but only if the service did not employ any methods that the lawyer could not employ (e.g., it did not use misleading communications or engage in in-person solicitations). The Commission learned that the District of Columbia has adopted a somewhat similar approach.<sup>8</sup>

This alternative would have retained the historical restrictions on paying others to engage in unethical conduct (such as paying “runners” to engage in in-person solicitation), but free lawyers to use new and innovative forms of marketing. For example, for-profit lawyer referral services would be able to recommend lawyers who are particularly well-suited to provide the specific services that a person is seeking, including offering a description of the lawyers’ qualifications and the cost of their services relative to other lawyers who offer similar services. Arguably, such a for-profit referral service would be able to match people with appropriate lawyers more effectively and efficiently than not-for-profit models and thus make the delivery of legal services more accessible, affordable, and transparent.<sup>9</sup>

<sup>8</sup> D.C. RULES OF PROF’L CONDUCT R. 7.1(b)(2) (“A lawyer shall not give anything of value to a person (other than the lawyer’s partner or employee) for recommending the lawyer’s services through in-person contact”); D.C. Bar Legal Ethics Comm., Ethics Op. 342 (2007).

<sup>9</sup> The proposal also would be consistent with the Commission’s proposed approach to outsourcing under Rule 5.3. In particular, proposed Comment [4] to that Rule provides that, “[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” The premise of that proposal is consistent with the idea that lawyers should be permitted to pay others to perform services on the lawyer’s behalf as long as the services are performed in a manner that is consistent with the lawyer’s own professional obligations.

The Commission nevertheless decided to retain the restriction on paying others for a recommendation. Concerns were raised that, by removing the restriction, for-profit entities would develop undue influence over the referral of professional work, even if they do not have the expertise to do so. Moreover, there was concern that such entities might wield inappropriate influence over lawyers who want to be recommended, despite the restrictions contained in Model Rule 5.4. For these reasons, the Commission's current proposal retains the current prohibition against paying for a recommendation, but clarifies what counts as a "recommendation."

#### **IV. Proposed Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)**

Model Rule 7.3 regulates a lawyer's direct contacts with the public for the purpose of soliciting business. Paragraph (a) prohibits most kinds of in-person, live telephone, and real-time electronic solicitations, but the Model Rule permits and regulates other forms of solicitations, such as those sent by direct mail and email.

The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a "solicitation" and thus fall within the scope of Model Rule 7.3. In the early days of the Internet, little such guidance was needed. Ethics opinions had concluded that emails constituted a solicitation and were governed by Rule 7.3, but that less targeted forms of advertising (such as websites) were not governed by the Rule.<sup>10</sup> Today, however, lawyers can post information on their social or professional networking pages (which function like websites), but can control the viewers and enter into conversations via those pages (like email). Similarly, some websites allow lawyers and the public to interact, sometimes in "real-time" and sometimes not. The Commission was advised that lawyers are uncertain as to whether these new forms of Internet-based activities fall within Model Rule 7.3.

The Commission concluded that, to address this ambiguity, lawyers need a clearer definition of a "solicitation." A new proposed Comment [1] would explain that a lawyer's communications constitute a solicitation when the lawyer offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific person. The phrase "reasonably understood to be offering to provide" is intended to ensure that lawyers are governed by the Model Rule even if their communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose. For example, if a lawyer approaches people at their homes and describes various legal services, the lawyer's communications constitute a "solicitation" even if the lawyer does not formally offer to provide those services, as long as a reasonable person would interpret the lawyer's communications as an offer to provide those services.

The second sentence is designed to clarify that a response to a request for information and an advertisement that is not directed to specific people are not "solicitations." For example, the sentence makes clear that advertisements that are automatically generated in response to an Internet search are not solicitations. Because those advertisements are generated in response to Internet-based research, they are more analogous to a lawyer's response to a request for

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<sup>10</sup> Such communications, however, may be governed by other rules, including Rule 7.1 (communications concerning a lawyer's services).

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information (which is not a solicitation) than an unsolicited and targeted letter to a person who is known to be in need of a particular legal service (which is a solicitation). These examples are intended to clarify when a lawyer's activities constitute a solicitation and are thus governed by Model Rule 7.3.

The Commission concluded that additional elaboration on this point also would be useful in renumbered Comment [3]. In particular, technology has enabled various kinds of online interactions between lawyers and the public. The clarifying language makes clear that lawyers do not violate paragraph (a) if they are responding to a request for information, which can occur in many settings, including online.

The Commission's research also revealed that "autodialing" (or "robo-calling") is now unlawful in many situations. *See, e.g.,* 47 U.S.C. 227(b). As a result, the Commission proposes to delete the reference to "autodialing" in renumbered Comment [3] and to remind lawyers that other law often governs a lawyer's conduct in this area.

Finally, the Commission's proposal addresses a matter of terminology. With the creation of Model Rule 1.18 in 2002, the phrase "prospective client" refers to a specific person who has actually shared information with a lawyer. Model Rule 7.3 clearly intends to cover contacts with all possible future clients, not just those who have had some contact with lawyers and have become "prospective clients" under Model Rule 1.18. (See the description of Model Rule 1.18 earlier in this Report.) Thus, the Commission proposes to re-title the Model Rule 7.3 "Solicitation of Clients" so that the title more clearly and accurately reflects the Rule's purpose.

## V. Conclusion

Technology has enabled lawyers to communicate about themselves and their services more easily and efficiently, and it has enabled the public to learn necessary information about lawyers, their credentials, and the particular legal services those lawyers provide as well as the cost of those services. Lawyers, however, need to ensure that these communications satisfy existing ethical obligations. The Commission's proposals are designed to give lawyers more guidance regarding these obligations in the context of various new client development tools. The Commission respectfully requests that the House of Delegates adopt the amendments to the Model Rules of Professional Conduct set forth in the Resolutions accompanying this Report.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

**Resolution 105b: Technology and Client Development**

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

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

No.

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

The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new ethics issues relating to technology and client development. Resolution 105b would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these issues.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The

Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on

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Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY1. Summary of the Resolution(s)**Resolution 105b: Technology and Client Development**

- The Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a “discussion” and thus does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word “discussion” with the word “consults” and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a “consultation” occurs under Rule 1.18.
- The Commission is proposing changes to Rule 7.2 of the Model Rules of Professional Conduct (Advertising) to clarify when the prohibition against paying for a “recommendation” is triggered. This prohibition has unclear implications for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Model Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.
- The Commission proposes to clarify when a lawyer’s online communications constitute the type of “solicitations” that are governed by Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients). The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute a “solicitation” and thus fall within the scope of the Rule.
- The Commission is proposing technical changes to a Comment to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) and a Comment to Model Rule 7.1 (Communications Concerning a Lawyer’s Services) that would remove references to “prospective clients.” That phrase is a defined term in Model Rule 1.18 and includes a narrower category of people than the Comments to Model Rules 5.5 and 7.1 are intended to cover.

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## 2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105b offers lawyers guidance regarding their ethical obligations when using new technology to market their services. The Resolution offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession

## 3. Please Explain How the Proposed Policy Position will address the issue

The Commission determined that, although no new restrictions on lawyer advertising are necessary, the existing Rules do not have clear implications for new forms of client development. Proposed Resolution 105b, if adopted, will provide lawyers with more guidance about how they can use new forms of marketing to disseminate information about themselves and their services, while protecting the public from false or misleading communications.

For example, the Commission proposes to clarify when electronic communications give rise to a prospective client-lawyer relationship under Rule 1.18 of the Model Rules of Professional Conduct (Duties to Prospective Client). Model Rule 1.18 currently requires a "discussion" and does not capture various Internet-based communications that can, in some situations, give rise to a prospective client relationship. The Commission proposes to replace the word "discussion" with the word "consults" and to include in new Comment [3] language that would give lawyers and clients more guidance as to when a "consultation" occurs under Rule 1.18.

The Resolution also updates several other Model Rules to reflect the changing nature of the technology that lawyers use for client development. Currently, Model Rule 7.2(b) of the Model Rules of Professional Conduct (Advertising) provides that a lawyer typically cannot provide anything of value to someone for recommending the lawyer's services. This prohibition has unclear implications

for new forms of Internet-based client development tools, such as pay-per-lead or pay-per-click services. To address this ambiguity, the Commission is proposing amendments to Comment [5] to Rule 7.2 of the Model Rules of Professional Conduct that would define a “recommendation” to include communications that endorse or vouch for a lawyer’s credentials, abilities, competence, character, or other professional qualities. This definition, along with additional Comment language, would enable lawyers to use new client development tools, while ensuring that the public is not misled and that the restrictions on fee sharing with nonlawyers are observed.

The Commission is also proposing amendments to Rule 7.3 of the Model Rules of Professional Conduct (Direct Contact with Prospective Clients) to clarify when a lawyer’s online communications constitute “solicitations” and are thus governed by the Rule.

#### 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105b as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105b relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission’s website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to

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keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

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

*Client-Lawyer Relationship*  
**Rule 1.1 Competence**

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

**Comment**

...

**Retaining or Contracting With Other Lawyers**

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

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

## **Maintaining Competence**

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

## ***Law Firms And Associations***

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistances**

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

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

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

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

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

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

## **Comment**

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

## **Nonlawyers Within the Firm**

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

### **Nonlawyers Outside the Firm**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Comment

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

...

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



## REPORT

### Introduction

Law firms, lawyers, and corporate counsel are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession's core values.<sup>1</sup> State and local bar associations also have offered guidance in this area.<sup>2</sup> To date, however, the Model Rules of Professional Conduct and their accompanying Comments have not specifically addressed outsourcing.

The ABA Commission on Ethics 20/20 has concluded that, although changes to the text of the Model Rules are not necessary, Comments to certain Rules should be clarified to address this issue so that lawyers can more easily determine their ethical obligations. In particular, the Resolutions that accompany this Report propose three changes. First, the Commission proposes a new Comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client's matter (i.e., outsourcing legal work to other lawyers). Second, the Commission proposes new Comments to Model Rule 5.3, in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers). Finally, the Commission proposes a new sentence to Comment [1] to Model Rule 5.5 to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. In each of these cases, the Commission's goal is to clarify how existing rules and principles apply to the particular context of outsourcing.

The Commission's proposals also reflect the view that the evolution of law practice and the continued rapid changes in and diversity of outsourcing arrangements make bright lines impossible to draw. Like many obligations described in the Model Rules, the proposals are intended to be rules of reason and are not intended to preclude consideration of broader legal concerns, such as malpractice and tort liability as well as the law described in the Restatements of Agency and the Law Governing Lawyers. In sum, the proposals do not (and cannot) replace existing legal principles that already govern lawyer conduct; rather, they are designed to ensure that lawyers engage in outsourcing in a manner that is consistent with applicable rules of professional conduct.

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<sup>1</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).

<sup>2</sup> See, e.g., State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. State Bar Prof'l Ethics Comm., Ethics Op. 07-2 (2008); N.C. State Bar, 2007 Formal Op. 12 (2008); N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Ethics Op. 762 (2003); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009), <http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf>; Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Guidelines\\_on\\_leg1\\_1277906265.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf).

The Commission understands that certain outsourcing is controversial in light of the current employment market for lawyers and the economic hardships faced by lawyers currently seeking jobs. The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct are neither an endorsement nor a rejection of the practice of outsourcing. Rather, the proposals respond to the existence and continuing growth of these practices and are intended to clarify a lawyer's obligations in this context so that lawyers who decide to outsource do so in an ethical and responsible manner.

In addition to its analysis of the issues, the Commission has conducted extensive outreach, held public meetings and public hearings on outsourcing, invited and considered comments from numerous entities and parties, posted material on its website, and sought the views of all ABA groups. Also, throughout its consideration the Commission has worked with the ABA's Standing Committee on Ethics and Professional Responsibility and the ABA Section of International Law Task Force on International Outsourcing of Legal Services. Their participation was critical to the development of the Resolutions and this Report, and the Commission is grateful for their assistance.

## **I. An Overview of Outsourcing by Lawyers and Law Firms**

Outsourcing refers generally to the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider, either in the United States or in another country.<sup>3</sup> Among the factors that have contributed to the significant growth of outsourcing are globalization, the technology-driven efficiencies developed and utilized by many providers of outsourced services, and the demand by clients for cost-effective services.

Lawyers have found that the same technology-driven efficiencies that have led to an increase in outsourcing throughout the global economy are also making outsourcing an appealing option within the legal profession for certain work. In particular, lawyers have found that, if they exercise proper care in the selection of a provider, work can be completed with greater speed and lower costs without sacrificing quality. These efficiencies offer opportunities for solo practitioners and small and medium-sized U.S. law firms, allowing them to better compete for large matters without fear that they will lack adequate resources to perform the legal work involved. Also, by reducing the cost of legal services, outsourcing can improve access to justice by making legal services more affordable.

Lawyers use outsourcing for a variety of tasks. Examples of law-related work that is frequently outsourced includes investigative services, offsite online data storage or online practice management tools (e.g., "cloud computing" services), and creation and maintenance of databases to manage discovery in litigation. Outsourcing also occurs when lawyers retain other lawyers and law firms to conduct a range of services, such as legal research, document review, patent searches, due diligence, and contract drafting. The Commission's research indicates that lawyers still tend to outsource legal and law-related work domestically more often than they outsource work internationally. In fact, information reviewed by the Commission indicates that,

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<sup>3</sup> When outsourced work is sent outside the U.S., the activity is often referred to as "offshoring." Work outsourced within the United States has been referred to as "onshoring," "insourcing" or "homesourcing."

more recently, the outsourcing industry is responding to client demand for greater availability of on-shore operations.

## II. The Commission's Research Regarding Outsourcing

As noted above, as it studied outsourcing the Commission benefited from the efforts of other ABA entities. In particular, the ABA Standing Committee on Ethics and Professional Responsibility had released Formal Opinion 08-451 in 2008, which addressed a variety of ethical issues associated with outsourcing. Moreover, shortly after the release of Formal Opinion 08-451, the ABA Section of International Law had created a Task Force on the International Outsourcing of Legal Services to examine related issues.

The Commission's research focused on the ethics-related issues identified in ABA Formal Opinion 08-451: fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and nonlawyers, unauthorized practice of law, and independence of professional judgment. The Commission also considered the ethics opinions issued by international, state and local bar associations, the vast majority of which identified issues similar to those in Formal Opinion 08-451.<sup>4</sup>

The Commission's conclusions regarding these issues were informed by scholarly articles, studies, and surveys; testimony offered at the Commission's public hearings; comments received in response to questions that were posed to clients, lawyers, law firms, and providers of outsourced services; and news reports. The Commission also reviewed materials from domestic and international outsourcing providers, finding substantial evidence that the providers are focused on the ethical considerations identified in the organized bars' ethics opinions. For example, providers of outsourced legal and non-legal services have developed protocols that include increasingly sophisticated technology to ensure quality control, adequate security over personnel and information, and opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.<sup>5</sup>

The Commission was particularly interested in procedures to protect confidential information. Although procedures vary depending on the type of work that is being outsourced, the Commission found that lawyer and nonlawyer employees of many outsourcing providers are required to sign confidentiality agreements, with some firms requiring employees to sign new and separate confidentiality agreements for each new assignment. Providers also frequently use security measures to protect electronic information (e.g., encryption, malware protection, firewalls). They use biometric and other security measures to ensure only authorized physical access to data, such as separate premises or areas for each project. They use continuous video monitoring, monitoring of employee computers, and repeated identity checks within buildings, elevators, and other areas where work is being performed. They frequently disable the portals on employee computers so that portable data storage devices cannot be used to remove information

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<sup>4</sup> See *supra* note 2.

<sup>5</sup> See ABA Commission on Ethics 20/20, [http://www.americanbar.org/groups/professional\\_responsibility/aba\\_commission\\_on\\_ethics\\_20\\_20.html](http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html) for a sample bibliography and other materials related to the Commission's research.

from the premises. They also perform extensive background checks on employees as well as periodic internal and external audits of all of the foregoing measures.

The Commission found that conflict-of-interest considerations are increasingly given careful attention. For example, a number of outsourcing providers employ conflicts checking procedures modeled after those used by large U.S. and U.K. law firms; others are developing similar systems. These systems include maintaining extensive databases for existing and former clients and screening the work history of new recruits and existing employees against both the information contained in the databases and information supplied by the client.

The Commission's research has revealed that a number of companies that provide outsourced services have established sophisticated training programs for nonlawyer and lawyer employees on a variety of topics, including U.S. substantive and procedural law, legal research and writing, and the rules of professional conduct. These companies also regularly seek input from and collaboration with the organized bar and lawyers and law firms in the development of ethics policies and training regimes for their lawyer and nonlawyer employees.

### III. Guiding Principles for the Commission's Recommendations

In considering possible changes to the ABA Model Rules of Professional Conduct, the Commission relied on two important principles. First, the Model Rules are a critical, but not exclusive, source of the law governing lawyers. In particular, the Model Rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."<sup>6</sup> Second, the comments to the Model Rules are often used to provide guidance as to these additional obligations.<sup>7</sup> In light of these guiding principles, the Commission concluded that lawyers should be given more guidance on outsourcing through changes to the Comments to the Model Rules.

The Commission's review of the Model Rules of Professional Conduct revealed that, in all but three instances, they are either easily recognizable as having application to outsourcing, or they bear no relation to it at all. For example, the extensive commentary accompanying the series of Model Rules dealing with conflicts of interest (Rules 1.7 through 1.13), when considered in conjunction with the wealth of ethics opinions, court cases, and scholarly discussion generally available on that subject, revealed that no special language needed to be added to those Rules to remind lawyers of how they apply to outsourcing practices. The Commission reached the same conclusion about Model Rule 1.5 (Fees) and the wealth of ethics opinions available treating myriad specific questions relating to the reasonableness of fees for both legal and non-legal services, as well as regarding Model Rule 1.15 (Safekeeping Property).

The Commission ultimately determined, however, that the comments to Rule 1.1 (Competence), Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) and Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) were appropriate locations for clearer guidance.

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<sup>6</sup> ABA MODEL RULES OF PROF'L CONDUCT, Scope, par. [15].

<sup>7</sup> See *id.* (observing that "comments are sometimes used to alert lawyers to their responsibilities under...other law").

#### **IV. The Commission's Proposal Regarding Model Rule 1.1: Retention of Nonfirm Lawyers**

Model Rule 1.1 requires a lawyer to perform legal services competently. The Commission concluded that, in light of the frequency with which lawyers now outsource work to another lawyer or law firm, the Comments to Rule 1.1 should be expanded to refer specifically to the practice.

The Commission concluded that Model Rule 1.1 is the appropriate location for this guidance for two reasons. First, Comment [1] to Model Rule 1.1 already addresses a related subject: a lawyer's duty to associate with another lawyer to ensure competent representation of a client. Second, as Formal Opinion 08-451 makes clear, the primary ethical consideration when retaining a nonfirm lawyer is whether the nonfirm lawyer is competent to assist in the representation. The Commission considered other locations for the new commentary, including Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), but concluded that the primary ethical consideration when retaining nonfirm lawyers is the competence of those nonfirm lawyers and that Model Rule 1.1 is therefore the appropriate location for further guidance.

The first sentence of the proposed new Comment [6] restates a general position expressed in ABA Formal Opinion 08-451 and in various state and local ethics opinions: lawyers should take reasonable steps to ensure that the outsourced services will be performed competently and that they contribute to the overall competent and ethical representation of the client.

The first sentence also explains that, ordinarily, a lawyer should obtain a client's informed consent before retaining a nonfirm lawyer. The Commission was reluctant to conclude that consent is always required, because consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information. Nevertheless, the Commission concluded that consent will typically be required, and will almost always be advisable, when a nonfirm lawyer is retained to assist on a client's matter.

Following the first sentence is a list of other Model Rules that lawyers should consult when retaining nonfirm lawyers. The Commission concluded that these Model Rules are commonly implicated in this context and that lawyers should be aware of their potential application.

The next sentence lists several factors that lawyers should consider when retaining nonfirm lawyers, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information. This list is not intended to be exhaustive, but is intended to give lawyers some guidance regarding some of the most important considerations to take into account when retaining nonfirm lawyers.

In early drafts of this proposal, the Commission had an additional sentence at the end of the Comment that would have required lawyers to reasonably believe that the nonfirm lawyer's work was competently performed. The Commission heard concerns that the sentence could be read to impose unnecessary, costly obligations to determine the competency of work performed by other lawyers in different firms to whom work was outsourced. The Commission concluded that these concerns were well-founded. Because the outsourcing of work to other lawyers takes many different forms, the Commission concluded that the level of oversight over those lawyers should be addressed in an ethics opinion, which can provide a nuanced treatment of the issue, rather than in a Comment to the Model Rules. The Commission has asked the ABA Standing Committee on Ethics and Professional Responsibility to address this issue either in a revised version of Formal Opinion 08-451 or a separate Formal Opinion.

Proposed Comment [7] emphasizes that, when multiple firms work together on a client's matter, the firms ordinarily should consult with the client and each other about the scope of the work being performed by each firm and the allocation of responsibility among them. When making such allocations of responsibility, however, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.

Finally, although the new Comments address outsourcing, the Commission does not use the word "outsourcing" in its proposed additions to the official Comments. The Commission concluded that, in this context, lawyers are more familiar with the concept of "retaining" or "contracting with" a nonfirm lawyer and that the word "outsourcing" would create unnecessary confusion. Moreover, the word "outsourcing" may become dated or fall out of use, to be replaced by a new term-of-art. Thus, the Commission retained the traditional terminology, but concluded that outsourcing as it occurs today is conceptually identical to the retention of nonfirm lawyers.

## V. Use of Nonlawyer Assistance Outside the Firm: Proposal Regarding Model Rule 5.3

Model Rule 5.3 was adopted in 1983, and was designed to ensure that lawyers employ appropriate supervision of nonlawyers. Although the Rule has been interpreted to apply to lawyers' use of nonlawyers within and outside the firm,<sup>8</sup> the Commission concluded that lawyers would benefit from additional guidance regarding the application of the Rule to outside nonlawyers.

### A. Proposed Changes to Comment [1]

The Commission determined that Comment [2], which offers an overview of Model Rule 5.3, is more appropriately located in Comment [1]. The Commission also concluded that this overview Comment should make clear that, consistent with existing authority,<sup>9</sup> Model Rule 5.3 applies to the use of nonlawyers within *and* outside the firm.

<sup>8</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995) (concluding that, "[u]nder Rule 5.3, a lawyer retaining . . . an *outside service provider* is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information") (emphasis added).

<sup>9</sup> *Id.*

## B. Proposed Changes to Comment [3]

An existing Comment (which would become Comment [2]) identifies the considerations that apply when the services are performed *within* the firm, and the Commission concluded that a separate Comment – proposed Comment [3] – should identify the distinct concerns that arise when the services are performed *outside* the firm.

As an initial matter, proposed Comment [3] recognizes that nonlawyer services can take many forms, including services performed by individuals and services performed by automated products (e.g., online data storage). To reflect the scope of the nonlawyer services now being provided outside of firms, the first sentence of the Comment [3] includes a “cloud computing” example. (For similar reasons, the Commission is proposing to change the title of Model Rule 5.3 from “Nonlawyer Assistants” to “Nonlawyer Assistance.”)

The rest of proposed Comment [3] describes a lawyer’s obligations when using nonlawyer services outside the firm. The Comment states that, when using such services, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer’s professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer’s obligations in this regard. The Comment also references several other Model Rules that lawyers should consider when using nonlawyer services outside the firm.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes an assignment, but the lawyer’s instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator’s conduct is compatible with the lawyer’s professional obligations.

Notably, the proposed Comment language does not describe whether a lawyer must obtain consent when disclosing confidential information to nonlawyer service providers outside the firm. The Commission concluded that there are many circumstances where such consent is unnecessary. For example, lawyers regularly send documents to outside vendors for scanning or copying, but there is ordinarily no need to obtain the client’s consent to have those services performed. There are, however, other situations where client consent might be advisable or required. As with the issue above relating to the level of oversight over nonfirm lawyers to whom work has been outsourced, the Commission concluded that lawyers would benefit from further clarification of this issue by the Standing Committee on Ethics and Professional Responsibility and has requested that the Committee undertake consideration of this issue.

Finally, as is the case with the proposed Comment to Model Rule 1.1, proposed Comment [3] does not use the term “outsourcing.” The Commission concluded that lawyers may incorrectly conclude that they are not engaged in “outsourcing” when using nonlawyer services outside the firm. To avoid such a misunderstanding, the Commission decided to retain the original phrasing of the Model Rule within the Comment.

### C. Proposed Changes to Comment [4]

Proposed Comment [4] recognizes that clients sometimes direct lawyers to use particular nonlawyer service providers. In such situations, the lawyer ordinarily should consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.

The word “monitoring” reflects a new ethical concept. The Commission concluded that it was needed because, when a nonlawyer outside the firm is performing services in connection with a matter, it may not be possible to “directly supervise” the nonlawyer. The word “monitoring” makes clear that there is nevertheless a need to remain aware of how nonlawyer services are being performing. The Comment explains that, when the client directs the lawyer to use a particular nonlawyer, the lawyer and client should ordinarily agree who will have this “monitoring” responsibility. In contrast, if the client has not directed the selection of the nonlawyer, the lawyer or law firm would have the “monitoring” responsibility.

The final sentence of the proposed Comment [4] is intended to remind lawyers that they may have duties to a tribunal that are not necessarily satisfied through compliance with the Rules of Professional Conduct. For example, if a client instructs the lawyer to hire a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client, given that the lawyer may have to make certain representations to a tribunal regarding the vendor’s work.

## VI. Assisting the Unauthorized Practice of Law: Proposal Regarding Model Rule 5.5

When lawyers outsource work to lawyers and nonlawyers, it is important to ensure that those lawyers and nonlawyers are not engaging in the unauthorized practice of law. The Commission concluded that it is important to make this point explicitly in Comment [1] to Model Rule 5.5. The Commission’s proposed amendment to that Comment serves that purpose.

### Conclusion

The Commission believes that continued study by, and education of, the profession about outsourcing practices is essential, especially given that those practices will evolve and new ethics issues may arise. Thus, in addition to recommending the adoption of the amendments described in the Resolutions accompanying this Report, the Commission enthusiastically endorses a comprehensive, user-friendly website that would be managed by the ABA Center for Professional Responsibility and would track all significant news and developments relating to the ethics of outsourcing. This website will provide up-to-date access to both evolving outsourcing practices and the technological changes that make them possible. During the period in which the continued and rapid evolution in outsourcing practices renders the creation of a static, established set of practice standards both unwieldy and premature, this web-based resource will serve as an easily-updated “living document,” useful both to those who engage in outsourcing and to those who study it.



The Ethics 20/20 Commission respectfully requests that the House of Delegates adopt the proposed amendments to Model Rules 1.1, 5.3, and 5.5 in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

# 105C

## GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

**Resolution 105c: Outsourcing**

- The Commission is proposing new Comments to Rule 1.1 of the Model Rules of Professional Conduct (Competence) to identify the factors that lawyers need to consider when retaining lawyers in a different firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.
- The Commission is proposing amendments to the title of, and Comments to, Rule 5.3 of the Model Rules of Professional Conduct to address issues relating to the retention of nonlawyers outside the firm. To reflect the increasingly important role of automated nonlawyer assistance, such as "cloud computing" services, the title of the Rule will change from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Moreover, the Comments will emphasize that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.
- The Commission is proposing amendments to Comment [1] to Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

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

No.

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

The adoption of these resolutions would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002. One aspect of this transformation has been the extent to which lawyers now outsource legal and nonlegal services. The Commission found that the Model Rules currently offer lawyers limited guidance regarding their ethical obligations in this increasingly important context.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution(s)

#### **Resolution 105(c): Outsourcing**

- The Commission is proposing new Comments to Rule 1.1 of the Model Rules of Professional Conduct (Competence) to identify the factors that lawyers need to consider when retaining lawyers in a different firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.
- The Commission is proposing amendments to the title of, and Comments to, Rule 5.3 of the Model Rules of Professional Conduct to address issues relating to the retention of nonlawyers outside the firm. To reflect the increasingly important role of automated nonlawyer assistance, such as "cloud computing" services, the title of the Rule will change from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Moreover, the Comments will emphasize that lawyers should make reasonable efforts to ensure that nonlawyers outside the firm provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.
- The Commission is proposing amendments to Comment [1] of Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

### 2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the practice of law. One aspect of this transformation is that legal and nonlegal work can be, and often is, disaggregated. The outsourcing of work, both domestically and internationally, as a means to provide clients with competent and cost-effective services is not new, but it is occurring with greater frequency due to technological change and increased globalization.

The Commission found that the Model Rules currently offer lawyers limited guidance regarding their ethical obligations in this increasingly important context. Resolution 105c, if adopted, will provide that guidance and do so in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105c, if adopted, will give lawyers who decide to engage in outsourcing more guidance regarding their ethical obligations.

The Commission's proposed new Comments [6] and [7] to Rule 1.1 of the Model Rules of Professional Conduct (Competence) identify the factors that lawyers need to consider when retaining lawyers in another firm to assist on a client's matter. The factors emphasize the importance of ensuring that the retained lawyers contribute to the competent and ethical representation of the client.

The Commission's proposed amendments to Rule 5.3 are designed to give lawyers more guidance regarding the retention of outside nonlawyers. The proposed new Comments identify the factors that lawyers need to consider when outsourcing work to nonlawyers and emphasize that lawyers should make reasonable efforts to ensure that those nonlawyers provide their services in a manner that is compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers and that the lawyer's instructions must be reasonable under the circumstances.

Comment [4] recognizes that clients frequently direct lawyers to use particular nonlawyer service providers. In such situations, Comment [4] provides that lawyers ordinarily should consult with their clients to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.

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Finally, the Commission is proposing amendments to Comment [1] to Rule 5.5 of the Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that would make clear that lawyers cannot engage in outsourcing in a manner that would facilitate the unauthorized practice of law.

## 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105c as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105c relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The



Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.



## AMERICAN BAR ASSOCIATION

## ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 5-6, 2012

RESOLUTION

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

**ABA Model Rule on Practice Pending Admission**

1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:
  - a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;
  - b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;
  - c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;
  - d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;
  - e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;
  - f. associates with a lawyer who is admitted to practice in this jurisdiction;
  - g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and
  - h. pays any annual client protection fund assessment.
2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:
  - a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;

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- b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
  - c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;
  - d. reasonably expects to fulfill all of this jurisdiction's requirements for admission as a foreign legal consultant; and
  - e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.
- 3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.
- 4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer's application for admission to this jurisdiction.
- 5. The authority in this Rule shall terminate immediately if:
  - a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;
  - b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;
  - c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;
  - d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or
  - e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.
- 6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:
  - a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;
  - b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer's authority to practice pursuant to this Rule;
  - c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and
  - d. take all other necessary steps to protect the interests of the lawyer's clients.

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

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

#### Comment

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

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

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

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

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

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## Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

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

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

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

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

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

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

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

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

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

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

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

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

### Comment

...

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

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

...

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

...

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





## REPORT

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports. The Resolutions accompanying this Report contain proposals that are designed to address the ethics and regulatory issues associated with a lawyer's establishment of a practice in a new jurisdiction.

The Commission is proposing adoption of a new standalone ABA Model Rule on Practice Pending Admission, which would be cross-referenced in Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Model Rules of Professional Conduct. The new Model Rule on Practice Pending Admission would enable lawyers to practice in a new jurisdiction while the lawyer actively pursues admission through one of the procedures that the jurisdiction authorizes, such as admission by motion or passage of that jurisdiction's bar examination.

This proposal recognizes the reality that, in today's legal services marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction can take considerable time. Subject to numerous restrictions to protect clients and the public, the new Model Rule is designed to permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law. The Commission is also proposing conforming amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that are designed to alert lawyers to the practice authority afforded by the new Model Rule on Practice Pending Admission.

### **I. Model Rule on Practice Pending Admission**

Technological and economic changes have produced an increase in cross-border practice, revealing an important gap in the practice authority granted by Model Rule 5.5(d). That gap affects an increasing number of lawyers who have found it necessary to quickly establish a practice in a jurisdiction where they are not otherwise admitted. For example, a lawyer may need to relocate in order to accommodate the needs of a client who has moved to a new jurisdiction. Or the lawyer may receive a job opportunity in a jurisdiction other than the jurisdiction of original licensure or be transferred to another jurisdiction, often requiring relocation within a very short timeframe. Lawyers also frequently have to relocate due to changes in personal circumstances, such as the relocation of a spouse or domestic partner due to military deployment or other professional opportunities. In sum, lawyers increasingly need to relocate during their careers, often more than once and frequently without much notice.<sup>1</sup>

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<sup>1</sup> In February 2012, the ABA House of Delegates recognized the frequent relocation needs of lawyers who are the spouses of deployed military personnel by adopting new policies designed to ease barriers to their ability to practice in new jurisdictions. ABA Resolution 108 (Feb. 2012), [http://www.abanow.org/wordpress/wp-content/files\\_flutter/13285629012012mm108.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/13285629012012mm108.pdf).

The Commission found and heard that, despite the increasing need to relocate, the admissions process for these lawyers can take considerable time. For example, the admission by motion process requires an applicant to complete and submit a lengthy application that requires personal and professional information that can take weeks or months to compile. The process typically requires a lawyer to obtain proof of licensure from the lawyer's home jurisdiction, submit evidence of a passing score on the Multistate Professional Responsibility Examination, and accumulate substantial personal and professional information in order to satisfy the character and fitness requirements of the jurisdiction. If the lawyer does not qualify for admission by motion (e.g., the lawyer has not satisfied the durational practice requirements), the lawyer will need to sit for the jurisdiction's bar examination, which is administered only twice per year.

The Commission found that this time consuming process can adversely affect lawyers' ability to represent their existing clients effectively and can have adverse consequences on lawyers' careers in a marketplace that requires an increasing amount of cross-border practice. Thus, the Commission concluded that, assuming procedural safeguards are put in place, these relocating lawyers should be permitted to establish a continuous and systematic presence for the practice of law in the new jurisdiction for a limited time (not to exceed 365 days) while diligently pursuing formal admission. The proposed new standalone Model Rule on Practice Pending Admission, if adopted, would authorize this form of practice.

A Comment to the Model Rule makes clear that the 365 day time period begins to toll immediately upon the lawyer's establishment of an office or other systematic and continuous presence for the practice of law in the jurisdiction. This would prevent the lawyer from using the 45 day period within which to file an application for admission as additional time in which to practice there. At the same time, however, the Commission also recognized that it may be necessary to extend the 365 day limit if (for reasons outside of the lawyer's control) the bar admission process takes longer than one year. To address that issue, the Commission has included a paragraph that provides that, for good cause shown by the applicant, the Court may, in its discretion, extend the time limits set forth in the Model Rule.

The proposed new Model Rule on Practice Pending Admission also includes a separate section that allows a foreign lawyer already licensed in one U.S. jurisdiction as a foreign legal consultant to continue practicing as a foreign legal consultant in another U.S. jurisdiction while an application to become a foreign legal consultant is pending in that new U.S. jurisdiction. It is important to note that this provision does not create any practice authority for foreign lawyers beyond what the Model Rules have already long allowed (e.g., rules relating to licensing and practice by foreign legal consultants and rules governing whether foreign lawyers can sit for a particular jurisdiction's bar examination). The section merely provides (subject to important limitations) that a foreign lawyer who is already admitted in a U.S. jurisdiction as a foreign legal consultant may continue to practice as such while their application for that form of admission is pending in another U.S. jurisdiction.

The Commission's proposal in this regard is not without precedent. The District of Columbia allows out-of-state lawyers to practice law from a principal office located in the District of Columbia for a period not to exceed 360 days during the pendency of a person's first application for admission to the District of Columbia Bar.<sup>2</sup> The Commentary to that Rule states

<sup>2</sup> D.C. CT. OF APPEALS R. 49(c)(8) (Limited Duration Supervision By D.C. Bar Member)  
<http://www.dccourts.gov/dccourts/docs/rule49.pdf>.

that it is designed to provide a one-time grace period for out-of-state lawyers who are moving their principal office to the District of Columbia. Missouri also has a similar procedure,<sup>3</sup> and New York recently adopted a similar provision for in-house lawyers.<sup>4</sup> The Commission inquired about and did not learn of any problems caused by these provisions.

The Commission nevertheless concluded that, to ensure that lawyers do not abuse the proposed exception or use this privilege in ways that would put the public at risk, numerous restrictions and limitations are appropriate. First, in order to qualify to practice pursuant to this new Model Rule, the lawyer must have been engaged in the active practice of law for three of the last five years. This time in practice requirement is consistent with the practice requirement in the newly amended Model Rule for Admission by Motion and would prevent a newly admitted lawyer (e.g., one who has passed the bar examination in a state with a very high bar passage rate) from using the new Model Rule to establish a practice in another jurisdiction (e.g., a jurisdiction with a very low bar passage rate), while studying for and waiting for the results of the bar examination in that other jurisdiction.

Second, the lawyer must not be disbarred or suspended from practice in any jurisdiction and must not currently be subject to discipline or be the subject of a pending disciplinary matter in any jurisdiction.

Third, the lawyer must not have been previously denied admission to practice in the jurisdiction (e.g., due to a failure to satisfy the jurisdiction's character and fitness requirements) or previously failed the jurisdiction's bar examination. This requirement is designed to ensure that a lawyer does not use the authority to practice under the Model Rule on Practice Pending Admission to circumvent a prior denial of the right to practice in the jurisdiction. For example, if a lawyer fails the bar examination in one jurisdiction and passes it in another, the lawyer cannot establish a practice in the former jurisdiction while waiting to re-take that jurisdiction's bar examination.

The Commission considered whether a failure of the jurisdiction's bar exam should be disqualifying for only a limited period of time (e.g., five years), but concluded that a cap would allow a lawyer who failed the jurisdiction's bar examination (and whose competence was, therefore, previously called into question in that jurisdiction) to engage in the practice of law in that jurisdiction without having completed a thorough vetting process, like admission by motion.

Fourth, the lawyer must notify Disciplinary Counsel and the licensing authority in writing that the lawyer is taking advantage of the practice authority in the Model Rule on Practice Pending Admission. This requirement is intended to ensure that the disciplinary and licensing authorities are aware of the lawyer's presence and intention to establish an ongoing practice in the jurisdiction under the Rule.

Fifth, the lawyer must submit an application for admission by motion, examination, or as a foreign legal consultant within [45] days of first providing legal services.<sup>5</sup> The purpose of this

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<sup>3</sup> MO. SUP. CT. R. 8.06 (Temporary Practice by Lawyers Applying for Admission to the Missouri Bar)  
<http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/e0bcf992eb92f9ae86256db7007379ef?OpenDocument>.

<sup>4</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 522.7 (2011).

<sup>5</sup> Registration as in-house counsel is not listed because Rule 5.5(d)(1) already provides authority for lawyers to practice as in-house counsel in a jurisdiction without being fully admitted to practice there. Although some jurisdictions require these

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requirement is to ensure that a lawyer is serious about applying for admission in the new jurisdiction and applies promptly upon arriving there. The time frame is placed in brackets so that a jurisdiction can tailor it according to the particular needs of that jurisdiction.

Sixth, the lawyer must have a reasonable expectation that the lawyer will fulfill all of the jurisdiction's requirements for admission. This requirement is analogous to Rule 5.5(c)(2), which permits a lawyer to practice temporarily in a jurisdiction in connection with a litigation matter if the lawyer "reasonably expects to be . . . authorized" to appear before a tribunal in that jurisdiction.

Seventh, the lawyer must associate with a lawyer who is licensed to practice in the jurisdiction. This requirement is designed to ensure that the incoming lawyer has the ability to consult with a lawyer who is licensed in the jurisdiction regarding any issues that may require knowledge of distinctly local laws or procedures. This requirement is similar to the requirement in Rule 5.5(c)(1), which permits an out-of-state lawyer to practice *temporarily* in the jurisdiction if the lawyer associates with a lawyer who is admitted in the jurisdiction. The Commission was reluctant to impose a stricter requirement, such as a requirement to be directly supervised by a lawyer who is admitted in the jurisdiction, because of the particular obstacles such a requirement would impose on solo practitioners. In particular, in-state lawyers may be reluctant to directly supervise a lawyer from another jurisdiction who is not in the same office, because of the administrative difficulties associated with supervising a lawyer in a different law office. For these reasons, the Commission concluded that the "association" requirement, which has worked well in the context of temporary practice under Rule 5.5(c)(1), is an adequate safeguard in the context of the Model Rule on Practice Pending Admission as well.<sup>6</sup>

Eighth, Paragraph 4 provides that the lawyer taking advantage of the practice authority conferred by the Model Rule must immediately notify Disciplinary Counsel and the Admissions Authority if, at any time during the [365] days of practice, the lawyer becomes subject to a disciplinary matter or disciplinary sanctions are imposed upon the lawyer in any other jurisdiction. Under those circumstances, the Admissions Authority must take that information into account in determining whether to grant the lawyer's application for admission or (as explained below) whether to terminate the lawyer's right to continue practicing pursuant to the new Model Rule.

Ninth, Paragraph 5 provides that the practice authority terminates immediately under a number of circumstances. For example, it terminates if the lawyer withdraws the application for admission or the application is denied before the expiration of the 365 day period (e.g., the application for admission by motion is denied or the lawyer fails the jurisdiction's bar

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lawyers to seek registration as in-house counsel, Rule 5.5(d)(1) is sufficient to protect the lawyer from allegations of unauthorized practice while the lawyer completes the registration process.

<sup>6</sup>The Commission believes that state and local bar associations could provide a great service to the profession and the public by establishing a roster of experienced lawyers who are willing to associate with incoming lawyers under these circumstances. Such an association not only would serve the public and the bar, but it also has the potential to be a source of new work for the in-state lawyer who may be called on to assist the incoming lawyer's clients. In many ways, this process would be analogous to the creation of rosters of lawyers who are willing to serve as mentors for new lawyers or who agree to serve as practice monitors for lawyers conditionally admitted to the practice of law. See ABA Model Rule on Conditional Admission to Practice Law (2008), available at [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/colap/ABAModelRule\\_ConditionalAdmission\\_Feb2008.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/colap/ABAModelRule_ConditionalAdmission_Feb2008.authcheckdam.pdf).

examination), or if the lawyer fails to file an application for admission within 45 days. Similarly, the practice authority terminates immediately if the lawyer fails to remain in compliance with the requirements of Paragraph 1 of the Model Rule or if the lawyer, after commencing practice, is subsequently suspended or disbarred in any other jurisdiction where the lawyer is admitted to practice or fails to comply with the notification requirements of Paragraph 4 of the Model Rule.

Tenth, upon denial of the application for admission, Paragraph 7 provides that the Admissions Authority must notify Disciplinary Counsel that the authority granted pursuant to the Rule has terminated. Concurrently, pursuant to Paragraph 6, the lawyer must stop practicing in the jurisdiction unless authorized to do so pursuant to another Rule; notify all clients being represented in pending matters in the jurisdiction, as well as opposing counsel or co-counsel, that the lawyer's practice authority has terminated; and not undertake any new representation that would require the lawyer to be admitted to practice law in the jurisdiction. These requirements are analogous to the client protection measures in Rule 27 ("Notice to Clients, Adverse Parties, and Other Counsel") of the ABA Model Rules for Lawyer Disciplinary Enforcement applicable to lawyers disbarred, placed on inactive status due to disability or suspended for more than six months.

Eleventh, a Comment to the proposed Model Rule would remind lawyers about their obligations under Rule 5.5(b)(2). In particular, the clear import of Rule 5.5(b)(2) is that a lawyer who practices in a jurisdiction pursuant to the authority contained in the Model Rule on Practice Pending Admission cannot "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." The proposed new Comments would remind lawyers of this restriction and emphasize that, to avoid misleading potential clients, lawyers also have to disclose their limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead, and explicitly disclose the lawyer's limited authority to all potential clients before agreeing to represent them.

Finally, Paragraph 3 makes clear that the practice authority does not extend to appearances before a tribunal. The lawyer would have to obtain pro hac vice admission in order to appear before a tribunal in that jurisdiction.

## **II. Conforming Amendment to Model Rule 5.5(d)**

The Commission first recommends that Rule 5.5(d) be amended to clarify the purpose of the paragraph. Rule 5.5(d) was intended (and has been interpreted) to permit a lawyer, under limited circumstances, to establish an office or other systematic and continuous presence for the practice of law in a jurisdiction where the lawyer is not otherwise admitted to practice. Except for those limited circumstances, an out-of-state lawyer must become admitted to practice law generally in the jurisdiction in order to establish an office or engage in any other systematic or continuous practice of law there. The Commission concluded that the prefatory language in Rule 5.5(d) is not sufficiently clear in this regard and that the prefatory language should state explicitly that paragraph (d) is intended to explain when a lawyer may "provide legal services through an office or other systematic and continuous presence" in the jurisdiction.

To help alert lawyers to the new practice authority in the Model Rule on Practice Pending Admission, the Commission also proposes to amend the black letter of Model Rule 5.5(d)(2) to

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emphasize that lawyers can practice in another jurisdiction on a systematic and continuous basis as long as another “rule” so provides. Comment [18] to Rule 5.5 would then make an explicit cross-reference to the proposed Model Rule on Practice Pending Admission.

## **III. Conclusion**

Globalization, changes in technology, and client demands have fueled an increase in cross-border practice as well as a related need for lawyers to relocate to new jurisdictions. The Resolutions accompanying this Report are intended to permit lawyers to respond to these developments, while providing adequate safeguards for clients and the public. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

**Resolution 105d: Model Rule on Practice Pending Admission**

- The Commission's proposal recognizes that, in today's legal marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction may take considerable time. Subject to numerous restrictions designed to protect clients and the public, the proposed new Model Rule on Practice Pending Admission will permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.
- The Commission is also proposing conforming amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that are designed to alert lawyers to the practice authority afforded by the new Model Rule on Practice Pending Admission.

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

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

No.

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

In addition to the creation of a new ABA Model Rule, the adoption of this Resolution would require amendments to the ABA Model Rules of Professional Conduct and the ABA Model Rule on Admission by Motion (see Resolution 105e).

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5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Resolution 105d recognizes that, in today's legal services marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction can take considerable time. Subject to numerous restrictions that are designed to protect clients and the public, the new Model Rule will permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law. The Commission is also proposing conforming amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that are designed to alert lawyers to the practice authority afforded by the new Model Rule on Practice Pending Admission.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically the new Model Rule on Practice Pending Admission. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.



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

None.

9. Disclosure of Interest. (If applicable)10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

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11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution(s)

#### **Resolution 105d: Model Rule on Practice Pending Admission**

- The Commission's proposal recognizes that, in today's legal marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction may take considerable time. Subject to numerous restrictions designed to protect clients and the public, the proposed new Model Rule on Practice Pending Admission will permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.
- The Commission is also proposing conforming amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law) that are designed to alert lawyers to the practice authority afforded by the new Model Rule on Practice Pending Admission.

### 2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the legal marketplace, with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those clients' needs by crossing borders (including virtually) or relocating to new jurisdictions. Lawyers also must relocate their practices to a new jurisdiction for other reasons, including employment opportunities for themselves or for a family member. For this reason, in February 2012, the ABA House of Delegates adopted new policies designed to ease

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admissions barriers for lawyers who are the spouses of deployed military personnel.

Resolution 105d builds on that recent House action and responds to similar changes affecting all lawyers and their clients by proposing a new Model Rule on Practice Pending Admission. The various protections and limitations identified in the Model Rule ensure that the new practice authority is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

### 3. Please Explain How the Proposed Policy Position will address the issue

Technological and economic changes have produced an increase in cross-border practice, revealing an important gap in the practice authority granted by Model Rule of Professional Conduct 5.5(d) (Unauthorized Practice of Law; Multijurisdictional Practice of Law). That gap affects an increasing number of lawyers who have found it necessary to establish a practice in a jurisdiction where they are not otherwise admitted. The Commission found and heard that, despite the increasing need to relocate, the admissions process for these lawyers can take considerable time. The Commission found that this time consuming process can adversely affect lawyers' ability to represent their existing clients effectively and can have unnecessary adverse consequences on lawyers' careers in a marketplace that requires an increasing amount of cross-border practice.

The proposed Model Rule on Practice Pending Admission, if adopted, will address this gap by providing a framework, replete with safeguards to protect clients and the public, that allows lawyers to establish a continuous and systematic presence for the practice of law in a new jurisdiction for a limited time (not to exceed 365 days) while diligently pursuing formal admission there.

Numerous safeguards are built into the Model Rule. For example, in order to qualify to practice pursuant to this new Model Rule, the lawyer must have been engaged in the active practice of law for three of the last five years and cannot have been disbarred or suspended or currently be the subject of a pending disciplinary proceeding in any jurisdiction. The lawyer also must not have previously been denied admission in the new jurisdiction and must submit an application for admission in the new jurisdiction within [45] days of first providing legal services. Other protections include, but are not limited to, a requirement that the lawyer associate with a lawyer licensed to practice in the jurisdiction and that the lawyer notify the Disciplinary Counsel and Bar Admissions Authority that the lawyer intends to practice there pursuant to this limited authority.

The proposed new Model Rule on Practice Pending Admission also includes a separate section that allows a foreign lawyer already licensed in one U.S.

jurisdiction as a foreign legal consultant to continue practicing as a foreign legal consultant in another U.S. jurisdiction while an application to become a foreign legal consultant is pending in that new U.S. jurisdiction. This provision does not create any practice authority for foreign lawyers beyond what the Model Rules and ABA policy have already long allowed (e.g., rules relating to licensing and practice by foreign legal consultants and their limited scope of practice requirements, and rules governing whether foreign lawyers can sit for a particular jurisdiction's bar examination). The section merely provides (subject to important limitations) that a foreign lawyer who is already admitted in a U.S. jurisdiction as a foreign legal consultant may continue to practice as such while their application for that form of admission is pending in another U.S. jurisdiction.

The Commission's proposal in this regard is not without precedent. The District of Columbia allows out-of-state lawyers to practice law from a principal office located in the District of Columbia for a period not to exceed 360 days during the pendency of a person's first application for admission to the District of Columbia Bar. Missouri also has a similar Rule for Temporary Practice by Lawyers Applying for Admission to the Missouri Bar.

The Commission is also proposing conforming amendments to the Comment to Model Rule 5.5 of the ABA Model Rules of Professional Conduct (Unauthorized Practice of Law; Multijurisdictional Practice of Law). If the House of Delegates adopts the new Model Rule on Practice Pending Admission, this new policy will need to be referenced in the Comment to Model Rule 5.5 to alert lawyers to the practice authority it authorizes.

#### 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105d as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105d relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and

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roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

AMERICAN BAR ASSOCIATION  
ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 6-7, 2012

RESOLUTION

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

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:
  - (a) have been admitted to practice law in another state, territory, or the District of Columbia;
  - (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
  - (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;
  - (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
  - (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
  - (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
  - (g) designate the Clerk of the jurisdiction's highest court for service of process.
2. For purposes of this ~~Rule~~, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed

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

- (a) Representation of one or more clients in the private practice of law;
  - (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
  - (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
  - (d) Service as a judge in a federal, state, territorial or local court of record;
  - (e) Service as a judicial law clerk; or
  - (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.
3. For purposes of this ~~¶~~Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.
4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this ~~¶~~Rule shall not be eligible for admission on motion.

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



## REPORT

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports.<sup>1</sup>

The Resolution accompanying this Report proposes an amendment to the ABA Model Rule on Admission by Motion that, if adopted, would allow lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows (i.e., after three, instead of five, years of practice). The Commission is also asking that the ABA adopt a resolution urging jurisdictions that have not adopted the Model Rule to do so and encouraging jurisdictions that already have admission by motion procedures to eliminate additional restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

The Commission's work in this area was informed by the efforts of the ABA Commission on Multijurisdictional Practice ("MJP Commission"), which completed its work a decade ago. In August 2002, the ABA House of Delegates adopted as Association policy all nine of the MJP Commission's recommendations,<sup>2</sup> which reflect a more permissive regulatory framework. This framework allows lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they are not otherwise authorized to practice law.<sup>3</sup> The framework also permits lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they are not otherwise authorized and without the necessity of sitting for a written bar examination.<sup>4</sup>

The Commission found that this framework has been widely adopted<sup>5</sup> and produced many benefits for clients and their lawyers. It has enabled lawyers to represent their clients more

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<sup>1</sup> In one Resolution, the Commission is recommending the creation of a Model Rule on Practice Pending Admission that would allow lawyers to establish a systematic and continuous presence in another jurisdiction while diligently pursuing admission in that jurisdiction. The Commission is also recommending changes to Model Rule 1.6 that would identify the information that lawyers can disclose in order to detect possible conflicts of interest that might arise when lawyers change firms or when two or more firms associate with each other or merge.

<sup>2</sup> See *Client Representation in the 21<sup>st</sup> Century*, Report of the Commission on Multijurisdictional Practice (2002), [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html).

<sup>3</sup> See, e.g., ABA MODEL RULES OF PROF'L CONDUCT R. [hereinafter MODEL RULE] 5.5(c); ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

<sup>4</sup> See, e.g., MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

<sup>5</sup> Since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, *State Implementation of ABA Model Rule 5.5* (2010),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf). Every jurisdiction now has a rule allowing for pro hac vice admission. Chart, *Comparison of ABA Model Rule For Pro Hac Vice Admission With State Versions and Amendments Since August 2002* (2011),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac\\_admin\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf). Seven jurisdictions have adopted a version of the ABA Model Rule for Temporary Practice by Foreign Lawyers. *Summary of State Action on ABA MJP Recommendations 8 & 9* (2010),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8\\_and\\_9\\_status\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf). Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2011),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf).

effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

The Commission concluded that, in light of these successes and the still growing need to engage in cross-border practice, the ABA should once again consider carefully crafted changes to the framework governing multijurisdictional practice. The Resolutions accompanying this Report address the ABA Model Rule on Admission by Motion.

## **I. History of the ABA Model Rule on Admission by Motion**

In August 2002, the ABA House of Delegates adopted the Model Rule on Admission by Motion. The Model Rule permits a lawyer admitted in one U.S. jurisdiction to gain full admission in another U.S. jurisdiction without having to pass that jurisdiction's bar examination. The lawyer, however, must satisfy several requirements, one of which is to have engaged in the active practice of law for five of the last seven years.<sup>6</sup>

Admission by motion procedures now exist in forty jurisdictions. The Commission's research revealed that more than 65,000 lawyers have used the procedure in the last ten years.<sup>7</sup> Approximately half of these lawyers were admitted in the District of Columbia. The Commission found that there is no evidence that lawyers admitted by motion – either in the District of Columbia or elsewhere – are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted through more traditional procedures. The Commission sought information in this regard from lawyer disciplinary counsel, and responses revealed that the admission by motion process has produced no discernible risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers.

## **II. Proposal to Amend the Model Rule on Admission by Motion**

In light of the Commission's findings and changes in the practice of law during the last decade, the Commission proposes to reduce the time-in-practice requirement in the Model Rule for Admission by Motion. The current Model Rule requires an applicant for admission by motion to have actively practiced in another jurisdiction for five out of the past seven years, and the Commission is proposing to allow lawyers to qualify for admission by motion after practicing in another jurisdiction for three out of the past five years.

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Finally, thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, *Foreign Legal Consultant Rules* (2010),

[http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for\\_legal\\_consultants.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf).

<sup>6</sup> The Model Rule has remained unchanged except for one amendment in 2011. In February 2011, the Section of Legal Education and Admissions to the Bar filed a Resolution with the House of Delegates recommending that the Model Rule be amended to eliminate a provision that prohibited a lawyer's work as in-house counsel or as a judicial law clerk from being counted as part of the necessary practice experience to qualify for admission by motion. The House agreed that the Model Rule had created "an unfair and unnecessary distinction" between in-house counsel and judicial clerks, on the one hand, and the other categories of lawyers listed in paragraph 2 of the Model Rule on the other, and thus adopted the proposed amendment.

<sup>7</sup> National Conference of Bar Examiners, *Bar Examination and Admission Statistics, 2011 Statistics*, at 28 (2011), [http://www.ncbex.org/assets/media\\_files/Statistics/2010Stats110111.pdf](http://www.ncbex.org/assets/media_files/Statistics/2010Stats110111.pdf) & *2005 Statistics*, at 35 (2005)

[http://www.ncbex.org/assets/media\\_files/Statistics/2005\\_Statistics.pdf](http://www.ncbex.org/assets/media_files/Statistics/2005_Statistics.pdf).

The Commission believes this change responds to client needs and market demands in an increasingly borderless world, where lawyers frequently need to gain admission in other U.S. jurisdictions. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating or who regularly do business in the jurisdiction in which motion admission is sought. The Commission's proposal would address this need, thus benefitting both lawyers and their clients.

The proposal also recognizes that lawyers often need to move to new jurisdictions for a wide range of personal reasons, including the need to find employment. The Commission determined that a reduction of the active practice requirement from five to three years would have particularly salutary effects for less senior lawyers, who are most likely to need to move from one jurisdiction to another. The challenging legal employment marketplace only increases the likelihood that relatively junior lawyers will need to move to a new jurisdiction in search of employment.

The Commission seriously considered several possible arguments against reducing the time-in-practice requirement of the Model Rule. First, the Commission considered the concern that a lawyer who has practiced for only three years may not be sufficiently competent to practice law in a new jurisdiction. The Commission, however, found no reason to believe that lawyers who have been engaged in the active practice of law for three of the last five years will be any less able to practice law in a new jurisdiction than a law school graduate who recently passed the bar examination in that jurisdiction. In fact, five jurisdictions already have a reduced duration-of-practice requirement of three years,<sup>8</sup> and none of those jurisdictions have reported any resulting problems.

The Commission also found unpersuasive the concern that passage of the bar examination is necessary to demonstrate knowledge of the law of the jurisdiction in which the lawyer is seeking admission. As explained above, more than 65,000 lawyers have obtained admission by motion in the last ten years, and there is no evidence from disciplinary counsel or any other source that these lawyers have been unable to practice competently in the new jurisdiction or have been unable to identify and understand aspects of the new jurisdiction's law that differ from the law of the jurisdiction where those lawyers were originally admitted.

The Commission also concluded that the "local law" concern rests on the incorrect assumption that passage of the bar examination demonstrates competence in local law. In fact, an increasing number of jurisdictions use the Uniform Bar Examination,<sup>9</sup> which typically does not require any knowledge of local law. And in jurisdictions that do test local law, the local law portion of the test is usually sufficiently small that bar passage does not turn on it. Thus, a significant percentage of bar examinations require either limited knowledge of local law or none at all, suggesting that passage of the bar examination does not offer better evidence of a lawyer's understanding of local law than three years of practice in another jurisdiction. To the contrary,

<sup>8</sup> Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2010), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf).

<sup>9</sup> Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n Section of Legal Education & Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2012*, at 23 (2012) (available at [http://www.ncbex.org/assets/media\\_files/Comp-Guide/CompGuide.pdf](http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf)).

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the Commission concluded that three years of practice in another jurisdiction may actually enable a lawyer to identify and understand variations in the law more easily than a recent law school graduate who has never practiced at all but has passed the jurisdiction's bar examination.

Another possible concern that the Commission considered is that lawyers might take and pass the bar examination in a jurisdiction with a relatively high passage rate and then seek admission by motion in a jurisdiction that has more demanding examination requirements. The Commission concluded, however, that the three year waiting period is sufficiently long that lawyers would not have an incentive to circumvent the bar examination requirements of a jurisdiction with a relatively low bar pass rate.

Additionally, the Commission considered whether to retain the existing seven year period within which a lawyer must fulfill the new three year practice requirement. One argument for doing so is that the career tracks of modern lawyers are not always linear and that lawyers, both male and female, frequently need to take time away from the practice of law due to changes in personal circumstances, including changes in substantive employment, military service, returning to school for another degree or, an issue that continues to disproportionately affect women, family care. At the same time, however, the Commission heard concerns that a four year gap in practice would be too substantial to offer adequate assurance to bar admission authorities that a lawyer has the requisite competence to practice law in the new jurisdiction. To reconcile these competing interests, the Commission determined that a lawyer seeking admission by motion should have to satisfy the three year practice requirement within a five year time period. This approach permits lawyers to take two years off from the active practice of law, while recognizing the concerns that bar admissions authorities would have about an extended period of time away from practice.

Finally, the Commission concluded that Section 2 of the Model Rule on Admission by Motion should state that the time spent practicing pursuant to the proposed new Model Rule on Practice Pending Admission should not count toward the period of time necessary to qualify for admission by motion. (The proposed new Model Rule on Practice Pending Admission would allow lawyers to establish a law practice in another jurisdiction while diligently pursuing admission in that jurisdiction through one of the recognized forms of admission, such as through admission by motion.) The Commission determined that this restriction in Section 2 is a necessary additional client protection as it will prevent lawyers from establishing a practice in a new jurisdiction in fewer than three years and prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

In sum, the Commission determined that, in most jurisdictions, a lengthy practice requirement unnecessarily hinders the lawyer mobility that clients and legal employers increasingly demand. Although the Commission recognizes that some jurisdictions may have particular needs that warrant a longer or shorter durational requirement, the Commission concluded that the vast majority of jurisdictions would benefit from the proposed approach.

### III. Implementation of ABA Model Rule on Admission by Motion Rule

The Commission concluded that the widespread adoption of admission by motion procedures is a positive development, but also found that a number of jurisdictions have not yet adopted an admission by motion process or have adopted a process that imposes unnecessary restrictions and requirements. Thus, in addition to proposing the amendments described above, the Commission also urges the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate any restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

With regard to the eleven jurisdictions that have not adopted any admission by motion procedure, those jurisdictions require lawyers to take at least some portion of the jurisdiction's bar examination (or a special lawyers' examination) in order to gain admission. The Commission concluded that such a requirement is unnecessary for lawyers who have three years of experience and that these jurisdictions should adopt an admission by motion procedure.

With regard to the forty jurisdictions that have adopted an admission by motion procedure, ten have an admission by motion procedure that is nearly identical to the Model Rule.<sup>10</sup> The other thirty jurisdictions, however, have procedures that impose restrictions beyond those contained in the Model Rule. More than half of these jurisdictions have some type of reciprocity requirement, which makes admission by motion possible only for lawyers from states that also offer admission by motion on a reciprocal basis.<sup>11</sup> Moreover, some jurisdictions define law practice in a manner that is narrower than the Model Rule definition.<sup>12</sup> Other jurisdictions require lawyers to certify that they intend to practice actively and maintain an office in the state where admission by motion is being sought.<sup>13</sup>

The Commission found no evidence that these more restrictive approaches are related in any way to the competence of the applicants or the protection of the public. Indeed, jurisdictions that have adopted the Model Rule without any additional restrictions have reported no problems. The Commission believes that such varied additional restrictions only serve to sustain outdated and parochial purposes at a time when the relevance of borders to the competent practice of law has and will continue to erode. The Commission believes that the Model Rule on Admission by Motion ensures competent representation and amply protects the integrity of the bar.

### Conclusion

Continually evolving technology, client demands and a national (as well as global) legal services marketplace have fueled an increase in cross-border practice as well as a related need for lawyers to relocate to new jurisdictions. The Resolutions accompanying this Report are intended to permit lawyers to respond to these developments to the benefit of their clients, while providing adequate regulatory safeguards. Accordingly, the Commission respectfully requests that the House of Delegates adopt those Resolutions.

<sup>10</sup> See Comparison Chart, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

**Resolution 105e: Admission by Motion**

- The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.
- The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.
- Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions that have admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2. Approval by Submitting Entity.

The Commission approved five of these Resolutions and Reports at its April 12 - 13, 2012 meeting.

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

No.

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

The adoption of this proposal would result in amendments to the ABA Model Rule on Admission by Motion.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002. One aspect of this transformation has been the extent to which lawyers now need to relocate to new jurisdictions during their careers. The proposed amendments to the Model Rule on Admission by Motion respond to this increased need for mobility while providing adequate safeguards for clients and the public.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically amendments to the ABA Model Rule on Admission by Motion. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.



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

None

9. Disclosure of Interest. (If applicable)10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

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11. Contact Name and Address Information. (Prior to the meeting)

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Regulation Counsel  
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[Ellyn.Rosen@americanbar.org](mailto:Ellyn.Rosen@americanbar.org)  
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12. Contact Name and Address Information. (Who will present the report to the House?)

Jamie S. Gorelick, Co-Chair  
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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution(s)

#### **Resolution 105e: Admission by Motion**

- The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.
- The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.
- Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

### 2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of

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globalization and technology on the legal profession and propose changes to ABA policies.

The ABA Model Rule on Admission by Motion was adopted in 2002, as part of the package of resolutions unanimously adopted by the House of Delegates to address increased cross-border practice. At the time of its adoption, the Model Rule required that lawyers could qualify for admission by motion only if they had been engaged in the active practice of law for 5 of the last 7 years.

Much has changed in the last decade, resulting in increased lawyer mobility. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating there or who regularly do business in that jurisdiction. Resolution 105e responds to this need, thus benefitting both lawyers and their clients, by reducing the time in practice requirement in the Model Rule for Admission by Motion to 3 of the last 5 years. The Commission's research revealed that the Model Rule has produced no problems in the jurisdictions that have adopted it and no problems in the jurisdictions that already allow admission by motion after only three years of practice.

### 3. Please Explain How the Proposed Policy Position will address the issue

A reduction of the time in practice requirement in the ABA Model Rule on Admission by Motion will facilitate the cross-border practice that clients demand in a 21<sup>st</sup> century legal marketplace.

The Commission's research revealed that there is no reason to believe that lawyers who have spent 3 of the last 5 years engaged in law practice will be any less able to practice law responsibly and competently in a new jurisdiction. The Commission found no evidence that lawyers admitted by motion are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted by examination. The Commission also found no evidence that the admission by motion process has produced any risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers. Finally, the Commission found that the five jurisdictions that already have a duration-of-practice requirement of three years have not encountered any problems.

Resolution 105e also adds language to make clear that time spent practicing pursuant to the proposed ABA Model Rule on Practice Pending Admission does not count toward the Model Rule of Admission by Motion's active practice requirement.

Additionally, given the increasing importance of lawyer mobility and the success of the Model Rule on Admission by Motion, the ABA should encourage the adoption of the Model Rule for Admission by Motion in the eleven jurisdictions

that have not yet adopted such a process. The ABA also should encourage jurisdictions that have an admission by motion process to eliminate restrictions that do not appear in the Model Rule and that pose unnecessary obstacles to using the process.

The Commission has concluded that these changes will facilitate lawyer mobility in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

#### 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105e as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105e relating to Admission by Motion: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

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The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

**AMERICAN BAR ASSOCIATION**  
**ADOPTED BY THE HOUSE OF DELEGATES**

**AUGUST 6-7, 2012**

**RESOLUTION**

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

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

**Rule 1.6 Confidentiality of Information**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~
- (6) to comply with other law or a court order; or

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

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. (As adopted in Resolution 105A Rule 1.6 (c)).

## Comment

...

## Detection of Conflicts of Interest

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

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

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



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

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

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

### **Acting Competently to Preserve Confidentiality**

[186] Paragraph (c) requires a lawyer must to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. (As adopted in Resolution 105A Rule 1.6 Comment [16]).

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

## Former Client

[2018] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

## Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

and

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

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

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

## Comment

...

### Client Confidences, Consent and Notice

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

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

...



## REPORT

### Introduction

The ABA Commission on Ethics 20/20 has examined how globalization and technology have transformed the practice of law and continue to fuel an increase in lawyer mobility. The Commission found that this increased mobility has raised a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility,<sup>1</sup> the Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance in this important area.

To offer this guidance, the Commission is proposing black letter and Comment amendments to Model Rule 1.6 (Confidentiality of Information) that track the Formal Opinion and more clearly explain the ethical considerations associated with these disclosures. The Commission is also proposing a change to Comment [7] to Model Rule 1.17 (Sale of Law Practice), because that Comment addresses conceptually similar issues.

These proposed amendments would codify what has long been common practice and acknowledged as essential in ethics opinions: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest.<sup>2</sup> By codifying existing authority and practices and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

### I. Proposed Amendment to Model Rule 1.6

The Commission proposes to amend Model Rule 1.6 and its Comments in order to provide a clearer doctrinal basis for, and place appropriate limitations on, disclosures of confidential information to detect and resolve conflicts of interest.

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<sup>1</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 [hereinafter ABA Formal Op. 09-455] (2009).

<sup>2</sup> *Id.* at 1 n.6 (citing LAWRENCE J. FOX & SUSAN MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 6.07 (ALI-ABA 2005)); *id.* at 4 (citing COLO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [5A] (2008); Boston Bar Ass'n Ethics Comm., Ethics Op. 2004-1 (2004); D.C. Bar Legal Ethics Comm., Ethics Op. 312 (2002); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 720 (1999); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2000-3 (2000)). *See also* Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

## A. Rationale for Change

Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently explained that lawyers and law firms must have discretion to disclose limited information to each other in order to determine if a conflict of interest will arise from a lawyer's association with the firm.<sup>3</sup> The Formal Opinion nevertheless concluded that "[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6."

The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it is arising, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more readily available guidance on the limitations on such disclosures.

## B. Limitations on the Disclosure Authority

The Commission concluded that the authority to disclose information, although necessary, needs to be carefully limited and regulated to ensure client protection while permitting the detection and resolution of conflicts of interest that arise from professional mobility, benefitting both clients and lawyers. Comment [13] to Model Rule 1.6 would make clear that any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. The Comment then explains that even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. For example, if the disclosure of a client's identity would be sufficient to detect and resolve a conflict, the lawyer should not disclose any additional information.

Formal Opinion 09-455 reached a nearly identical conclusion regarding the categories of information that may be disclosed.<sup>4</sup> The Ethics Committee found that, "[i]n most situations involving lawyers moving between firms[,] . . . lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for [a] conflicts analysis." The Commission's proposal goes one modest step further by allowing lawyers to disclose whether the matter has terminated. The Commission concluded that this additional information is often needed because conflicts analyses differ for former and current clients. The Commission also uses the word "ordinarily," recognizing that there may be additional narrow categories of information that are not privileged or prejudicial and may need to be disclosed in order to detect a conflict of interest. For example, it may be necessary to disclose the location where work on a current or former matter occurred in order to address choice of law issues relating to conflicts of interest.

Even this limited disclosure is not permissible, absent informed client consent, if it would "compromise the attorney-client privilege or otherwise prejudice the client." For example, the

<sup>3</sup> ABA Formal Op. 09-455 describes the need to perform a conflicts check when hiring (or discussing the possibility of hiring) a lateral lawyer, but the logic of the Opinion applies equally well to other conceptually similar situations, such as when law firms consider a merger or when a lawyer considers the purchase of another lawyer's practice.

<sup>4</sup> ABA Formal Op. 09-455 (2009), *supra* note 1, at 3.

proposed Comment explains that, if a lawyer or firm knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible to disclose sufficient information to ensure compliance with the conflicts of interest rules.<sup>5</sup> If the lawyer is not able to obtain informed consent, the proposed relationship may have to be postponed unless the lawyer can be screened or the firm can obtain the information needed to conduct the conflicts check from other sources.<sup>6</sup>

As noted, these limitations are drawn from Formal Opinion 09-455. The Formal Opinion concluded that the disclosed information “must not compromise the attorney-client privilege or otherwise prejudice a client or former client.”<sup>7</sup> Moreover, the examples of situations that could cause such prejudice (an undisclosed plan for a hostile takeover, a consultation regarding a possible divorce, and an appearance before a grand jury) are drawn directly from the Formal Opinion.<sup>8</sup> Finally, the Formal Opinion, like the Commission’s proposal, provides that a lawyer can nevertheless disclose privileged or prejudicial information after getting “informed consent.”<sup>9</sup>

Another limitation on the lawyer’s authority to disclose appears in Comment [13]. That Comment explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred. This timing is consistent with the Formal Opinion, which concluded that “conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.”<sup>10</sup>

The last sentence of Comment [13] reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.<sup>11</sup>

Proposed Comment [14] reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. Comment [14] explains that other lawyers in the same firm are nevertheless permitted to use the information if it was acquired from an

<sup>5</sup> *Id.* (concluding that an interpretation of Rule 1.6 that prohibited “any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest”).

<sup>6</sup> *Id.* at 4. The last sentence of Comment [13] emphasizes that the prohibition against disclosing privileged or prejudicial information exists only under “paragraph (b)(7),” because lawyers may have the ability to disclose this kind of information pursuant to one of the *other* exceptions to Rule 1.6(b). For example, it may be possible to disclose the information to an independent lawyer, who may be able to help the lawyer and the firm to determine whether a conflict would arise from the possible new relationship without disclosing the lawyer’s information to the firm or the firm’s information to the lawyer. Such a disclosure would be permissible under Rule 1.6(b)(4), which permits disclosures to secure legal advice about compliance with the Rules. *Id.* at 5 (citing GEOFFREY C. HAZARD, & W. WILLIAM HODES, *THE LAWYER OF LAWYERING*, § 14.4, n.2 at 14-40 (3d ed. 2009 Supp.); Tremblay, *supra* note 2, at 544; Wald, *supra* note 2, at 227).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 5.

<sup>11</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-414, at 2 (1999).

independent source. For example, a lawyer who works on a transaction might learn detailed information about the business structure of another party to the transaction. The lawyer can use that information, even if the lawyer for the other party to that transaction subsequently discloses the same information to the firm as part of a conflicts check.

Proposed Comment [14] also explains that law firms regularly need to conduct conflicts checks in response to inquiries from potential new clients or in response to existing clients who may wish to retain the firm on a new matter. To conduct conflicts checks in these situations, the firm may need to contact lawyers within the firm to determine whether their work on current or former matters would give rise to a conflict in the event that the firm accepts the new matter. The last sentence of the Comment makes clear that, as they always have been, such disclosures are impliedly authorized under Comment [5]. That Comment provides that “[l]awyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.” This point is also made through the inclusion of the phrase “between lawyers in different firms” in the black letter of the proposed Rule.

### C. Concerns Raised in Response to the Commission’s Proposal

Although the Commission’s proposal contains important restrictions and limitations that are consistent with existing authorities and scholarly commentary,<sup>12</sup> the Commission heard several concerns in response to early drafts.

One concern was that lawyers should never be permitted to disclose this sort of information without client consent. The Commission concluded that such an absolute requirement is unworkable for the reasons that the Ethics Committee explained in its Formal Opinion:

[S]eeking prior informed consent likely would involve giving notice to the lawyer’s current firm, with unpredictable and possibly adverse consequences. Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm.<sup>13</sup>

The Commission had in mind, for example, a second-year associate in her current firm, looking to relocate. Under the Commission’s proposal, that lawyer cannot disclose any information that would compromise the attorney-client privilege or prejudice the client, so the client is protected. If the lawyer needs to disclose such information, client consent is required. In sum, the Commission rejected the idea that informed consent should be required in all instances, and instead sought to codify the Formal Opinion’s approach, which carefully balances the tensions between the reality of lawyer mobility and the importance of protecting confidential client information.

<sup>12</sup> See ABA Formal Op. 09-455, *supra* note 1.

<sup>13</sup> *Id.*



The Commission also heard claims that the proposal would jeopardize the client-lawyer relationship and the duty of confidentiality for the mere purpose of business expediency. The Commission disagrees. These disclosures are essential to ensure that lawyers comply with their ethical obligation to avoid conflicts of interest.<sup>14</sup> Moreover, this proposal will provide more, not less protection, for client confidences by filling a void left by the lack of any express guidance regarding these disclosures, with a practical framework for regulating them. By codifying the Formal Opinion's approach to this issue and expressly regulating and carefully limiting the scope of disclosures that can occur, the proposal will ensure that the legal profession provides more protection for client confidences than the present framework provides.

The Commission also considered the views expressed by two members, who maintain their views, that informed consent alone is not sufficient to protect the client and that client consent to disclosure of information that would compromise the attorney-client privilege or prejudice the client should not only be confirmed in writing but also be accompanied by the lawyer's advice to the client to seek independent counsel. The reasons for this view are that the lawyer has an interest in securing consent and so is not disinterested; that in instances where the interests of the lawyer and client diverge financially, the lawyer must advise the client to seek independent counsel, as provided in Rules 1.8(a) and 1.8(h)(2); that proposed new 1.6(b)(7) contains nothing comparable to the written notice, statement, agreement, and certification requirements for effective screening, as provided in Rule 1.10(a)(2)(ii) and (iii); that consents to conflicts under Rules 1.7 and 1.9 also require confirmation in writing; and that the interests at risk here are as or more compelling than the client interests in these rules.

The Commission seriously considered these arguments, but concluded that these additional restrictions are unnecessary and inconsistent with existing procedures. Model Rule 1.6(a) currently permits a lawyer to disclose privileged or prejudicial information with a client's informed consent; the Rule does not require the lawyer to confirm the consent in writing or advise the client to seek independent counsel. The Commission has heard of no problems arising from the existing framework and thus concluded that "informed consent," as that term is defined in Model Rule 1.0(e) and Comment [6] to that Rule, is sufficient to protect the client's interests.

The ABA Formal Opinion provides that a lawyer can disclose privileged or prejudicial information after getting "informed consent."<sup>15</sup> The Formal Opinion does not suggest that the consent should be in writing or that a lawyer should have to advise the client to seek independent counsel.

The Commission also concluded that any additional requirements would be inconsistent with how the Rules treat other, conceptually similar disclosures of information. As noted above, a lawyer already can reveal *any* information, regardless of what it is or the purpose of the disclosure, with just informed consent under Model Rule 1.6(a). Moreover, a lawyer may now use protected information generally to the "disadvantage" of a client, with just informed consent under Model Rule 1.8(b). In light of these provisions, the Commission concluded that it would be inconsistent to impose any requirements beyond "informed consent" when lawyers are trying to abide by their ethical duty to avoid conflicts of interest.

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<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 4.

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## II. Proposed Amendment to Model Rule 1.17

Model Rule 1.17 describes a number of ethical obligations that arise during the sale of a law practice, and Comment [7] describes the information that can be shared between the owner of the law practice and the prospective buyer. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

### Conclusion

For the reasons set forth above, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs  
ABA Commission on Ethics 20/20

August 2012

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

**Resolution 105(f): Conflicts Detection**

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.
- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

2. Approval by Submitting Entity.

The Commission approved this Resolution during a meeting via conference call on May 1, 2012.

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

No.

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

The adoption of these resolutions would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social

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change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility that address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

6. Status of Legislation. (If applicable)

N/A

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

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

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

None

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution(s)

#### **Resolution 105(f): Conflicts Detection**

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.
- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

### 2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA's Standing Committee on Ethics and Professional Responsibility that

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address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

Resolution 105f provides a doctrinal basis for, and places appropriate limitations on, disclosures of confidential information that are made to detect and resolve conflicts of interest. The Resolution ensures that these disclosures occur in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

### 3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105f, if adopted, would codify what has long been common practice and acknowledged as essential in ethics opinions and seminal scholarly writings on the subject: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest. By codifying existing authority and practices, and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

The Commission concluded that the proposed authority to disclose information in new black letter Model Rule 1.6(b)(7), although necessary, must be carefully limited and regulated to ensure client protection. For example, new language in Comment [13] of the Rule would make clear that any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited disclosure, however, is not permissible, absent informed client consent, if it would "compromise the attorney-client privilege or otherwise prejudice the client." Comment [13] further explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred and reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. All of these limitations are drawn from Formal Opinion 09-455.

New Comment language also reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.



Proposed amendments to Comment [7] of Model Rule 1.17 (Sale of a Law Practice) address conceptually similar ethical obligations that arise during the sale of a law practice. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

#### 4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105f as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105f relating to Conflicts Detection: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website ([click here](#)). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as

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complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

**RESOLUTION**

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

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

**Rule 1.6 Confidentiality of Information**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest ~~between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.~~

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. (As adopted in Resolution 105A Rule 1.6 (c)).

**Comment**

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**Detection of Conflicts of Interest**

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

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

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

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

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).

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

### Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. (As adopted in Resolution 105A Rule 1.6 Comment [16]).

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

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### Former Client

[2018] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

### Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

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

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

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

### Comment

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### Client Confidences, Consent and Notice

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

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Deletions struck through; additions underlined