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IN THE ARIZONA SUPREME COURT

PETITION TO AMEND ERS 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, AND 7.3, RULE 42, ARIZ. R. SUP. CT.	Supreme Court No. **Petition to Amend ERs 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3, Rule 42, Ariz. R. Sup. Ct.**

The State Bar of Arizona petitions the Court to amend Ethical Rules ("ERs") 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Arizona Rules of Professional Conduct (either the rules themselves or their comments) to reflect most of the recent amendments to the American Bar Association Model Rules of Professional Conduct. The proposed amendments are attached as Appendices A through L. These amendments address various ethics issues related to changes in technology and the globalization of the practice of law identified by the American Bar Association's Commission on Ethics 20/20 ("ABA 20/20").

As discussed below, the State Bar agrees with most of the amendments. For the other Model Rule amendments, the State Bar proposes rejecting or modifying those changes that are inconsistent with Arizona's ERs and proposes different language in a couple of rules that either is clearer or more appropriate for the intended result.

I. ABA 20/20 and Amendments to the Model Rules of Professional Conduct

In 2009, then-ABA President Carolyn B. Lamm created ABA 20/20 to analyze the impact of technology and globalization on the ABA Model Rules of Professional Conduct and develop recommendations to modify those rules affected by those issues. Technological advances have significantly changed how lawyers practice law, communicate and store or access information. Consequently, these new technologies can have a substantial effect on lawyers' ethical obligations.

The first stage of ABA 20/20's work focused on research and outreach to the public and the legal community to identify those rules affected by technological change and globalization. The second stage focused on developing proposed Model Rule changes and circulating those rule changes for comment. The third, and final, stage focused on proposed rule changes based on comment and feedback and presenting final proposals to the ABA House of Delegates. Ultimately, the ABA House of Delegates approved each of the amendments recommended by ABA 20/20.

The State Bar of Arizona's Committee on the Rules of Professional Conduct ("Ethics Committee") created a subcommittee to review and analyze the proposals, recommendations, and comments circulated by ABA 20/20. The Ethics Committee received regular updates and made recommendations to Arizona's ABA delegates regarding the changes to the ABA Model Rules of Professional Conduct proposed by ABA 20/20. The Ethics Committee endorsed, and Arizona's ABA delegates voted in favor of, all of the changes requested in this Petition.

ABA 20/20 was organized into several working groups based on topics. This petition is similarly organized:

- Technology and Client Development: The proposals in this topic reflect changes in how lawyers use modern technology and electronic forms of communications when marketing their practice.

- Technology and Confidentiality: The proposals in this topic are intended to make lawyers more aware of obligations to maintain confidential information when using current technology.

- Confidentiality and Detection of Conflicts of Interest: The proposals in this topic reflect the reality that lawyers may need to disclose confidential information on occasion when determining whether a conflict of interest exists and provide guidance by regulating the practice of utilizing such information.

- Outsourcing: The proposals in this topic are intended to ensure that lawyers properly assess their ethical obligations when outsourcing legal and law-related work domestically and offshore.

Each proposed amendment is discussed under one of these topics.[1]

ABA 20/20's efforts also resulted in changes to: (1) the comment to Model Rule 8.5, which deals with jurisdiction; (2) the black letter of Model Rule 5.5, which deals with unauthorized practice; and (3) various admissions- and non-member-related model rules. It also resulted in the ABA adopting the new Model Rule on Practice Pending Admission. This petition does not deal with the admissions- and non-member-related model rules or the amendments to Model Rule 5.5, which were intended to implement those admissions- and non-member-related changes. The State Bar also is not recommending that Arizona adopt the revisions to comment 5 of Model Rule 8.5 because Arizona did not adopt comment 5 to Model Rule 8.5. The additional language also merely identifies an additional

[1] The appendices, however, contain each ER separately and in sequential order.

permissive factor that tribunals may consider when determining which jurisdiction's law to apply in a disciplinary proceeding.

II. Proposed Amendments to the Arizona Rules of Professional Conduct

A. Technology and Client Development

The proposed ABA amendments in this area primarily serve to modernize the ethical rules, incorporating a recognition that the Internet now serves as a frequent method for lawyers to communicate about their services both to the general public and specific prospective clients. Applying the existing rules to Internet-based communications has been a frequent topic of requests for ethics guidance since the last ABA rules overhaul, suggesting that additional clarification of the rules would be useful to Arizona lawyers. As described below, the ABA's proposed amendments are both reasonable and consistent with the guidance that the State Bar has been providing to its members through ethics opinions.

Contact with Prospective Clients. One set of proposed changes grapples with when a member of the public becomes a "prospective client" to whom duties are owed under ER 1.18. Contact between lawyers and prospective clients that occur in real-time, by phone or in-person, are clearer and easier to manage than those conducted over the Internet. The lawyer knows she is communicating about the possibility of a representation, and can begin by checking on the identity of the parties and the subject matter of the inquiry to avoid conflicts or lack of subject-matter competence. The Internet creates more challenging dynamics, whether in the form of information posted on a lawyer's website and read by a potential client or unsolicited emails divulging confidential information about the potential client's case. In 2002, the Ethics Committee issued Op. 02-04 seeking to clarify the lawyer's obligations regarding unsolicited emails and advising lawyers to take

precautionary measures when making their email addresses available on websites. The ABA's proposed amendments track the advice given in that opinion, incorporating it into comment 2 to ER 1.18, and making other changes to the text of the rule to reflect the reality that Internet-based communications permit consultation and information sharing without any real-time "discussion." *See* Proposed ER 1.18(a), (b).[2]

The proposed amendments also make additional conforming changes in comment 4 to ER 7.1[3]; comments 6 and 8 to ER 7.2[4]; and the black letter of ER 7.3(a), (b) and (c) as well as comments 2, 3, 4, 5 and 6[5]. The changes remove references to "prospective client" from rules that are intended to regulate lawyers' communications with the public at large or with people they wish to represent, and not just with individuals who have communicated an interest in engaging that lawyer for a matter. The ABA simply removed the phrase "a prospective client" from Model Rule 7.3(a). Because of concerns that eliminating that phrase actually substantively widens the restriction, the State Bar proposes to replace "a prospective client" with the phrase "the person contacted" in both ER 7.3(a) and the main paragraph of (b).

Referral Services. The Internet has led to the development of forms of advertising that straddle the line between advertising and referral services. In the past eight years, the Ethics Committee has issued three opinions addressing these kinds of programs, drawing distinctions between advertising and referral services based on whether the website in question purports to recommend or vouch for the

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[2] *See* Appendix F (Proposed Amendments to ER 1.18).
[3] *See* Appendix J (Proposed Amendments to ER 7.1).
[4] *See* Appendix K (Proposed Amendments to ER 7.2).
[5] *See* Appendix L (Proposed Amendments to ER 7.3).

listed lawyers. Ariz. Ethics Ops. 05-08, 06-06, 11-02. The proposed amendments to comment 5 to ER 7.2 adopt the same analysis as these opinions.[6] Given the frequency with which these issues have been raised by Arizona lawyers seeking ethics guidance, the proposed amendment is likely to provide much-needed information to lawyers without the need to search for ethics opinions.

Modernization of Rules to Reflect Prevalence of Internet-Based Communications. The remaining proposed amendments in the area of technology and client development reflect efforts to modernize rule language to reflect the use of the Internet and email, rather than to change the substance of lawyers' obligations. Thus, comments 2 and 3 to ER 7.2 are amended to reference these forms of communication, while ER 7.3 is revised throughout to reference "contact" with solicited potential clients, rather than "conversations" and to provide a definition of "solicitation" that covers common forms of Internet-based communications.[7]

B. Technology and Confidentiality

The proposed ABA amendments in this area primarily modernize the rules to reflect changes in technology and the expansion of the use of technology in the practice of law. With a small number of significant exceptions, as described below, the ABA's amendments are both reasonable and consistent with the guidance that the State Bar has been providing to its members through ethics opinions. In general, incorporating these clarifications into the rules should provide additional needed guidance. This discussion of technology and confidentiality, however,

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[6] *See* Appendix K (Proposed Amendments to ER 7.2).

[7] *See id.*; Appendix L (Proposed Amendments to ER 7.3).

starts with an ABA amendment adding two new comments to Model Rule 1.1 that the State Bar submits are not necessary or appropriate.

Retaining or Contracting With Other Lawyers. The ABA amendments add the following two new comments to Model Rule 1.1 (Competence):

> [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.

These comments largely echo obligations already imposed by other ERs (*e.g.*, ERs 1.2, 1.4, 1.5, 1.6, and 5.5, which are specifically listed in the new comment 6 to Model Rule 1.1). To the extent these comments differ from those obligations, they would create confusion by suggesting in comments that there are obligations different than those set forth in other ERs. Accordingly, these comments are not necessary given the current ERs and could create mischief if adopted. For these reasons, adoption of these comments is not recommended.

Maintaining Competence. Given the pervasive use of technology in the practice of law, and consistent with various independent obligations, the proposed ABA amendments justifiably suggest adding to a lawyer's competence obligations, as reflected in ER 1.1, comment 6[8], an express duty to keep abreast of the benefits and risks associated with the use of relevant technology.

Confidentiality of Information. The proposed ABA amendments add ER 1.6(e), and related changes to comments 20 and 21, requiring a lawyer to make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[9] These suggested changes properly provide additional clarity by specifying obligations imposed upon lawyers to protect confidential information.

Respect for Rights of Others. The proposed ABA amendments expand obligations under Model Rule 4.4(b) regarding inadvertently produced documents to include inadvertently produced electronically stored information, consistent with changes in technology over the past two decades. Comments 2 and 3 to Model Rule 4.4 generally continue to authorize returning a document that is inadvertently received but also properly authorize deleting electronically stored information in such circumstances.[10]

The last sentence of comment 2 to Model Rule 4.4 now states "[m]etadata 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." Model Rule 4.4, comment 2. That standard is contrary to

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[8] See Appendix B (Proposed Amendment to ER 1.1).
[9] *See* Appendix D (Proposed Amendments to ER 1.6).
[10] *See* Appendix G (Proposed Amendments to ER 4.4).

the analysis set forth in Ariz. Ethics Op. 07-03 (Nov. 2007), which itself is based on Arizona's non-Model Rule language in its customized ER 4.4(b). Accordingly, the following alternative language is recommended as the last sentence to comment 2 to ER 4.4: "A receiving lawyer who discovers metadata embedded within a document or electronically stored information and who knows or reasonably should know that the metadata reveals confidential or privileged information has a duty to comply with the procedures set forth in ER 4.4(b)."[11] *See* Ariz. Ethics Op. 07-03 (Nov. 2007).

Modernization of Rules to Reflect Prevalence of Electronic Communications. The remaining proposed ABA amendments in the area of technology and confidentiality reflect efforts to modernize the language of the ethical rules to correspond with advancements in technology. Thus, ER 1.0(n) is amended to replace "e-mail" with "electronic communications" and comment 9 to ER 1.0, is amended, in two places, to refer to "materials" with the phrase "information, including information in electronic form."[12] In addition, comment 4 to ER 1.4 is amended to replace an obligation to promptly return or acknowledge telephone calls with an obligation to promptly respond to or acknowledge client communications, a broader obligation that properly reflects use of technology to communicate broader than simply the use of the telephone.[13]

C. Confidentiality and Detection of Conflicts of Interest

The two proposed amendments in this area recognize the need for lawyers to share confidential information when determining whether a conflict of interest

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[11] *See id.*

[12] *See* Appendix A (Proposed Amendments to ER 1.0).

[13] *See* Appendix C (Proposed Amendments to ER 1.4).

exists. These amendments are intended to recognize that such disclosures already occur and to provide guidance by regulating the practice of utilizing confidential information in these circumstances.

The first proposed amendment adds a new subsection (d)(7) to ER 1.6 that would allow lawyers and law firms, with appropriate restrictions, to disclose limited confidential information for the purpose of detecting conflicts of interest.[14] New comments 17 and 18 to ER 1.6 are proposed to further explain when such information may be disclosed and the procedure for doing so.[15] This comports with Arizona's interpretation of the existing rule. *See, e.g.,* Ariz. Ethics Op. 10-02 (March 2010) ("Both the law firm and the departing lawyer have ongoing obligations regarding their former shared clients. The duty to maintain confidentiality outlasts the lawyer-client relationship. ER 1.9(c) and ER 1.9, comment 7. Both the law firm and the departing lawyer also must avoid impermissible conflicts of interest arising from the representation of those clients under ERs 1.7 and 1.9, and any firm that the departing lawyer joins also must comply with ER 1.10(d), including timely screening of the lawyer to avoid impermissible conflicts").

The second proposed amendment adds language to ER 1.17, comment 7, reflecting how the new ER 1.6(d)(7) applies to sharing confidential information when determining conflicts of interest in selling a law practice.[16] The ABA amendment would permit lawyers and law firms to disclose such confidential information for those limited purposes "only once substantive discussions

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[14] *See* Appendix D (Proposed Amendments to ER 1.6).

[15] *See id.*

[16] *See* Appendix E (Proposed Amendments to ER 1.17).

regarding the new relationship have occurred." Model Rule 1.6, comment 17. This standard, however, does not properly protect confidential information and does not properly balance the competing interests between protection of such information and limited disclosure. Accordingly, the following language is recommended to replace that clause: "only when there is a reasonable possibility that a new relationship might be established." This comports with Arizona's interpretation of the existing rule. *See* Ariz. Ethics Op. 06-01 (April 2006) ("If two law firms contemplating a merger do not need client consent to exchange basic, minimal information, such as client names to check for conflicts, then a lawyer negotiating to sell his or her solo law practice may provide similar minimal information to the prospective purchasing lawyer").

D. Outsourcing

In light of the increased use of outsourcing, the concern over the ethical propriety of this phenomenon, and the failure of the existing rules to address outsourcing directly, the ABA 20/20 amendments "provide guidance regarding the ethical implications of retaining lawyers and nonlawyers outside the firm to work on client matters (i.e. outsourcing)."[17] With these amendments, the Model Rules now contain outsourcing guidance in three places: (1) the comments to Model Rule 1.1 (Competence); (2) the title and comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); and (3) the comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). Each change is briefly described below.

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[17]ABA House of Delegates Resolution 105C (Aug. 2013), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf

First, the amendments include a new comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client's matter (i.e., outsourcing legal work to other lawyers). For the reasons mentioned in Part I.B above, these changes are not recommended, although they partly mirror the amendments to comments 3 and 4 to Model Rule 5.3, which are recommended below.

Second, the amendments include "new Comments to Model Rule 5.3, in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers)."[18] Third, and finally, the amendments add "a new sentence to Comment [1] to Model Rule 5.5 to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law."[19]

The ABA House of Delegates adopted the amendments without significant controversy. The amendments do not alter the text of any rules; instead the amendments simply provide clarifying guidance in the official comments for lawyers dealing with outsourcing, consistent with the previous ABA ethics opinion on the subject.[20] As helpful guidance not currently found in the ERs, the amendments should be adopted in Arizona.

The proposed changes related to outsourcing are identical to the ABA 20/20

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[18] *See* Appendix H (Proposed Amendments to ER 5.3).

[19] *See* Appendix I (Proposed Amendments to ER 5.5**).** For a detailed discussion of each change, see ABA House of Delegates Resolution 105C and Report (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c.authcheckdam.pdf.

[20] *See* ABA Comm. on Ethics & Prof'l Responsibility Formal Ethics Op. 08-451 (2008).

amendments with the following four exceptions: (1) references to "Rules" were changed to "ERs" to reflect Arizona's naming convention; (2) comments 6 and 7 to Model Rule 1.1 were not included; (3) a cross-reference to comment 6 to Model Rule 1.1 was not included in the comment to ER 5.3; and (4) with respect to ER 5.5, (i) to make the amendment fit into Arizona's modified rule and comments, an additional sentence from the Model Rule comments was incorporated, but the sentence does not impact the substance of the existing ER or the amendment and (ii) an irrelevant and inconsequential amendment to Model Rule comment 21, which had never been adopted in Arizona, was not incorporated.

E. Additional Proposed Amendment to ER 1.18

While not part of the ABA 20/20 changes, the State Bar also proposes – for efficiency and accuracy – amending the last sentence of comment 2 to ER 1.18.[21] That sentence urges lawyers to "employ reasonable measures to alert prospective clients that a) they should not convey information about a legal matter unilaterally to the lawyer and b) unilateral communications may not be kept confidential." In that context, the term "prospective clients" is inaccurate because persons who merely convey information unilaterally to a lawyer are not "prospective clients." Indeed, "prospective clients" would not require such a warning because the lawyer with whom they communicate would already have a duty of confidentiality regarding information learned from the prospective client. *See* ER 1.18(b). Accordingly, the State Bar proposes that the term "prospective clients" in the last sentence of comment 2 to ER 1.18 be replaced with the term "persons," which is the term used for non-prospective clients in ER 1.18.

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[21] *See* Appendix F (Proposed Amendments to ER 1.18).

III. Conclusion

Most of the ABA's recent amendments to Model Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 should be incorporated into the Arizona Rules of Professional Conduct, with the relevant modifications suggested in this petition. Arizona's ethics rules do not yet reflect recent advances in technology and globalization. ABA 20/20 worked for three years to study the impact of these advancements and its final proposals were approved by the ABA House of Delegates, including Arizona's delegates to the ABA. These rule changes are not substantive, but merely amend the language in rules and comments to appropriately reflect changes in technology and globalization. Because the proposed changes are reasonable and consistent with Arizona's ethics rules, the State Bar of Arizona respectfully requests that the Court amend ERs 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3, as shown in Appendices A through L.

RESPECTFULLY SUBMITTED this 19th day of December, 2013.

By _____
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Deputy General Counsel
John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
19th day of December, 2013.

By: _____

APPENDIX A

State Bar's Proposed Amendment to ER 1.0

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 1.0(n)

''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.

ER 1.0, comment [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.

APPENDIX B

State Bar's Proposed Amendment to ER 1.1

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 1.1 comment [6]

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

APPENDIX C

State Bar's Proposed Amendment to ER 1.4

(Petitioner's proposed additions are shown by <u>underscoring</u> and proposed deletions are shown by ~~strikethrough~~)

<u>ER 1.4, comment [4]</u>

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.~~ <u>A lawyer should promptly respond to or acknowledge client communications.</u>

APPENDIX D

State Bar's Proposed Amendment to ER 1.6

(Petitioner's proposed additions are shown by <u>underscoring</u> and proposed deletions are shown by ~~strikethrough~~)

<u>ER 1.6(d), (e)</u>

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

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

(2) to 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 compliance with 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 final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

<u>(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not</u>

compromise the attorney-client privilege or otherwise prejudice the client.

(e) 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.

ER 1.6, comments [17]-[24]

[17] Paragraph (d)(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 when there is a reasonable possibility that a new relationship might be established. 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.

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

[19~~17~~] Paragraph (d) 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.

[20~~18~~] Paragraph (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). 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 (d) 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 this Rule. See ERs 1.2(d), 4.1(b), 8.1 and 8.3. ER 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See ER 3.3(b).

Withdrawal

[21~~19~~] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Acting Competently to Preserve Confidentiality

[22~~20~~] Paragraph (e) 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 (e) 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].

[23~~21~~] 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

[24~~22~~] The duty of confidentiality continues after the client-lawyer relationship has terminated. See ER 1.9(c)(2). See ER 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

APPENDIX E

State Bar's Proposed Amendment to ER 1.17

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 1.17, comment [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 ER 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.

APPENDIX F

State Bar's Proposed Amendment to ER 1.18

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 1.18(a)-(b)

(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 would be permitted by ER 1.6 or by ER 1.9 with respect to information of a former client.

ER 1.18, comments [1], [2], [5], [6]

[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 who~~ 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. 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 lawyer-client relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client~~" within the meaning of paragraph (a) and, therefore, the information does not subject the lawyer to disqualification under this Rule.~~." Lawyers should employ reasonable measures to alert persons ~~prospective clients~~ that a) they should not convey information about a legal matter unilaterally to the lawyer and b) unilateral communications may not be kept confidential.

ER 1.18, comments [5]-[6]

[5] 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 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 ER 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[6] 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 ER 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.

APPENDIX G

State Bar's Proposed Amendment to ER 4.4

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 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 and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.

ER 4.4, comments [2]-[3]

[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 stop reading the document, to make no use of the document, and 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, e-mail and ~~or~~ other ~~electronic modes of transmission~~ forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. A receiving lawyer who discovers metadata embedded within a document or electronically stored communication and who knows or reasonably

should know that the metadata reveals confidential or privileged information has a duty to comply with the procedures set forth in ER 4.4(b).

[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.

APPENDIX H

State Bar's Proposed Amendment to ER 5.3

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 5.3 (Title)

Responsibilities Regarding Nonlawyer Assistance~~ts~~

[No change to rule]

ER 5.3, comments [1]-[4]

Nonlawyers Within the Firm

[1]~~2]~~ Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving ~~establish internal policies and procedures designed to provide~~ 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.~~Rules of Professional Conduct.~~ See ER 5.1, Comment [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 such nonlawyers within or outside the firm~~a nonlawyer~~ that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2~~1~~] 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. Law enforcement officers generally are not considered associated with government lawyers, for purposes of this Rule. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

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

APPENDIX I

State Bar's Proposed Amendment to ER 5.5

(Petitioner's proposed additions are shown by <u>underscoring</u> and proposed deletions are shown by ~~strikethrough~~)

<u>ER 5.5, comment [1]</u>

[1] <u>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.</u> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

APPENDIX J

State Bar's Proposed Amendment to ER 7.1

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 7.1, comment [3]

Promising or guaranteeing a particular outcome or result is misleading. A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated 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 a clear and conspicuous 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.

APPENDIX K

State Bar's Proposed Amendment to ER 7.2

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 7.2, comments [1]-[3], [5]-[6] [8]

[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 ~~is~~, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see ER 7.3(a) for

the prohibition against ~~the~~ a solicitation ~~of a prospective client~~ through a real-time electronic exchange ~~that is not~~ initiated by the ~~prospective client~~ lawyer.

. . . .

[5] ~~Lawyers~~ Except as permitted under paragraphs (b)(1)-(b)(34), lawyers are not permitted to pay others for recommending the lawyer's services or 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 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. Giving or receiving a de minimis gift that is not a quid pro quo for referring a particular client is permissible. ~~But see ER 5.4.~~ See also ER 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers ~~who prepare marking materials for them~~); Rule 8.4 (duty to avoid violating the Rules through the actions of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists ~~prospective clients~~ people who seek to secure legal representation. Published and electronic group advertising and directories are not lawyer referral services, but participation in such listings is governed by ERs 7.1 and 7.4. A lawyer referral service, on the other hand, is any organization in which a person or entity receives requests for lawyer services, and allocates such requests to a particular lawyer or lawyers or 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, such as the State Bar of Arizona, as affording adequate protections for ~~prospective clients~~ the public.

. . . .

[8] 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 ER 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 ER 7.3.

APPENDIX L

State Bar's Proposed Amendment to ER 7.3

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 7.3

Rule 7.3. ~~Direct Contact with Prospective~~ Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment from the person contacted ~~a prospective client~~ or employ or compensate another to do so when a 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 or knowingly permit solicitation on the lawyer's behalf from the person contacted ~~a prospective client~~ by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

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

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

(3) the solicitation relates to a personal injury or wrongful death and is made within thirty (30) days of such occurrence.

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

(1) At the time of dissemination of such written communication, a written copy shall be forwarded to the State Bar of Arizona at its Phoenix office.

(2) Written communications mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(3) If a contract for representation is mailed with the written communication, the contract shall be marked "sample" in red ink and shall contain the words "do not sign" on the client signature line.

(4) The lawyer initiating the communication shall bear the burden of proof regarding the truthfulness of all facts contained in the communication, and shall, upon request of the State Bar or the recipient of the communication, disclose how the identity and specific legal need of the potential recipient were discovered.

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

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches. *See* Rule 8.4 (duty to avoid violating the Rules through the actions of another).

~~[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 overreaching.

~~[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 ~~lawyer advertising and written and recorded communication permitted under ER 7.2 offer~~ lawyers have 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~~ transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. Those 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~~ public to direct in-person, telephone or real-time electronic persuasion that may overwhelm the ~~client's~~ 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 ER 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 ER 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 a 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 ER 7.3(a) and the requirements of ER 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 ER 7.1, which involves coercion, duress or harassment within the meaning of ER 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 ER 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a person as permitted by paragraph (c), the lawyer receives no response, any further effort to communicate with the person may violate the provisions of ER 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 ER 7.2.

~~[7]~~[8] The requirement in ER 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] Lawyers may comply with the requirement of paragraph (c)(1) by submitting (a) a copy of every written, recorded or electronic communication soliciting professional employment from a prospective client known or believed likely to be in need of legal services for a particular matter, or (b) a single copy of any identical communication published or sent to more than one person and a list of the names and mailing or e-mail addresses or fax numbers of the intended recipients and the dates identical solicitations were published or sent. Lawyers may comply with the requirement of paragraph (c)(1) by submitting the required communications and information to the State Bar on a monthly basis.

~~[9]~~[10] The State Bar may dispose of the submissions received pursuant to paragraph (c)(1) after one year following receipt.

~~[10]~~[11] 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 ERs 7.1, 7.2 and 7.3(b). See ER 8.4(a).