I. Welcome & Introductions     (Bagley) 1-2

II. Approval of Minutes from 1/10/20 meeting    (Bagley) 3-24

III. Update on prior changes     (NeSmith)

IV. Action Items       (Bagley)

A. Possible revision to Part 7 of the Rules--In 2018 the American Bar Association reorganized MRPC Part VII (Information About Legal Services) to address changes in technology. Georgia’s current rules are not based on the ABA Model. This matter is on the agenda for the Committee to determine whether to adopt rules based on the ABA Model.
   i. Email from John Bedard  25-26
   ii. ABA Report            27-40
   iii. ABA Rules 7.1--7.5    41-51
   iv. GRPC Part VII         52-65

B. Rule 1.17 Comment 6—Comment 6 of Georgia’s Rule 1.17 includes a reference to ABA Model Rule 1.6(b)(7), which is not a part of the GRPC. The Committee needs to either amend the comment to take out the reference, or consider adopting ABA Rule 1.6(b)(7).
   i. GRPC 1.17 Comment 6 66
   ii. ABA 1.6(b)(7) 66
C. Proposed New Comment 7 to Rule 1.1 (Hicks)
In late 2018 the Committee voted to add a new Comment 7 to Rule 1.1 (Competence) stating that wellness is an important element of competence. The Lawyer Assistance Program has voiced concerns about the comment and the Committee must decide whether to proceed with the proposal.
   i. Email from Lynn Garson 67-70
   ii. Proposed new comment 71

V. Discussion Items (Bagley)

D. ABA Rule 1.8(e)(3)-- In August 2020 the ABA revised Rule 1.8 to create an exception to the rule prohibiting lawyers from providing financial assistance to clients who they represent in litigation matters. This is informational only, but the Committee may decide whether to put it on a later agenda for possible adoption in Georgia.
   i. New ABA Rule 1.8 72-74
   ii. Report to the House of Delegates 75-89
   iii. GRPC 1.8 90-92

E. Rule 5.4-- Several jurisdictions are exploring regulatory innovations that would allow nonlawyer provision of legal services, investment in law firms, etc. This matter is informational only.
   i. GRPC 5.4 93-94
   ii. ABA 5.4 95-96
   iii. Articles 97-121

F. Rule 3.8-- Georgia’s version of Rule 3.8 (Special Duties of Prosecutors) is different from the ABA Model. The Committee should consider whether to amend the rule.
   i. GRPC 3.8 122-123
   ii. ABA Rule 3.8 124-127
   iii. Red-line 128-132
   iv. Article 133-134

G. Rule 8.4(g)-- The Committee has previously considered and rejected Rule 8.4(g), which prohibits harassment and discrimination in the profession. Recent events have spurred renewed interest in the provision.
   i. ABA Rule 8.4(g) 135-136
   ii. Articles 137-142

VI. Adjourn
# Disciplinary Rules and Procedures

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<td>Chairperson</td>
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<td>Mr. R. Gary Spencer</td>
<td>Vice Chairperson</td>
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<td>Mr. Paul T. Carroll, III</td>
<td>Member</td>
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<td>Hon. J. Antonio DelCampo</td>
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<td>Ms. Erin H. Gerstenzang</td>
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<td>Mr. John G. Haubenreich</td>
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<td>Mr. Patrick H. Head</td>
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<td>Ms. R. Javoyne Hicks</td>
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<td>Ms. Jabu Mariette Sengova</td>
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<td>Mr. H. Craig Stafford</td>
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<td>Mr. Patrick John Wheale</td>
<td>Member</td>
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<tr>
<td>Ms. Paula J. Frederick</td>
<td>Staff Liaison</td>
<td>2021</td>
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MINUTES

Chair John Haubenreich called the meeting to order at 12:30 p.m.

Attendance:


Approval of Minutes:
The Committee approved the Minutes from the September 19, 2019 meeting.

Informational Item:

ABA changes to advertising rules
The Committee decided to table the issue until its next meeting. Paula Frederick will provide an annotated version where the Georgia rules fit into the ABA rules and comments.

Action Items:

Rule 7.5
The Committee decided to table the issue and address it along with the other advertising rules at its next meeting. The Office of the General Counsel will contact Greg Beck and inform him that the Committee is considering his issue.

Use of term “grievance”
The Committee made the following amendments to distinguish between a grievance form and an investigation.

Rule 1.0 (o)
- The Committee voted to add a definition of Memorandum of Grievance. It will read: “Memorandum of Grievance” denotes an allegation of unethical conduct against a lawyer filed in writing with the Office of the General Counsel and containing the name and signature of the complainant or initiated pursuant to Rule 4-203(2).”
- The Committee voted to remove “Memorandum of Grievance” from (j).

Rule 9.3
• The Committee voted to replace “grievance filed under” with “matter pursuant to.”

Rule 4-202
• The Committee voted to amend section (a) so it now reads: “The Office of the General Counsel may begin an investigation upon receipt of a Memorandum of Grievance, an Intake Form from the Client Assistance Program, or credible information from any source. If the investigation is based upon receipt of credible information the Office of the General Counsel must first notify the respondent lawyer and provide a written description of the information that serves as the basis for the investigation.”
• The Committee voted to amend section (b) so it now reads: “The Office of the General Counsel may also deliver the information from any source to the State Disciplinary Board for initiation of a grievance under Rule 4-203 (2).”
• The Committee voted to amend section (c) so it now reads: “The Office of the General Counsel shall be empowered to collect evidence and information concerning any matter under investigation. The screening process may include forwarding information received to the respondent so that the respondent may respond.”
• The Committee voted to replace “grievance(s)” with “matter(s)” in the first sentence of sections (e) and (f).
• The Committee voted to remove the last sentence of section (e).
• The Committee previously voted to change “Consumer Assistance Program” to “Client Assistance Program.” in section (f) at its September 19, 2019 meeting. The changes are currently pending for approval.

Rule 4-203
• The Committee voted to replace “any grievance” with “the information” in the second sentence of section (1).
• The Committee voted to amend section (2) so it now reads: “to initiate grievances on its own motion, to require additional information from a complainant, where appropriate, and to dismiss and reject matters that seem unjustified, frivolous, or patently unfounded.”
• The Committee voted to replace “grievance” with “matter” in section (3).
• The Committee voted to amend section (5) so it now reads: “to conduct Probable Cause investigations, to collect evidence and information concerning matters under investigation, and to certify matters to the Supreme Court of Georgia for hearings by Special Masters as hereinafter provided;”

Rule 4-204
• The Committee voted to amend “grievance” to “matter” in the first sentence of section (a).
• The Committee previously voted to change “Consumer Assistance Program” to “Client Assistance Program.” in section (a)(5) at its September 19, 2019 meeting. The changes are currently pending for approval.

Rule 4-204.1
• The Committee voted to add “or written description pursuant to Rule 4-202(a)” to sections (a)(1) and (a)(2).
• The Committee voted to amend “grievance” to “matter” in section (a)(4).
Rule 4-204.3
• The Committee voted to amend “grievance” to “matter” in sections (a) and (c).

Rule 4-208.2
• The Committee voted to add “or written description pursuant to Rule 4-202(a)” to section (a)(6).

Rule 4-208.4
• The Committee voted to amend “grievance” to “matter” in section (c).

Rule 4-222
• The Committee voted to add “or written description pursuant to Rule 4-202(a)” after Memorandum of Grievance in the first sentence in section (a).
• The Committee previously voted to change “Consumer Assistance Program” to “Client Assistance Program.” in section (a) at its September 19, 2019 meeting. The changes are currently pending for approval.
• The Committee voted to amend section (b) so it now reads: “Referral of a matter to the State Disciplinary Board shall occur within 12 months of receipt of the Memorandum of Grievance by the Office of the General Counsel or notification to the Respondent of the written description pursuant to Rule 4-202(a).”

Rule 4-223
• The Committee voted to replace “grievance” with “matter being investigated” in section (b).

Rule 4-224
• The Committee voted to amend “grievance” to “matter” in sections (a), (a)(1), (a)(2), (c), and (f).
• The Committee voted to remove “filed” in section (f).
• The Committee previously voted to change “Consumer Assistance Program” to “Client Assistance Program.” in section (f) at its September 19, 2019 meeting. The changes are currently pending for approval.

Client Security Fund Rule 10-106
• The Committee voted to remove “of a grievance filed with the State Disciplinary Board of the State Bar of Georgia” from section (c).

Rule 8.4
The Committee voted to replace section (b)(1) with a reference to Rule 1.0 (e) to address the inconsistency of the term conviction in Rules 1.0 (e) and Rule 8.4 (b). Seth Kirschenbaum opposed.

The next meeting will be in March 2020.
Revisions as approved:

RULE 1.0 TERMINOLOGY AND DEFINITIONS.

(a) “Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from the circumstances.

(b) “Confidential Proceedings” denotes any proceeding under these rules which occurs prior to a filing in the Supreme Court of Georgia.

(c) “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 (l) 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.

(d) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) “Conviction” or “convicted” denotes any of the following accepted by a court, whether or not a sentence has been imposed:

1. a guilty plea;
2. a plea of nolo contendere;
3. a verdict of guilty;
4. a verdict of guilty but mentally ill; or
5. A plea entered under the Georgia First Offender Act, OCGA § 42-8-60 et seq., or a substantially similar statute in Georgia or another jurisdiction.

(f) “Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any state or territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.

(g) “Firm” or “law firm” denotes a lawyer or lawyers in a private firm, law partnership, professional corporation, sole proprietorship or other association authorized to practice law pursuant to Bar Rule 1-203 (d); or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
(h) “Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.

(i) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive; not merely negligent misrepresentation or failure to apprise another of relevant information.

(j) “Grievance” denotes an allegation of unethical conduct filed against a lawyer.

(k) “He,” “Him” or “His” denotes generic pronouns including both male and female.

(l) “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.

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

(n) “Lawyer” denotes a person authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia including persons admitted to practice in this state pro hac vice.

(o) “Memorandum of Grievance” denotes an allegation of unethical conduct against a lawyer filed in writing with the Office of the General Counsel and containing the name and signature of the complainant or initiated pursuant to Rule 4-203 (2).

(p) “Nonlawyer” denotes a person not authorized to practice law by either the:

1. Supreme Court of Georgia or its rules (including pro hac vice admission), or
2. duly constituted and authorized governmental body of any other state or territory of the United States, or the District of Columbia, or
3. duly constituted and authorized governmental body of any foreign nation.

(q) “Notice of Discipline” denotes a notice by the State Disciplinary Board that the respondent will be subject to a disciplinary sanction for violation of one or more Georgia Rules of Professional Conduct unless the respondent affirmatively rejects the notice.

(r) “Partner” denotes a member of a partnership, a shareholder in a law firm organized pursuant to Bar Rule 1-203 (d), or a member of an association authorized to practice law.

(s) “Petition for Voluntary Surrender of License” denotes a Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this state. A voluntary surrender of license is tantamount to disbarment.
(t) “Probable Cause” denotes a finding by the State Disciplinary Board that there is sufficient evidence to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of the rules.

(u) "Prospective Client" denotes a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

(v) “Public Proceedings” denotes any proceeding under these rules that has been filed with the Supreme Court of Georgia.

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

(x) “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.

(y) “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.

(z) “Respondent” denotes a person whose conduct is the subject of any disciplinary investigation or proceeding.

(aa) “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.

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

(cc) “Tribunal” denotes a court, an arbitrator in an 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 legal judgment directly affecting a party's interests in a particular matter.

(dd) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including but not limited to handwriting, typewriting, printing, photostating, photography, audio or video recording and 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

[1] Bar Rule 4-110 includes additional definitions for terminology used in the procedural section of these rules.

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Georgia Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.
[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

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

Informed Consent

[6] Many of the Georgia Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2 (c), 1.6 (a) and 1.7 (b). The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently
represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7 (b) and 1.9 (a). For a definition of "writing" and "confirmed in writing," see paragraphs (s) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8 (a) (3) and (g). For a definition of "signed," see paragraph (s).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 and 1.12.

[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 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 relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.
The purpose of this definition is to permit a lawyer to use developing technologies that maintain an objective record of a communication that does not rely upon the memory of the lawyer or any other person. See OCGA § 10-12-2(8).

RULE 9.3 COOPERATION WITH DISCIPLINARY AUTHORITY

During the investigation of a matter pursuant to these Rules, the lawyer complained against shall respond to disciplinary authorities in accordance with State Bar Rules.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Much of the work in the disciplinary process is performed by volunteer lawyers and lay persons. In order to make good use of their valuable time, it is imperative that the lawyer complained against cooperate with the investigation. In particular, the lawyer must file a sworn response with the member of the Investigative Panel charged with the responsibility of investigating the complaint.

[2] Nothing in this Rule prohibits a lawyer from responding by making a Fifth Amendment objection, if appropriate. However, disciplinary proceedings are civil in nature and the use of a Fifth Amendment objection will give rise to a presumption against the lawyer.

Rule 4-202 Receipt of Grievances; Initial Review by Bar Counsel

(a) The Office of the General Counsel may begin an investigation upon receipt of a Memorandum of Grievance, an Intake Form from the Client Assistance Program, or credible information from any source. If the investigation is based upon receipt of credible information the Office of the General Counsel must first notify the respondent lawyer and provide a written description of the information that serves as the basis for the investigation.
(b) The Office of the General Counsel may also deliver the information from any source to the State Disciplinary Board for initiation of a grievance under Rule 4-203 (2).

(c) The Office of the General Counsel shall be empowered to collect evidence and information concerning any matter under investigation. The screening process may include forwarding information received to the respondent so that the respondent may respond.

(d) The Office of the General Counsel may request the Chair of the State Disciplinary Board to issue a subpoena as provided by OCGA § 24-13-23 requiring a respondent or a third party to produce documents relevant to the matter under investigation. Subpoenas shall be enforced in the manner provided at Rule 4-221 (c).

(e) Upon completion of its screening of a matter, the Office of the General Counsel shall be empowered to dismiss those matters that do not present sufficient merit to proceed.

(f) Those matters that appear to allege a violation of Part IV, Chapter 1 of the Georgia Rules of Professional Conduct may be forwarded to the State Disciplinary Board pursuant to Rule 4-204. In lieu of forwarding a matter to the State Disciplinary Board, the Office of the General Counsel may refer a matter to the Client Assistance Program so that it may direct the complaining party to appropriate resources.

**Rule 4-203 Powers and Duties**

In accordance with these Rules, the State Disciplinary Board shall have the following powers and duties:

(1) to receive and evaluate any and all written grievances against lawyers and to frame such charges and grievances as shall conform to the requirements of these Rules. A copy of the information serving as the basis for investigation or proceedings before the State Disciplinary Board shall be furnished to the respondent by the procedures set forth in Rule 4-203.1;

(2) to initiate grievances on its own motion, to require additional information from a complainant, where appropriate, and to dismiss and reject matters that seem unjustified, frivolous, or patently unfounded;

(3) to issue letters of instruction when dismissing a matter;

(4) to delegate the duties of the State Disciplinary Board enumerated in paragraphs (1), (2), (8), (9), (10), and (11) hereof to the Chair of the State Disciplinary Board or such other members as
the State Disciplinary Board or its Chair may designate subject to review and approval by the full State Disciplinary Board;

(5) to conduct Probable Cause investigations, to collect evidence and information concerning matters under investigation, and to certify matters to the Supreme Court of Georgia for hearings by Special Masters as hereinafter provided;

(6) to prescribe its own Rules of conduct and procedure;

(7) to receive, investigate, and collect evidence and information, and review and accept or reject Petitions for Voluntary Discipline pursuant to Rule 4-227 (b) (1);

(8) to sign and enforce, as hereinafter described, subpoenas for the appearance of persons and the production of documents, things and records at investigations both during the screening process and the State Disciplinary Board’s investigation;

(9) to issue a subpoena as provided in this Rule whenever a subpoena is sought in this State pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, where the issuance of the subpoena has been duly approved under the law of the other jurisdiction. Upon petition for good cause the State Disciplinary Board may compel the attendance of witnesses and production of documents in the county where the witness resides or is employed or elsewhere as agreed by the witness. Service of the subpoena shall be as provided in the Georgia Civil Practice Act. Enforcement or challenges to the subpoena shall be as provided at Rule 4-221 (c);

(10) to extend the time within which a formal complaint may be filed;

(11) to issue Formal Letters of Admonition and Confidential Reprimands as hereinafter provided;

(12) to issue a Notice of Discipline providing that unless the respondent affirmatively rejects the notice, the respondent shall be sanctioned as ordered by the Supreme Court of Georgia;

(13) to refer a lawyer who appears to be impaired for an evaluation by an appropriate medical or mental health professional; and

(14) to use the staff of the Office of the General Counsel in performing its duties.
Rule 4-204 Investigation and Disposition by State Disciplinary Board-Generally

(a) Each matter that presents sufficient merit to proceed may be referred with a Notice of Investigation to the State Disciplinary Board for investigation and disposition in accordance with its Rules. The Clerk of the State Disciplinary Boards shall assign a lawyer member of the State Disciplinary Board to be responsible for the investigation. The Office of the General Counsel shall simultaneously assign a staff investigator to assist the State Disciplinary Board member with the investigation. If the investigation of the State Disciplinary Board establishes Probable Cause to believe that the respondent has violated one or more of the provisions of Part IV, Chapter 1 of these Rules, it shall:

1. issue a Formal Letter of Admonition;
2. issue a Confidential Reprimand;
3. issue a Notice of Discipline;
4. refer the case to the Supreme Court of Georgia for hearing before a Special Master and file a formal complaint with the Supreme Court of Georgia, all as hereinafter provided; or
5. refer a respondent for evaluation by an appropriate medical or mental health professional pursuant to Rule 4-104 upon the State Disciplinary Board’s determination that there is cause to believe the lawyer is impaired.

All other cases may be either dismissed by the State Disciplinary Board or referred to the Client Assistance Program so that it may direct the complaining party to appropriate resources.

(b) The primary investigation shall be conducted by the member of the State Disciplinary Board responsible for the investigation, assisted by the staff of the Office of the General Counsel, upon request of the State Disciplinary Board member. The Board of Governors of the State Bar of Georgia shall fund the Office of the General Counsel so that the Office of the General Counsel will be able to adequately investigate and prosecute all cases.

Rule 4-204.1 Notice of Investigation
a. A Notice of Investigation shall accord the respondent reasonable notice of the charges against him and a reasonable opportunity to respond to the charges in writing. The Notice shall contain:

1. a statement that the grievance or written description pursuant to Rule 4-202(a) is being transmitted to the State Disciplinary Board;
2. a copy of the grievance or written description pursuant to Rule 4-202(a);
3. a list of the Rules that appear to have been violated;
4. the name and address of the State Disciplinary Board member assigned to investigate the matter and a list of the State Disciplinary Board members; and
5. a statement of the respondent’s right to challenge the competency, qualifications or objectivity of any State Disciplinary Board member.

b. The form for the Notice of Investigation shall be approved by the State Disciplinary Board.

c. The Office of the General Counsel shall cause the Notice of Investigation to be served upon the respondent pursuant to Rule 4-203.1.

**Rule 4-204.3. Answer to Notice of Investigation Required**

a. The respondent shall deliver to the State Disciplinary Board member assigned to investigate the matter a written response under oath to the Notice of Investigation within 30 days of service.

b. The written response must address specifically all of the issues set forth in the Notice of Investigation.

c. The State Disciplinary Board member assigned to investigate the matter may, in the State Disciplinary Board member’s discretion, grant extensions of time for the respondent’s answer. Any request for extension of time must be made in writing, and the grant of an extension of time must also be in writing. Extensions of time shall not exceed 30 days and should not be routinely granted.

d. In cases where the maximum sanction is disbarment or suspension and the respondent fails to properly respond within the time required by these Rules, the Office of the General Counsel may seek authorization from the Chair or Vice-Chair of the State Disciplinary Board to file a motion for interim suspension of the respondent.

1. When an investigating member of the State Disciplinary Board notifies the Office of the General Counsel that the respondent has failed to respond and that the respondent should be suspended,
the Office of the General Counsel shall, with the approval of the Chair or Vice-Chair of the State Disciplinary Board, file a Motion for Interim Suspension of the respondent. The Supreme Court of Georgia shall enter an appropriate order.

2. When the State Disciplinary Board member and the Chair or Vice-Chair of the State Disciplinary Board determine that a respondent who has been suspended for failure to respond has filed an appropriate response and should be reinstated, the Office of the General Counsel shall file a Motion to Lift Interim Suspension. The Supreme Court of Georgia shall enter an appropriate order. The determination that an adequate response has been filed is within the discretion of the investigating State Disciplinary Board member and the Chair of the State Disciplinary Board.

**Rule 4-208.2 Notice of Discipline; Contents; Service**

a. The Notice of Discipline shall include:

1. the Rules that the State Disciplinary Board found the respondent violated;
2. the allegations of facts that, if unrebutted, support the finding that such Rules have been violated;
3. the level of public discipline recommended to be imposed;
4. the reasons why such level of discipline is recommended, including matters considered in mitigation and matters considered in aggravation, and such other considerations deemed by the State Disciplinary Board to be relevant to such recommendation;
5. the entire provisions of Rule 4-208.3 relating to rejection of a Notice of Discipline. This may be satisfied by attaching a copy of the Rule to the Notice of Discipline and referencing the same in the notice;
6. a copy of the Memorandum of Grievance or written description pursuant to Rule 4-202(a); and
7. a statement of any prior discipline imposed upon the respondent, including confidential discipline under Rules 4-205 to 4-208.

b. The Notice of Discipline shall be filed with the Clerk of the Supreme Court of Georgia, and a copy of the Notice of Discipline shall be served upon the respondent pursuant to Rule 4-203.1.
c. The Office of the General Counsel shall file documents evidencing service with the Clerk of the Supreme Court of Georgia.

d. The level of disciplinary sanction in any Notice of Discipline rejected by the respondent or the Office of the General Counsel shall not be binding on the Special Master, the State Disciplinary Board or the Supreme Court of Georgia in subsequent proceedings in the same matter.

**Rule 4-208.4 Formal Complaint Following Notice of Rejection of Discipline**

(a) The Office of the General Counsel shall file with the Clerk of the Supreme Court of Georgia a formal complaint and a Petition for Appointment of Special Master within 30 days following the filing of a Notice of Rejection. The Notice of Discipline shall operate as the notice of finding of Probable Cause by the State Disciplinary Board.

(b) The Office of the General Counsel may obtain extensions of time for the filing of the formal complaint from the Chair of the State Disciplinary Board or his designee.

(c) After the rejection of a Notice of Discipline and prior to the time of the filing of the formal complaint, the State Disciplinary Board may reconsider the matter and take appropriate action.

**Rule 4-222 Limitation**

a. No proceeding under Part IV, Chapter 2, shall be brought unless a Memorandum of Grievance or written description pursuant to Rule 4-202(a) or a Client Assistance Program referral form has been received at the State Bar of Georgia headquarters or instituted pursuant to these Rules within four years after the commission of the act; provided, however, this limitation shall be tolled during any period of time, not to exceed two years, that the offender or the offense is unknown, the offender’s whereabouts are unknown, or the offender’s name is removed from the roll of those authorized to practice law in this State.

b. Referral of a matter to the State Disciplinary Board shall occur within 12 months of receipt of the Memorandum of Grievance by the Office of the General Counsel or notification to the Respondent of the written description pursuant to Rule 4-202(a).

**Rule 4-223. Advisory Opinions**
(a) Any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person. Formal Advisory Opinions which have been approved or modified by the Supreme Court pursuant to Rule 4-403 shall also be binding in subsequent disciplinary proceedings which do not involve the person who requested the opinion.

(b) It shall be considered as mitigation to any matter being investigated under these rules that the respondent has acted in accordance with and in reasonable reliance upon a written Informal Advisory Opinion requested by the respondent pursuant to Rule 4-401 or a Formal Advisory Opinion issued pursuant to Rule 4-403, but not reviewed by the Supreme Court of Georgia.

Rule 4-224 Expungement of Records

(a) The record of any matter against a respondent under these Rules which does not result in discipline against the respondent shall be expunged by the Office of the General Counsel in accordance with the following:

1. those matters closed by the Office of the General Counsel after screening pursuant to Rule 4-202 (e) shall be expunged after one year;
2. those matters dismissed by the State Disciplinary Board after a Probable Cause investigation pursuant to Rule 4-204 (a) shall be expunged after two years; and
3. those complaints dismissed by the Supreme Court of Georgia after formal proceedings shall be expunged after two years.

(b) Definition. The term “expunge” shall mean that all records or other evidence of the existence of the complaint shall be destroyed.

(c) Effect of Expungement. After a file has been expunged, any response to an inquiry requiring a reference to the matter shall state that any record of such matter has been expunged and, in addition, shall state that no inference adverse to the respondent is to be drawn on the basis of the incident in question. The respondent may answer any inquiry requiring a reference to an
expunged matter by stating that the matter or formal complaint was dismissed and thereafter expunged.

(d) Retention of Records. Upon application to the State Disciplinary Board by the Office of the General Counsel, for good cause shown, with notice to the respondent and an opportunity to be heard, records that would otherwise be expunged under this Rule may be retained for such additional period of time not exceeding three years as the Board deems appropriate. Counsel may seek a further extension of the period for which retention of the records is authorized whenever a previous application has been granted for the maximum period permitted hereunder.

(e) A lawyer may respond in the negative when asked if there are any complaints against the lawyer if the matter has been expunged pursuant to this Rule. Before making a negative response to any such inquiry, the lawyer shall confirm that the record was expunged and shall not presume that any matter has been expunged.

(f) A lawyer may respond in the negative when asked if he has ever been professionally disciplined or determined to have violated any professional disciplinary rules if all matters against the lawyer have either been referred to the Client Assistance Program, dismissed, or dismissed with a letter of instruction.

Clients’ Security Fund Rule 10-106 Eligible Claims

(a) The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and because of a lawyer-client relationship, or a fiduciary relationship, between the lawyer and the claimant.

(b) As used in these Rules, “dishonest conduct” means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value.

(c) There must be a final disposition resulting in indefinite suspension, disbarment, or voluntary surrender of license.

(d) The claim shall be filed no later than two years after the date of final disciplinary action by the Supreme Court of Georgia. In the event disciplinary action cannot be prosecuted due to the fact that the attorney is either deceased or cannot be located, the claim shall be filed no later than
five years after the dishonest conduct was first discovered by the applicant; provided, however, the claim shall be filed no later than seven years after the dishonest conduct occurred.

(e) Except as provided by part (f) of this Rule, the following losses shall not be reimbursable:

1. losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of lawyer(s) causing the losses;

2. losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;

3. losses incurred by any financial institution, which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

4. losses incurred by any business entity controlled by the lawyer, or any person or entity described in part (e) (1) hereof;

5. losses incurred by any governmental entity or agency;

6. losses incurred by corporations or partnerships, including general or limited.

(f) In cases of extreme hardship or special and unusual circumstances, the Board may, in its discretion, recognize a claim that otherwise would be excluded under these Rules in order to achieve the purpose of the Fund.

(g) In cases where it appears that there will be unjust enrichment, or the claimant unreasonably or knowingly contributed to the loss, the Board, in its discretion, may deny the claim.

(h) The Board shall require the applicant to exhaust his or her civil remedies unless the Board determines that the pursuit of the civil claim is not feasible or practical.

RULE 8.4 MISCONDUCT

a. It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to:
   1. violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
2. be convicted of a felony;
3. be convicted of a misdemeanor involving moral turpitude where the underlying conduct relates to the lawyer's fitness to practice law;
4. engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation;
5. fail to pay any final judgment or rule absolute rendered against such lawyer for money collected by him or her as a lawyer within ten days after the time appointed in the order or judgment;
6. 
   i. state an ability to influence improperly a government agency or official by means that violate the Georgia Rules of Professional Conduct or other law;
   ii. state an ability to achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
   iii. achieve results by means that violate the Georgia Rules of Professional Conduct or other law;
7. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
8. commit a criminal act that relates to the lawyer's fitness to practice law or reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, where the lawyer has admitted in judicio, the commission of such act.

b.
1. For purposes of this Rule, “Conviction” shall have the meaning set forth in Rule 1.0(e).
2. The record of a conviction or disposition in any jurisdiction based upon a guilty plea, a plea of nolo contendere, a verdict of guilty or a verdict of guilty but mentally ill, or upon the imposition of first offender probation shall be conclusive evidence of such conviction or disposition and shall be admissible in proceedings under these disciplinary rules.

c. This Rule shall not be construed to cause any infringement of the existing inherent right of Georgia Superior Courts to suspend and disbar lawyers from practice based upon a conviction of a crime as specified in paragraphs (a) (1), (a) (2) and (a) (3) above.
d. Rule 8.4 (a) (1) does not apply to any of the Georgia Rules of Professional Conduct for which there is no disciplinary penalty.
The maximum penalty for a violation of Rule 8.4 (a) (1) is the maximum penalty for the specific Rule violated. The maximum penalty for a violation of Rule 8.4 (a) (2) through (c) is disbarment.

Comment

[1] The prohibitions of this Rule as well as the prohibitions of Bar Rule 4-102 prevents a lawyer from attempting to violate the Georgia Rules of Professional Conduct or from knowingly aiding or abetting, or providing direct or indirect assistance or inducement to another person who violates or attempts to violate a rule of professional conduct. A lawyer may not avoid a violation of the rules by instructing a nonlawyer, who is not subject to the rules, to act where the lawyer can not.

[2] This Rule, as its predecessor, is drawn in terms of acts involving "moral turpitude" with, however, a recognition that some such offenses concern matters of personal morality and have no specific connection to fitness for the practice of law. Here the concern is limited to those matters which fall under both the rubric of "moral turpitude" and involve underlying conduct relating to the fitness of the lawyer to practice law.

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


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

[6] Persons holding public office assume responsibilities going beyond those of other citizens. A
lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.
The same is true of abuse of positions of private trust such as trustee, executor, administrator,
guardian, agent and officer, director or manager of a corporation or other organization.
From: Mike Bagley <BagleyM@deflaw.com>
Sent: Wednesday, September 16, 2020 11:19 AM
To: David Lipscomb; gary@rgaryspencer.com
Cc: Paula Frederick
Subject: RE: Board of Governors

Thank you David. Mike

From: David Lipscomb <david@lipscomblaw.com>
Sent: Wednesday, September 16, 2020 11:18 AM
To: Mike Bagley <BagleyM@deflaw.com>; gary@rgaryspencer.com
Cc: Paula Frederick <PaulaF@gabar.org>
Subject: FW: Board of Governors

All,

Please see the note below and consider putting this issue on the 10/22 committee meeting agenda for discussion.

http://bedardlawgroup.com/attorneys/

David S. Lipscomb
175 Langley Drive
Suite C-1
Lawrenceville, GA 30046
(770) 995-2515 T
(770) 995-2502 F
David@lipscomblaw.com

From: John Bedard
Sent: Tuesday, September 15, 2020 2:46 PM
To: David Lipscomb <david@lipscomblaw.com>
Subject: Board of Governors

David,
My name is John Bedard and I am an attorney located in Duluth, GA. I recently sent a question to the State Bar Ethics email and had a very productive exchange about the
ethics rules surrounding advertising. The ethics adviser encouraged me to reach out to my representative on the Board of Governors because of an issue we identified which is not addressed in the ethics rules. I’m not sure if you are my representative. If you are not, I would be grateful if you would tell me how I go about learning who my representative is.

The issue we identified is that Rule 7.2 addresses advertising rules for attorneys, but does not address 21st century advertising methods. I’d like to purchase some banner ad space on a smartphone app, which when clicked, links back to my firm’s web site. Including all the information Rule 7.2 requires in a tiny smartphone app banner advertisement is not really practical. My question to the ethics line was whether the link to my web site, which does contain all the required information required by Rule 7.2 would qualify my banner ad as complying with the rule. The answer is not clear.

I suspect the Rules addressing advertising by attorneys are 20+ years old. They are in need of modernization. I would love to assist in this process.

Thank you for listening. Stay well.

John H. Bedard, Jr.
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REPORT

LAWYER ADVERTISING RULES FOR THE 21st CENTURY

I. Introduction

The American Bar Association is the leader in promulgating rules for regulating the professional conduct of lawyers. For decades, American jurisdictions have adopted provisions consistent with the Model Rules of Professional Conduct, relying on the ABA’s expertise, knowledge, and guidance. In lawyer advertising, however, a dizzying number of state variations exist. This breathtaking variety makes compliance by lawyers who seek to represent clients in multiple jurisdictions unnecessarily complex, and burdens bar regulators with enforcing prohibitions on practices that are not truly harmful to the public.¹ This patchwork of advertising rules runs counter to three trends that call for simplicity and uniformity in the regulation of lawyer advertising.

First, lawyers in the 21st century increasingly practice across state and international borders. Clients often need services in multiple jurisdictions. Competition from inside and outside the profession in these expanded markets is fierce. The current web of complex, contradictory, and detailed advertising rules impedes lawyers’ efforts to expand their practices and thwart clients’ interests in securing the services they need. The proposed rules will free lawyers and clients from these constraints without compromising client protection.

Second, the use of social media and the Internet—including blogging, instant messaging, and more—is ubiquitous now.² Advancing technologies can make lawyer advertising easy, inexpensive, and effective for connecting lawyers and clients. Lawyers can use innovative methods to inform the public about the availability of legal services. Clients can use the new technologies to find lawyers. The proposed amendments will facilitate these connections between lawyers and clients, without compromising protection of the public.

² See Association of Professional Responsibility Lawyers 2015 Report of the Regulation of Lawyer Advertising Committee (2015) [hereinafter APRL 2015 Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf at 18-19 ("According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet: 52% of online adults now use two or more social media sites; 71% are on Facebook; 70% engage in daily use; 56% of all online adults 65 and older use Facebook; 23% use Twitter; 26% use Instagram; 49% engage in daily use; 53% of online young adults (18-29) use Instagram; and 28% use LinkedIn.").
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Finally, trends in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about legal services may be unlawful. The Supreme Court announced almost forty years ago that lawyer advertising is commercial speech protected by the First Amendment. Advertising that is false, misleading and deceptive may be restricted, but many other limitations have been struck down.³

Antitrust law may also be a concern. For nearly 20 years, the Federal Trade Commission (FTC) has actively opposed lawyer regulation where the FTC believed it would, for example, restrict consumer access to factually accurate information regarding the availability of lawyer services. The FTC has reminded regulators in Alabama, Arizona, Florida, Indiana, Louisiana, New Jersey, New Mexico, New York, Ohio, Tennessee, and Texas that overly broad advertising restrictions may reduce competition, violate federal antitrust laws, and impermissibly restrict truthful information about legal services.⁴

The Standing Committee on Ethics and Professional Responsibility (SCEPR) is proposing amendments to ABA Model Rules 7.1 – 7.5 that respond to these trends. It is hoped the U.S. jurisdictions will follow the ABA’s lead to eliminate compliance confusion and promote consistency in lawyer advertising rules. As amended, the rules will provide lawyers and regulators nationwide with models that continue to protect clients from false and misleading advertising, but free lawyers to use expanding and innovative technologies to communicate the availability of legal services and enable bar regulators to focus on truly harmful conduct. The amended rules will also increase consumer access to accurate information about the availability of legal services and, thereby, expand access to legal services.

II. Brief Summary of the Changes

The principal amendments:

³ For developments in First Amendment law on lawyer advertising, see APRL June 2015 Report, supra note 2, at 7-18.
⁴ The recent decision in North Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015) may be a warning. The Court found that the Board of Dental Examiners exclusion of non-dentists from providing teeth whitening services was anti-competitive and an unfair method of competition in violation of the Federal Trade Commission Act. The Court determined that a controlling number of the board members were “active market participants” (i.e., dentists), and there was no state entity supervision of the decisions of the non-sovereign board. Many lawyer regulatory entities are monitoring the application of this precedent as the same analysis might be applicable to lawyers. See also, ABA Center for Professional Responsibility, FTC Letters Regarding Lawyer Advertising (2015), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/FTC_lawyerAd.html.
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- Combine provisions on false and misleading communications into Rule 7.1 and its Comments.
- Consolidate specific provisions on advertising into Rule 7.2, including requirements for use of the term "certified specialist".
- Permit nominal “thank you” gifts under certain conditions as an exception to the general prohibition against paying for recommendations.
- Define solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter."
- Prohibit live, person-to-person solicitation for pecuniary gain with certain exceptions.
- Eliminate the labeling requirement for targeted mailings but continue to prohibit targeted mailings that are misleading, involve coercion, duress or harassment, or that involve a target of the solicitation who has made known to the lawyer a desire not to be solicited.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 remains unchanged; however, additional guidance is inserted in Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required. New Comment [3] provides that communications that contain information about a lawyer’s fee must also include information about the client’s responsibility for costs to avoid being labeled as a misleading communication.

In Comment [4], SCEPR recommends replacing “advertising” with “communication” to make the Comment consistent with the title and scope of the Rule. SCEPR expands the guidance in Comment [4] by explaining that an “unsubstantiated claim” may also be misleading. SCEPR also recommends in Comment [5] that lawyers review Rule 8.4(c) for additional guidance.

Comments [6] through [9] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. SCEPR has concluded that Rule 7.1, with the guidance of new Comments [6] through [9], better addresses the issues.

B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules
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Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

SCEPR recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term “advertising” with “communication” and replacing the identification of specific methods of communication with a general statement that any media may be used.

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving “anything of value” to someone for recommending a lawyer. New subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words “compensate” and “promise” emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not “compensation.”

SCEPR’s amendments to Rule 7.2(b) allow lawyers to give something “of value” to employees or lawyers in the same firm. As to lawyers, this new language in Rule 7.2(b) simply reflects the common and legitimate practice of rewarding lawyers in the same firm for generating business. This is not a change; it is a clarification of existing rules. As to employees, SCEPR has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called “runners,” which are also prohibited by other rules, e.g. Rule 8.4(a).

SCEPR recommends deleting the second sentence Rule 7.2(b)(2) because it is redundant. Comment [6] has the same language.

Specialization: Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and Comments. SCEPR acknowledges suggestions offered by the Standing Committee on Specialization, which shaped revisions to Rule 7.4. Based on these and other recommendations, the prohibition against claiming certification as a specialist is moved to new subdivision (c) of Rule 7.2 as a specific requirement. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase “based on the lawyer’s experience, specialized training or education.”
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Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. "employees, agents and vendors who are engaged to provide marketing or client development services."

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] ("Legal services plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules.") (Emphasis added.).

C. Rule 7.3: Solicitation of Clients

The black letter of the current Rules does not define "solicitation;" the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia's definition. A solicitation is:
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...a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication such as Skype or FaceTime or other face-to-face communications. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include “experienced users of the type of legal services involved for business matters.” Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely to occur when the solicitation is directed toward experienced users of the legal services in a business matter.

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.

After much discussion, SCEPR is recommending deletion of the requirement that targeted written solicitations be marked as “advertising material.” Agreeing with the recommendation of the Standing Committee on Professionalism and the Standing
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Committee on Professional Discipline’s suggestion to review both Oregon’s rules and Washington State’s proposed rules, which do not require such labeling, SCEPR has concluded that the requirement is no longer necessary to protect the public. Consumers have become accustomed to receiving advertising material via many methods of paper and electronic delivery. Advertising materials are unlikely to mislead consumers due to the nature of the communications. SCEPR was presented with no evidence that consumers are harmed by receiving unmarked mail solicitations from lawyers, even if the solicitations are opened by consumers. If the solicitation itself or its contents are misleading, that harm can and will be addressed by Rule 7.1’s prohibition against false and misleading advertising.

The statement that the rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (d) of Rule 7.3.

Amendments were made to Rule 7.3(e) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to wide range of groups. They do not engage in solicitation as defined by the Rules.

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.

IV. SCEPR’s Process and Timetable

The amendments were developed during two years of intensive study by SCEPR, after SCEPR received a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016. Throughout, SCEPR’s process has been transparent, open, and welcoming of comments, suggestions, revisions, and discussion from all quarters of the ABA and the profession. SCEPR’s work included the formation of a broad-based working group, posting drafts for comment on the website of the Center for Professional Responsibility, holding public forums at the Midyear Meetings in February 2017 and February 2018, conducting a webinar in March 2018, and engaging in extensive outreach seeking participation and feedback from ABA and state entities and individuals.

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6 APRL’s April 26, 2016 Supplemental Report can be accessed here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/apri_april_26_2016%20report.authcheckdam.pdf;

Written comments were received through the CPR website. SCEPR studied them all. Those comments are available here:
The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

A. Development of Proposals by the Association of Professional Responsibility Lawyers (APRL) – 2013 - 2016

In 2013, APRL created a Regulation of Lawyer Advertising Committee to analyze and study lawyer advertising rules. That committee studied the ABA Model Rules and various state approaches to regulating lawyer advertising and made recommendations aimed at bringing rationality and uniformity to the regulation of lawyer advertising and disciplinary enforcement. APRL’s committee consisted of former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyer-experts in the field of professional responsibility and legal ethics. Liaisons to the committee from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel (“NOBC”) provided valuable advice and comments.

The APRL committee obtained, with NOBC’s assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules. That committee received survey responses from 34 of 51 U.S. jurisdictions.

APRL’s 2014 survey of U.S. lawyer regulatory authorities showed:

- Complaints about lawyer advertising are rare;
- People who complain about lawyer advertising are predominantly other lawyers and not consumers;
- Most complaints are handled informally, even where there is a provable advertising rule violation;
- Few states engage in active monitoring of lawyer advertisements; and
- Many cases in which discipline has been imposed involve conduct that would constitute a violation of ABA Model Rule 8.4(c).

APRL issued reports in June 2015 and April 20167 proposing amendments to Rules 7.1 through 7.5 to streamline the regulations while maintaining the enforceable standard of prohibiting false and misleading communications.

In September 2016 APRL requested that SCEPR consider its proposals for amendments to the Model Rules.

B. ABA Public Forum – February 2017

https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.

7 Links to both APRL reports are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75.html.
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On February 3, 2017 SCEPR hosted a public forum at the ABA 2017 Midyear Meeting to receive comments about the APRL proposals. More than a dozen speakers testified, and written comments were collected from almost 20 groups and individuals.8

C. Working Group Meetings and Reports – 2017

In January 2017, SCEPR’s then chair Myles Lynk appointed a working group to review the APRL proposals. The working group, chaired by SCEPR member Wendy Wen Yun Chang, included representatives from Center for Professional Responsibility (“CPR”) committees: Client Protection, Ethics and Professional Responsibility, Professional Discipline, Professionalism, and Specialization. Liaisons from the National Conference of Bar Presidents, the ABA Solo, Small Firm and General Practice Division, NOBC, and APRL were also appointed.

Chang provided SCEPR with two memoranda summarizing the various suggestions received for each advertising rule and, where applicable, identified recommendations from the working group.

D. SCEPR December 2017 Draft

After reviewing the Chang memoranda and other materials SCEPR drafted proposed amendments to Model Rules 7.1 through 7.5, and Model Rule 1.0 (terminology), which were presented to all ABA CPR Committees at the October 2017 Leadership Conference. SCEPR then further modified the proposed changes to the advertising rules based in part on the suggestions and comments of CPR Committees. In December 2017, SCEPR released for comment and circulated to ABA entities and outside groups a new Working Draft of proposed amendments to Model Rules 7.1-7.5.

E. ABA Public Forum – February 2018

In February 2018, the SCEPR hosted another public forum at the 2018 Midyear Meeting, to receive comments about the revised proposals.9 The proposed amendments were also posted on the ABA CPR website and circulated to state bar representatives,

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8 Written submissions to SCEPR are available at: https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html.
9 Speakers included George Clark, President of APRL; Mark Tuft, Chair, APRL Subcommittee on Advertising; Charlie Garcia and Will Hornsby, ABA Division for Legal Services; Bruce Johnson; Arthur Lachman; Karen Gould, Executive Director of the Virginia State Bar; Dan Lear, AVVO; Matthew Driggs; and Elijah Marchbanks.
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NOBC, and APRL. Thirteen speakers appeared. Twenty-seven written comments were submitted. SCEPR carefully considered all comments and further modified its proposals.\textsuperscript{10}

On March 28, 2018, SCEPR presented a free webinar to introduce and explain the Committee’s revised recommendations. More than 100 people registered for the forum, and many favorable comments were received.\textsuperscript{11}

V. The Background and History of Lawyer Advertising Rules Demonstrates Why the Proposed Rules are Timely and Necessary

A. 1908 – A Key Year in the Regulation of Lawyer Advertising

Prior to the ABA’s adoption of the Canons of Professional Ethics in 1908, legal advertising was virtually unregulated. The 1908 Canons changed this landscape; the Canons contained a total ban on attorney advertising. This prohibition stemmed partially from an explosion in the size of the legal profession that resulted in aggressive attorney advertising, which was thought to diminish ethical standards and undermine the public’s perception of lawyers.\textsuperscript{12} This ban on attorney advertising remained for approximately six decades, until the Supreme Court’s decision in 1977 in \textit{Bates v. Arizona}.\textsuperscript{13}

B. Attorney Advertising in the 20\textsuperscript{th} Century

\textsuperscript{10} All Comments can be found here: \url{https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/mrpc_rule71_72_73_74_75/modelrule7_1_7_5comments.html}. The full transcript of the Public Forum can be accessed here: \url{https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/public_hearing_transcript_complete_authcheckdam.pdf}.

\textsuperscript{11} An MP3 recording of the webinar can be accessed here: \url{https://www.americanbar.org/content/dam/aba/multimedia/professional_responsibility/advertising_rules_webinar_authcheckdam.mp3}. A PowerPoint of the webinar is also available: \url{https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/webinar_advertising_powerpoint_authcheckdam.pdf}.


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Bates established that lawyer advertising is commercial speech and entitled to First Amendment protection. But the Court also said that a state could prohibit false, deceptive, or misleading ads, and that other regulation may be permissible.

Three years later, in Central Hudson, the Supreme Court explained that regulations on commercial speech must "directly advance the [legitimate] state interest involved" and "if the governmental interest could be served as well by a more limited restriction...the excessive restrictions cannot survive."

In the years that followed, the Supreme Court applied the Central Hudson test to strike down a number of regulations on attorney-advertising. The Court reviewed issues such as the failure to adhere to a state "laundry list" of permitted content in direct mail advertisements, a newspaper advertisement's use of a picture of a Dalkon Shield intrauterine device in a state that prohibited all illustrations, and an attorney's letterhead that included his board certification in violation of prohibition against referencing expertise. The court's decisions in these cases reinforced the holding in Bates: a state may not constitutionally prohibit commercial speech unless the regulation advances a substantial state interest, and no less restrictive means exists to accomplish the state's goal.

C. Solicitation

Unlike advertising, in-person solicitation is subject to heightened scrutiny. In Ohralik v. Ohio State Bar Ass'n, the Supreme Court upheld an Ohio regulation prohibiting lawyers from in-person solicitation for pecuniary gain. The Court declared: "The State—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in-person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." The Court added: "It hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." The Court concluded that a prophylactic ban is constitutional given the virtual impossibility of regulating in-person solicitation.

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15 447 U.S. at 564.
16 See APRL 2015 Report, supra note 2, at 9-18, for a discussion of these cases.
22 Id. at 464-65.
23 Id. at 465-467.
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Ohradik’s blanket prohibition on in-person solicitation does not extend to targeted letters. The U.S. Supreme Court held in Shapero v. Kentucky Bar Ass’n,24 that a state may not prohibit a lawyer from sending truthful solicitation letters to persons identified as having legal problems. The Court concluded that targeted letters were comparable to print advertising, which can easily be ignored or discarded.

D. Commercial Speech in the Digital Age

The Bates-era cases preceded the advent of the Internet and social media, which have revolutionized attorney advertising and client solicitation. Attorneys are posting, blogging, and Tweeting at minimal cost. Their presence on websites, Facebook, LinkedIn, Twitter, and blogs increases exponentially each year. Attorneys are reaching out to a public that has also become social media savvy.

More recent cases, while relying on the commercial speech doctrine, exemplify digital age facts. A 2010 case involves a law firm’s challenge to New York’s 2006 revised advertising rules, which prohibited the use of “the irrelevant attention-getting techniques unrelated to attorney competence, such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and... the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter.”25 The U.S. Court of Appeals for the Second Circuit found New York’s regulation to be unconstitutional as a categorical ban on commercial speech. The speech was not likely to be misleading.26 The court noted that prohibiting potentially misleading commercial

24 486 U.S. 466 (1988). But see, Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995). The Supreme Court has upheld (in a 5 to 4 decision) a Florida Bar rule banning targeted direct mail solicitation to personal injury accident victims or their families for 30 days. The court found that the timing and intrusive nature of the targeted letters was an invasion of privacy; and, when coupled with the negative public perception of the legal profession, the Florida rule imposing a 30 day “cooling off” period materially advanced a significant government interest. This decision, however, does not support a prophylactic ban on targeted letters, only a restriction as to their timing. But see, Ficker v. Curran, 119 F.3d 1150 (4th Cir. 1997), in which Maryland’s 30-day ban on direct mail in traffic and criminal defense cases was found unconstitutional, distinguishing Went for It, because criminal and traffic defendants need legal representation, time is of the essence, privacy concerns are different, and criminal defendants enjoy a 6th amendment right to counsel.

25 Alexander v. Cahill, 598 F.3d 79, 84-86 (2d Cir. 2010). The court commented, “Moreover, the sorts of gimmicks that this rule appears designed to reach—such as Alexander & Catalano’s wisps of smoke, blue electrical currents, and special effects—do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client’s house so quickly that they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe—purely as a matter of ‘common sense’—that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics. Indeed, some of these gimmicks, while seemingly irrelevant, may actually serve ‘important communicative functions: [they] attract [ ] the attention of the audience to the advertiser’s message, and [they] may also serve to impart information directly.’” (Citations omitted.).

26 Alexander v. Cahill, 598 F.3d 79, at 86.
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speech might fail the *Central Hudson* test. The court concluded that even assuming that New York could justify its regulations under the first three prongs of the *Central Hudson* test, an absolute prohibition generally fails the prong requiring that the regulation be narrowly fashioned.

In 2011, the Fifth Circuit reached a similar conclusion, ruling that many of Louisiana’s 2009 revised attorney advertising regulations contained absolute prohibitions on commercial speech, rendering the regulations unconstitutional due to a failure to comply with the least restrictive means test in *Central Hudson*. The Fifth Circuit applied the *Central Hudson* test to attorney advertising regulations. Although paying homage to a state’s substantial interest in ensuring the accuracy of information in the commercial marketplace and the ethical conduct of its licensed professionals, the Fifth Circuit relied on the Supreme Court’s decision in *Zauderer* to conclude that the dignity of attorney advertising does not fit within the substantial interest criteria.

The mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

Florida also revised its attorney advertising rules in light of the digital age evolution of attorney advertising and the commercial speech doctrine. Nonetheless, some of Florida’s rules and related guidelines have failed constitutional challenges. For example, in *Rubenstein v. Florida Bar* the Eleventh Circuit declared Florida Bar’s prohibition on advertising of past results to be unconstitutional because the guidelines prohibited any such advertising on indoor and outdoor displays, television, or radio. The state’s underlying regulatory premise was that these “specific media . . . present too high a risk of being misleading.” This total ban on commercial speech again did not survive constitutional scrutiny.

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27 *Id.*
28 *Id.* Note that the court did uphold the moratorium provisions that prevent lawyers from contacting accident victims for a certain period of time.
29 *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 632 F.3d 212, 229 (5th Cir. 2011). Note that the court did uphold the regulations that prohibited promising results, that prohibited use of monikers or trade names that implied a promise of success, and that required disclaimers on advertisements that portrayed scenes that were not actual or portrayed clients who were not actual clients. The court distinguished its holding from New York’s in *Cahill* by indicating that the Bar had produced evidence in the form of survey results that supported the requirement that the regulation materially advanced the government's interest in protecting the public.
31 *Id.* at 220.
34 *Id.* at 1312.
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Finally, in Searcy v. Florida Bar, a federal court enjoined The Florida Bar from enforcing its rule requiring an attorney to be board certified before advertising expertise in an area of law. The Searcy law firm challenged the regulation as a blanket prohibition on commercial speech, arguing board certification is not available in all areas of practice, including the firm’s primary mass torts area of expertise.

VII. Conclusion

Trends in the profession, the current needs of clients, new technology, increased competition, and the history and law of lawyer advertising all demonstrate that the current patchwork of complex and burdensome lawyer advertising rules is outdated for the 21st Century. SCEPR’s proposed amendments improve Model Rules 7.1 through 7.5 by responding to these developments. Once amended, the Rules will better serve the bar and the public by expanding opportunities for lawyers to use modern technology to advertise their services, increasing the public’s access to accurate information about the availability of legal services, continue the prohibition against the use of false and misleading communications, and protect the public by focusing the resources of regulators on truly harmful conduct. The House of Delegates should proudly adopt these amendments.

Respectfully submitted,

Barbara S. Gillers, Chair
Chair, Standing Committee on Ethics and Professional Responsibility
August, 2018

ABA 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

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

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.

[3] A communication 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 claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim 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.
It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

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

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

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

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
ABA Rule 7.2: Communications Concerning a Lawyer’s Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer’s services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:

1. pay the reasonable costs of advertisements or communications permitted by this Rule;
2. pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
3. pay for a law practice in accordance with Rule 1.17;
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; and
5. give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.

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

1. the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
2. the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer’s or law firm’s 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.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay
others for recommending the lawyer’s services. A communication contains a
recommendation if it endorses or vouches for a lawyer’s credentials, abilities,
competence, character, or other professional qualities. Directory listings and group
advertisements that list lawyers by practice area, without more, do not constitute
impermissible “recommendations.”

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications
permitted by this Rule, including the costs of print directory listings, on-line directory
listings, newspaper ads, television and radio airtime, domain-name registrations,
sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may
compensate employees, agents and vendors who are engaged to provide marketing or
client development services, such as publicists, public-relations personnel, business-
development staff, television and radio station employees or spokespersons and website
designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of
appreciation to a person for recommending the lawyer’s services or referring a
prospective client. The gift may not be more than a token item as might be given for
holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in
consideration of any promise, agreement or understanding that such a gift would be
forthcoming or that referrals would be made or encouraged in the future.

[5] 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 Comment [2] (definition of “recommendation”). See also Rule 5.3 (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).

[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 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. Qualified referral services are 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. 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.

[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. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.
[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer’s professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer’s communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a
state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer’s recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm’s services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.
ABA Rule 7.3 Solicitation of Clients

Information About Legal Services

(a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the 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.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, 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 live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in particular matter covered by the plan.

Comment

Information About Legal Services
Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or the law firm’s pecuniary gain. A lawyer’s communication is not 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 electronic searches.

“Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person’s judgment.

The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and
occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional 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 overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not 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.
Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll 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 (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must 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 (c).

ABA Rules 7.4 and 7.5--Deleted
PART SEVEN

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1. COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

(a) A lawyer may advertise through all forms of public media and through written communication not involving personal contact so long as the communication is not false, fraudulent, deceptive or misleading. By way of illustration, but not limitation, a communication is false, fraudulent, deceptive or misleading if it:

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

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Georgia Rules of Professional Conduct or other law;

(3) compares the lawyer’s services with other lawyers’ services unless the comparison can be factually substantiated;

(4) fails to include the name of at least one lawyer responsible for its content; or

(5) contains any information regarding contingent fees, and fails to conspicuously present the following disclaimer:

“Contingent attorneys’ fees refers only to those fees charged by attorneys for their legal services. Such fees are not permitted in all types of cases. Court costs and other additional expenses of legal action usually must be paid by the client.”
contains the language “no fee unless you win or collect” or any similar phrase and fails to conspicuously present the following disclaimer:

“No fee unless you win or collect” [or insert the similar language used in the communication] refers only to fees charged by the attorney. Court costs and other additional expenses of legal action usually must be paid by the client. Contingent fees are not permitted in all types of cases.

A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication.

A lawyer retains ultimate responsibility to ensure that all communications concerning the lawyer or the lawyer’s services comply with the Georgia Rules of Professional Conduct.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] This rule governs the content of all communications about a lawyer’s services, including the various types of advertising permitted by Rules 7.3 through 7.5. Whatever means are used to make known a lawyer’s services, statements about them should be truthful.

[2] The prohibition in sub-paragraph (a)(2) of this Rule 7.1: Communications Concerning a Lawyer’s Services of statements that may create “unjustified expectations” would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.
**Affirmative Disclosure**

[3] In general, the intrusion on the First Amendment right of commercial speech resulting from rationally-based affirmative disclosure requirements is minimal, and is therefore a preferable form of regulation to absolute bans or other similar restrictions. For example, there is no significant interest in failing to include the name of at least one accountable attorney in all communications promoting the services of a lawyer or law firm as required by sub-paragraph (a)(5) of *Rule 7.1: Communications Concerning a Lawyer’s Services*. Nor is there any substantial burden imposed as a result of the affirmative disclaimer requirement of sub-paragraph (a)(6) upon a lawyer who wishes to make a claim in the nature of “no fee unless you win.” Indeed, the United States Supreme Court has specifically recognized that affirmative disclosure of a client’s liability for costs and expenses of litigation may be required to prevent consumer confusion over the technical distinction between the meaning and effect of the use of such terms as “fees” and “costs” in an advertisement.

[4] Certain promotional communications of a lawyer may, as a result of content or circumstance, tend to mislead a consumer to mistakenly believe that the communication is something other than a form of promotional communication for which the lawyer has paid. Examples of such a communication might include advertisements for seminars on legal topics directed to the lay public when such seminars are sponsored by the lawyer, or a newsletter or newspaper column which appears to inform or to educate about the law. Paragraph (b) of this *Rule 7.1: Communications Concerning a Lawyer’s Services* would require affirmative disclosure that a lawyer has given value in order to generate these types of public communications if such is in fact the case.

**Accountability**

[5] Paragraph (c) makes explicit an advertising attorney’s ultimate responsibility for all the lawyer’s promotional communications and would suggest that review by the lawyer prior to dissemination is advisable if any doubts exist concerning conformity of the end product with these Rules. Although prior review by disciplinary authorities is not required by these Rules,
lawyers are certainly encouraged to contact disciplinary authorities prior to authorizing a promotional communication if there are any doubts concerning either an interpretation of these Rules or their application to the communication.

**RULE 7.2. ADVERTISING**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through:

(1) public media, such as a telephone directory, legal directory, newspaper or other periodical;

(2) outdoor advertising;

(3) radio or television;

(4) written, electronic or recorded communication.

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

(c) Prominent disclosures. Any advertisement for legal services directed to potential clients in Georgia, or intended to solicit employment for delivery of any legal services in Georgia, must include prominent disclosures, clearly legible and capable of being read by the average person, if written, and clearly intelligible by an average person, if spoken aloud, of the following:

(1) Disclosure of identity and physical location of attorney. Any advertisement shall include the name, physical location and telephone number of each lawyer or law firm who paid for the advertisement and who takes full personal responsibility for the advertisement. In disclosing the physical location, the responsible
lawyer shall state the full address of the location of the principal bona fide office of each lawyer who is prominently identified pursuant to this paragraph. For the purposes of this Rule, a bona fide office is defined as a physical location maintained by the lawyer or law firm from which the lawyer or law firm furnishes legal services on a regular and continuing basis. In the absence of a bona fide physical office, the lawyer shall prominently disclose the full address listed with the State Bar of Georgia or other Bar to which the lawyer is admitted. A lawyer who uses a referral service shall ensure that the service discloses the location of the lawyer’s bona fide office, or the registered bar address, when a referral is made.

(2) Disclosure of referral practice. If the lawyer or law firm will refer the majority of callers to other attorneys, that fact must be disclosed and the lawyer or law firm must comply with the provisions of Rule 7.3 (c) regarding referral services.

(3) Disclosure of spokespersons and portrayals. Any advertisement that includes a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, portrayal of a client by a non-client, or any paid testimonial or endorsement, shall include prominent disclosure of the use of a non-attorney spokesperson, portrayal of a lawyer by a non-lawyer, or of a client by a non-client.

(4) Disclosures regarding fees. A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be available to the client at the time of retainer for any such service.

(5) Appearance of legal notices or pleadings. Any advertisement that includes any representation that resembles a legal pleading, notice, contract or other legal document shall include prominent disclosure that the document is an advertisement rather than a legal document.

The maximum penalty for a violation of this Rule is a public reprimand.
Comment

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

[2] This Rule permits public dissemination of information concerning a lawyer’s name or firm name, address 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 advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television 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.

[4] Neither this Rule nor Rule 7.3: Direct Contact with Prospective Clients prohibits communications authorized by law, such as notice to members of a class in class action litigation.
[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule.

**RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer’s firm, lawyer’s partner, associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

(1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;

(2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

(3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or

(4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked “Advertisement” on the face of the
envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer’s employment by a client, or as a reward for having made a recommendation resulting in the lawyer’s employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

(1) A lawyer may pay the usual and reasonable fees or dues charged by a lawyer referral service, if the service:

   (i) does not engage in conduct that would violate these Rules if engaged in by a lawyer;

   (ii) provides an explanation to the prospective client regarding how the lawyers are selected by the service to participate in the service; and

   (iii) discloses to the prospective client how many lawyers are participating in the service and that those lawyers have paid the service a fee to participate in the service.

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

   (i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies that can provide the assistance the clients need. Such organization shall file annually with
the State Disciplinary Board a report showing its rules and regulations, its
subscription charges, agreements with counsel, the number of lawyers
participating and the names and addresses of the lawyers participating in the
service;

(ii) the sponsoring bar association for the lawyer referral service must
be open to all lawyers licensed and eligible to practice in this state who maintain
an office within the geographical area served, and who meet reasonable
objectively determinable experience requirements established by the bar
association;

(iii) the combined fees charged by a lawyer and the lawyer referral
service to a client referred by such service shall not exceed the total charges
which the client would have paid had no service been involved; and

(iv) a lawyer who is a member of the qualified lawyer referral service
must maintain in force a policy of errors and omissions insurance in an amount no
less than $100,000 per occurrence and $300,000 in the aggregate.

(3) A lawyer may pay the usual and reasonable fees to a qualified legal
services plan or insurer providing legal services insurance as authorized by law to
promote the use of the lawyer’s services, the lawyer’s partner or associates services so
long as the communications of the organization are not false, fraudulent, deceptive or
misleading;

(4) A lawyer may pay for a law practice in accordance with Rule 1.17. Sale of
Law Practice.

(d) A lawyer shall not solicit professional employment as a private practitioner for the
lawyer, a partner or associate through direct personal contact or through live telephone contact,
with a nonlawyer who has not sought advice regarding employment of a lawyer.
(e) A lawyer shall not accept employment when the lawyer knows or reasonably should know that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization that would violate these Rules if engaged in by a lawyer.

The maximum penalty for a violation of this Rule is disbarment.

Comment

Direct Personal Contact

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer’s own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

Direct Written Solicitation

[3] Subject to the requirements of Rule 7.1 and paragraphs (b) and (c) of this Rule, promotional communication by a lawyer through direct written contact is generally permissible. The public’s need to receive information concerning their legal rights and the availability of legal
services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public’s intelligent selection of counsel, including the restrictions of paragraphs (a) (3) and (a) (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative “advertisement” disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer’s services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal services provided under its auspices.

[8] A lawyer may not indirectly engage in promotional activities through a lay public relations or marketing firm if such activities would be prohibited by these Rules if engaged in directly by the lawyer.

GRPC Part Seven
DRPC 10/23/20 Meeting
RULE 7.4. COMMUNICATION OF FIELDS OF PRACTICE

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

[2] A lawyer may truthfully communicate the fact that the lawyer is a specialist or is certified in a particular field of law by experience or as a result of having been certified as a “specialist” by successfully completing a particular program of legal specialization. An example of a proper use of the term would be “Certified as a Civil Trial Specialist by XYZ Institute” provided such was in fact the case, such statement would not be false or misleading and provided further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide professional entity.

RULE 7.5. FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.

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

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

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

(e) A trade name may be used by a lawyer in private practice if:

(1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and

(2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.

The maximum penalty for a violation of this Rule is a public reprimand.

Comment

[1] Firm names and letterheads are subject to the general requirement of all advertising that the communication must not be false, fraudulent, deceptive or misleading. Therefore, lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests partnership in the practice of law.
[2] Trade names may be used so long as the name includes the name of at least one or more of the lawyers actively practicing with the firm. Firm names consisting entirely of the names of deceased or retired partners have traditionally been permitted and have proven a useful means of identification. Sub-paragraph (e) (1) permits their continued use as an exception to the requirement that a firm name include the name of at least one active member.
GRPC 1.17 Comment 6:

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6: Confidentiality of Information than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to detailed information relating to the representation, 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 any proposed change in the terms of future representation, 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.

ABA Rule 1.6(b)(7):

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
Thanks, Paula. You and the others on this email who know me know that I couldn’t agree more with the sentiments expressed below. I am in fact on an ABA Wellness Committee tasked with addressing commitment to the ABA Well-Being Pledge. It is just the placement of the comment in our rules that I want to consider further.

Lynn

Lynn—Here’s a copy of the memo I gave to the Rules Committee when they considered adding comment 7 to Rule 1.1. It appears that I pulled Comment 7 from a Virginia rule. They added the comment in response to the ABA’s renewed focus on wellness and the report that the ABA Wellness Task Force had recently issued. It seemed like a good idea because many disciplinary cases stem from a lawyer’s illness—it’s just as often something like uncontrolled diabetes as it is mental health issues. The comment was intended as a good reminder that we all need to take care of ourselves.

Thank you, Paula, I appreciate your consideration. I wish I could come to the meeting Friday, but I have a direct conflict. If this is still under discussion as a future meeting approaches, please let me know and I will do my best to attend.

Lynn
<KathyJ@gabar.org>
Subject: RE: Proposed New Comment [7] to Rule 1.1

[External Email: Use caution when clicking on links or opening attachments.]

Lynn—I don’t think there’s any problem with pulling the comment for now so that we can consider your concerns. I have copied Deputy General Counsel Bill NeSmith, who will file the Motion with the Court. He’s out today but I don’t think he has filed anything yet, so it’s a simple matter to hold this comment for further discussion.

I have asked my paralegal to pull the information that was provided to the Disciplinary Rules Committee so that I can refresh my recollection about where this proposal came from! I’ll get back to you next week but in the meantime if you would like to attend the Rules Committee meeting during Midyear (Friday at noon) feel free to do so. If there is time on the agenda I know the Committee will be happy to hear from you either Friday or at a future meeting.
--Paula

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CONNECT WITH THE BAR:  

From: Garson, Lynn [mailto:lgarson@bakerlaw.com]
Sent: Monday, January 6, 2020 2:50 PM
To: Paula Frederick <PaulaF@gabar.org>
Cc: jgh@sktbllaw.com; david@lipscomblaw.com; Javoyne Hicks (rjavoynehicks@gmail.com) (rjavoynehicks@gmail.com) <rjavoynehicks@gmail.com>
Subject: Proposed New Comment [7] to Rule 1.1

Paula, I was recently contacted by [redacted], a Bar member who speaks widely on mental health/substance use. He made me aware of proposed comment (7) to Rule 1.1 and expressed a number of concerns about potential unintended consequences of the comment. Upon review, I agree with much that [redacted] had to say. I think it’s a problem of perception - given the general culture of fear and stigma around mental illness/substance use, placement of this comment as a comment to a rule describing disbarment plays right into stigma by drawing a direct line between the two. Put the same comment with a little more context elsewhere and it could be a plus instead.

Since I was unaware of the comment until very recently, I would appreciate it if the comment could be held until we have the opportunity for further review and time to consider possibilities for alternative placement.

Thanks very much,

Lynn

Lynn Garson
Counsel
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MEMORANDUM

To: Members, Disciplinary Rules Committee

From: Paula Frederick

Date: January 3, 2019

Re: Proposed revisions to Comments, Rule 1.1(Competence)

The committee has previously considered and rejected an amendment to Rule 1.1 (Competence) that would add new ABA Comment [8] dealing with technology. A new ABA Ethics Opinion (#483) discusses the obligation of competence in technology in the context of a lawyer's duty after a cyber-breach. The relevant portion of the opinion states:

In the context of a lawyer’s post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission’s thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer’s competency in this regard may be satisfied either through the lawyer’s own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.

On another front, Virginia is currently considering amending its Rule to add a comment dealing with Wellness.

I have attached a draft of Georgia’s rule with both of these comments included for discussion. The Committee may want to discuss this issue again since it appears that the obligation of competence is expanding.
RULE 1.1 COMPETENCE

Comment 7

[7] A lawyer’s mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients and to make responsible choices in the practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law. See also Rule 1.16(a)(2).
ABA Rule 1.8: Current Clients: Specific Rules

…

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.
... Comments ...

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may give the client modest gifts Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.
[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

…
I. Introduction

The Standing Committee on Ethics and Professional Responsibility (SCEPR) and the Standing Committee on Legal Aid and Indigent Defendants (SCLAID) propose adding a narrow exception to Model Rule 1.8(e) that will increase access to justice for our most vulnerable citizens. Rule 1.8(e) forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would permit financial assistance for living expenses only to indigent clients, only in the form of gifts not loans, only when the lawyer is working pro bono without fee to the client, and only where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.

The proposed rule addresses a gap in the current rule. Currently, lawyers

- may provide financial assistance to any transactional client;
- may invest in a transactional client, subject to Rule 1.8(a);
- may offer social hospitality to any litigation or transactional client as part of business development; and
- may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.

The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as “a humanitarian exception” to Rule 1.8(e).1

Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: “There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes.”2 Another wrote: “I

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1 See, e.g., Philip G. Schrag, The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e), 28 GEO. J. LEGAL ETHICS 39, 40 (2015) (discussing the desirability of a humanitarian exception to Model Rule 1.8(e)); Model Rule 1.8(e) “is at odds with the legal profession’s goal of facilitating access to justice. [It] bars lawyers from assisting their low-income litigation clients with living expenses, such as food, shelter and medicine, though such clients may suffer or even die while waiting for a favorable litigation result.” The rule should be changed “[b]ecause of its indifference to the humanitarian or charitable impulses of lawyers and its harsh effect on indigent clients”); Cristina D. Lockwood, Adhering to Professional Obligations: Amending ABA Model Rule of Professional Conduct 1.8(e) to Allow for Humanitarian Loans to Existing Clients, 48 U.S.F. L. REV. 457 (2014). See also Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (giving an indigent client a used coat and $200 is an “act of humanitarianism”).

2 Statement of Legal Services Corporation (“LSC”) Program Executive Director in connection with a broad but anecdotal survey conducted by the National Legal Aid and Defender Association (NLADA) for the
hate that helping a client . . . is against the rules.”3 And another: “Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule.”4

Model Rule 1.8 cmt. [10] gives two reasons for the prohibition against lawyers financially assisting litigation clients. First, it prevents lawyers from having “too great a financial stake in the litigation.” Second, allowing assistance would “encourage clients to pursue lawsuits that would not otherwise be brought.”

Regarding the first reason, because the assistance permitted by the proposed rule must be in the form of a gift, not a loan, there is no interest in recoupment that could affect the lawyer’s advice. Further, the amounts will often be small compared to the sums lawyers may now advance for litigation costs, which are repayable from a client’s recovery and therefore could affect the lawyer’s judgment.

Regarding the second reason—that financial assistance will “encourage... lawsuits that might not otherwise be brought”—in the limited circumstances the amendment describes, that outcome, if it occurs, furthers ABA Policy. By enabling the most financially vulnerable clients to vindicate their rights in court within the proposed rule’s restrictions, the amendment ensures equal justice under law, a core ABA mission.5

Additional support for this conclusion is found in legislation—for example, in civil rights and anti-discrimination statutes that empower courts to award counsel fees to the prevailing plaintiff. The policy behind this legislation is to facilitate access to courts, not discourage it.6 Lawyers in turn advance the legislative purpose if they can financially help their indigent clients with living expenses while a case is pending.

Support is also found in two Supreme Court opinions recognizing the social value of court access. In another context, Justice Hugo Black wrote “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”7 Nor can there be equal justice when the ability to bring and prosecute a case—to get a trial at all—is lost because of extreme poverty.

3 SCLAID Survey, supra note 2, at 3.
4 Id. at 1.
5 See ABA MISSION STATEMENT, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited May 4, 2020). Many ABA policies support equal justice. See, e.g., ABA CONSTITUTION Art. 10, sec. 10.1 (creation of the Civil Rights and Social Justice Section and Criminal Justice Section); ABA CONSTITUTION Art. 15 (creation of the ABA Fund for Justice and Education); ABA BY-LAWS sec. 31.7 (creation of SCLAID).
Nearly thirty years later, Justice Byron White rejected the argument that restrictions on lawyer advertising were justified by the goal of not “stirring up litigation.” Justice White wrote:

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: ‘we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action’. . . . That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride.\(^8\)

The amendment SCEPR and SCLAID propose is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

**II. Support for the Proposed Rule in the Nonprofit Community**

SCEPR and SCLAID have received support from the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty lawyers in nonprofit organizations and legal services and legal aid offices, including the Legal Aid Society in NYC—an office of more than 1200 lawyers, and clinical faculty at law schools nationwide.\(^9\) Further, in a letter to the ABA Board of Governors, the Association of Pro Bono Counsel (“APBCo”), a membership organization of nearly 250 partners, counsel, and practice group managers who run pro bono practices on primarily a full-time basis at more than 100 of the country’s largest law firms wrote:

APBCo supports the effort to modify the Model Rules and permit pro bono lawyers to help their indigent clients meet basic human necessities, such as food, rent, transportation and medicine during the course of the representation. In the context of pro bono representation, none of these kinds of charitable gifts present any concerns raised by the Model Rule, which is designed to prevent lawyers from providing financial assistance to clients in order to subsidize lawsuits or administrative proceedings in a way

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\(^9\) See (i) SALT email of April 24, 2020, (ii) NLADA Memo of April 23, 2020, and (iii) emails dated April 10 and April 11, 2020 from Daniel L. Greenberg, Special Counsel for Pro Bono Initiatives at Schulte, Roth, & Zabel and former member of SCLAID, and Barbara S. Gillers, SCEPR Chair, to public interest lawyers and law school clinicians, and responses, on file with SCEPR. SALT is one of the largest associations of law professors in the United States.
that encourages clients to pursue lawsuits that might not otherwise be brought and gives lawyers a specific financial stake in the litigation. Neither pro bono lawyers nor their firms profit from public interest representation; the kinds of limited financial assistance contemplated by the proposed amendment will in no way violate the intended policy behind the Rule.10

III. Background

Model Rule of Professional Conduct 1.8(e) was adopted in 1983.11 Its prohibition against financial assistance in connection with litigation is derived from the common law prohibitions against champerty and maintenance.12 As originally defined, maintenance is “‘improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.’”13 Champerty is “a specialized form of maintenance in which the person assisting another’s litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery.”14

Payments or loans for litigation costs and expenses are allowed under the rule “because [they] are virtually indistinguishable from contingent fees and help ensure access to the courts.”15 Comment [10], which was added in 2001 on the recommendation of the Ethics 2000 Commission,16 makes clear that “court costs and litigation expenses [include] the expenses of medical examination and the costs of obtaining and presenting evidence”.17 Litigation expenses also typically include payments for experts, translators, court reporters, medical examinations connected to the merits or remedies, mailing, and photocopying.18 However, living expenses in connection with pending or contemplated litigation, e.g. for food, rent, and other basic necessities, were never permitted by the rule.

10 See Letter, April 14, 2020, APBCo to the ABA Board of Governors, on file with SCEPR.
12 See MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. [16] (2019) (paragraph (e) “has its basis in common law champerty and maintenance”); Cristina D. Lockwood, supra note 1 at 466 (“the restrictions in Rule 1.8(e) were adopted to protect the poor by incorporating rules against champerty and maintenance”); Utah State Bar, Advisory Op. 11-02 (2011) (Rule 1.8(e) is “derived from the common law prohibition of champerty and maintenance”) (cite omitted); Mich. State Bar Advisory Opinion RI-14 (1989) (Rule 1.8(e) “is the result of the common law rules against champerty and maintenance”). See also John Sahl, Helping Clients With Living Expenses; “No Good Deed Goes Unpunished”, 13 No. 2 PROF. LAW. 1 (Winter 2002) (common law doctrines of champerty and maintenance influence the ABA Rules against financial assistance to clients).
14 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.13 at 940 (1986) (cites omitted); GILLERS, supra note 13 at 630 (“[c]hamperty [is] the unlawful maintenance of a suit, where a person without an interest in it agrees to finance the suit, in whole or in part, in consideration for receiving a portion of the proceeds of the litigation . . . .”) (quoting Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997)); In re Primus, 436 U.S. 412, 424 n. 15 (1978) (champerty is “maintaining a suit in return for a financial interest in the outcome”; maintenance is “helping another prosecute a lawsuit”).
16 See GARWIN, supra note 11 at 207.
because of concerns rooted in traditional common law prohibitions on champerty and maintenance.

Modern American applications of the doctrines of champerty and maintenance are varied and in some jurisdictions are quite limited.\(^\text{19}\) Moreover, courts and commentators have recognized that these doctrines “can be used abusively—to deny unpopular litigants access to the courts to vindicate constitutional rights. They can also make it harder for persons with even mundane claims to go to court . . . .”\(^\text{20}\) Some bar committees have rejected the essential justification for the doctrines.\(^\text{21}\) The SCLAID Survey demonstrated that the prohibition on living expenses is especially harsh on indigent clients for whom even small financial burdens can pose significant barriers to initiating, participating in, and completing litigation.\(^\text{22}\) For all of these reasons, and those explained below, the prohibition on financial assistance should no longer apply in the limited circumstances and the types of representations covered by the proposed rule.

IV. Analysis

A. The Current Rule

Model Rule of Professional Conduct 1.8(e)(1) and (2) strictly limit financial assistance to clients in pending or contemplated litigation. Only court costs and litigation expenses are permitted. The Rule reads: “A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.”\(^\text{23}\)

Comment [10] explains why Rule 1.8(e) permits financial assistance for litigation expenses and court costs only: “Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.”\(^\text{24}\) The Comment continues: “[L]ending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence” is permitted “because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

\(^{19}\) Report to the President by the New York City Bar Association Working Group on Litigation Funding 5-8 (Feb. 28, 2020) (“[t]he extent to which the United States has adopted and has continued to enforce prohibitions [based on champerty and maintenance] varies by jurisdiction”) (cites omitted).

\(^{20}\) GILLERS, supra note 13 at 631 (cites omitted).

\(^{21}\) See, e.g., Utah State Bar, Advisory Op. 11-02, supra note 12 at 4 (permitting “small charitable gifts” under Utah RPC 1.8(e), which is “more permissive” than M.R. 1.8(e); observing that “[t]he original goal of not stirring up litigation is no longer a justification for [the rule]”) (cites omitted)).

\(^{22}\) See Memo from SCLAID to the SCEPR dated June 14, 2016, on file with SCEPR [hereinafter, “SCLAID Memo”].

\(^{23}\) Model Rules of Prof’l Conduct R. 1.8(e) (2019).

Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.\textsuperscript{25}

\textbf{B. The Proposed Rule}

The proposed rule adds a new exception, 1.8(e)(3). The new exception permits lawyers representing poor people pro bono or through certain organizations or programs to contribute to the living expenses of their indigent clients. As further explained below, the contributions must be gifts not loans for basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the litigation or administrative proceedings or from withstanding the delays that put substantial pressure on the client to settle. The assistance is permitted even if the representation is eligible for an award of attorney’s fees under a fee-shifting statute, for example, the Civil Rights Attorney’s Fees Award Act.\textsuperscript{26} The lawyer may not promise the assistance in advance, seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client, or advertise its availability. The new provision reads:

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. The legal services must be delivered at no fee to the indigent client and the lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide financial assistance to clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

\textsuperscript{25} Id.
\textsuperscript{26} 42 U.S.C.A. § 1988 ("[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs [with exceptions]").
SCEPR and SCLAID propose new Comments [11], [12], and [13] to explain key elements of the new exception.

Comment [11]


[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, a lawyer representing an indigent client through a nonprofit legal services or public interest organization and a lawyer representing an indigent client through a law school clinical or pro bono program may give the client modest gifts if financial hardship would otherwise prevent the client from instituting or maintaining pending or contemplated litigation or administrative proceedings or from withstanding delays that would put substantial pressure on the client to settle. Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4

Living Expenses

Comment [11] gives examples of permitted assistance: “Gifts permitted under paragraph (e)(3) include modest contributions as are reasonably necessary for food, rent, transportation, medicine and similar basic necessities of life.” This would include reasonable contributions for meals, clothing, transportation, housing and similar basic necessities. Examples from SCLAID include small amounts for moving to avoid eviction, bus fare, meals, clothes to go to court, and groceries, including cleaning supplies and toilet paper.27

Amounts

The Rule and the Comments permit contributions of modest and reasonable amounts. This follows seven of the eleven jurisdictions that have already adopted a humanitarian exception.28 The flexibility gives lawyers room to decide amounts based on

27 See SCLAID Survey, supra note 2.
28 See D.C. Rule of Prof’l Conduct 1.8(d) (a lawyer may “pay or otherwise provide . . . financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings”) (emphasis added); Minn. Rule of Prof’l Conduct 1.8(e)(3) (a lawyer may guarantee a loan “reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship”; prohibits promises of assistance prior to retention and requires that client remain liable for repayment without regard to the
the cost of living in their jurisdictions and other factors. Rent assistance and food costs in New York City, for example, would differ from that in a rural area. Lawyers routinely make judgments about reasonableness. See, e.g., Model Rule 1.4(a)(2) (lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”); Model Rule 1.4(a)(3) (lawyers must “keep the client reasonably informed about the status of the matter”); Model Rule 1.4(a)(4) (lawyers must “promptly comply with reasonable requests for information”); Model Rule 1.5 (lawyers must “not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses”); and Model Rule 1.6 (limiting the disclosure of confidential information “to the extent the lawyer reasonably believes necessary”); see also, Model Rule 1.0(h), (i) and (j) (defining “reasonable,” “reasonably,” “reasonable belief” and “reasonably should know”).

No Definition of “Indigent”

The new Rule and Comments do not add a definition of “indigent.” None is needed. The word “indigent” has been in Rule 1.8(e) since 1983. It was also in the predecessor rule, DR 5-103(B). SCEPR is aware of no problems in applying this term. Further, the Model Rules already address obligations toward the indigent, the poor, and “persons of limited means.” Additionally, SCEPR opinions address lawyers’ obligations toward the “indigent.” Webster’s Dictionary defines (1) “indigent” as “suffering from indigence” and “impoverished” and (2) “indigence” as (3) “a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking” and (4) “impoverished.”
Synonyms include “needy, necessitous, and impoverished.” Finally, lawyers covered by the exception generally serve only the poor and the most economically disadvantaged.

Comment [12]

Comment [12] contains safeguards against conflicts and abuse by prohibiting lawyers from (i) using assistance to lure clients, (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client, and (iii) advertising the availability of assistance. It provides:

[12] The paragraph (e)(3) exception is narrow. A gift is allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

New Comment [13]

New Comment [13] underscores that contributions may be made even if the representation is eligible for fees under a fee-shifting statute but not in connection with contingent-fee personal injury cases or other specified matters. It reads:

[13] Financial assistance may be provided pursuant to paragraph (e)(3) even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

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C. Proposed 1.8(e)(3) Does Not Present the Ethical Risks that 1.8(e)(1) and (2) Address

Policy Against “Encouraging Litigation”

As noted earlier, Model Rule 1.8(e) prohibits living expenses “because [permitting them] would encourage clients to pursue lawsuits that might not otherwise be brought. . . .” 33

The proposed amendment could result in a poor client being able to bring and maintain a lawsuit that would not otherwise be brought or that would be settled quickly if brought because of the client’s adverse financial circumstances. SCEPR and SCLAID deem this a worthy objective. It reflects the view that legal ethics rules should not impede a poor client’s access to the courts, as the current rule does, where the conditions described in the proposed rule are present. Furthermore, as noted earlier, in public interest fee-shifting cases the proposed rule will reinforce the legislative goal of facilitating rather than impeding court access. It would frustrate that goal and achieve no benefit if the amendment allowed financial assistance to indigent clients only if a lawyer were willing to forego a court-ordered fee under a fee-shifting statute.

Comment [10] is not addressed to the problem of frivolous litigation, as some analysts seem to suggest. 34 Other rules do that. Model Rule 3.1 makes clear that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is basis in law and fact for doing so that is not frivolous. . . .” 35 Rule 11 of the Federal Rules of Civil Procedure requires lawyers to certify, inter alia, that court filings are not “presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . .[and that] claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” 36 Many jurisdictions have similar court rules and other mechanisms to prevent frivolous litigation. 37

Whatever the relationship between financial assistance and frivolous litigation in other contexts, however, it is not credible that a lawyer working without fee would assist

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34 See Lockwood, supra note 1 at 472-474 (“the assertion [in Cmt. [10] is that] unlike the financing of litigation expenses, financing living expenses is somehow distinguishable from contingency fee financing and leads to frivolous litigation”); N.Y. City Bar Report by the Prof’l Responsibility Comm. Proposed Amendment to Rule 1.8(e), NY Rules of Professional Conduct 8 (Mar. 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/proposed-amendment-to-rule-18e-ny-rules-of-professional-conduct [hereinafter “CITY BAR RPT.”] (NYRPC 1.8 cmt. [10], which is identical to Model Rule 1.8 cmt. [10], is aimed, in part, to curb frivolous litigation). Lawyers will “support” plaintiffs, it is suggested, in order to get retained to bring cases that turn out to be frivolous. As shown in the text by reference to Model Rule 1.8 cmt. [10] this is not the purpose of the prohibition in 1.8(e). It is not in the text. It is not in the Comment. Other Rules perform that function.
36 Fed. R. Civ. P. 11(b)(1) and (b)(2) (emphasis added).
37 See, e.g., N.Y. Rules of the Chief Administrator of the Courts Part 130, Awards of Costs and Imposition of Financial Sanctions For Frivolous Conduct In Civil Litigation, 22 NYCRR 130-1.1.
a poor client with living expenses, which could not be recouped, so that the lawyer could file a frivolous lawsuit.

**No Compromise of the Lawyer’s Independent Judgment**

Rule 1.8(e) forbids financial assistance for living expenses also to avoid conflicts between the interests of the lawyer and the interests of the client and to protect the lawyer’s independence. Living expenses are not allowed “because such assistance gives lawyers too great a financial stake in the litigation.”

Rule 1.8(e)(1), however, allows the lawyer to advance the costs of litigation with repayment contingent on the outcome of the matter. There is no cap on the amount of these expenses, which can amount to tens of thousands of dollars. Lawyers also may invest thousands of hours on a contingency matter which will be compensated only if there is a recovery. The profession tolerates these outlays of time and money, trusting that lawyers will honor their obligations to exercise independent professional judgment in the advice they give clients and not be influenced by their own financial concerns.

The proposed rule presents no such risks simply because loans to assist indigent clients are prohibited. Unlike in the exception for advancing the costs of litigation, lawyers have no interest in repayment of the financial help.

**No Competition for Clients**

Some opponents of expanding a lawyer’s discretion to provide financial assistance under Rule 1.8(e) expressed concern that lawyers will use this discretion to improperly compete for clients. The proposed rule avoids this problem because it prohibits advertising or publicizing the availability of financial assistance for living expenses. More importantly, however, pro bono lawyers don’t compete for business. As stated by SCLAID: “Poverty lawyers and lawyers who provide pro bono service to clients in poverty are simply not competing for the business of their clients.”

**Other Impediments to Financial Assistance**

There may be other laws or rules in American jurisdictions that will operate if financial assistance is allowed and provided. Some commenters seemed to suggest that the proposed rule might affect a client’s tax status or the ability to qualify for public assistance or social services or, potentially, a financial disclosure requirement. SCEPR and SCLAID have seen no evidence that the type of modest assistance to indigent clients

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39 See, e.g., Sahl, supra note 12 at 5 (“[s]ome practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance”) (cite omitted); Schrag, supra note 1 at 54 (a “thread that runs through the history of Rule 1.8(e) is the concern that lawyers might compete with each other for business through the generosity of the gifts or loan terms that they might offer their clients”).
40 SCLAID Memo, supra note 22.
for basic necessities of life permitted by the proposed rule will have such consequences.\(^{41}\) However, Model Rule of Professional Conduct 1.4 requires lawyers to consult with clients about the representation and a reference is made to that obligation in the proposed new Comments.

Financial assistance to transactional clients, social hospitality toward all clients as part of business development, and payment of litigation expenses that may or may not be recovered may all have collateral consequences under tax or other law. But in allowing each, the only question is whether the activity creates the kind of dangers that should concern the Model Rules of Professional Conduct. The limited exception in the proposed amendment does not create those dangers.

V. The Need for ABA Leadership

In all but eleven U.S. jurisdictions Rule 1.8(e) is identical or substantially similar to Model Rule 1.8(e).\(^{42}\) Ethics Committees generally interpret the prohibition strictly.\(^{43}\) Courts generally discipline lawyers for providing clients with non-litigation expenses.\(^{44}\) Only a handful of courts and ethics committees have approved financial assistance in small amounts beyond litigation expenses, even where the text of the rule would forbid it.\(^{45}\)

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\(^{41}\) SCEPR asked Tom Callahan, Chair of the ABA Tax Section, about the tax consequences of the proposed rule. He told the Committee that the proposed rule appears to be a gift with true donative intent; that the gift should be neither income to the donee nor deductible by the donor for federal income tax purposes; and that there is an exclusion from gift taxes of up to $15,000 per donee for 2020. Tom Callahan also indicated that the tax impact, if any, of state and local taxes has not been considered. Email exchange between Tom Callahan and SCEPR Chair Barbara S. Gillers, on file with SCEPR.

\(^{42}\) See Ellen J. Bennett & Helen W. Gunnarsson, Annotated Model Rules of Professional Conduct 173 (9th ed. 2019) (“[m]ost jurisdictions do not allow an exception for assisting indigent clients”).


\(^{44}\) See Schrag, supra note 1 at 59-61(discussing “unforgiving” application of Rule 1.8(e)); Lawyer Disciplinary Bd. v. Nessel, 769 S.E.2d 484, 493 (W. Va. 2015) (prohibition on living expenses is absolute; no exception for “altruistic intent”; Matter of Cellino, 798 N.Y.S.2d 600 (4th Dept. 2005) (suspension for, among other violations, loaning a client money for the client’s son’s nursing and care and rehabilitation); State ex rel. Oklahoma Bar Ass’n v. Smolen, 17 P.3d 456 (2000) (suspending a lawyer for, among other violations, loaning a client $1200 for living expenses); Maryland Attorney Grievance Comm’n v. Kandel, 563 A.2d 387 (Md. App. 1989) (discipline for advancing the cost of medical treatment and transportation to obtain the treatment).

Of the jurisdictions that have adopted an exception to Rule 1.8(e)’s prohibition on providing assistance for living expenses, some go beyond the modest amendment SCEPR and SCLAID propose. They permit, for example, advances and loans for basic needs and other living expenses. Reimbursement by the client is sometimes required. By contrast, the proposed rule permits gifts only. No loans. No advances. No reimbursements. New Jersey has a specific provision for pro bono legal services.

The proposed rule draws on the rules of the eleven jurisdictions, expert commentary, and comments provided in response to earlier drafts. In addition, SCEPR and SCLAID notes that recently, the New York State Bar Association (NYSBA) House of Delegates unanimously approved a recommendation by the NYSBA Committee on Standards of Attorney Conduct (COSAC) and the City Bar Professional Responsibility Committee to adopt a humanitarian exception to NYRPC 1.8(e) that is similar in some respects to the one SCEPR and SCLAID propose for the Model Rules.

The ABA has been a leader in access to justice for decades. It should lead here, too, by changing an out-of-date rule that interferes with access to justice by the most vulnerable population and encouraging all American jurisdictions to adopt the new rule.

VI. Support Based on Bar Counsel Experience

SCEPR asked bar counsel for the eleven jurisdictions with some form of humanitarian exception about their experience implementing the provision. Two jurisdictions, D.C. and Louisiana, responded. Both jurisdictions permit loans for living expenses and apply in contingency matters. Chief Disciplinary Counsel in Louisiana wrote that Louisiana’s version of Rule 1.8(e), which has been in effect since 1976,
permits lawyers to advance monies to clients in necessitous circumstances. The Louisiana rule is not limited to non-profits and does not prohibit a lawyer from obtaining reimbursement, although it does not permit a lawyer to obtain reimbursement of interest for funds the lawyer advances directly. . . . The Louisiana Office of Disciplinary Counsel has received very few complaints against lawyers concerning Rule 1.8(e) and (f). The complaints that have been lodged primarily involve how the lawyer calculated disbursement of funds from monetary recoveries resulting from a suit or settlement. Because you have informed me that the proposed ABA Rule prohibits any reimbursement of any necessitous circumstances advances, I do not anticipate that such a rule would lead to any complaints (such as the ones we have received) to a state’s disciplinary counsel. Based upon my experience as the Chief Disciplinary Counsel in Louisiana, it is my belief that the rule discussed would not lead to an increase in disciplinary enforcement action nor increase the potential for harm to the public or to the legal profession.  

Disciplinary Counsel for D.C. wrote:

We have had few if any complaints about lawyers violating Rule 1.8(d) [the D.C. analogue to M.R. 1.8(e)]. I can't represent that no one has ever complained because I don't have a way of checking every one of the approximately 1000 complaints we receive each year. Certainly, we have never brought a case based on a violation of that rule, and it has been mentioned in only three reported opinions, two of which are reciprocal matters from other states whose parallel rule is not as liberal as our Rule 1.8(d).  

VII. Support from the Pro Bono Community

Commenters have questioned whether the pro bono community supports adding a humanitarian exception to Rule 1.8(e). SCEPR’s work in connection with the proposed rule shows that there is broad support for this in the pro bono and law school clinician

49 Letter from Chief Disciplinary Counsel in Louisiana, Charles B. Plattsmier to SCEPR Member Michael H. Rubin (Apr. 8, 2020) (on file with SCEPR).
50 E-mail from Hamilton P. Fox, Disciplinary Counsel in D.C. to SCEPR Member Thomas H. Mason (Apr. 8, 2020) (on file with SCEPR) (citing the following reciprocal cases: In re Schurtz, 25 A.3d 905, 906-907 (D.C. 2011); In re Edelstein, 892 A.2d 1153, 1159 n.3 (D.C. 2006); In re Wallace, Board Docket No. 17- BD-001 at 10 n.6 (BPR HCR, Mar. 16, 2018)). See also Sahl, supra note 12 at 8 (DC’s “permissive approach concerning lawyer advances for living expenses has existed for a 'long time and has not produced any official complaints.' Nor has the approach caused the bar any 'reason to be concerned.'”) (citing the author's conversations with D.C. Bar Counsel); CITY BAR RPT., supra note 34 at 10 (“the committee informally consulted bar regulators and academic ethicists in the jurisdictions which currently have a version of a ‘humanitarian exception,’ in order to assess whether those rules have led to any notable abuses or problems. Without exception, no one reported problems with a humanitarian exception in pro bono cases.”).
communities.\textsuperscript{51} SCLAID is a cosponsor. ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities—the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; the Standing Committee on Pro Bono and Public Service, the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.\textsuperscript{52} Just recently— on Easter weekend and in response to SCEPR’s Survey—one lawyer wrote:

\begin{quote}
Ethics rule 1.8, and its correlating rule under New York rules, has substantially hindered our ability to support clients: rather than supporting those in the most desperate of circumstances, we can only help clients with no pending or contemplated litigation. We urge the rule be amended to allow our ability to respond to our client's financial needs during this crisis.\textsuperscript{53}
\end{quote}

Some lawyers outside the pro bono community have suggested that giving pro bono lawyers discretion to help their needy clients would create stress that might impair the client-lawyer relationship. SCEPR has seen no evidence from the pro bono community that this is true, and there are several approaches short of denying the discretion to the many pro bono lawyers who seek it. Lawyers and legal services organizations can adopt a policy against providing assistance with living expenses to any client. Alternatively, decisions can be made not by individual attorneys but by a central-decision maker according to rules and standards adopted by the organization.

\section*{VIII. Conclusion}

For the foregoing reasons, the ABA should adopt the proposed amendments to Rule 1.8(e).

Respectfully submitted,

Barbara S. Gillers
Chair, Standing Committee on Ethics and Professional Responsibility
August 2020

\textsuperscript{51} See Section II of this Report.
\textsuperscript{52} Id.
\textsuperscript{53} E-mail from Michael Pope, Executive Director of Youth Represent, to Daniel L. Greenberg and Barbara S. Gillers (Apr. 10, 2020) (on file with SCEPR).
RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall neither enter into a business transaction with a client if the client expects the lawyer to exercise the lawyer's professional judgment therein for the protection of the client, nor shall the lawyer knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information gained in the professional relationship with a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, grandparent, child, grandchild, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or
(2) a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for or against the clients, nor in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyers disclosure shall include the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, grandparent, child, grandchild, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer has actual knowledge is represented by the other lawyer unless his or her client gives informed consent regarding the relationship. The disqualification stated in this paragraph is personal and is not imputed to members of firms with whom the lawyers are associated.
(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fees or expenses as long as the exercise of the lien is not prejudicial to the client with respect to the subject of the representation; and

(2) contract with a client for a reasonable contingent fee in a civil case, except as prohibited by Rule 1.5.

The maximum penalty for a violation of Rule 1.8 (b) is disbarment. The maximum penalty for a violation of Rule 1.8 (a) and 1.8 (c)-(j) is a public reprimand.

Comment

Transactions Between Client and Lawyer

[1A] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. The client should be fully informed of the true nature of the lawyer's interest or lack of interest in all aspects of the transaction. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's informed consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

Use of Information to the Disadvantage of the Client

[1B] It is a general rule that an attorney will not be permitted to make use of knowledge, or information, acquired by the attorney through the professional relationship with the client, or in the conduct of the client's business, to the disadvantage of the client. Paragraph (b) follows this general rule and provides that the client may waive this prohibition. However, if the waiver is conditional, the duty is on the attorney to comply with the condition.

Gifts from Clients

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the objective advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the subject of the representation creates a conflict between the interest of the client and the personal interest of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j) of this rule.

Financial Assistance to Clients

[4] Paragraph (e) eliminates the former requirement that the client remain ultimately liable for financial
assistance provided by the lawyer. It further limits permitted assistance to court costs and expenses directly related to litigation. Accordingly, permitted expenses would include expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses would not include living expenses or medical expenses other than those listed above.

Payment for a Lawyer's Services from One Other Than The Client

[5] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4 (c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Settlement of Aggregated Claims

[6] Paragraph (g) requires informed consent. This requirement is not met by a blanket consent prior to settlement that the majority decision will rule.

Agreements to Limit Liability

[7] A lawyer may not condition an agreement to withdraw or the return of a client's documents on the client's release of claims. However, this paragraph is not intended to apply to customary qualifications and limitations in opinions and memoranda.

[8] A lawyer should not seek prospectively, by contract or other means, to limit the lawyer's individual liability to a client for the lawyer's malpractice. A lawyer who handles the affairs of a client properly has no need to attempt to limit liability for the lawyer's professional activities and one who does not handle the affairs of clients properly should not be permitted to do so. A lawyer may, however, practice law as a partner, member, or shareholder of a limited liability partnership, professional association, limited liability company, or professional corporation.

Family Relationships Between Lawyers

[9] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10.

Acquisition of Interest in Litigation

[10] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in the common law prohibition of champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for lawyer's fees and for certain advances of costs of litigation set forth in paragraph (e).
RULE 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
   (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
   (2) a lawyer or law firm who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
   (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;
   (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter;
   (5) a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and
   (6) a lawyer may pay a referral fee to a bar-operated nonprofit lawyer referral service where such fee is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter pursuant to Rule 7.3: Direct Contact with Prospective Clients.

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
   (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
   (2) a nonlawyer is a corporate director or officer thereof; or
   (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may:
   (1) provide legal services to clients while working with other lawyers or law firms practicing in, and organized under the rules of, other jurisdictions, whether domestic or foreign, that permit nonlawyers to participate in the management of such firms, have equity ownership in such firms, or share in legal fees generated by such firms; and
   (2) share legal fees arising from such legal services with such other lawyers or law firms to the same extent as the sharing of legal fees is permitted under applicable Georgia Rules of Professional Conduct.

(f) The activities permitted under the preceding portion of this paragraph (e) are subject to the following:
   (1) The association shall not compromise or interfere with the lawyer’s independence of professional judgment, the client-lawyer relationship between the client and the lawyer, or the lawyer’s compliance with these rules; and
   (2) Nothing in paragraph (e) is intended to affect the lawyer’s obligation to comply with other applicable Rules of Professional Conduct, or to alter the forms in which a lawyer is permitted to practice, including but not limited to the creation of an alternative business structure in Georgia.

The maximum penalty for a violation of this rule is disbarment.
Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] The provisions of paragraphs (e) and (f) of this rule are not intended to allow a Georgia lawyer or law firm to create or participate in alternative business structures (ABS) in Georgia. An alternative business structure is a law firm where a nonlawyer is a manager of the firm, or has an ownership-type interest in the firm. A law firm may also be an ABS where another body is a manager of the firm, or has an ownership-type interest in the firm. This rule only allows a Georgia lawyer to work with an ABS outside of the state of Georgia and to share fees for that work.
ABA Rule 5.4: Professional Independence of a Lawyer

Law Firms AndAssociations

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

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

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

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

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

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

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

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

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

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

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

Comment

Law Firms AndAssociations
[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).
Utah embraces nonlawyer ownership of law firms as part of broad access-to-justice reforms

BY LYLE MORAN

AUGUST 14, 2020, 3:45 PM CDT

The Utah Supreme Court has unanimously approved a slate of reforms that allow for nonlawyer ownership or investment in law firms and permit legal services providers to try new ways of serving clients during a two-year pilot period.

The court said the measures adopted Wednesday, including related ethics rules changes, “represent perhaps the most promising effort by courts to tackle the access-to-justice crisis in the last hundred years.”

“What has become clear during this time is that real change in Utahns’ access to legal services requires recognition that we will never volunteer ourselves across the access-to-justice divide and that what is needed is market-based, far-reaching reform focused on opening up the legal market to new providers, business models, and service options,” the court wrote in a standing order detailing many of the reforms.

The court also noted that the COVID-19 pandemic and its economic fallout have resulted in the public’s need for affordable legal services reaching “crisis levels.”

While other nations such as the United Kingdom and Australia have embraced alternative business structures in the legal industry, U.S. jurisdictions have been more resistant.

In Utah, nontraditional legal services entities will have the opportunity to operate in a regulatory sandbox the state supreme court has established. The court also created an Office of Legal Services Innovation that will evaluate and recommend sandbox applicants to the court, as well as oversee the applicants that are approved for entry into the sandbox.

Earlier this year, Utah began accepting sandbox proposals from applicants who believe they could provide low-cost or no-cost legal services addressing issues stemming from COVID-19. Utah Supreme Court Justice Constantinos “Deno” Himonas tells the ABA Journal that the proposals received to date have been very promising, and he expects more to come that will cover a wide range of legal issues.

“I’m hoping to see some innovations that have not really been imagined,” says Himonas, adding that new capital in the industry should help fuel change.

Sandbox participants that are able to demonstrate their legal services “do not cause levels of consumer harm above threshold levels” established by the innovation office may receive approval to exit the sandbox and continue practicing law, according to the court’s standing order.
At the conclusion of a two-year period that began Friday, the court said it will evaluate whether the core reforms it has approved should continue “based on a review of data collected from those entities and individuals participating in the program.”

Additionally, changes to Utah’s Rules of Professional Conduct that became effective Friday include a new Rule 5.4A that permits attorney fee sharing with nonlawyers as long as there is written notice to the client.


Gillian Hadfield, a University of Toronto law professor who served on the two Utah regulatory reform panels, wrote on Twitter (https://twitter.com/ghadfield/status/1294063589469364225) Thursday that she was “SO excited to have played a part in this historic move.”

“Utah has acted where so many other states have merely formed yet another study group to solve the unconscionable lack of access to reasonably priced legal help that lawyer (and court!) regulation has created,” Hadfield tweeted.

Utah’s actions have also drawn praise from regulatory reform advocates across the country, including those in other states considering opening up their legal marketplaces.

“While I wish it was California that was undertaking such historic measures, I applaud the Utah Supreme Court for being the first in the nation to meaningfully attempt to address the inability of so many to receive affordable legal services,” says Joanna Mendoza, who served on a California task force (https://www.abajournal.com/legalrebels/article/nothing-is-off-limits-for-the-calif-bars-task-force-on-access-through-innovation-in-legal-services) that advocated for broad regulatory reforms.

“It will be better for everyone when several states, including California, have adopted similar changes as it will make it more likely to result in serious investment into new forms of providing legal services across the country,” Mendoza adds.
Jayne Reardon, a member of a task force in Illinois that has recommended regulatory reforms (https://www.abajournal.com/news/article/task-force-backs-fee-sharing-rule-changes-to-help-small-firm-lawyers-gain-clients), called the Utah Supreme Court’s actions on re-regulation “remarkably bold.”

“The data that will be gathered in Utah will help inform efforts underway in other states, including Illinois,” Reardon wrote in an email. “I am hopeful that re-regulation of legal services will help reduce the access to justice gap as well as help the profession to thrive and regain relevance.”

In Arizona, the state supreme court is scheduled later this month to review proposed rules changes that would permit alternative business structures featuring nonlawyers. Himonas says he is also hopeful Utah’s approach will propel other states forward in their efforts.

“If it works, then I think we are going to see a lot of states follow,” he says.
How Reforming Rule 5.4 Would Benefit Lawyers and Consumers, Promote Innovation, and Increase Access to Justice

Jason Solomon, Deborah Rhode, and Annie Wanless*
April 2020
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Introduction: The Access to Justice Crisis and Rule 5.4

It is a shameful irony that the nation with one of the world’s highest concentrations of lawyers has done so little to make them accessible to those who need them most. The U.S. ranks just 109 out of 128 countries in access to justice and affordability of civil legal services, below Zambia, Nicaragua, and Afghanistan.¹ Two-thirds of American adults reported having a civil legal problem in the past year, but only one-third of those received any help.² The human costs are often staggering, with domestic violence, illness and serious economic hardships among them. Small businesses have significant legal issues as well, and yet 60% of small business owners who have at least one such issue – which they describe as one of the “greatest threats to their business” – do not have a lawyer to assist them.³ Nor is the problem getting better. Today, nearly 80% of civil cases involve at least one party without an attorney – double the percentage of self-represented litigants in 1980.⁴

The U.S. ranks just 109 out of 128 countries in access to justice and affordability of civil legal services.

Legal aid and pro bono alone cannot solve the problem. Providing even one hour of attorney time to everyone in the United States with a legal problem would cost around $40 billion, but total expenditures on legal aid (both public and private) are just 3.5% of that amount.⁵

Providing one hour of pro bono per justice problem would require over 200 hours of pro bono work per attorney per year, but the average pro bono hours worked per attorney is only 42.8.⁶

Why hasn’t the market offered more solutions to serve individuals and small businesses who can pay something for legal services, but not upwards of $200 per hour? One significant reason – as explained further be-
low is that regulations on legal service providers limit the ability to create solutions. The American Bar Association's (ABA) Model Rule of Professional Conduct 5.4, Professional Independence of a Lawyer, includes several provisions: “A lawyer or law firm shall not share legal fees with a nonlawyer;” a “lawyer shall not form a partnership with a nonlawyer;” and a lawyer shall not practice law for profit if “a nonlawyer owns any interest therein.” The Rule aims to protect the “professional judgment of a lawyer” but is both a poor fit for that task and has negative consequences for the legal services market.

“We need new ideas. We are one-fifth into the 21st century, yet we continue to rely on 20th-century processes, procedures and regulations.”

Judy Perry Martinez, ABA President

Under this rule, “[l]egal services must be provided by a law firm that is owned, managed, and financed exclusively by lawyers.” Yet forbidding outside ownership and investment in legal services providers contributes to the low innovation and high cost of services that characterize the U.S. legal market today. In short, the rule is a “major contributing factor” to America’s access to justice problem. Indeed, countries that allow lay investment in or ownership of legal service providers consistently rank ahead of the United States in access to and affordability of legal services. Without the ability to offer equity stakes to business leaders or investors – or to have a diverse, independent board of directors through the corporate form – legal service providers are not able to enlist the best business expertise.

For these reasons, there has long been a consensus among both legal ethics scholars and experts on the legal services market that Rule 5.4 should be repealed. Leaders of the bar are increasingly voicing this view as well. In February 2020, the ABA’s House of Delegates passed a resolution calling for “regulatory innovations that have the potential to improve the ac-
cessibility, affordability, and quality of civil legal services.”13 As ABA President Judy Perry Martinez put it, “We need new ideas. We are one-fifth into the 21st century, yet we continue to rely on 20th-century processes, procedures and regulations.”14 The Conference of Chief Justices passed a similar resolution, specifically citing “consideration of alternative business structures” as an area to consider.15 And the outgoing president of the Legal Services Corporation, James Sandman, has also pointed to regulatory reform as a key priority to help increase collaboration with other professionals and drive access to justice.16

**Bans on Outside Investment and Ownership Limit Choice and Services for Consumers**

Rule 5.4, which prohibits lawyers from partnering with non-lawyers and prohibits non-lawyers from investing in law firms, harms the legal market in two primary ways.17 First, prohibiting investment from non-lawyers leaves law firms strapped for capital. Second, it makes it harder for law firms to keep up with modern innovations in business practices. Firms cannot form cost-effective multidisciplinary practices with other service providers, and few have incentive to invest in technology and business processes. Consumers today expect seamless, integrated services, and Rule 5.4 prevents lawyers from meeting the needs of their clientele.

**Legal Service Providers Have Limited Access to Capital**

Under the ABA’s regulations, private-sector lawyers can only deliver legal services through three kinds of entities: sole proprietorships, legal partnerships, or LLCs.18 As Gillian Hadfield has pointed out, these first two structures are the most common in law but play a limited role in the modern economy generally, and are much less common even among other professional services firms.19 For law firms, money comes in as fees, and partners receive profits annually. Because law firms cannot obtain equity investments from non-lawyers, firms’ only sources of capital are revenues and loans.20 Indeed, a part of rule 5.4 has been interpreted to preclude revenue-sharing or profit-sharing arrangements with entities or individuals who are not lawyers. As such, “[a]nxiety over the negative effect that
inadequate capital has on attorneys in private practice has been a constant source of concern for the bar.”

Law firms’ financing structures are especially poorly suited to today’s workforce.

Law firms’ financing structures are especially poorly suited to today’s workforce. Currently, a firm’s capital comes almost entirely from its equity partners, but as lateral movement among firms increases, more and more lawyers “may be reluctant to invest in firms’ long-term needs.” Because partners must bear all the financial risk, firms are left more vulnerable to economic downturns. As analysts observed during the 2008 recession, “the fact that the only outside source of capital available to law firms was conventional debt put them in an especially vulnerable position.” Lawyers are only able to use financial tools that are “primitive” compared to modern advances in finance.

The lack of access to capital also means firms are less likely to invest in efforts that have a long time horizon in which to deliver a return. This has limited law firms’ capacity to build the economies of scale needed to provide the level of service now expected of most customer-oriented businesses. “Prohibition of lay investment cuts legal organizations off from the sources of funds that fuel innovation elsewhere in the economy: angel investors, venture capital, private equity, and public capital markets.” As a result, law firms lag far behind other industries – including other professional services like accounting, consulting and medicine – in adopting business processes and technology to provide better service at lower cost. As other industries – including law firm clients – undergo “digital transformation” to improve their own operations and services, the legal industry’s limited access to investment capital has become increasingly stark and problematic.
The Legal Profession Is Ill-Equipped to Benefit From Business Expertise

Rule 5.4 prevents law firms from utilizing the best business practices both by inhibiting long-term investment in firm-specific capital like business processes and technology, and by preventing firms from offering equity stakes, or revenue or profit-sharing opportunities, to individuals or organizations with business expertise.

The ban on nonlawyer ownership means lawyers – who receive no training on how best to manage a business during their three years in law school – are expected to run businesses. Private-sector lawyers spend much of their time on business development and administrative tasks, with an average of only 2.5 hours of billable time per 8 hour work day.\textsuperscript{29} Allowing non-lawyers to have a larger stake in the business side of the law firm would free up lawyers to focus on their strength of practicing law.

\textit{Private-sector lawyers spend much of their time on business development and administrative tasks, with an average of only 2.5 hours of billable time per 8 hour work day.}

Meanwhile, other professionals with significant business-development expertise cannot obtain equity in law firms, which may deter them from taking otherwise desirable jobs in the legal field. In business, the majority of compensation of most executive pay packages comes in the form of equity, so the ability to offer stock options becomes key to attracting talent.\textsuperscript{30} Thus, law firms suffer from a lack of innovation in marketing, finance systems, project management, and more.\textsuperscript{31} Indeed, the need for expertise in marketing to consumers is particularly important when seeking to develop a business that provides a “one to many” solution for routine legal matters.
These limitations have prevented real mass-market law firms for consumers from emerging. Jacoby & Meyers, a consumer law firm with offices across the U.S., has repeatedly explained that restrictions on non-lawyer ownership hamper its ability to grow and become such a mass-market law firm. It sued the state bars in New York, New Jersey, and Connecticut to try to overcome these barriers. The firm argued that it cannot upgrade technology, take advantage of scale, or expand its offices because of the prohibition on obtaining outside capital. And it maintained that it could give more clients access to justice if the prohibitions were eliminated. Erin Levine, a family lawyer in California, started a successful, award-winning low-cost divorce platform (“Hello Divorce”), but said that “one thing that has been really difficult for me is the lack of ability for a nonlawyer to have an ownership interest in a law firm. Another is this lack of our ability as a law firm to take any sort of outside investment from a nonlawyer.”

“One thing that has been really difficult for me is the lack of ability for a nonlawyer to have an ownership interest in a law firm. Another is this lack of our ability as a law firm to take any sort of outside investment from a nonlawyer.”

Erin Levine, Founder & CEO, Hello Divorce

Individuals and small businesses are turning to legal businesses like LegalZoom and Rocket Lawyer that have little to no lawyer ownership at all, and lie largely outside the existing regulatory scheme. And corporate clients are also turning towards entities that are better suited to their needs. A 2019 survey found 63% of traditional law firms were losing business to in-sourcing by law departments in businesses, 14% were losing business to alternative legal providers, and 9% were losing business to the Big 4 accounting firms. Accounting firms can provide similar services to law firms on matters such as tax, estate planning, intellectual property, and litigation support. But since these firms do not have the same restrictions on access to capital, accounting firms “generally offer a wider range of
services, greater economies of scale, and more effective marketing and managerial capacities.”

Meanwhile, lawyers continue to rely on a “narrow, outdated business model” – individual lawyers providing service billed by the hour to individual clients – that is isolated from the tools that other industries use to “create incentives to reduce costs, improve quality, and figure out better ways to meet economic demand.”

In this respect, law compares unfavorably to medicine, where doctors have considerably more flexibility in the contractual and organizational arrangements that they use to deliver care. Many doctors are employees of health care organizations such as hospitals or HMOs (not owned by physicians), which offers them a salary in exchange for the revenue they bring in. That is a practice that the bar’s ethical rules prohibit. Other doctors are part of a group medical practice where they may have an ownership stake, but also have revenue or profit-sharing arrangements with other entities – another structure impermissible in law.

To be sure, the presence of third-party payers such as private insurance or government programs has played a major role in expanding access to medical care. However, the delivery of those services has been achieved through a variety of contractual and organizational structures that share the risks, rewards, and incentives among physicians, people with business and management expertise, and investors. Like lawyers, doctors have ethical obligations to their patients, which may conflict with financial considerations, but the profession has found ways to regulate such conflicts without banning cost-effective service delivery structures.

**Evidence from Other Jurisdictions and Innovative U.S. Companies Indicates Reforms Would Benefit the Public**

Many jurisdictions and entities have recognized that changing the prohibition on non-lawyer ownership may create stronger, more stable law firms, as well as free up lawyers to focus on more on legal practice, which
is what they are trained in and interested in doing. Jurisdictions that have eliminated regulations similar to Rule 5.4 (and the innovative U.S. legal businesses that have developed outside the “practice of law”) demonstrate that involvement of non-lawyers fuels innovation without compromising legal services. These jurisdictions include England & Wales, Scotland, Australia, Canada, Germany, the Netherlands, and Brussels.\textsuperscript{39} To date, no jurisdiction that eliminated its prohibition on non-lawyer ownership has reinstated it.\textsuperscript{40}

**Other Countries’ Reforms Led to More Choice and Better Services for Consumers**

Much of the recent data on outside ownership of law firms comes from England and Wales, which recently implemented the Legal Services Act of 2007 (LSA). The reforms eliminated bans on non-lawyer ownership, and lawyers and non-lawyers can now work together in Alternative Business Structures (ABS). England and Wales began licensing ABS firms in 2011. Precise evaluations of these new structures has been challenging, particularly because England and Wales were significantly impacted by the 2008 global economic crisis, which led to severe cuts to legal aid throughout the 2010s.\textsuperscript{41} Regardless, preliminary data indicate that the ABS model has allowed law firms to develop more innovative practices than traditional counterparts:

- ABS firms are more likely to use technology, with 91% of ABS firms using a website to deliver information and services, compared to only 52% of solicitor firms\textsuperscript{42}
- ABS firms are 13 to 15% more likely to introduce new legal services\textsuperscript{43}
- ABS firms are “particularly likely to have delivered radical service innovations or organizational innovations”\textsuperscript{44}

Most importantly, comparative research finds no evidence that ABS models result in adverse effects on consumers. Rather, they allow for increased choice and competition, improved services to consumers, reduced prices, and increased innovation in the provision of legal services.\textsuperscript{45} ABS reforms also made it possible for 45% of consumers with family law
needs to pay a fixed fee for services, compared to only 12% of consumers in 2012, which made it easier for individuals to make informed choices among providers. The proportion of family law clients who reported that they received value for their money increased from 50% to 62%.

Examples of the innovative firms and services that have emerged include:

- Z Group, a firm in London that employs architects, accountants and solicitors, and so serves as a “one stop shop” for design planning, architecture, feasibility analysis, tax and legal;
- Parental Choice, which helps parents find a nanny or au pair and also helps them understand their legal obligations as employers; and
- Co-Op Legal Services, operated by a well-established consumer-owned grocery chain that has used its brand and consumer-facing expertise to provide will-writing, family, employment and other consumer legal services at affordable prices.

These innovative practices have not just improved services for consumers; lawyers have benefited as well. They have experienced no loss of employment after the LSA; in fact, job vacancies advertised at law firms increased 48% in 2014. Introducing ABS firms has also alleviated concerns of financial vulnerability: “Extending law firm ownership to include non-lawyers has contributed to the improvement of the financial stability of some law firms through attracting, promoting and retaining people with corporate management skills and encouraging external investment.”

Australia offers another example. The country was the first common law jurisdiction to create alternative business structures. In 2001, New South Wales passed legislation permitting legal practices to incorporate, share receipts, and provide services in conjunction with non-lawyer legal practitioners. Much of the impetus came from attorneys who felt that traditional law firm ownership structures were not meeting their needs, or those of consumers.
While the reforms have been less studied in Australia than in England and Wales, most evidence indicates that the reforms were successful. After witnessing New South Wales’s reforms in 2001, all Australian jurisdictions have since decided to permit alternative business structures. And almost a third of law firms have taken advantage of the ability to alter their practice structures through incorporation. Removing regulatory barriers has also increased seamless legal services across state lines.

Slater and Gordon, Australia’s first publicly traded law firm, has reported that the “consequent capital raising has allowed national expansion and growth that would not otherwise have been possible.” The firm used that capital to grow (in just six years) from seven equity partners to a mass-market national firm that serves consumers with a range of legal needs, including help with pensions and disability insurance, workers’ compensation, and estate planning. In addition to raising necessary capital, the firm has been able to access business expertise through their independent board and by hiring people from other consumer-facing industries to build efficient processes that have kept prices down while enabling high-quality client experiences.

Allowing Outside Ownership Would Be Particularly Beneficial in the U.S.

In general, studies from other countries “provide support to the argument that non-lawyer ownership can, and in some circumstances does, lead to new innovation in legal services, larger economies of scale and scope, and new compensation structures.” In the U.S., there is reason to believe that non-lawyer ownership could bring even greater benefits to consumers.

First of all, the U.S. legal market is currently more heavily regulated than the U.K. market was before the Legal Services Act. The U.K. market had already undergone significant deregulation since the Thatcher era. Historically, there have also been different kinds of legal professionals and “citizen advice bureaus” in the U.K. to provide services to a broad range of consumers. The U.S. market has always been strictly limited to lawyers,
so reforms would alter the status quo more substantially and with larger benefits.

Moreover, the U.S. legal market is substantially larger and the capital markets “more robust” than the markets in England and Wales or Australia, so the environment is well-suited to scale online legal services that could reach low and middle income Americans.60 The U.S. has already demonstrated significantly more innovation in the online legal sphere than comparable countries.61 Given the size, money, and entrepreneurial spirit in the U.S., reforming Rule 5.4 could result in new delivery methods for legal services that no one could have imagined even a few years ago. Indeed in the U.K., innovations in marketing – critical to expanding mass-market legal services – were used by 58% of alternative business structures, as opposed to just 35% of non-ABS organizations and 37% of all solicitors.62

Given the size, money, and entrepreneurial spirit in the U.S., reforming Rule 5.4 could result in new delivery methods for legal services that no one could have imagined even a few years ago.

Within the U.S., some legal businesses – which escape Rule 5.4 regulation by offering legal services that do not constitute the “practice of law”63 – have already demonstrated the innovation that occurs with increased access to capital. These new, mostly online legal services companies have benefited from venture capital funding. It has helped fuel the rapid growth of online legal services companies such as LegalZoom, which offers guided document preparation; Rocket Lawyer, which provides documents for starting businesses; and UpCounsel, which is a business law marketplace. But the scope of what these new businesses can offer is limited by the combination of Rule 5.4 and unauthorized practice of law (UPL) restrictions.64
Ethical Concerns Should Not Preclude Reform

Lawyers’ Professional Judgment Is Unlikely to Be Impaired

Some worry that if multidisciplinary practices and non-lawyer investment were allowed, lawyers’ professional judgment would be compromised as they strive to build their bottom line. However, these concerns are unsupported in practice and founded on a questionable premise. This is why we see broad support among legal ethics experts for eliminating Rule 5.4.

In practice, jurisdictions that allow for nonlawyer ownership or partnership do not report increased ethical concerns. For example, the District of Columbia has allowed nonlawyer ownership for more than two decades, and experienced no escalation of related disciplinary violations. Lawyers who have worked in both traditional law firms and firms that allow for partnerships with nonlawyers testified to the ABA House of Delegates that “there were not significant differences in the ethical cultures of the two kinds of organizations.” Indeed, in the United Kingdom, the alternative business structures have so far dealt better with complaints and had no more regulatory action taken against them than traditional 100% lawyer-owned practices.

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*In practice, jurisdictions that allow for nonlawyer ownership or partnership do not report increased ethical concerns.*

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Furthermore, this critique of nonlawyer ownership implies that lawyers in traditional firms are driven only by what is best for the client. It is naive to argue that lawyers now are immune from competing financial concerns or pressure from nonlawyers that could impair their professional judgment. In-house lawyers and government lawyers, for instance, must please non-lawyer managers to meet business or policy goals. Solo practitioners are under pressure to pay their bills, and lawyers at large
firms are under pressure to meet their hours.\textsuperscript{70} Moreover, reliance on borrowing may also put pressure on lawyers’ judgment.\textsuperscript{71}

Indeed, lawyers are already driven by their desire to maximize their own profits – an interest that is no doubt stronger than any pressure to increase profits for someone else. Law firms are, at their core, businesses, and survival compels finding ways to constrain financial pressures. Moreover, the overwhelming majority of private-sector lawyers work in partnerships whose revenue is distributed right back to lawyer-partners in profit every year – a structure which places the financial motive front and center in lawyers’ minds in a way it might not be in other professional services firms. In fact, the key metric by which major law firms are compared is Am Law 100’s annual “Profits Per Equity Partner” ranking – a metric that plays a critical role in the market for talent.\textsuperscript{72}

\begin{quote}
\textit{Alternative business structures in the U.K. such as Riverview Law have found that separating ownership from management helps incentivize firm-specific investments that both benefit clients and produce long-term returns.}
\end{quote}

There is, moreover, reason to believe that outside ownership or investment will both help insulate lawyers’ judgment from financial pressures as well as insulate business decision-making from lawyers’ individual interests. The latter was the effect at Slatters and Gordon, Australia’s first publicly traded law firm. Its managing director reported that their corporate structure has the benefit of creating greater separation between the interests of the business, and the personal interests and careers of employees.\textsuperscript{73} Similarly, alternative business structures in the U.K. such as Riverview Law – a technology and process-driven legal managed services company – have found that separating ownership from management helps incentivize firm-specific investments that both benefit clients and produce long-term returns.\textsuperscript{74} The U.K. and Australian legal experience suggests that allowing the “corporate practice of law” would better align interests for the benefit of the firm and its clients.
Established Mechanisms Exist for Mitigating Risk

In other common-law jurisdictions that have implemented reforms to allow lawyers and non-lawyers to own businesses together, regulatory systems exist to mitigate ethical concerns. These jurisdictions all use some form of entity-based regulation, meaning that both law firms and lawyers are regulated (e.g., the entity is regulated separately from the authorized legal practitioners who work there, who are regulated as individuals). In short, “since most lawyers now practice in firms, and most firms operate as businesses, ethical regulation of the legal profession can no longer afford to focus only on individual lawyers.”

Under this system, the firm – rather than just the individual lawyer – can be sanctioned for violations committed by its employees. A common practice is to require each business to have one legal compliance officer who is responsible for ensuring that the organization meets all ethical and confidentiality requirements. The idea is that “specialized management positions, such as ethics advisor and law firm general counsel, will promote individual accountability by promoting ethical awareness and monitoring within firms.”

For example, in England, where lawyers and non-lawyers can now work together in ABS firms, each ABS has a Head of Legal Practice who acts as a compliance officer. While individual lawyers remain subject to traditional disciplinary sanctions, the firm must also report on rule breaches; maintain appropriate systems for governance and compliance; and provide indemnity insurance coverage appropriate for the work they do, among other requirements.

Similarly, incorporated legal practices in Australia must have at least one legal practitioner director who is responsible for managing the legal services provided by the firm and preventing or remedying professional misconduct by employees. Australia uses a proactive, management-based approach to regulation (PMBR), under which Australian oversight officials identify regulatory objectives, and each firm is responsible for de-
signing their own management systems and using a system of self-assessments to ensure compliance.81 Research in New South Wales showed that the rate of complaints against entities that were subject to management-based regulation was two-thirds lower than the rate for entities that weren’t subject to such regulation.82 Several Canadian regulators are instituting similar approaches.83

Research in New South Wales showed that the rate of complaints against entities that were subject to management-based regulation was two-thirds lower than the rate for entities that weren’t subject to such regulation.

This kind of management-based approach to regulation is also catching on in the United States: The Colorado Supreme Court Office of Attorney Regulation Counsel has developed a voluntary self-assessment tool for lawyers to assess their systems for ensuring ethical behavior in their practice, and Illinois has implemented a self-assessment program that is mandatory for some lawyers and available to all.84 New Mexico is considering similar changes.85 The evidence from Australia indicates that focusing on proactive efforts to prevent ethical problems before they occur is a more cost effective way to mitigate harm than after-the-fact discipline.

Although most U.S. jurisdictions still only discipline individual lawyers for ethical violations, two jurisdictions– New York and New Jersey – have already laid the groundwork for stronger entity-based regulation, though in the context of exclusively lawyer-owned firms. New Jersey has asserted its authority to discipline entire law firms since 1984.86 New York similarly extended each law firm’s duty to ensure their lawyers comply with disciplinary rules.87 Although few prosecutions of firms has occurred in either state, the disciplinary structure exists to deter violations under a more permissive approach to lawyer and nonlawyer jointly owned organizations.88
Conclusion

Reforming Rule 5.4 is an opportunity to regulate in a way that benefits both lawyers and consumers. The current rule prohibiting lawyers from jointly investing with non-lawyers discourages profitable business practices, leaving law firms unable to access capital and vulnerable to economic downturns. State bar associations also remain targets for threats of litigation for antitrust claims. And critically, consumers suffer from a lack of access to affordable, easy-to-use legal services. U.S. jurisdictions should follow in the footsteps of other countries and allow lawyer and non-lawyer partnerships to better serve the public and the profession.

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2 Id.
3 The Legal Needs of Small Business: A Research Study Conducted by Decision Analyst (LegalShield 2013).
5 Gillian Hadfield & Deborah Rhode, How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering, 67 HASTINGS L.J. 1191, 1193 (2016).
7 MODEL CODE OF PROF’L CONDUCT r. 5.4(a) (AM. BAR ASS’N 1983).
8 Id. at r. 5.4(b).
9 Id. at r. 5.4(d)(1).
10 Hadfield and Rhode, supra note 5, at 1194.
11 Id.
13 Resolution 115, passed at 2020 Midyear Meeting.

18 *Id.*


24 Sebok, *Selling Attorney’s Fees*, supra note 21, at 1211-12.


26 Sebok, *Selling Attorney’s Fees*, supra note 21, at 1211.

27 Rhode, supra note 22, at 100.


33 Second Amended Complaint for Declaratory and Injunctive Relief, Jacoby & Meyers Law Offices, 2013 WL 9580965; *The Case Against Clones, supra note 32. See also William Henderson, The Failed Storefront Revolution and the Inner Guild in All of Us*, Legal Evolution, July 29, 2018 (suggesting that the regulations limiting what paraprofessionals can do in providing legal services prevented Jacoby and Meyers from building a sustainable business model).

34 Lawyers Gone Ethical podcast 34, Ethics Issues in the Development of Innovative Legal Products with Erin Levine, at 8:00.


36 Rhode, supra note 22, at 95.

37 Hadfield, *Rules For A Flat World*, supra note 19, at 240.


40 *Id.* at 65.
43 Id.
45 Id.
46 Hadfield & Rhode, supra note 5, at 1212-13.
47 Id.
48 Crispin Passmore, submission to CA Bar ATILS, at 11, 20 (Sept. 20, 2019); Hadfield, The Cost of Law, supra note 19, at 43.
49 Hadfield & Rhode, supra note 5, at 1212-13.
50 Impact Evaluation, supra note 44.
51 McCauley, supra note 39, at 58.
52 Id. at 58-61.
53 Id.
54 Id.
57 Kowalski, supra note 56, at 10-14.
58 Robinson, supra note 41, at 44.
59 Id. at 18.
60 Id. at 44.
61 Id.
63 According to some commentators: “What is clear is that wherever you look in the US legal market change has already happened. New ideas have broken through guild like walls and new law companies are meeting the needs of clients of traditional law firms in ways that simply bypass regulators.” Crispin Passmore, Re-Regulating Legal Services in the U.S., PASSMORE CONSULTING (Jan. 9, 2020), https://www.passmoreconsulting.co.uk/re-regulating-legal-services-in-the-us.
67 Rhode, supra note 22, at 96.
Crispin Passmore, submission to CA Bar ATILS, at 8 (Sept. 20, 2019).

Rhode, supra note 22, at 97.

Id. at 99-100; Letter from Thomas Gordon, Executive Director, Responsive Law, to the ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures, May 31, 2011.

See, e.g., Bernard Sharfman, Note, Modifying Model Rule 5.4 to Allow for Minority Ownership of Law Firms by Nonlawyers, 13 GEO. J. LEGAL ETHICS 477, 486 (2000) (“Overdependence on bank borrowings may put a severe financial strain on a law firm and its lawyers, putting pressure on their independence of judgment about what is best for the client.”).


Kowalski, supra note 56, at 21.

Id. at 51.


For an in-depth discussion of professional regulation under the LSA, see Andrew Boon, Professionalism Under the Legal Services Act of 2007, 17 INT’L J. L. PROF. 195 (2010). All standards and regulations issued by the Solicitors Regulatory Authority (SRA) can be found at https://www.sra.org.uk/solicitors/standards-regulations/. Additionally, the Law Society, an independent professional body for solicitors in England and Wales, issued a guide to entity based regulation for firms and practitioners authorized by the SRA. It is available at https://www.lawsociety.org.uk/support-services/advice/practice-notes/entity-based-regulation/.


Parker et al, supra note 76, at 471.


Parker et al, supra note 76, at 488.

Mize, supra note 81, at 3.


Reardon, Would Entity Regulation Improve Consumer Protection?, supra note 75.


Reardon, Would Entity Regulation Improve Consumer Protection?, supra note 75.
RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

a. refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

b. refrain from making any effort to prevent the accused from exercising a reasonable effort to obtain counsel;

c. Reserved.

d. make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;

e. exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this rule;

f. not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

1. the information sought is not protected from disclosure by any applicable privilege;

2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

3. there is no other feasible alternative to obtain the information; and

g. except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

The maximum penalty for a violation of this rule is a public reprimand.

Comment
[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4: Misconduct.


[4] Paragraph (f) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (g) supplements Rule 3.6: Trial Publicity, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6 (b) or 3.6 (c): Trial Publicity.
ABA Rule 3.8: Special Responsibilities of a Prosecutor

Advocate

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel,
employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

Advocate

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.
Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with
the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.
Rule 3.8: Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

a. **refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause**;

b. **make reasonable efforts** to prevent the accused from exercising a reasonable effort has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

c. Reserved.

c. **not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing**;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

e. exercise reasonable care to prevent persons who are under the direct supervision of the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under subsection (g) of this rule;
(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

1. (1) the information sought is not protected from disclosure by any applicable privilege;

2. (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

3. (3) there is no other feasible alternative to obtain the information; and

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

The maximum penalty for a violation of this rule is a public reprimand.

Comment

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Comment

Advocate

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4: Misconduct.


[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval
of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (gf) supplements Rule 3.6—Trial Publicity, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)—Trial Publicity.

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.
[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor’s jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor’s jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant’s counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.
In Georgia, few options to hold prosecutors accountable

NEWS | July 24, 2020
By Brad Schrade - The Atlanta Journal-Constitution
Bill Rankin - The Atlanta Journal-Constitution

Georgia district attorneys have faced a series of scandals and controversies in recent years that have raised a fundamental question: Does anyone police the prosecutors in this state?

In January, a $300,000 settlement was announced in a sexual harassment lawsuit against longtime Paulding County District Attorney Dick Donovan.

Fulton County DA Paul Howard has faced a string of recent discrimination and sexual harassment lawsuits by employees who have worked for him, and he is currently the target of a GBI criminal investigation into his use of a nonprofit he heads to funnel city funds to supplement his salary.

In May, Brunswick DA Jackie Johnson and Waycross DA George Barnhill were accused of mishandling the case involving the shooting death of Ahmaud Arbery and distorting the recusal process that governs prosecutors when a conflict of interest exists in a case.

The wave of criticism and national attention that rained down in that case led to the introduction of legislation in June to bring a formal oversight process to the state’s 49 elected district attorneys.

“It’s important to have a check on misconduct,” said House Minority Leader Robert Trammell, D-Luthersville, one of several sponsors of the bill that would create a state administrative body to oversee and investigate misconduct by prosecutors.

Trammell said he hopes to renew a push for creation of a District Attorneys Oversight Commission when the legislature reconvenes in January. He said he envisions the body functioning similar to the state Judicial Qualifications Commission, which investigates complaints of misconduct by judges.

Some prosecutors are open to the idea of more oversight.
“There’s a group of us embarrassed by the actions of some of our colleagues,” said Gwinnett County DA Danny Porter. “I think DAs have to recognize we haven’t done a good job at policing our own conduct.”

Richard Hyde, a member of the state’s judicial watchdog agency, agreed.

“I think it’s time that we have a serious discussion in this state about regulating prosecutors as we do judges,” he said.

In Georgia, the State Bar is responsible for investigating lawyer discipline and referring cases to the state Supreme Court for possible discipline. But cases brought before the court against wayward prosecutors are extremely rare.

“The fact is, there were very few complaints,” said Paula Frederick, the bar’s general counsel.

The state’s punishment for prosecutors who violate codes of conduct, such as withholding exculpatory evidence from the defense, is among the weakest in the country, said Clark D. Cunningham, a Georgia State University law school professor.

The maximum punishment is a public reprimand.

“The situation in Georgia in terms of monitoring and deterring prosecutorial misconduct is completely inadequate,” he said.
Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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Rule 8.4 Misconduct - Comment

Maintaining The Integrity of The Profession

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

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

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

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

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

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
A Philadelphia lawyer has filed a First Amendment challenge to Pennsylvania’s new ethics rule barring manifestations of bias or prejudice in the practice of law.

Lawyer Zachary Greenberg contends that the ethics rule will chill his speech as a lawyer for the Foundation for Individual Rights in Education, which defends due process and free speech rights of students and faculty.

192/new-anti-bias-rule-for-pa-attys-hit-with-legal-challenge) and Law.com
Speaking at legal events, Greenberg has endorsed due process protections for students accused of sexual misconduct, has opposed campus bans on hate speech, has defended the right of professors and students to engage in hateful speech, and has spoken in favor of allowing religious speech on campus that espouses discriminatory views.

The new ethics rule could lead to a sanction against Greenberg “if an audience member misconstrues his speech as a manifestation of bias or prejudice,” the lawsuit says.

The Pennsylvania Supreme Court adopted Rule 8.4(g) of the Pennsylvania Rules of Professional Conduct on June 8.

Pennsylvania’s rule, set to take effect Dec. 8, is a variation of Rule 8.4(g) of the ABA Model Rules of Professional Conduct. The ABA adopted the bias rule in 2016.

The Pennsylvania version of the rule says it is professional misconduct for a lawyer to “in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these rules.”

A comment to the Pennsylvania rule says “conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.”

The suit says Greenberg reasonably fears that his writing and speeches could be misconstrued. Even U.S. Supreme Court justices have been criticized as potentially biased for opinions and comments, the suit says.

Among those criticized:
• The late Justice Antonin Scalia was criticized for a discussion of mismatch theory that contends that university racial preferences harm minorities with lower academic credentials.

• Justice Clarence Thomas has been criticized as homophobic in his opinions.

• Justice Samuel A. Alito Jr. was accused of manifesting a “jurisprudence of white racial innocence.”

• Justice Brett M. Kavanaugh was accused of writing an opinion that peddles “class prejudice.”

• Justice Ruth Bader Ginsburg was criticized as borderline prejudiced when she referred to civil rights activist and football quarterback Colin Kaepernick’s national anthem protests as “dumb and disrespectful.”

The suit alleges that the Pennsylvania ethics rule unconstitutionally infringes Greenberg’s free speech rights and is “unconstitutionally vague.”

Greenberg is represented by the Hamilton Lincoln Law Institute, a nonprofit law firm that advocates for free markets, limited government and free speech.

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The ABA Standing Committee on Ethics and Professional Responsibility released additional guidance Wednesday on the application of Rule 8.4(g) of the ABA Model Rules of Professional Conduct. This rule prohibits discrimination and harassment on the basis of race, sex, religion, national orientation and sexual orientation by lawyers in “conduct related to the practice of law.”

One of the most debated rules of professional conduct in recent memory, 8.4(g) arose largely because of the prevalence of sexual harassment in law and legal-related functions. The change to the model rule was adopted by the ABA House of Delegates in 2016.

According to Formal Ethics Opinion 493, the rule must be assessed using a standard of objective reasonableness and applies to conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination. Only conduct found harmful is grounds for discipline. Conduct can violate the rule even if it is not severe or pervasive, the traditional standard in employment
discrimination law. However, if the harassing or discriminatory conduct is an isolated incident, that can be a mitigating factor in disciplinary proceedings.

The opinion elaborates on the meaning of both harassment and discrimination. Harassment, the opinion reads, “refers to conduct that is aggressively invasive, pressuring, or intimidating.” Discrimination includes “harmful verbal or physical conduct that manifests bias or prejudice towards others.”

The opinion notes that “two important constitutional principles guide and constrain [Rule 8.4(g)’s] application.” These include concerns over vagueness and overbreadth—that the rule must be sufficiently clear and that it not sweep too far within its reach to bar protected speech or conduct. “Courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment challenge,” the opinion notes.

The ethics opinion provides five hypotheticals to illustrate the scope and application of the rule. The following three examples would not constitute a violation of 8.4(g):
• A lawyer would not violate 8.4(g) by representing a religious organization that challenges on First Amendment grounds a rule requiring schools to provide gender-neutral facilities.

• The lawyer could also be a member of a religious legal organization that advocated for the right of a private employer to fire or refuse to hire people based on their sexual orientation or gender identity.

• The rule would not prohibit a CLE speaker from asserting viewpoints about affirmative-action programs in higher education.

However, the following two examples would be violations:

• A lawyer serving as an adjunct professor in a law school clinic would violate 8.4(g) by making comments of a sexual nature to students.

• A lawyer also would violate 8.4(g) by making discriminatory remarks about Muslims to another lawyer in a planning session for an orientation program for new associates.

The opinion concludes by emphasizing the importance of the rule: “Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.”

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ABA Journal (https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct): “States split on new ABA Model Rule limiting harassing or discriminatory conduct”


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