

Technology and Professional Responsibility

A Look at the American Bar Association's Commission on Ethics 20/20

By Donald S. Maurice, Jr.
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Donald Maurice is an attorney and shareholder of the law firm of Maurice & Needleman, P.C., with offices in Flemington, NJ and Philadelphia, PA. Don is admitted to the Bar of the District of Columbia, New Jersey and New York, the Second, Third, Eighth and D.C. Circuit Courts of Appeal and the United States Supreme Court. Don has been practicing consumer financial services law since 1988. You can follow Don on Twitter (@dsmaurice) or on his blog (consumerfsblog.com).

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ABA's Commission on Ethics 20/20

This August the ABA adopted several changes to its *Model Rules of Professional Conduct* proposed by its Commission on Ethics 20/20. Several of the changes are significant for attorneys engaged in debt collection.

Amendments to Model Rule 1.0 (Terminology)

Rule 1.0(n), defining "writing," is amended by deleting "email" and replacing it with "electronic communications."

Comment 9 is amended to note that screening procedures (assuring the confidential information known by a disqualified lawyer remains protected), includes the protection of "information, including information in the electronic form."

Amendments to Model Rule 1.1 (Competence)

There is no change to the text of the Rule, but significant changes are made to the Comments. New Comments 6 and 7 address retaining or contracting with other lawyers to assist in the provision of legal services to a client. Comment 6 provides that *before* a lawyer retains or contracts with outside lawyers, a lawyer 1) "should ordinarily obtain informed consent from the client;" and

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2) should “reasonably believe” the outside lawyer will “contribute to the competent and ethical representation of the client.” The Comment suggests 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) are all implicated.

Comment 7 is added to address those situations in which lawyers from more than one firm are providing legal services to a client in a particular matter. In those instances the lawyers should, “ordinarily,” consult with one another and the client about the scope of their respective legal services and the allocation of responsibility.

Existing Comment 6 is re-designated as Comment 8 and contains an interesting amendment. The revision provides that not only should a lawyer “keep abreast of changes in the law and its practice,” but also “the benefits and risks associated with relevant technology.”

Amendments to Model Rule 1.4 (Communication)

Comment 6 is amended by deleting “Client telephone calls should be promptly returned or acknowledged” and replacing it with “A lawyer should promptly respond to or acknowledge client communications.”

Amendments to Model Rule 1.6 (Confidentiality of Information)

A new section (c) is added:

- (c) 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.

Comment 16 is now designated as Comment 18 and provides that a lawyer must act competently to safeguard information related to her representation of the client, not only from inadvertent or unauthorized disclosure, but in a nod to technology, from “unauthorized access by third parties.” A lawyer does not violate the Rule if “the lawyer has made reasonable efforts to prevent the access or disclosure.” Several factors are suggested (but not deemed all-inclusive) when measuring the reasonableness of the lawyer’s efforts: 1) “the sensitivity of the information;” 2) “likelihood of disclosure if additional safeguards are not employed;” 3) cost of using additional safeguards; 4) the difficulty of implementing the additional safeguards; and, 5) the extent to which the additional 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).”

Amendments to Model Rule 4.4 (Respect for Rights of Third Persons)

The text of Rule 4.4(b) is amended to cover not only a lawyer’s receipt of documents, but also of “electronically stored information,” which was inadvertently “sent.”

Comment 2 is revised to make clear that documents or electronically stored information are “inadvertently sent” when they are “accidentally transmitted” or “accidentally included with information that was intentionally transmitted.”

Amendments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

The title of this Rule changes from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer *Assistance*” which expresses a change in the scope of the Rule. While there is no change to the text of Model Rule 5.3, substantial changes are made to the Comments.

Comment 2 is designated as Comment 1 and is substantially modified. Comment 1 previously stated that lawyers with managerial authority (under 5.3(a)) are required to make reasonable efforts “to establish internal policies and procedures” concerning non-lawyer conduct. The revised comment provides that lawyers with managerial authority should “make reasonable efforts 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** act in a way compatible **with the professional obligations of the lawyer.**” (additions in **bold**).

The revised Comment 1 also provides that 5.3(b) now addresses the responsibilities of lawyers with direct supervisory authority over nonlawyers within *and* outside the firm. The revised comment also notes that 5.3(c) specifies those circumstances where a lawyer can be responsible for a nonlawyer's conduct, regardless of whether the non-lawyer is within or outside the firm.

A new Comment 3 is added addressing nonlawyers outside the firm. It provides that lawyers may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client, such as investigative or paraprofessional services, document management

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firms and storage of client information in “cloud” services. It notes that the lawyer’s obligation to supervise nonlawyer assistance provided from entities outside the firm will depend on the circumstances, and would include

- 1) the education, experience and reputation of the nonlawyer;
- 2) the nature of the services involved;
- 3) the terms of any arrangements concerning the protection of client information;
- 4) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

Comment 3 also asks that a lawyer consider the implications of 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. Finally, the Comment instructs that when “engaging or directing” nonlawyers 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.

A new comment 4 is added providing guidance when a client selects for the lawyer the nonlawyers outside the firm and directs her lawyer to use that outside service. In those instances, the comment states that the lawyer “should ordinarily agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.”

Other Revisions Adopted Related to Technology and Client Development

The Commission on Ethics 20/20 also made revisions intended to address the impact of technology on a lawyer's conduct in client development. These changes are found in Rules 1.18 (Duties to Prospective Client), 7.1 (Communications Concerning a Lawyer's Services), 7.2 (Advertising), 7.3 (originally entitled, Direct Contact with Prospective Clients) and 5.5 (UPL/MPL).

Amendments to Model Rule 1.18

The revisions clarify the scope of the Rule. Currently, the Rule encompasses information learned from discussions with prospective clients and the information learned during the consultation. The revision expands who is a prospective client from a person who "discuss[es] with a lawyer the possibility" of engagement to a person who "consults with a lawyer **about** the possibility" of engagement. Information "learned from a prospective client" is now protected as opposed to "information learned in the consultation." Comment 2 is substantially modified to provide that a "consultation" depends on the circumstances but can occur either in writing, orally or by electronic communications. For example, the Comment notes that a consultation has likely occurred if the lawyer requests "either in person or through the lawyer's advertising in any medium," that prospective clients submit information to the lawyer "without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations," and the prospective client submits information. In contrast, a lawyer who merely advertises her education, background and experience or provides information of general interest does not create a consultation when a

prospective client communicates information to that lawyer, “without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.”

Amendments to Model Rule 7.1 (Communications Concerning a Lawyer's Services)

Comment 2 is revised to provide that the “use of appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public” as opposed to the prior “a prospective client.”

Amendments to Model Rule 7.2 (Advertising)

Comments 2 and 3 are revised to explicitly include emails and websites within the scope of Rule 7.2. Comment 3 now equates the Internet and other forms of electronic communication along with television as “the most powerful media for getting information to the public.” The prior form of the Comment only provided this elevated status to television, noting that “electronic media, such as the Internet, can be an important source of information about legal services.”

Comment 5 contains major revisions concerning referral sources. It strictly prohibits a lawyer from paying “others for recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3.” There is no change to the Comment's understanding that it is permissible to pay others for the costs associated with publishing or disseminating permissible advertising and communications.

Comment 5 also adds a section devoted solely to Internet-based client generation services, saying the same do not violate the Rule

so long as the lead generator 1) does not recommend the lawyer; 2) payments made for the service do not violate Rules 1.5(e) (Fee Sharing) or 5.4 (professional independence of the lawyer); and 3) the lead generators communications are consistent with Rule 7.1 (communications concerning a lawyer's services). It would be a violation if a lawyer pays a lead generator that 1) states, implies or "creates a reasonable impression that it is recommending the lawyer; 2) is making the referral without compensation; or 3) has analyzed the legal issue when determining the lawyer that should receive the referral.

Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)

The title of the Rule has been changed to Solicitation of Clients. The text of the Rule and Comments remove the term "prospective client," leaving the solicitation as one being made to anyone. The text refers to a "target of the solicitation" in (b)(1) and in Comment 1 discusses a "targeted communication" as one directed to a "specific person . . . that offers to provide, or can reasonably be understood as offering to provide, legal services."

Communications directed to the general public, in response to a request for information or "automatically generated in response to Internet searches" are not solicitations that are targeted communications.

Amendments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)

Comment 21 is revised as follows:

Paragraphs (c) and (d) do not authorize communications advertising legal services to

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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.

The nature of the Internet allows lawyer advertising to reach a broad range of persons, including persons who may be located in jurisdictions where the lawyer is not licensed. The Comment reminds us to consider Rules 7.1 and 7.5 in the course of advertising.

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Donald Maurice is President of Maurice & Needleman, P.C., whose attorneys specialize in all areas of creditors' rights and financial services litigation. Since 1988, Don has successfully litigated for the financial services industry in both State and Federal courts. He has provided defense for claims brought under the Truth in Lending Act, Equal Credit Opportunity Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Magnuson-Moss Act and other state and federal consumer laws. Don is peer-rated AV by Martindale-Hubbell, the worldwide guide to lawyers. He has been recognized by Law & Politics Magazine as a New Jersey Super Lawyer in Bankruptcy & Debtor/Creditor Law and as a Corporate Counsel Super Lawyer. His firm has been named a "Go-to Law Firm for the Top 500 Companies," and a "Go-to Financial Law Firm" by Corporate Counsel Magazine/ALM Publications. He currently serves as vice chair of the Debt Collection Practices and Bankruptcy Subcommittee of the American Bar Association's Consumer Financial Services Committee, Business Law Section.

Bar Admissions: New Jersey and U.S. District Court, District of New Jersey; District of Columbia and District of Columbia U.S. District Court; New York and U.S. District Courts for the Southern and Eastern Districts of New York; U.S. District Court for the District of Nebraska; U.S. Courts of Appeals for the District of Columbia, Second, Third and Eighth Circuits and U.S. Supreme Court.

Don's full CV is available at: <http://www.mnlawpc.com/attorneys/dsm.htm>