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SUPREME COURT OF WISCONSIN

No. 15-03

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

FILED

JUL 21, 2016

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

On June 30, 2015, the State Bar of Wisconsin (State Bar), by then-President Robert R. Gagan, filed the rule petition on behalf of the State Bar's Standing Committee on Professional Ethics.[1] The petition asks the court to amend various sections of Chapter 20 of the supreme court rules (Rules of Professional Conduct for Attorneys).

The court discussed the petition at open rules conference on November 16, 2015 and voted to schedule two public hearings. A letter to interested persons, seeking input, was sent on November 23, 2016. Comments were received from the Office of Lawyer Regulation (OLR) on January 14, 2016, and from Attorney Dean Dietrich on

[1] Wisconsin State Bar By-Laws require the Standing Committee on Professional Ethics to consider the "Rules of Professional Conduct for Attorneys" and recommend advisable changes. See Article IV, Section 3 of the Appendix to SCR Chapter 10.

December 28, 2015 and January 19, 2016, in support of the proposed amendments.

The first public hearing was held on January 22, 2016, and focused on proposed amendments that are identical to amendments made by the American Bar Association to the Model Rules of Professional Conduct (ABA Model Rules). State Bar President-Elect Francis W. Deisinger presented the petition. Attorney Timothy J. Pierce, State Bar Ethics Counsel, and Attorney Dean Dietrich also appeared and provided testimony.

A second public hearing was held on February 23, 2016. This hearing focused on proposed amendments not identical to or included in changes to the ABA Model Rules. Attorney Timothy J. Pierce presented the matter to the court. William McKinley, Vice Chair, State Bar Standing Committee on Professional Ethics, testified in support of the petition. The court discussed the matter at an open administrative rules conference on April 13, 2016 and again on May 12, and voted 6 to 1 to adopt the proposed amendments. Justice Shirley S. Abrahamson did not vote in support of the petition. She stated that she favored additional review of the proposed changes by a committee charged with reviewing the supreme court rules in their entirety and noted that the appendix to the petition filed by the State Bar includes some additional helpful background information that may be of use to practitioners. Therefore,

IT IS ORDERED that, effective January 1, 2017:

SECTION 1. 20:1.0(q) of the Supreme Court Rules is amended to read:

20:1.0(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.

SECTION 2. ABA Comment [9] to 20:1.0 of the Supreme Court Rules is amended to read:

[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.

SECTION 3. ABA Comment [6] to 20:1.1 of the Supreme Court Rules is renumbered as ABA Comment [8] and amended to read:

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.

SECTION 4. ABA Comments [6] and [7] to 20:1.1 of the Supreme Court Rules are created to read:

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.

SECTION 5. ABA Comment [4] to 20:1.4 of the Supreme Court Rules is amended to read:

[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.

SECTION 6. 20:1.6(c)(4) of the Supreme Court Rules is amended to read:

20:1.6(c)(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~~

SECTION 7. 20:1.6(c)(5) of the Supreme Court Rules is amended to read:

20:1.6(c)(5) to comply with other law or a court order~~.~~; or

SECTION 8. 20:1.6(c)(6) of the Supreme Court Rules is created to read:

20:1.6(c)(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.

SECTION 9. 20:1.6(d) of the Supreme Court Rules is created to read:

20:1.6(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.

SECTION 10. A Wisconsin Committee Comment to 20:1.6(c) of the Supreme Court Rules is created to read:

WISCONSIN COMMITTEE COMMENT

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.

SECTION 11. ABA Comments [13]-[18] to 20:1.6 of the Supreme Court Rules are renumbered as ABA Comments [15]-[20]. Renumbered ABA Comments [18] and [19] are further amended to read:

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.

SECTION 12. ABA Comments [13] and [14] to 20:1.6 of the Supreme Court Rules are created to read:

[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.

SECTION 13. A Wisconsin Committee Comment to 20:1.8 of the Supreme Court Rules is created to read:

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.

SECTION 14. ABA Comment [7] to 20:1.17 of the Supreme Court Rules is amended to read:

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~~ 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.

SECTION 15. 20:1.18(a) and (b) of the Supreme Court Rules are amended to read:

20:1.18(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.

SECTION 16. ABA Comments [1], [2], [4], and [5] to 20:1.18 of the Supreme Court Rules are amended to read:

[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~~ 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 nonrepresentation 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.

SECTION 17. 20:4.4(b) of the Supreme Court Rules is amended to read:

20:4.4(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.

SECTION 18. 20:4.4(c) of the Supreme Court Rules is created to read:

20:4.4(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.

SECTION 19. A Wisconsin Committee Comment to 20:4.4 of the Supreme Court Rules is created to read:

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.

SECTION 20. ABA Comments [2] and [3] to 20:4.4 of the Supreme Court Rules are amended to read:

[2] Paragraph (b) recognizes that lawyers sometimes receive a document~~s~~ 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 accidently 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 original document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email or other 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 ~~the document~~ it 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.

SECTION 21. 20:5.3 (title) of the Supreme Court Rules is amended to read:

20:5.3 Responsibilities regarding nonlawyer ~~assistants~~ assistance

SECTION 22. ABA Comments [1] and [2] to 20:5.3 of the Supreme Court Rules are renumbered in the reverse. Renumbered ABA Comment [1] is further amended to read:

~~[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 Rules of Professional Conduct~~ with the professional obligations of the lawyer. 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 inside or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

SECTION 23. ABA Comments [3] and [4] to 20:5.3 of the Supreme Court Rules are created to read:

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

directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

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

SECTION 24. 20:5.5(d) of the Supreme Court Rules is amended to read:

20:5.5(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 <u>through an office or other systematic and continuous presence</u> 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 <u>or other rule</u> of this jurisdiction.

SECTION 25. ABA Comments [1], [4], [18], and [21] to 20:5.5 of the Supreme Court Rules are amended to read:

[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 are admitted to practice in other

jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

SECTION 26. 20:5.7(a)(1) of the Supreme Court Rules is amended to read:

20:5.7(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).

SECTION 27. 20:5.7(d) of the Supreme Court Rules is amended to read:

20:5.7(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).

SECTION 28. 20:5.8 of the Supreme Court Rules is created to read:

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.

SECTION 29. ABA Comments [1] through [11] to 20:5.8 are created to read:

[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).

SECTION 30. ABA Comment [3] to 20:7.1 of the Supreme Court Rules is amended to read:

[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 ~~a prospective client~~ the public.

SECTION 31. ABA Comments [1], [2], [3], [5], [6], and [7] to 20:7.2 of the Supreme Court Rules are amended to read:

[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~~ among ~~of~~ the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~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), lawyers ~~Lawyers~~ are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name

registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another) ~~who prepare marketing materials for them~~.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists ~~prospective clients~~ people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. 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 ~~prospective clients~~ the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (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 ~~prospective clients~~ the public; (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 ~~refer prospective clients~~ make referrals 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 ~~prospective clients~~ the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

SECTION 32. 20:7.3 of the Supreme Court Rules is amended to read:

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.

SECTION 33. ABA Comments [1]-[8] to 20:7.3 of the Supreme Court Rules are renumbered as ABA Comments [2]-[9]. Renumbered ABA Comments [2]-[7] are further amended to read:

~~[1]~~[2] There is a potential for abuse ~~inherent in~~ when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with ~~a prospective client~~ someone 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 ~~prospective client~~ person, 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 ~~which may~~ can 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 ~~a prospective client~~ the public 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

~~prospective client~~ the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic ~~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 prospective client~~ the recipient of the communication 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 ~~a prospective client~~ people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of

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

SECTION 34. ABA Comments [1]-[8] to 20:7.3 of the Supreme Court Rules are renumbered as ABA Comments [2]-[9].

SECTION 35. ABA Comment [1] to 20:7.3 of the Supreme Court Rules is created to read:

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

IT IS FURTHER ORDERED that the Comments above are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rules.

IT IS FURTHER ORDERED that the rules adopted pursuant to this order shall apply to proceedings commenced after the effective date of this rule and, insofar as is just and practicable, to proceedings pending on the effective date.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 21st day of July, 2016.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. *(dissenting)* The Wisconsin State Bar Board of Governors proposes Rule Petition 15-03 on behalf of the State Bar Standing Committee on Professional Ethics. A lot of good, hard work has gone into this petition, and the Committee and its chair, Attorney Dean Dietrich, are to be not only thanked but also congratulated.

¶2 As I commented at the public hearing, I am disappointed that the Committee was made up entirely of lawyers; there were no public members. Over the years, many public members have served on component parts of the lawyer regulatory system, including the Board of Administrative Oversight, the Preliminary Review Committee, the Special Preliminary Review Panel, and the 16 District Committees. The public members make important contributions and bring a different perspective to bear based on their life experiences and their experiences in diverse lawyer regulation matters.

¶3 I would not adopt the proposal today on three "procedural" grounds.

A

¶4 First, I would add this petition, along with Rule Petition 15-04, to the work of a committee to be appointed by the court to review the Rules of Professional Conduct for Attorneys. I would not approach changes in the Rules piecemeal unless exigent circumstances exist.

¶5 I proposed such a committee in Rule Petition 15-01.[2] The committee I proposed would have also studied the organization, operation, processes, and procedures of the lawyer discipline system and made recommendations for changes.

¶6 The court dismissed Petition 15-01 as part of an inventive ruse, namely that it was not a proper subject for a rule petition.

¶7 As was noted at the court's November 16, 2015 open conference and in the order dismissing Rule Petition 15-01, the dismissal of Rule Petition 15-01 does not necessarily end the prospects for the appointment of a committee to study the lawyer discipline system.

¶8 Unfortunately, however, decisions about whether a committee will be established and the composition, mission, and functioning of any such committee will be made behind closed doors.

¶9 Lawyer discipline is of great importance to the bench, the bar, and the public. Discussion about changing the Rules of Professional Conduct for Attorneys, in my opinion, should take place in public.

¶10 I write separately here not only to express my views of the proposed rule but also to repeat my commitment to keeping the bench, the bar, and the public informed as best I can about what progress (or lack thereof) is made in the creation of such

[2] Rule Petition 15-01 and the court's order dismissing it can be found at https://www.wicourts.gov/scrules/supreme.htm. Rule Petition 15-01 was dismissed on December 21, 2015.

a committee. As of this date, the public has not been advised about such a committee.

B

¶11 Second, included in the petition submitted to and considered by the court, but omitted from the order adopting the rule, is material the Bar submitted in its petition under the heading "Supporting Information for the Proposed Amendment."

¶12 The Supporting Information is helpful. I would have included it along with the material labeled Comments.

¶13 I recommend that anyone researching any of the rules or comments adopted in this order examine the "Supporting Information." It is available at https://www.wicourts.gov/supreme/docs/1503petition.pdf.

C

¶14 Third, most of the proposed changes (about 20 at a minimum, depending on how the material is counted) and the bulk of the text relates to the creation or revision of Comments to the Rules, not to the text of the Rules themselves. By my count, only 12 provisions propose changes to the text of the Rules themselves; changes in the Rules comprise a comparatively small amount of the text of the proposal.

¶15 Although most of the work presented in the petition has been on Comments, the order states that the court does not adopt the Comments; the Comments are printed to provide guidance only.

¶16 My concern about the Comments is that it seems at times that the narrative in the Comments is being substituted

for reconsideration of the text of the Rules; some Comments do not seem to have a basis in the Rules; other Comments go far afield. The court's use of Comments in the Rules should be re-examined.

¶17 For the reasons set forth, I write separately.