RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

[No change to Rule 1.2 or Comment 1 to Rule 1.2]

[1A] In consulting with a client about the means to accomplish a client's objectives, a lawyer must take into consideration the lawyer's own professional obligations in dealing with third parties, see Rules 4.1-4.4, and the lawyer's duties as an advocate, see Rules 3.1-3.9. A lawyer should not permit a client's personal prejudices or animosities to dictate the lawyer's treatment of the opposing party or counsel or others involved in the legal process and should reject client requests to engage in abusive tactics.

[No further changes to Comments to Rule 1.2]

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

[No change in paragraphs (a) through (f) of Rule 3.4]

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in preparing, attending or testifying;

(2) reasonable compensation to a witness for loss of time in preparing, attending or testifying; and

(3) a reasonable fee for the professional services of an expert witness; or

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter~~; or(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding~~.

Comment

[No change to Comments 1 through 3 to Rule 3.4]

[3A] The obligations covered by paragraph (c) include, where the rules of the tribunal so require, obligations to cooperate in scheduling and case management and to meet and

confer in good faith to resolve or narrow issues before submitting them to the tribunal for decision.

[No change to Comments 4 through 6 to Rule 3.4]

~~[7] Paragraph (i) concerns conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.~~

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not

(1) use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, ~~or~~

(2) use methods of obtaining evidence that violate the legal rights of such a person, or

(3) engage in conduct that manifests bias or prejudice based on race, sex, marital status, religion, national origin, disability, age, sexual orientation or gender identity against such a person. This clause (3) does not preclude legitimate advice or advocacy otherwise consistent with these Rules.

[No change to paragraph (b) of Rule 4.4]

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons, including other parties, counsel, witnesses, court personnel, and other participants in the legal process. It is impractical to ~~catalogue~~catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[1A] It is also impractical to catalog all the ways in which a person may be harassed. A non-exhaustive, illustrative list of examples of harassment includes: aggressive physical conduct that would cause a reasonable person to feel threatened or the threat to use same; following a person (or causing another to follow a person) in or about a public place or places; communicating to or about such other person any lewd, lascivious or threatening words, language or images; communicating (or causing another to communicate) repeatedly in an anonymous manner or repeatedly at extremely inconvenient hours; and engaging in a course of conduct that is intended to cause fear, distress, or physical or psychological harm.

[1B] Professional actions by an attorney that manifest bias or prejudice in violation of paragraph (a)(3) undermine confidence in the legal profession and strike at the heart of the legal system, under which all persons are to be treated equally and with equal dignity. Paragraph (a)(3) concerns conduct in the representation of a client that manifests bias or prejudice based on race, sex, marital status, religion, national origin, disability, age, sexual orientation or gender identity of any person.

[No further changes to Comments to Rule 4.4]

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS AND SUPERVISORY LAWYERS

[No change to Rule 5.1 or Comments 1-3]

3A. Dealing with colleagues whose mental, emotional or physical abilities have declined to the point of impairing their ability to provide competent representation or otherwise conform to these rules falls within the obligations imposed by this rule. See Rules 1.1 and 1.3. Persons with managerial authority in a law firm should encourage such colleagues to seek assistance, and shall put in place procedures such as auditing the lawyer's past work and limiting or monitoring future work as reasonably necessary to protect clients.

[No further changes to Comments to Rule 5.1]

ADD NEW DEFINITION OF SEXUAL RELATIONS IN RULE 1.0:

RULE 1.0

(__) "Sexual relations" denotes sexual intercourse or the intentional touching of an intimate part of the lawyer or another person for the purpose of sexual arousal or sexual gratification.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

[No changes in Rule 1.7 or in Comments to Rule 1.7 until Comment 12]

[12] ~~The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any~~Combining an attorney-client relationship with an intimate personal relationship raises concerns about ~~conflict of interest~~conflicts between the attorney's personal interests and the best interests of the client, impairment of the judgment of both lawyer and client, and preservation of the attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client. In some cases, sexual relationships between lawyer and client are prohibited by Rule 1.8(j). Even if the sexual relationship does not violate Rule 1.8(j), the lawyer must consider whether the lawyer's ability to represent the client effectively will be affected by the sexual relationship. Unless it would be clear to a reasonable person that a sexual relationship with the client would not materially affect the representation, the lawyer should either avoid the sexual relationship or withdraw from the representation.

[12A] Sexual relations with a representative of an organizational client who supervises, directs, or regularly consults with the outside lawyer concerning the organization's legal matters can also raise the risk that the lawyer's independent professional judgment will be impaired and the attorney-client privilege compromised. A client representative in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the representative's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver.

[No further changes in Comments to Rule 1.7]

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

[No changes in Rule 1.8 until paragraph (j)]

(j) ~~Reserved.~~(1) A lawyer shall not:

(a) during the course of any representation by the lawyer or the lawyer's firm, employ coercion, intimidation or undue influence to enter into or continue sexual relations with a client; or

(b) as a condition of entering into or continuing any representation by the lawyer or the lawyer's firm, require or demand sexual relations with a client or prospective client.

(2) In addition, in domestic relations matters, a lawyer shall not enter into sexual relations with a client during the course of the lawyer's representation of the client. Rule 1.8(j)(2) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (~~i~~j)(1) that applies to any one of them shall apply to all of them.

Comment

[No changes in Comments to Rule 1.8 until Comment 17]

Client-Lawyer Sexual Relationships

[17] ~~Reserved~~The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. Paragraph (j)(1)(a) seeks to prevent a lawyer from exploiting the professional relationship with a client by prohibiting the use of coercion, intimidation or undue influence to obtain sexual relations with a client or a prospective client of the lawyer or the lawyer's firm while Paragraph (j)(1)(b) more generally prohibits a lawyer from demanding sexual relations as a condition of providing legal services, even if the demand does not otherwise appear to involve coercion, intimidation, or undue influence. Because domestic relations matters entail a heightened risk of exploitation of the client, paragraph (j)(2) prohibits lawyers from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and prejudice to the client is not immediately apparent. A sexual relationship that is permissible under paragraph (j) may nevertheless interfere with the lawyer's exercise of professional judgment and create a conflict between the lawyer's personal interests and the best interests of the client. See Rule 1.7, Comment 12.

[No further changes in Comments to Rule 1.8]

ADD NEW DEFINITION OF SEXUAL RELATIONS IN RULE 1.0:

RULE 1.0

(p) "Sexual relations" denotes sexual intercourse or the intentional touching of an intimate part of the lawyer or another person for the purpose of sexual arousal or sexual gratification.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

[No changes in Rule 1.7 or in Comments to Rule 1.7 until Comment 12]

[12] ~~A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~Combining an attorney-client relationship with an intimate personal relationship raises concerns about conflicts between the attorney's personal interests and the best interests of the client, impairment of the judgment of both lawyer and client, and preservation of the attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client. In some cases, sexual relationships between lawyer and client are prohibited by Rule 1.8(j). Even if the sexual relationship does not violate Rule 1.8(j), the lawyer must consider whether the lawyer's ability to represent the client effectively will be affected by the sexual relationship. Unless it would be clear to a reasonable person that a sexual relationship with the client would not materially affect the representation, the lawyer should either avoid the sexual relationship or withdraw from the representation.

[12A] Sexual relations with a representative of an organizational client who supervises, directs, or regularly consults with the outside lawyer concerning the organization's legal matters can also raise the risk that the lawyer's independent professional judgment will be impaired and the attorney-client privilege compromised. A client representative in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the representative's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver.

[No further changes in Comments to Rule 1.7]

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

[No changes in Rule 1.8 until paragraph (j)]

(j) (1) *A lawyer shall not ~~have~~*:

(a) during the course of any representation by the lawyer or the lawyer's firm, employ coercion, intimidation or undue influence to enter into or continue *sexual*

relations with a client ~~unless a consensual sexual relationship existed between them when~~ ; or

(b) as a condition of entering into or continuing any representation by the lawyer or the lawyer's firm, require or demand sexual relations with a client or prospective client.

(2) In addition, in domestic relations matters, a lawyer shall not enter into sexual relations with a client during the course of the lawyer's representation of the client. Rule 1.8(j)(2) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of *the client-lawyer relationship ~~commenced~~*.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (~~i~~j)(1) that applies to any one of them shall apply to all of them.

Comment

[No changes in Comments to Rule 1.8 until Comment 17]

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is ~~almost always~~often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. ~~In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer~~Paragraph (j)(1)(a) seeks to prevent a lawyer from exploiting the professional relationship with a client by prohibiting the use of coercion, intimidation or undue influence to obtain sexual relations with a client or a prospective client of the lawyer or the lawyer's firm while Paragraph (j)(1)(b) more generally prohibits a lawyer from demanding sexual relations as a condition of providing legal services, even if the demand does not otherwise appear to involve coercion, intimidation, or undue influence. Because domestic relations matters entail a heightened risk of exploitation of the client, paragraph (j)(2) prohibits lawyers from ~~having~~ entering into sexual relations with ~~a client regardless of whether the~~domestic relations clients during the course of the representation even if the sexual relationship is consensual and ~~regardless of the absence of prejudice to the client.~~prejudice to the client is not immediately apparent. A sexual relationship that is permissible under paragraph (j)

may nevertheless interfere with the lawyer's exercise of professional judgment and create a conflict between the lawyer's personal interests and the best interests of the client. See Rule 1.7, Comment 12.

[No further changes in Comments to Rule 1.8]

INFORMATION ABOUT LEGAL SERVICES

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 ~~permitted by Rule 7.2.~~ Whatever means are used to make known a lawyer's services, statements about them ~~should~~must be truthful.

[2] ~~Truthful~~Misleading statements ~~that are misleading are also~~, even if truthful, 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 ~~also~~ misleading if ~~there is~~ 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] ~~An advertisement~~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 ~~the services or fees~~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.

[4] 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 ~~influence~~ improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A

lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired 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.

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

[7] 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. For example, lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[8] 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.

[9] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

RULE 7.2: ~~ADVERTISING~~COMMUNICATIONS CONCERNING A LAWYER'S SERVICES; SPECIFIC RULES

(a) ~~Subject to the requirements of Rules 7.1 and 7.3, a~~A lawyer may ~~advertise~~communicate information regarding the lawyer's services through ~~written, recorded or electronic communication, including public~~any media.

(b) A lawyer shall ~~not~~neither compensate nor 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, not-for-profit lawyer referral service~~,~~ or qualified legal assistance organization;

(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) ~~pay fees permitted by Rule 1.5(e) or Rule 5.4(a)(4).~~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) ~~Any communication made pursuant to this Rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.~~Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. However, a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the certifying organization is clearly identified in the communication, and:

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

(2) the communication states that the certifying organization is "a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

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

Comment

[1] ~~To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.~~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.

~~[2] [Reserved]~~

~~[3] [Reserved]~~

~~[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a website or home page would generally be considered advertising subject to this Rule, rather than solicitation subject to Rule 7.3. For the distinction between advertising governed by this Rule and solicitations governed by Rule 7.3, see Comment 1 to Rule 7.3.~~

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

Paying Others to Recommend a Lawyer

[~~5~~2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services ~~or for channeling professional work in a manner that violates Rule 7.3.~~. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1)~~, however,~~ allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, 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, not-for-profit lawyer referral service, or qualified legal assistance organization. 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 is a consumer-oriented organization that provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and affords other client protections, such as complaint procedures or malpractice insurance requirements. A qualified legal assistance organization is defined by Rule 1.0(j).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rules 5.3 and 8.4(a). Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[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. Such Conflicts of interest created by such arrangements are governed by Rule 1.7, and therefore require the client's informed consent in writing.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. Lawyers who hold themselves out as specialists should expect to be held to the standard of performance of specialists in that particular service, field, or area.

[10] The Patent and Trademark Office has a long-established policy of licensing 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.

RULE 7.3: SOLICITATION OF CLIENTS

(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 ~~by in-person, live telephone or real-time electronic contact~~ solicit professional employment ~~for a fee, unless the person contacted:~~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) ~~is a~~ lawyer;

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

(3) ~~is a grandparent of the lawyer or the lawyer's spouse, a descendant of the grandparents of the lawyer or the lawyer's spouse, or the spouse of any of the foregoing persons; or~~

~~(4) is~~ (i) ~~a~~ representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) ~~a~~ person engaged in trade or commerce as defined in G. L. c. 93A, §1 (*b*), in connection with such person's trade or commerce.

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

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

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

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the prohibition in this clause (3) only applies to solicitations for a fee.

~~(c) [Reserved]~~

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

(e) Notwithstanding the prohibitions in ~~paragraph (a)~~this Rule, a lawyer may ~~request referrals from a lawyer referral~~participate with a prepaid or group legal service plan operated~~, sponsored, or approved by a bar association or other non-profit organization, and cooperate with any other qualified legal assistance organization.~~ 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 a particular matter covered by the plan.

Comment

[1] ~~A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does~~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 ~~constitute~~ a

solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to ~~Internet~~electronic searches.

[2]~~This Rule allows lawyers to conduct some form of solicitation of employment, except in a small number of very special circumstances, and hence permits the public to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal solicitation in the circumstances prohibited by this Rule and seeks to limit them by regulating the form and manner of solicitation by rules that reach no further than the danger that is perceived. Lawyers are also required to comply with other applicable laws that govern solicitations.~~For purposes of the prohibition in paragraph (b), "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 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 over-reaching. The prohibitions of paragraph (b) do not of course apply to in-person communications after contact has been initiated by a person seeking legal services.

[3] 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.

[4] 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] Paragraph (b) acknowledges that 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 a

representative of an organization, including a non-profit or government entity, or is a person engaged in trade or commerce as defined in G.L. c. 93A, §1 (b), where the contact is in connection with the activities of such organization or the person's trade or commerce. 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.

[3] Paragraph (a) applies to in-person, live telephone, and real-time electronic contact by a lawyer. Paragraph (b) applies to all forms of solicitation, including both the real-time solicitation covered by paragraph (a) and solicitation by written, recorded or other forms of electronic communication such as email. 6] Prohibited solicitations include those that contain false or misleading information within the meaning of Rule 7.1, that involve 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), that involve coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involve communications with someone who the lawyer knows or should know cannot exercise reasonable judgment in employing a lawyer within the meaning of Rule 7.3(c)(3). In determining whether a contact is permissible under Rule 7.3(bc)(3), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Likewise, persons who are elderly or disabled, or who are not fluent in the language of the solicitation, may be especially vulnerable to coercion or duress. The reference to the "physical, mental, or emotional state of the target of the solicitation" is intended to be all-inclusive of the condition of such person and includes anyone who for any reason lacks sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (bc)(3) makes clear that it is not intended to reduce the ability possessed by nonprofit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations may constitute a violation of paragraph (bc)(2) of the Rule or Rule 8.4(c) or (d). The references in paragraph (ab) and (bc)(3) of the Rule to solicitation for "the lawyer's or the law firm's pecuniary gain" or "for a fee" are intended to exempt solicitations by non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the Rule. There is no blanket exemption from regulation for all solicitation that is not done "for a fee." Non-profit organizations are subject to the general prohibitions of subparagraphs (b)(1) and (b)(2).

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might

~~constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in person, live telephone or real-time electronic 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] While paragraph (b) permits written and other nondirect solicitation of any person, except under the special circumstances set forth in subparagraphs (1) through (3), paragraph (a) prohibits solicitation in person or by live telephone or real-time electronic communication, except in the situations described in subparagraphs (1) through (4). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through computer-accessed or similar types of communications. The prohibitions of paragraph (a) do not of course apply to in-person solicitation after contact has been initiated by a person seeking legal services.~~

~~[6] Subparagraphs (1) through (4) of paragraph (a) acknowledge that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the target of the solicitation is a former client or a member of the lawyer's immediate family. The word "descendant" is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, nonprofit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business Subparagraph (a)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organization, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.~~

~~[7] Paragraph (d) permits a lawyer to request referrals from described organizations.~~

~~RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE~~

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

~~(b) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. Lawyers who hold themselves out as specialists shall be held to the standard of performance of specialists in that particular service, field, or area.~~

~~(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless the name of the certifying organization is clearly identified in the communication and:~~

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

(2) the communication states that the certifying organization is "a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

Comment

[1] Paragraphs (a) and (b) of this Rule permit a lawyer to indicate areas of practice in communications about the lawyer's services. Lawyers are generally permitted to hold themselves out as specialists in a particular service, field or area of law but the definition of what is included in the term "holding out" is broad and the examples in paragraph (b) are not intended to be exclusive. Any such claims of specialization are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (c) identifies the circumstances under which lawyers may state that they are certified as specialists in a field or area of law. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.5: FIRM NAMES AND LETTERHEADS

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

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

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

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

~~**Comment**~~

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

~~[2] With regard to paragraph (d), lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.~~

~~[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.~~

[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 that 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).

INFORMATION ABOUT LEGAL SERVICES

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, even if truthful, 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.

[4] 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.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name

or designation is misleading if it implies a connection with a government agency, with a deceased or retired 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.

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

[7] 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. For example, lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[8] 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.

[9] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

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~~neither compensate~~,~~ nor 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~~;~~ or qualified legal assistance organization;

(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~~Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. However, a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the certifying organization is clearly identified in the communication, and:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate State 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~~or

(2) the ~~name of~~communication states that the certifying organization is ~~clearly identified in the communication.~~"a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

(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, or qualified legal assistance organization. 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~~ is a consumer-oriented ~~organizations~~organization that ~~provide~~provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and ~~afford~~affords 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.~~A qualified legal assistance organization is defined by Rule 1.0(j).

[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. Lawyers who hold themselves out as specialists should expect to be held to the standard of performance of specialists in that particular service, field, or area.

[10] The Patent and Trademark Office has a long-established policy of ~~designating~~licensing 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.~~

RULE 7.3: SOLICITATION OF CLIENTS

(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.~~(i) representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) person engaged in trade or commerce as defined in G. L. c. 93A, §1 (b), in connection with such person's trade or commerce.

(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; or

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the prohibition in this clause (3) only applies to solicitations for a fee.

(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 a particular matter covered by the plan.

Comment

[1] 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.

[2] ~~"Live~~For purposes of the prohibition in paragraph (b), "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 over-reaching. The prohibitions of paragraph (b) do not of course apply to in-person communications after contact has been initiated by a person seeking legal services.

[3] 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.

[4] 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~~Paragraph (b) acknowledges that 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~~a representative of an organization, including a non-profit or government entity, or is a person engaged in trade or commerce as defined in G.L. c. 93A, §1 (b), where the contact is in connection with the activities of such organization or the person's trade or commerce. 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~~ Prohibited solicitations include those that contain 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~~involve 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~~, that involve coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involve communications with someone who the lawyer knows or should know cannot exercise reasonable judgment in employing a lawyer within the meaning of Rule 7.3(c)(3). In determining whether a contact is permissible under Rule 7.3(c)(3), it is relevant to consider the times and circumstances under which the contact is initiated. For example, a person undergoing active medical treatment for traumatic injury is unlikely to be in an emotional state in which reasonable judgment about employing a lawyer can be exercised. Likewise, persons who are elderly or disabled, or who are not fluent in the language of the solicitation, 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.~~duress. The reference to the "physical, mental, or emotional state of the target of the solicitation" is intended to be all-inclusive of the condition of such person and includes anyone who for any reason lacks sufficient sophistication to be able to select a lawyer. A proviso in subparagraph (c)(3)

makes clear that it is not intended to reduce the ability possessed by nonprofit organizations to contact the elderly and the mentally disturbed or disabled. Abuse of the right to solicit such persons by non-profit organizations may constitute a violation of paragraph (c)(2) of the Rule or Rule 8.4(c) or (d). The references in paragraph (b) and (c)(3) of the Rule to solicitation for "the lawyer's or the law firm's pecuniary gain" or "for a fee" are intended to exempt solicitations by non-profit organizations. Where such an organization is involved, the fact that there may be a statutory entitlement to a fee is not intended by itself to bring the solicitation within the scope of the Rule.

[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~~that 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).

~~**RULE 7.4 [DELETED]**~~

~~**RULE 7.5 [DELETED]**~~

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system~~,~~ and a public citizen having special responsibility for the quality of justice.

~~1.~~ [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client~~'~~'s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client~~'~~'s position under the ~~Rules~~rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest ~~dealing~~dealings with others. ~~A~~As an evaluator, a lawyer acts ~~as evaluator~~ by examining a client~~'~~'s legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

~~2.~~ [4] In all professional functions a lawyer should be competent, prompt~~,~~ and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

~~3.~~ [5] A lawyer~~'~~'s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer~~'~~'s business and personal affairs. A lawyer should use the law~~'~~'s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers~~,~~ and public officials. While it is a lawyer~~'~~'s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer~~'~~'s duty to uphold legal process.

~~4.~~ [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice~~,~~ and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law~~,~~ and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance~~, and~~. Therefore, all lawyers should ~~therefore~~ devote professional time and ~~civic influence in their behalf~~resources and use civic influence to ensure equal access to our system of justice for all those who because

of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

5. [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

6. [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

7. [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. 8. The legal profession is largely self-governing These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

9. [11] To the extent that lawyers meet the obligations of their professional calling, the occasion for further government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

10. [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

~~11.~~ [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

~~[1]~~ [14] The Rules of Professional Conduct are ~~Rules~~rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms ~~"~~"shall~~"~~" or ~~"~~"shall not.~~"~~" These define proper conduct for purposes of professional discipline. Others, generally cast in the term ~~"~~"may~~"~~," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional ~~discretion~~judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer~~'~~'s professional role. ~~Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.~~

~~[2]~~ [15] The Rules presuppose a larger legal context shaping the lawyer~~'~~'s role. That context includes court ~~Rules~~rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers~~,~~ and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily ~~on~~upon understanding and voluntary compliance, secondarily ~~on~~upon reinforcement by peer and public opinion~~,~~ and~~,~~ finally, when necessary, ~~on~~upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal ~~Rules~~rules. The Rules simply provide a framework for the ethical practice of law.

~~[3]~~ [17] Furthermore, for purposes of determining the lawyer~~'~~'s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that ~~may~~ attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

~~[4]~~ [18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in

circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, or any other substantive statutory authority of government lawyers.

~~[5]~~ [19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer~~'~~'s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act ~~on~~upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, ~~including~~such as the ~~wilfulness~~willfulness and seriousness of the violation, extenuating factors~~,~~ and whether there have been previous violations.

~~[6]~~ [20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. "A violation of a canon of ethics or a disciplinary Rule . . . is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary ~~agencies. The~~ agencies. The Rules are not designed to be a basis for civil liability, but they may embody a substantive principle of law that furnishes the basis for disqualification or a non-disciplinary liability. The fact that a Rule is a just ~~a~~ basis for a lawyer~~'~~'s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not ~~necessarily mean~~imply that an antagonist in a collateral proceeding or transaction ~~may rely on a violation of a~~has standing to seek enforcement of the Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary Rule was intended to protect one in his position, a violation of that Rule may be some evidence of the attorney's negligence." Id. at 649.

~~[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.~~

~~[8] [RESERVED]~~[9] [21] The Rules are authoritative. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments to each Rule are intended as guides to interpretation~~, but the text of each Rule is authoritative.~~. They are meant to assist lawyers in

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PREAMBLE AND SCOPE

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to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. ~~These Rules do not abrogate any such~~They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, or any other substantive statutory authority of government lawyers.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. "A violation of a canon of ethics or a disciplinary Rule . . . is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. ~~They~~The Rules are not designed to be a basis for civil liability, ~~Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The~~ but they may embody a substantive principle of law that furnishes the basis for disqualification or a non-disciplinary liability. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a~~ "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary Rule was intended to protect one in his position, a violation of that Rule may be some evidence of ~~breach of the applicable standard of conduct.~~the attorney's negligence." Id. at 649.

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Rule 1.15A: Client Files

(a) For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

(1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;

(2) all correspondence relating to the matter, whether in physical or electronic form;

(3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client's claims or defenses;

(4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence;

(5) all intrinsically valuable documents of the client; and

(6) copies of the lawyer's work product.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records. For purposes of this Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by the lawyer's employee, agent, or consultant, and not described in subparagraphs (2), (3), (4) or (5) above. Examples of work product include without limitation legal research, closing binders, records of witness interviews, and reports of negotiations.

(b) A lawyer must make the client's file available to a client or former client within a reasonable time following the client's or former client's request for his or her file, provided however, that:

(1) the lawyer may at the lawyer's own expense retain copies of documents turned over to the client;

(2) the client may be required to pay (i) any copying charges for copying the material described in subparagraphs (a)(3) and (a)(6), consistent with the lawyer's actual copying cost, unless the client has already paid for such material, and (ii) the lawyer's actual cost for the delivery of the file;

(3) the lawyer is not required to turn over to the client investigatory or discovery documents for which the client is obligated to pay under the fee agreement but has not paid; and

(4) unless the lawyer and the client have entered into a contingent fee agreement, the lawyer is only required to turn over copies of the lawyer's work product for which the client has paid.

Notwithstanding anything in this paragraph (b) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.

(c) ~~Except for materials governed by paragraphs (d), (e) and (f), a lawyer shall take reasonable measures to retain a client's file in a matter until at least six years have elapsed after completion of the matter or termination of the representation in the matter unless (i)~~(1) Unless the lawyer has transferred the ~~file or items~~client's file to the client or successor counsel, or as otherwise directed by the client, or ~~(ii)~~ the client agrees in writing to an alternative arrangement for the file's custody or destruction, ~~provided, however, that~~a lawyer shall take reasonable measures to retain a client's file in a matter until the latest of (i) for files subject to paragraph (f) below, the periods specified in paragraph (f) below, (ii) for documents governed by paragraph (d) below, when the conditions of that paragraph have been satisfied, (iii) for files relating to the representation of a minor ~~shall be retained until at least~~, six years after the minor reaches the age of majority~~.~~, and (iv) for all other documents and files, six years have elapsed after the completion of the matter or the termination of the representation in the matter.

(2) If the client has not requested the file within ~~six years after completion or termination of the representation or within six years after a minor reaches the age of majority~~the period of retention set forth in paragraph (c)(1), the file may be destroyed, except as provided in ~~paragraphs (d),~~paragraph (e)~~, and (f)~~ below.

(3) When a lawyer transfers a client's file or items to the client or successor counsel or agrees in writing to an alternative arrangement for the file's custody or destruction, the lawyer shall retain a copy of the writing describing the alternative arrangement, or a cover letter or other document evidencing the transmittal of the file to the client or successor counsel or as otherwise directed by the client, for at least six years following the date of the arrangement or transmittal.

(d) Intrinsically valuable documents that constitute trust property of the client must be delivered to the client as provided in Rule 1.15(c). All other intrinsically valuable documents must be appropriately safeguarded and delivered in accordance with paragraph (b) above, or retained until such time as the documents no longer possess intrinsic value. If the client cannot be found, the lawyer shall securely retain such documents or, where applicable, deliver such items to an appropriate governmental repository.

(e) A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;

(2) a criminal or other governmental investigation related to the client matter is pending or anticipated; or

(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated.

(f) Criminal defense counsel and defense counsel in delinquency cases shall retain a client's files as follows:

(1) for the life of the client if the matter resulted in a conviction and a sentence of death or life imprisonment with or without the possibility of parole; and

(2) in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client.

(g) A lawyer appointed to represent a client by the Committee for Public Counsel Services shall retain a copy of the client's file in accordance with the requirements set forth in the Committee for Public Counsel Services Assigned Counsel Manual.

(h) A lawyer shall take reasonable measures to ensure that the destruction of all or any portion of a client file shall be carried out in a manner consistent with all applicable confidentiality obligations.

Comments

[1] In order to represent clients competently in a matter, lawyers customarily maintain a file of papers and electronically stored information that will in the lawyers' judgment aid in the representation. This Rule governs lawyers' obligations with respect to the custody and destruction of client files. A lawyer's obligations with respect to client funds are governed by Rule 1.15 and, with specific respect to trust property such as jewelry and other valuables entrusted to the lawyer by the client, by Rule 1.15(b)(4). Lawyers are encouraged to address disposition of client files in the written engagement letter required by Rule 1.5(b)(1) and, in instances where particular arrangements for disposition or transfer have not been made, in the lawyer's final communication to the client at the conclusion of a matter.

[2] The client's file in a given matter consists of those items that must be made available upon the client's direction to the client or successor counsel to provide a reasonably complete record of the services provided and, if the matter is unfinished, to give successor counsel what is needed to complete the representation. Thus, the client file for a litigation matter would include the pleadings and court filings, rulings and other documents issued by the court, all correspondence including with the client and opposing counsel, deposition transcripts, documents produced or received in discovery (subject to applicable protective orders), investigatory materials and expert reports, the trial record, memorialized legal research and analysis, and any settlement documents. In a case with a limited number of parties, the pleadings

would include all the material pleadings. In a large case with many parties, such as a large bankruptcy proceeding, the pleadings would only include those directly relevant to the client's claims and defenses. The client file for a transactional matter would include all correspondence, including with the client and counterparties and the exchange of drafts, contracts and other documents establishing the terms of the transaction (often gathered into a "closing binder"), and memorialized legal research and analysis.

[3] Multiple copies or drafts of the same document ordinarily do not constitute part of the client's file unless the matter is unfinished, and the client and successor counsel must have the drafts to complete the representation. Similarly, a lawyer's personal notes ordinarily do not constitute part of the client's file unless the notes are the only record of a witness interview, a settlement negotiation, a meeting with regulators or prosecutors, or some similar event. Once a document is finalized or personal notes of an event are memorialized, this Rule does not require preservation of the drafts or notes. However, documents that are part of the client's file at the time of a request for the file must thereafter be preserved and produced. Except as provided in Comment 4, this Rule does not require preservation of any physical documents that have been converted to electronic form.

[4] Unless other applicable law requires a particular document to be physically preserved for its legal effectiveness, a lawyer may maintain a client's file in electronic form, provided, however, that, for documents stored only in electronic form, the lawyer must make reasonable efforts to store such electronic files in a form that can be read with available technology for any period during which the file must be retained. If the original form of the document is important, however, it should not be destroyed without the client's permission.

[5] The client's file does not include a lawyer's administrative files such as conflict checks, billing and accounting records, and communications within a law firm concerning matters of administration such as account creation, billing and collections, logistics, and the assignment and evaluation of personnel assigned to the matter. Such documents may be subject to discovery in a dispute concerning the representation, but ordinarily do not need to be provided to the client or successor counsel at the client's direction.

[6] Rule 1.15A does not supersede obligations imposed by court order, rules of a tribunal, or other law including discovery rules in civil cases, subpoenas and other mandatory process, and the law of spoliation and obstruction of justice. Similarly, Rule 1.15A does not supersede specific retention requirements imposed by other rules of professional conduct. See, e.g., Rule 1.5(c). The maintenance of records required for trust property and trust accounts is governed exclusively by Rule 1.15. A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[7] Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable documents under paragraph (d), or if the lawyer has agreed otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the

lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. See Rule 1.6(c). A lawyer may destroy a client's file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.

[8] For a lawyer to rely on an agreement in writing of the client to an alternative for the file's custody or destruction pursuant to paragraph (c)(1), the agreement must be enforceable, that is, for a minor client the agreement must be entered into with an adult representative authorized to act for the client, and for an adult client, the adult must be competent to enter into a binding agreement.

[9] The lawyer's obligations under this Rule to retain and return files to the client are not excused because the lawyer forwarded papers to the client from time to time during the course of the representation.

[~~9~~10] Nothing in this Rule is intended to mandate that a lawyer destroy a file. A lawyer appropriately may decide to retain certain types or portions of files, or portions of files for longer than six years, such as files relating to a structured settlement or other matters creating long-term obligations to or by the client. Unless the lawyer and the client have otherwise agreed, a lawyer may retain a copy of the file or any document in the file.

**Amendments to the Rules of Professional Conduct to
Move the Definition of the Term "Confidential Information" to Rule 1.6(a)**

1. Rule 1.6(a) would be revised to read as follows (added text underlined):

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the legal community or in the trade, field or profession to which the information relates.

2. Comment 3A to Rule 1.6 would be revised to read (deleted text stricken):

[3A] ~~"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the legal community or in the trade, field or profession to which the information relates.~~ A lawyer may not disclose confidential information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. Information that is "generally known in the local community or in the trade, field or profession to which the information relates" includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not "generally known in the local community." As another example, a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews. The accumulation of legal knowledge that a lawyer gains through practice ordinarily is not client information protected by this Rule. In addition, the factual information acquired about the structure and operation of an entire industry during the representation of one entity within the industry would not ordinarily prevent an attorney from undertaking a successive representation of another entity in a matter when the attorney had no other relevant confidential information from the earlier representation and there was no other conflict of interest at issue.

3. Rule 1.0 would be revised to insert the following new Rule 1.0(c) and the subsequent paragraphs of Rule 1.0 would be renumbered. All cross references to such Rules affected

by the renumbering would be corrected.

(c) "Confidential information" is defined in Rule 1.6(a).

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