STATE OF WISCONSIN SUPREME COURT OF WISCONSIN

In the Matter of Petition
For Amendments to Rules of
Professional Conduct for
Attorneys

TO: Chief Justice Patience D. Roggensack
Justice Shirley S. Abrahamson
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Annette Kingsland Ziegler
Justice Michael J. Gableman

Filed with the Clerk of Court Diane Fremgen
Clerk of Supreme Court
110 E. Main Street Suite 215
Madison, WI 53703

The State Bar of Wisconsin hereby petitions the Supreme Court of Wisconsin for an order establishing and amending the following rules and comments in Supreme Court Rules Chapter 20:

1. SCR 20:1.0(q) and ABA Comment [9] to SCR 20:1.0;
2. ABA Comment [6], [7] and [8] to SCR 20:1.1;
3. ABA Comment [4] to SCR 20:1.4;
4. SCR 20:1.6, Wisconsin Committee Comment, and ABA Comment to [13]-[20] to SCR 20:1.6;
5. Wisconsin Committee Comment to SCR 20:1.8;
6. ABA Comment [7] to SCR 20:1.17;

7. SCR 20:1.18 and ABA Comment [1], [2], [4] and [5] to SCR 20:1.18;

8. SCR 20:4.4, Wisconsin Committee Comment, and ABA Comment [2] and [3] to SCR 20:4.4;

9. SCR 20:5.3 and ABA Comment [1], [2], [3] and [4] to SCR 20:5.3;

10. SCR 20:5.5 and ABA Comment [1], [4], [18] and [21] to SCR 20:5.5;

11. SCR 20:5.7(a)(1) and (d);

12. SCR 20:5.8;

13. ABA Comment [3] to SCR 20:7.1;

14. ABA Comment [1], [2], [3], [5], [6] and [7] to SCR 20:7.2; and

15. SCR 20:7.3 and ABA Comment [1] - [9] to SCR 20:7.3.

Petitioner submits Appendix A, Supporting Memorandum, and Cover Sheet in support of this request.

Respectfully submitted this 23 day of June, 2015.

Robert R. Gagan
President
State Bar of Wisconsin
State Bar No. 1034106

APPENDIX A

Text of the Proposed Amendments and Supporting Information

Proposed Amendment 1

SCR 20:1.0(q) and ABA Comment [9] to SCR 20:1.0

SCR 20:1.0 Terminology

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

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ABA COMMENT

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

other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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Supporting Information for the Proposed Amendment

Language changes in several of the ABA Model Rules were made to clarify a lawyer's ethical duty to protect the confidentiality of client information, including material stored electronically. The language changes in the definition of "writing" or "written" in ABA Model Rule 1.0(n) and in ABA Comment [9] to SCR 20:1.0 were made to encompass electronically stored information.

SCR 20:1.0(q)

The proposed amendment of the definition of "writing" or "written" in SCR 20:1.0(q) reflects the amendment of the definition of "writing" or "written" in ABA Model Rule 1.0(n) as amended by the ABA in August 2012.

The ABA Commission on Ethics 20/20 (the Commission) concluded that the definition of "writing" or "written" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail" was not a sufficiently expansive definition. The Commission reasoned that lawyers use, or are likely to use in the near future, a wide range of methods when memorializing an agreement, such as a written consent to a conflict of interest. Therefore, the word "e-mail" was replaced with "electronic communications." [1]

[1] ABA Comm'n on Ethics 20/20, Resolution 105A and Report to the House of Delegates at 3 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Confidentiality).

ABA Comment [9] to SCR 20:1.0

The proposed amendment to ABA Comment [9] as it appears in SCR 20:1.0 is necessary to accurately reflect the current ABA Comment to Rule 1.0 as amended by the ABA in August 2012.

SCR 20:1.0(n) defines "screened" and describes the elements of an effective screen. ABA Comment [9] elaborates on the definition and stresses the importance of limiting the screened lawyer's access to information relating to the matter. The Commission observed that the advances in technology have made client information more accessible to the entire law firm and that limiting access to client information should include not only limiting access to physical documents but also to electronic information. The Commission further observed that the existing version of the rule defining screening arguably encompasses information in both physical and electronic form. To provide greater clarity and specificity, however, ABA Comment [9] was amended to "explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form."[2]

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[2] *Id.*

Proposed Amendment 2

ABA Comment [6], [7] and [8] to SCR 20:1.1

SCR 20:1.1 Competence

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ABA COMMENT

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Retaining or Contracting With Other Lawyers

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

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

Maintaining Competence

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

Supporting Information for the Proposed Amendment

The proposed amendment to ABA Comment [6], [7] and [8] as it appears in SCR 20:1.1 is necessary to accurately reflect the current ABA Comment to Rule 1.1 as amended by the ABA in August 2012.

Model Rule 1.1 requires a lawyer to perform legal services competently. The Commission concluded that the Comment to Rule 1.1 should be expanded to refer specifically to include the frequent practice of outsourcing work to another lawyer or law firm. While other locations for the new commentary were considered, the Commission concluded that the primary ethical concern when retaining nonfirm lawyers is the competence of those lawyers.

The addition of new paragraph [6] to the Comment provides guidance by identifying factors to consider when retaining outside lawyers. In an early draft of paragraph [6], the Commission had included a sentence that would have required lawyers to reasonably believe that the nonfirm lawyer's work was competently performed. The Commission deleted that sentence because concerns were raised that the sentence could be read to impose unnecessary, costly obligations to determine the competency of other lawyers to whom work was outsourced. The Commission concluded that outsourcing takes many different forms and that the level of oversight should be addressed, not in the Comment, but in an ethics opinion, which could provide a more nuanced treatment of the issue. The Commission asked the ABA Standing Committee on

Ethics and Professional Responsibility to address this issue in either a revised Formal Opinion 08-451 or a separate Formal Opinion.[3]

The addition of new Comment [7] emphasizes that, when multiple firms work together on a client's matter, the firms ordinarily should consult with the client and each other about the scope of the work being performed by each firm and the allocation of responsibility among them.

The new language in [8] is a reminder that a lawyer's duty to remain competent in the digital age includes keeping up with changes in relevant technology. The language in prior Comment [6] implicitly encompassed that obligation as noted in ethics opinions regarding topics such as cloud computing, email, and metadata. The new Comment [8] does not impose any new obligations, but makes that obligation explicit because "technology is such an integral – and yet at times invisible – aspect of contemporary law practice."[4]

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[3] ABA Comm'n on Ethics 20/20, Resolution 105C and Report to the House of Delegates at 6 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Outsourcing).

[4] ABA Comm'n on Ethics 20/20, Introduction and Overview at 8 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Introduction and Overview).

Proposed Amendment 3

ABA Comment [4] to SCR 20:1.4

SCR 20:1.4 Communication

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ABA COMMENT

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

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Supporting Information for the Proposed Amendment

The proposed amendment to ABA Comment [4] as it appears in SCR 20:1.4 is necessary to accurately reflect the current ABA Comment to Rule 1.4 as amended by the ABA in August 2012.

The language change in [4] was made to encompass electronic communications and to acknowledge that "a lawyer's obligation to respond should exist regardless of the medium that is used." [5]

[5] ABA Comm'n on Ethics 20/20, Resolution 105A and Report to the House of Delegates at 4 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Confidentiality).

Proposed Amendment 4:

SCR 20:1.6, Wisconsin Committee Comment, and ABA Comment

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

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

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

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

(3) to secure legal advice about the lawyer's conduct under these rules;

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

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

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

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

WISCONSIN COMMITTEE COMMENT

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Paragraph (c)(6) differs from its counterpart, Model Rule 1.6(b)(7). Unlike its counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer's change in employment or from changes in the composition or ownership of a firm. Paragraph (c)(6), like its counterpart, recognizes that in certain circumstances, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest. ABA Comment [13] provides examples of those circumstances. Paragraph (c)(6), unlike its counterpart, also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests. Under those circumstances, any such disclosure should ordinarily include no more than the identity of the clients or former clients. The disclosure of any information, to either lawyers in different firms or to other clients or former clients, is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client. ABA Comment [13] provides examples of when the disclosure of any information would prejudice the client. Lawyers should err on the side of protecting confidentiality.

ABA COMMENT

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

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by

means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[~~13~~ 15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[~~14~~ 16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[~~15~~ 17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1, and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[~~16~~ 18] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the

lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[~~17~~ 19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

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

Supporting Information for the Proposed Amendment

SCR 20:1.6(c)(6), the Wisconsin Committee Comment, and ABA Comment [13] and [14]

Proposed Amendment SCR 20:1.6(c)(6)

The proposed amendment to SCR 20:1.6 and the ABA Comment is to provide a clearer doctrinal basis for, and appropriate limitations on, disclosures of confidential information to detect and resolve conflicts of interest. The proposed paragraph (c)(6), like its Model Rule 1.6(b)(7) counterpart, helps address ethics questions that arise when lawyers consider associating with another firm, when two or more firms consider a merger, or when lawyers consider purchasing another law practice. While ABA Formal Opinion 09-455 explained that lawyers and law firms must have discretion to disclose limited information to each other to determine if a conflict of interest will arise from a lawyer's association with the firm, the opinion also acknowledged that disclosure of conflicts information does not fit neatly into the specific exceptions to Rule 1.6. The new language permits a lawyer to disclose information related to client representation to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest between lawyers in different firms as long as the disclosure does not compromise the attorney-client privilege or otherwise prejudice.

Unlike its Model Rule counterpart, paragraph (c)(6) is not limited to detecting and resolving conflicts arising from the lawyer's change in employment or from changes in the composition or ownership of a firm. Proposed paragraph (c)(6) also recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients to detect and resolve conflict of interests.

Proposed Amendment to Wisconsin Committee Comment

The proposed Wisconsin Committee Comment recognizes that in certain circumstances, lawyers may need to disclose limited information to clients and former clients in order to detect and resolve conflicts. The proposed Comment makes it clear that any such disclosure should ordinarily include no more than the identity of the clients or former clients. The proposed Comment also makes it clear that even the limited disclosure is not permissible, absent client consent, if it would compromise the attorney-client privilege or otherwise prejudice the client. The proposed Wisconsin Committee reminds lawyers that they should err on the side of protecting confidentiality.

Proposed Amendment to ABA Comment [13] and [14]

The proposed amendment to ABA Comment [13] and [14] as it appears in SCR 20:1.6 is necessary to accurately reflect the current ABA Comment to Rule 1.6 as amended by the ABA in August 2012.

ABA Comment [13] makes it clear that any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated because conflict analyses differ for former and current clients. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve a conflict. For example, if the disclosure of the client's identity is sufficient to detect and resolve a conflict, a lawyer should not disclose any additional information.

Moreover, Comment [13] permits the disclosure only after substantive discussions regarding the possible new relationship have occurred. This timing is consistent with ABA Formal Opinion 09-455.

Comment [13] also makes it clear that even the limited disclosure is not permissible, absent client consent, if it would compromise the attorney-client privilege or otherwise prejudice the client. The Comment provides examples, which were taken from ABA Formal Opinion 09-455,

in which it may be impossible to disclose sufficient information to comply with the conflict of interest rules." [6]

Comment [13] reminds lawyers that they may have fiduciary duties to their current firms that are beyond the scope of the Rules of Professional Conduct.

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

SCR 20:1.6(d) and ABA Comment [18] and [19]

SCR 20:1.6 is revised by adding (d) to affirm that a lawyer has a duty to make reasonable efforts to prevent inadvertent as well as unauthorized disclosure of information relating to client representation. The current SCR 20:1.6 addresses the lawyer's duty not to disclose client information. The Rule does not, however, address what ethical duty a lawyer has to prevent such disclosure. The Commission concluded that the duty was sufficiently important to be included in the Rule, especially given the various confidentiality concerns associated with electronically stored information.[7]

The proposed amendment to ABA Comment [18] and [19] as it appears in SCR 20:1.6 is necessary to accurately reflect the current ABA Comment to Rule 1.6 as amended by the ABA in August 2012.

The Commission identified three types of problems that can lead to the unintended disclosure of client information. "First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party 'hacks' into a law firm's network or lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority,

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[6] ABA Comm'n on Ethics 20/20, Resolution 105F and Report to the House of Delegates at 3 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Model Rule 1.6: Detection of Conflicts of Interest).

[7] ABA Comm'n on Ethics 20/20, Resolution 105A and Report to the House of Delegates at 4 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Confidentiality).

such as when an employee posts confidential information on the Internet." *Id.* The proposed amendment is intended to make it clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards. *Id.*

Comment [18] makes it clear that a lawyer does not engage in misconduct any time a client's information is subject to unauthorized access or disclosed inadvertently or without authority. Such disclosures can occur even if a lawyer takes all reasonable precautions.

The Commission concluded that technology is changing too rapidly to offer detailed guidance about the measures that lawyers should employ because as new risks emerge, new security procedures become available. Instead, the Commission identified several factors that lawyers should consider when determining whether their efforts are reasonable, including the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

In addition to identifying these factors, both Comment [18] and [19] recognize that some clients might require the lawyer to implement special security measures not required by the Rule or may give informed consent to forego the use of security measures that would be required by the Rule.

Both Comment [18] and [19] remind lawyers that other laws beyond the Rules of Professional Conduct impose confidentiality-related obligations, such as federal, state, and international laws and regulations relating to data privacy.

Proposed Amendment 5:

Wisconsin Committee Comment to SCR 20:1.8

SCR 20:1.8

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WISCONSIN COMMITTEE COMMENT

ABA Comment [8] states that Model Rule 1.8 "does not prohibit a lawyer from seeking to have the lawyer or partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position." This language is inconsistent with SCR 20:7.3(e), which prohibits a lawyer, at his or her instance, from drafting legal documents, such as wills or trust instruments, which require or imply that the lawyer's services be used in relation to that document. For this reason, ABA Comment [8] is inapplicable.

Supporting Information for the Proposed Amendment

ABA Comment [8] to SCR 20:1.8 is inconsistent with SCR 20:7.3(e). The proposed Wisconsin Committee Comment would caution lawyers to follow SCR 20:7.3(e), which has no counterpart in the Model Rules.

Proposed Amendment 6:

ABA Comment [7] to SCR 20:1.17

SCR 20:1.17 Sale of law practice

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ABA COMMENT

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Client Confidences, Consent and Notice

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

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Supporting Information for the Proposed Amendment

The proposed amendment to ABA Comment [7] as it appears in SCR 20:1.17 is necessary to accurately reflect the current ABA Comment to Rule 1.17 as amended by the ABA in August 2012.

The language changes in Comment [7] were made to reflect the changes to Model Rule 1.6(b)(7, which were made to help address ethics questions that arise when lawyers consider purchasing another law practice, and the proposed changes in SCR 20:1.6(c)(6).

Proposed Amendment 7:

SCR 20:1.18 and ABA Comment [1], [2], [4] and [5]

SCR 20:1.18 Duties to prospective client

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

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.

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

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

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

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

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

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

ABA COMMENT

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

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

...

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

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

...

Supporting Information for the Proposed Amendment

The revision to SCR 20:1.18 and the ABA Comment clarifies when electronic communications give rise to a prospective lawyer-client relationship.

The Commission concluded that the definition of "prospective client" needed to be sufficiently flexible to address the increasing volume of electronic communications that lawyers receive from people who seek legal services. ABA Formal Ethics Opinion 10-457 identified the circumstances under which these communications might give rise to a prospective client-lawyer

relationship. The Commission further concluded that lawyers and the public would benefit from a codification of the elements of that Formal Opinion.[8]

The Commission proposed and the ABA adopted replacing the word "discusses" in paragraph (a) of Model Rule 1.18 with the word "consults" to make clear what the Formal Opinion concluded: a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and a person seeking legal services has not taken place. In the Commission's view, "[t]he word "consults" makes this point more clearly than the word "discusses" and anticipates future methods of interaction between lawyers and the public."[9]

"Consult" or "consultation" is defined in SCR 20:1.0(b) as a "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." The Commission does not refer to this definition in its Report. The definition of "consult" is related to the particular matter in question and, consequently, is flexible enough to apply to the initial interaction between the lawyer and the person seeking representation.

To be consistent with paragraph (a), the Commission proposed and the ABA adopted the amendment to replace the phrase "had discussions with" a prospective client in paragraph (b) to "learned information from" a prospective client.

The proposed amendment to ABA Comment [1], [2], [4] and [5] as it appears in SCR 20:1.18 is necessary to accurately reflect the current ABA Comment to Rule 1.18 as amended by the ABA in August 2012.

The new Comment language proposed by the Commission and adopted by the ABA elaborates on the meaning of "consults" and gives lawyers more guidance about how to avoid the creation of an inadvertent client-lawyer relationship. The Comment "emphasizes that a consultation can occur, and a prospective client relationship can arise, if a lawyer specifically invites the submission of information about a potential representation without clear and

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[8] ABA Comm'n on Ethics 20/20, Resolution 105B and Report to the House of Delegates at 2 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Client Development).

[9] *Id.*

reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response."[10]

The new language in Comment [2] also explains that unilateral communications from a person to a lawyer are not sufficient to give rise to a prospective client relationship, even if the information is submitted through the lawyer's website. For example, the Comment explains that a consultation does not occur, and a prospective client relationship does not arise, if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. This language is consistent with ABA Formal Opinion 10-457. In addition, the final sentence to Comment [2] makes it clear that a person is not a prospective client if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent, a practice commonly known as "taint shopping." The Commission concluded that the Comment should include this statement, given the ease with which technology makes "taint shopping" possible."[11]

[10] *Id.* at 2-3.

[11] *Id.* at 3.

Proposed Amendment 8:

SCR 20:4.4, Wisconsin Committee Comment, and ABA Comment [2] and [3]

SCR 20:4.4 Respect for rights of 3rd persons

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

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

(c) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently shall:

(1) immediately terminate review or use of the document or electronically stored information;

(2) promptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

WISCONSIN COMMITTEE COMMENT

This Rule, unlike its Model Rule counterpart, contains paragraph (c), which specifically applies to information protected by the lawyer-client privilege and the

work product rule. If a lawyer knows that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently, then this Rule requires the lawyer to immediately terminate review or use of the document or electronically stored information, promptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure, and abide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment.

ABA COMMENT

...

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

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

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

Supporting Information for the Proposed Amendment

The Addition of the Phrase "Electronically Stored Information" in SCR 20:4.4(b) and the ABA Comment

The changes in the language to SCR 20:4.4b) and the accompanying ABA Comment were made to encompass electronically stored information as well as traditional forms. The changes also clarify that metadata is included in this rule. These changes are identical to the changes adopted by the ABA in August 2012.

Technology has increased the risk that client information will be inadvertently disclosed. To address one aspect of this risk, both Model Rule 4.4(b) and SCR 20:4.4(b) provide that if lawyers receive documents that they know or reasonably should know were inadvertently sent to them, they must notify the sender. The Commission concluded that the word "document" is inadequate to express the various kinds of information that can be inadvertently sent in the digital age. For example, information can be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata).[12]

To make clear that the Rule applies to those situations, the Commission proposed and the ABA adopted the amendment that replace the word "document" with the phrase "document or electronically stored information," a phrase that is commonly used in the context of discovery.

The Addition of SCR 20:4.4(c) and the Wisconsin Committee Comment

Proposed SCR 20:4.4, unlike its Model Rule counterpart, contains paragraph (c), which specifically applies to information protected by the lawyer-client privilege and the work product rule. If a lawyer knows that the document or electronically stored information contains information protected by the lawyer-client privilege or the work product rule and has been disclosed to the lawyer inadvertently, then this Rule requires the lawyer to immediately terminate review or use of the document or electronically stored information, promptly notify the person or the person's lawyer if communication with the person is prohibited by SCR 20:4.2 of the inadvertent disclosure, and abide by that person's or lawyer's instructions with respect to disposition of the document or electronically stored information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

The language of proposed paragraph (c) reflects the concern that SCR 20:4.4(b) and its counterpart, Model Rule 4.4(b), provide no guidance for the receiving lawyer. The lawyer's sole obligation upon receiving any representation-related document that the lawyer knows or

[12] ABA Comm'n on Ethics 20/20, Resolution 105A and Report to the House of Delegates at 6 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Confidentiality).

reasonably should know was inadvertently sent is to "promptly notify the sender." SCR 20:4.4(b) does not require the receiving lawyer to return the document or preserve it. SCR 20:4.4(b) does not specify whether the lawyer may read the document if the lawyer already knows it was sent in error, or whether the lawyer must stop reading it upon realizing the error. Nor does SCR 20:4.4(b) draw any distinction based on whether the document looks privileged. Whatever the lawyer is required or permitted to do and whatever role the client's wishes should play in the lawyer's decision are matters beyond the scope of the Rules.

Prior to the adoption of Model Rule 4.4(b), ABA Formal Ethics Opinion 92-358 (1992) had concluded that a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them. The opinion covered the circumstances where a lawyer received information subject to the attorney-client privilege or that could otherwise be deemed confidential in a situation where it was clear that the information was inadvertently sent. In that instance, the Committee opined that the receiving lawyer had three obligations: (1) to refrain from examining the materials; (2) to notify the sending lawyer of the receipt of the materials; and (3) to abide by the instructions of the sending lawyer. Model Rule 4.4(b) superseded that opinion, and ABA Formal Ethics Op. 05-437 formally withdrew Op. 92-358 to the extent that it exceeded Model Rule 4.4(b).

The proposed paragraph (c) is crafted narrowly to apply only when the information inadvertently disclosed is protected by the lawyer-client privilege and the work product rule. The duties imposed by proposed paragraph (c) reflect the importance of the lawyer-client privilege and the work product rule, and recognizes that protecting the lawyer-client privilege promotes the functioning of the justice system. Moreover, the duties imposed by paragraph (c) are consistent with *Harold Sampson Children's Trust v. The Linda Gale Sampson 1979 Trust,* 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794 (2004), which concluded that a lawyer, without the consent or knowledge of a client, cannot waive the lawyer-client privilege by voluntarily producing privileged documents, which the lawyer does not recognize as privileged, to an opposing attorney in response to a discovery request. The court held that only the client can waive the lawyer-client

privilege under Wis. Stat. § 905.11 regarding attorney-client privileged documents.

Moreover, proposed paragraph (c) is consistent with Wis. Stat. § 804.01(7), which governs recovering information inadvertently disclosed.

> If information inadvertently produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

The Proposed Amendment of ABA Comment [2] and [3]

The proposed amendment to ABA Comment [2] and [3] as that Comment appears in SCR 20:4.4 is necessary to accurately reflect the current ABA Comment to Rule 4.4 as amended by the ABA in August 2012.

The new language in ABA Comment [2] clarifies that the Rule applies to metadata. The Comment states that the receipt of metadata, data embedded in electronic information, obligates the receiving lawyer to notify the sender only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent. This new language is consistent with Wisconsin Formal Ethics Opinion EF-12-01. The Opinion concluded that SCR 20:4.4(b), which states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender," is directly applicable to metadata.

The new language in Comment [2] also defines "inadvertently sent." The Commission concluded that the phrase is ambiguous and potentially misleading because it could be read to exclude information that is intentionally sent, but to the wrong person. To ensure that the purpose of the Rule is clear, the new language was added to the Comment. "A document

or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted."[13]

[13] *Id.*

Proposed Amendment 9:

SCR 20:5.3 and ABA Comment

SCR 20:5.3 Responsibilities regarding nonlawyer assistance~~ts~~

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

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

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

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

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

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

ABA COMMENT

[~~2~~ 1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm

who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct.~~ See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~.~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority ~~over the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

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

[3] A lawyer may use nonlaywers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-base service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved;

the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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

Supporting Information for the Proposed Amendment

Although Rule 5.3 has been interpreted to apply to lawyers' use of nonlawyers within and outside the firm, the Commission concluded that lawyers would benefit from additional guidance regarding the application of the Rule to outside nonlawyers. The changes in the Comment make it clear that the Rule applies to the use of nonlawyers both inside and outside the firm.

The proposed amendment to ABA Comment as it appears in SCR 20:5.3 is necessary to accurately reflect the current ABA Comment to Rule 5.3 as amended by the ABA in August 2012.

New Comment [3] identifies distinct concerns that arise when services are performed outside the firm. It recognizes that nonlawyer services can take many forms, such as services performed by individuals and services performed by automated products. It identifies the factors that determine the extent of the lawyer's obligations when using such services, and it also references other Rules of Professional Conduct that the lawyer should consider when using such

services. New Comment [3] also emphasizes that the lawyer has an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, when a lawyer retains an investigative service, the lawyer may not be able to directly supervise how a particular investigator completes an assignment, but the lawyer's instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator's conduct is compatible with the lawyer's professional obligations.

New Comment [3] does not, however, describe whether a lawyer must obtain consent when disclosing client information to nonlawyer service providers outside the firm. The Commission concluded that while there are many circumstances where consent is unnecessary, such as scanning or copying, there are also circumstances where client consent might be advisable or required."[14]

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

The Commission acknowledged that the word "monitoring" reflects "a new ethical concept," but concluded that the new concept was needed because it may not be possible for the lawyer to "directly supervise" a nonlawyer when the nonlawyer is performing the services outside the firm.[15] The word "monitoring" makes it clear that the lawyer has an obligation to remain aware of how nonlawyer services are being performed. The Comment also reminds lawyers that they have duties to tribunal that may not be satisfied through compliance with this Rule. For example, if a client instructs a lawyer to use a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client because the lawyer may have to make certain representations to the tribunal regarding the vendor's work.[16]

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[14] ABA Comm'n on Ethics 20/20, Resolution 105C and Report to the House of Delegates at 7 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Outsourcing).

[15] *Id.* at 8.

[16] *Id.*

Proposed Amendment 10:

SCR 20:5.5 and ABA Comment [1], [4], [18] and [21]

SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction except that a lawyer admitted to practice in Wisconsin does not violate this rule by conduct in another jurisdiction that is permitted in Wisconsin under SCR 20:5.5(c) and (d) for lawyers not admitted in Wisconsin; or

(2) assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

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

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

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

(c) Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that:

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

or

(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the

lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; or

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

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

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, who is not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or medical incapacity, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that ~~may provide legal services in this jurisdiction that~~:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with SCR 10.03 (4) (f), and are not services for which the forum requires pro hac vice admission; or

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

(e) A lawyer admitted to practice in another jurisdiction of the United States or a foreign jurisdiction who provides legal services in this jurisdiction pursuant to sub. (c) and (d) above shall consent to the appointment of the Clerk of the Wisconsin Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction.

...

ABA COMMENT

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

...

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

...

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

...

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

Supporting Information for the Proposed Amendment

The proposed language changes to SCR 20:5.5 (d) is to clarify the purpose of the paragraph. SCR 20:5.5(d) was intended and has been interpreted to permit a lawyer, under limited circumstances, to establish an office or other systematic and continuous presence for the practice of law in a jurisdiction where the lawyer is not otherwise admitted to practice. The Commission concluded that the prefatory language in Rule 5.5(d) was not sufficiently clear and should state explicitly that paragraph (d) is intended to explain when a lawyer may provide legal services through an office or other systematic and continuous presence in the jurisdiction. Consequently, the ABA amended Rule 5.5(d) to replace "may provide legal services in this jurisdiction" with "may provide legal services through an office or other systematic and continuous presence in this jurisdiction."[17]

The proposed language change to SCR 20:5.5(d)(2) adds "or other rule" to the services authorized by federal law or other law. The new language was included in Model Rule 5.5(d)(2) to reflect the ABA's new Model Rule on Practice Pending Admission, which would allow a lawyer to establish a presence in a new jurisdiction while pursuing permanent admission if the lawyer is associated with an attorney admitted in the new jurisdiction and has an active license in another jurisdiction and has been engaged in active law practice for three of the past five years.[18] ABA Comment [18] was amended to make an explicit cross-reference to the new Model Rule on Practice Pending Admission.

The proposed amendment to ABA Comment [1], [4], [18] and [21] as it appears in SCR 20:5.5 is necessary to accurately reflect the current ABA Comment to Rule 5.5 as amended by the ABA in August 2012.

The Commission proposed and the ABA adopted the amendment to ABA Comment [1] to add that "a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction." The amendment reminds lawyers that when

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[17] ABA Comm'n on Ethics 20/20, Resolution 105D and Report to the House of Delegates at 5 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Practice Pending Admission).

[18] *Id.* at 5-6.

work is outsourced, the lawyers should ensure that they are not assisting in the unauthorized practice of law.

The Commission proposed and the ABA adopted the amendment to remove the words "prospective client" from ABA Comment [21]. That comment emphasizes that paragraphs (c) and (d) or the Rule do not authorize lawyers who are admitted in other jurisdictions to advertise their services in this jurisdiction. "Prospective client" was removed from Comment [21] because its definition (Rule 1.18(a)) includes a narrower category of people than the advertising rules are intended to cover.

Proposed Amendment 11:

SCR 20:5.7(a)(1) and (d)

(a)(1) A lawyer may be a member of a law firm that is organized as a limited liability organization solely to render professional legal services under the laws of this state, including chs. 178 and 183 and subch. XIX of ch. 180. The lawyer may practice in or as a limited liability organization if the lawyer is otherwise ~~licensed~~ authorized to practice law in this state and the organization is registered under sub. (b).

. . .

(d) A law firm that is organized as a limited liability organization under the laws of any other state or jurisdiction or of the United States solely for the purpose of rendering professional legal services that is authorized to do business in Wisconsin and that has ~~a~~ at least one lawyer licensed to practice law in Wisconsin and who also has an ownership interest in the firm may register under this rule by complying with the provisions of sub. (b).

Supporting Information for the Proposed Amendment

The proposed language change to SCR 20:5.7(a)(1) corrects a seeming incongruity between SCR 20:5.5(d)(2) and SCR 20:5.7(a)(1). While SCR 20:5.5(d)(2) permits a lawyer who is not licensed in Wisconsin to provide legal services, that lawyer could do so only in a sole proprietorship or partnership and not in a limited liability organization pursuant to SCR 20:5.7(a)(1), which requires the lawyer to be licensed in Wisconsin. For example, a lawyer who is awaiting admission to the Wisconsin bar would like to practice federal immigration law in a Wisconsin firm organized as an LLC. Such practice is permitted by SCR 20:5.5(d)(2). SCR 20:5.7(a)(1), however, prohibits a lawyer in this situation from practicing in a limited liability organization.

The proposed language change to SCR 20:5.7(d) clarifies the requirements under that paragraph. Paragraph (d) permits an out-of-state law firm that is a limited liability organization to register to practice in Wisconsin provided that at least one lawyer in the firm is licensed to practice law in Wisconsin and provided that the firm complies with the provisions of paragraph (b). Paragraph (b) requires that the annual registration form be signed by a lawyer who is licensed in Wisconsin and who also has an ownership interest in the firm. The lack of a reference in paragraph (d) to the requirement that the Wisconsin lawyer must have an ownership interest in the firm creates confusion. The proposed language emphasizes that the Wisconsin lawyer signing the registration must have ownership interest in the firm.

Proposed Amendment 12:

SCR 20:5.8

SCR 20:5.8 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

ABA COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the

ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same

matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed

to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Supporting Information for the Proposed Amendment

The proposed SCR 20:5.8 is identical to ABA Model Rule 5.7. The Model Rule provides a framework for determining when a lawyer providing non-legal services should be bound by the Rules of Professional Conduct. The rule as proposed would not create any new, or remove any current, obligations for Wisconsin lawyers, and is consistent with state of the law in Wisconsin. Adopting the proposed rule would assist Wisconsin lawyers by clarifying the existing obligations.

Proposed Amendment 13:

ABA Comment [3] to SCR 20:7.1

SCR 20:7.1 Communications concerning a lawyer's services

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ABA COMMENT

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

...

Supporting Information for the Proposed Amendment

The proposed amendment to ABA Comment [3] as it appears in SCR 20:7.1 is necessary to accurately reflect the current ABA Comment to Rule 7.1 as amended by the ABA in August 2012.

The Commission proposed and the ABA adopted the amendment to remove the words "prospective client" from ABA Comment [3] and replace them with "the public." "Prospective client" was removed from Comment [3] because its definition (Rule 1.18(a)) includes a narrower category of people than the advertising rules are intended to cover.

Proposed Amendment 14:

ABA Comment [1], [2], [3], [5], [6] and [7] to SCR 20:7.2

SCR 20:7.2 Advertising

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ABA COMMENT

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

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

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified"advertising. Television, the Internet, and other forms of electronic communication are ~~is~~ now

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

...

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

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

satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

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

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Supporting Information for the Proposed Amendment

The proposed amendment to ABA Comment [1], [2], [3], [5], [6] and [7] as it appears in SCR 20:7.2 is necessary to accurately reflect the current ABA Comment to Rule 7.2 as amended by the ABA in August 2012.

SCR 20:7.2 and Model Rule 7.2 prohibit a lawyer from giving anything of value for recommending the lawyer's services. Exceptions permit a lawyer to pay for the "reasonable costs" of advertising and the "usual charges" of non-profit or state-qualified lawyer referral services. Prior to the Internet, the distinction was not difficult to understand. For example, payments to television stations to run a commercial or payments to the phone book company to run an advertisement were clearly permissible. Sharing fees with a for-profit referral service was clearly impermissible. The new marketing methods on the Internet, such as Legal Match, Total Attorneys, and Groupon, do not fit neatly into the existing categories. Although the specifics of

each of the entities differ, lawyers often pay these entities a fee for each client lead that is generated. The question in this context is whether the lead generator is "recommending" the lawyer for whom the lead is generated. If so, payments from the lawyer would violate Rule 7.2(b). The Rule itself does not clearly resolve the issue. Consequently, the Commission concluded that clarifying language was needed.[19]

The changes in the language to the ABA Comment permit lawyers to pay for "lead generation" services, including internet-based leads, as long as certain safeguards are followed. Comment [5] defines the word "recommendation" as a communication that "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." This definition permits lawyers to use lead generation services, such as those that are increasing prevalent online, but would require lawyers to ensure that the lead generators do not engage in conduct that the Rule was intended to prohibit, such as in-person solicitations or false or misleading tactics. The definition makes it clear that lawyers cannot pay lead generators who endorse or vouch for the lawyer's credentials, abilities, competence, character, or other professional qualities. "This restriction is consistent with the idea that nonlawyers do not have the necessary expertise to know which lawyer has the necessary professional qualities to handle a particular matter."[20]

The Commission identified other possible concerns associated with lead generation. First, Comment [5] explains that even when the lead generator does not "recommend" the lawyer, the lawyer's use of the lead generator must be consistent with Rule 1.5(e)(division of fees) and Rule 5.4 (professional independence of the lawyer). The reference to Rule 1.5(e) acknowledges that a lead generator may be another lawyer, in which case the restrictions on division of fees must be observed. The reference to Rule 5.4 reminds lawyers that although a lawyer may pay a fee to a nonlawyer for a client lead, the fee should not be contingent on a person's use of the lawyer's services because such fee would constitute an impermissible sharing of fees with nonlawyers.

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[19] ABA Comm'n on Ethics 20/20, Resolution 105B and Report to the House of Delegates at 4 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Client Development).

[20] *Id.*

Moreover, the reference to Rule 5.4 also reminds lawyers that a nonlawyer lead generator should not direct or regulate how the lawyer's work is performed.[21] *Id.* at 5.

Second, the Comment reminds lawyers that the lead generator's communications must be consistent with Rule 7.1, which prohibits false or misleading communications.

The Commission concluded that lead generators do not need to state affirmatively that they are not recommending the lawyer and have not analyzed the person's legal needs. Lead generation takes many forms and some do not require any affirmative statements to prevent misunderstandings. For some forms of lead generations, such as when someone clicks on an advertisement and is taken to the lawyer's website, it is obvious from the context that the lead generator has not analyzed the person's legal needs and is not recommending the lawyer. *Id.* Consequently, the Commission concluded that it was more appropriate to state generally that lead generators should not state, imply, or create a reasonable impression that they are recommending the lawyer or that they have analyzed a person's legal problems when determining which lawyer should receive the referral.[22]

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[21] *Id.* at 5.

[22] *Id.*

Proposed Amendment 15:

SCR 20:7.3 and ABA Comment

SCR 20:7.3 ~~Direct contact with prospective~~ Solicitation of clients

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

(1) is a lawyer; or

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

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

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

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

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

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from ~~a prospective client~~ anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any printed, recorded or electronic communication, unless the recipient of the communication is a person specified in pars. (a)(1) or (a)(2), and a copy of it shall be filed with the office of lawyer regulation within five days of its dissemination.

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

(e) Except as permitted under SCR 11.06, a lawyer, at his or her instance, shall not draft legal documents, such as wills, trust instruments or contracts, which require or imply that the lawyer's services be used in relation to that document.

...

ABA 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 constrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, and Internet banner advertisement, a website or a television commercial, or if is is in response to a request for information or is automatically generated in response to Internet searches.

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

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

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

[4 5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the

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

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

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

to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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

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

Supporting Information for the Proposed Amendment

SCR 20:7.3 regulates a lawyer's direct contacts with the public for the purpose of soliciting business. The proposed language change removes references to "prospective clients." SCR

20:1.18(a) defines "prospective client," and that definition includes a narrower category of people than SCR 20:7.3 is intended to cover. Similarly, the references to "prospective clients" were removed from the ABA Comment.

The proposed amendment to ABA Comment as it appears in SCR 20:7.3 is necessary to accurately reflect the current ABA Comment to Rule 7.3 as amended by the ABA in August 2012 as amended by the ABA in August 2012.

The Commission concluded that lawyers would benefit from a clearer definition of what kinds of communications constitute "solicitation." New ABA Comment [1] explains that a lawyer's communications constitute a solicitation when the lawyer offers to provide, or can be reasonably understood to be offering to provide, legal services to a specific person. The phrase "reasonably understood to be offering to provide" is "intended to ensure that lawyers are governed by the Model Rule even if their communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose."[23] The second sentence in new Comment [1] is designed to clarify that a response to a request for information and an advertisement that is not directed to specific people are not "solicitations." The examples in the Comment are intended to clarify when a lawyer's activities constitute solicitations.[24]

In addition, renumbered Comment [3] further clarifies the types of communications that do not constitute solicitations. The Commission deleted the reference to "autodialing" in the Comment because it is unlawful in many jurisdictions. [25]

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[23] ABA Comm'n on Ethics 20/20, Resolution 105B and Report to the House of Delegates at 7 (2012), http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (Resolution and Report: Technology and Client Development).

[24] *Id.* at 7-8.

[25] *Id.* at 8.