

Practicing Law in the 21st Century

An ALPS Ethics and Professionalism Program

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**ALPSSM
Attorneys Liability Protection Society, Inc.
A Risk Retention Group**

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This program is designed to be interactive. After viewing a series of video vignettes, the audience will discuss in small groups a series of questions that address the issues raised in each vignette. A large group discussion will follow in order to bring together the many ideas and responses that arise in the small groups.

Our goals are to create an awareness of learning opportunities and to discuss possible solutions to the issues raised. We intend to emphasize that attorneys should take time to reflect upon ethical issues and professionalism, and use such an analysis in their individual practices on a more frequent basis. The focus is to be upon process and solutions. Ultimately, we want the attendees to leave the program better able to identify learning opportunities, and more willing to take advantage of those opportunities.

The presentation contains a description of each vignette before the vignette starts. The characters and events in this program are fictional. Any likeness to real individuals or events is unintended and coincidental.

Note: Although the vignettes may be presented as taking place outside of your jurisdiction, please apply the Rules of Professional Conduct and Ethical Opinions of your jurisdiction to the analysis of the issues presented. Selected excerpts of the relevant rules of your jurisdiction are included with these materials.

Vignette One - “Virtual Reality”

Narrator: *This series of vignettes opens in the office of James Parker, one of the four members of Curtis Parker, PC, which is a multi-location virtual law firm of six attorneys. Mr. Parker and his associate, Andrew Morgan, live and work in Fairfax, Virginia. Bob Curtis is in Baltimore, Kira Baskett is in the District of Columbia, and Ian Smith and his associate, Jennifer White are in Philadelphia. There is no formal physical firm. The attorneys practice out of their homes or rented office space in order to minimize overhead. As is his habit, Mr. Parker has started his day by placing a brief Internet video call to one of his partners, Bob Curtis and we now listen in.*

James: So, I emailed those documents to Julia yesterday and she said she’d have them finished and filed with the court this afternoon.

Bob: That’s great, that’s one more item we can take off today’s “to do” list. I will tell you that I was a little bit concerned when Julia told me her husband was being transferred to Orlando. I really didn’t want to go through the hassle of trying to find another paralegal with her set of skills.

James: Me to. You know, she really has proven to be one of the best hiring decision we’ve ever made and to tell you the truth, this telecommute idea has worked out pretty well too. I’m surprised we didn’t think of it sooner.

Bob: Well you live and learn my friend. Now that we’ve crossed that bridge we’re in a better positioned to grow this firm than ever before. It’s like that line from the movie “Talladega Nights?” What is that? Oh yeah, “Shake and Bake.” Yeah, we’re ready to shake and bake.

James: Oh, you are in rare form this morning, Robert! You know, I wonder if we could turn this idea of yours into a marketing campaign on our website. I can see it now. You and I are standing trackside. We’re both wearing our NASCAR attire and you say “Hi there, I’m Bobbie and this here’s James. If you’ve got legal trouble, we’ve got the car to get you across the finish line first. How do we do it?” Then I step in and say, “Well Bobbie, we shake and bake, that’s the way we do it, we shake and bake.” Then we flash on the screen “Shake-n-bakelaw.com, One way or the other, we’ll get you there first.” I love it!

Bob: I think the bar might have something to say about that idea and seriously, you need to cut down on the caffeine. You know I’m, ready to push technology as much as anybody, and I do love my movies; but I’m not about to start doing commercials, Bud in hand, standing there saying “shake and bake”. It’s not going there, I don’t think so.

James: Oh man, what I would have given to see that. Well, I tried. Hey, listen, I know we've both have things that we have to do. I wanted to tell you that you should be receiving a call from Jackie Alvarez with Virtual Steele sometime this afternoon. As a reminder, they've been a longtime local client of mine and they are in the early stages of licensing some codes and I think this is just going to be the beginning of something big. So I assured them that handing them off to you they were going to be in very good hands.

Bob: I am looking forward to it. I got your email and went through your notes and am ready to jump in anytime you need me, so we will go from there. Is there anything else?

James: No, I think that's it, s thank you and we'll reconnect tomorrow.

Bob: Yup, will talk later.

James: OK

Bob: Thanks

Narrator: *Before moving on, a little additional information is in order. Andrew has been with the firm for over 3 years. During this time he has proven himself to be not only computer savvy and quite the expert at Internet research, but he has also demonstrated that he has the necessary people skills to succeed in law. For whatever reason, clients have seemed to connect with him. As a result, he has been successful in building his own client base. In short, Andrew appears to be a great fit given that he practices with a virtual firm. We now rejoin James in his office later in the day as he and Andrew discuss a client matter.*

James: I understand Ms. Klein had some trouble accessing her files online. Has that problem been resolved?

Andrew: It has. It was just a little misunderstanding in logging in. After helping her get back in, I resent the instructions in another email and suggested that she keep that in a secure place. We don't want the kids seeing anything not meant for their eyes.

James: No, no. I appreciate your willingness to help her out. You know, this online file system has worked out really well. Clients really love the 24/7 access to their files and being able to fill out their forms online. You know, I'm suprised that so few firms have gone in this direction. I mean, once they understand what practicing in the cloud is all about, a decision like this is a no brainer.

Andrew: I couldn't agree more. I particularly like the automated online forms. They're a huge time saver. Hey, we got to make a decision on how we're going to handle the document review process with St. Pats. Counting emails, we're going to be dealing with six to eight hundred thousand documents.

James: Personally, I think it is going to be even more than that. Obviously, we're not set up to handle that internally, so outsourcing is on the table.

Andrew: You want to take this abroad? I'm surprised considering how hard it was for you to get comfortable with the idea of Julia working from Florida.

James: Yeah, well I do struggle with a decision from time to time; but once I make that decision I'm all in. No, I'm not necessarily saying we should go abroad with this. Financially it makes sense, but I'm concerned about the information contained in those documents. I mean, at the very least, they're going to be references to patients and details about the hospital's proprietary encryption program to include the code itself.

Andrew: I'm sure we can put your worries to rest by properly encoding the files for transmission. Client confidences will be maintained and given the cost difference between keeping it stateside and taking it overseas, you and I both know there is room for a little markup. It can be win/win.

James: I have no problem making a little money; it's not our ability to maintain client confidences that worries me. It's about regulatory issues. Does HIPPA factor in here? Are there any prohibitions to sending details about an encryption process or even software code overseas? In this day and age I just don't know.

Andrew: Well, I hadn't even thought of that. You might be on to something. Why don't I do a little research and see what I can find out.

James: Well thank you, that'd be great. You know these issues they get to me. When I first started out practicing, I was proud to be an attorney. I still am, don't get me wrong. But, back then, self regulation meant something and professional judgment mattered. If I felt a client was best served by outsourcing, then that's what we did. It's different now. With things like Sarbanes Oxley, HIPPA, the Blue Sky Regs, the list goes on, well it just seems like the professional judgment rule isn't what it used to be. I mean even the FTC has gotten in on this. Remember when that crazy business over them saying that attorneys are creditors and should be regulated as such. For a self regulating profession, it seems like we're subject to one heck of a lot of external regulation.

Andrew: Oh, I hear ya. I was just reading that in the U.K. and Australia, law firms can now take in outside investors and be publically traded. I don't think that will shake us up anytime soon, but change is on the wind. Seems to me that in the US, Big Law is going to have to adjust to remain competitive globally and that's going to send us down a new ethics path. I don't know what's coming but, the professional judgment rule we've entered this century with isn't going to be the one we'll exit with.

James: It gets crazier every year, doesn't it? That being the case, I think it's time that we start shifting into high gear on our business development plan. How about we start a virtual paralegal business, or we offer virtual aspects of all types, not just to clients, but to Big Law as well? We could employ nurses, accountants, paralegals, investigators, you name it. At the same time, we scale up what we're doing and sell that online. We commoditize process, customize product, and standardize delivery and we do it all in the cloud for anybody that wants it. We'll be the change agent that helps make the business of law lean and mean. What do you think about that?

Andrew: That's why I love working here. You guys get it.

James: Shake-n-bake.

Andrew: What?

James: Oh, nothing. Just thinking out loud.

Questions to Consider:

- A) We know that at least one employee at Curtis Parker telecommutes. How does one properly supervise an offsite employee in terms of ensuring compliance with our Rules of Professional Conduct? What processes and procedures might you develop to ensure employee compliance with the Rules? Does it make any difference if the telecommute employee resides in state verses out of state? The issues raised by telecommuting do go beyond employee supervision. What other Rules are implicated and how would you address the issues?
- B) Virtual law firms as described in this vignette do exist and their numbers are growing. While the business models vary greatly, one common denominator is the lack of a brick and mortar firm location. These firms are the "Amazon.coms" of law. How does one manage such a firm in terms of ensuring compliance with the RPCs?
- C) Is James's handoff of Virginia based Virtual Steele, to Bob, a Maryland based attorney facilitating the unauthorized practice of law? Does the resolution of the issue depend upon who is licensed to practice where? Are there situations or circumstances where the cross border practice of law is ethical? If so, what are

those circumstances? For example, could Andrew hand off one of his VA divorce clients to Ian in Philadelphia? Remember, they are all with the same firm. Instead of just 6 attorneys, what if the firm was a firm of 650 attorneys, would that change anything?

- D)** This firm has begun the transition of moving their practice to “the cloud.” Let’s define cloud computing for the purposes of this discussion as simply using someone else’s software and hardware for the purpose of conducting your own business. Here, the firm moved client files online and enabled client access and form filling capability as part of the service offered. What ethical concerns arise and how might these concerns be appropriately addressed? **Note** that many will say that this question isn’t relevant to their practice as they have no intention of ever practicing in the cloud. My response to this is what about the use of the likes of Google Docs, Mozy online backup, Yahoo calendar, Hotmail, file sharing services such as YouSendIt, or text/video services such as Skype? To varying degrees all of these online tools involve the use of someone else’s software and hardware to conduct your business and such services are in wide use. The use of any online service, such as one of these, means that some client data is residing on someone else’s server.
- E)** The firm is considering outsourcing document review. If telecommuting isn’t a concern for you, then certainly outsourcing shouldn’t be. They’re basically the same are they not? And haven’t attorneys have been outsourcing for years? What about sending a copy job to Kinko’s, hiring an outside transcriptionist or dictationist, or farming out legal research and writing? The spin here is the project may go overseas. Does this change anything ethically? Are James’ regulatory concerns justified? If so, what are the options?
- E)** James remarks that “For a self regulating profession, it seems like were subject to one heck of a lot of external regulation.” Share your thoughts about his statement. After all, if an attorney feels that in her professional judgment a client is best served by outsourcing the work overseas shouldn’t that be the end of it? Now factor in the outside investor change that has already occurred in the UK and Australia. How should the profession respond to these kinds of developments while remaining true to our Rules? Is it even possible, or is the Professional Judgment Rule as it currently stands going the way of the dinosaur? Our rules of ethics are well and good until they prevent us from remaining competitive in the marketplace, then serious change is in order. True?

Reference Points for these Questions:

Rule 1.4 Communication

Rule 1.6 Confidentiality of Information

Rule 5.1 Responsibilities of a Partner, Managers, and Supervisory Lawyers

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice

Vignette Two - “Getting Schooled in Social Media”

Narrator: *We now shift our focus and jump to Philadelphia to listen in on a video call between Ian and his associate, Jennifer. A few days ago a local firm, Brown Barker, learned that one of their partners had embezzled over \$735,000 from various client estates over a period of years. This firm has retained Ian for the purpose of helping them manage media spin control and to assist the firm in responding to a bar investigation that is just underway. Let’s listen in.*

Ian: This is one unfortunate situation.

Jennifer: It really is. I can hardly believe that someone of Charlie’s stature did this. It wasn’t like he needed the money and he was so looking forward to his retirement. This just doesn’t make sense.

Ian: Things like this often don’t make sense; but I guess Charlie had his reasons, as misguided as they were.

Listen, I need you to do a little research for me.

Jennifer: Sure, how can I help?

Ian: I’d like to get out ahead of the disciplinary board on this. Charlie is going to be disbarred. We know that; however, I also anticipate that he is not going to be the sole target in this investigation. While there are several tacks that we could take in terms of responding to that probability, one twist I’d like you to explore is the innocent partner defense. In short, does “We didn’t know” go anywhere? I recognize that as the investigation evolves, the specifics of the firm’s policies and procedures will significantly impact the viability of the argument. I just want to know what the parameters are. So, here is the question. Can a partner ever truly be innocent of the acts of a fellow partner and, if so, under what circumstances?

Jennifer: Interesting question. I’ll look into it right away. When did you want a response?

Ian: Yesterday would be great, but I can settle with Thursday morning.

Jennifer: Consider it done. Anything else?

Ian: Not at the moment, thanks. We’ll reconnect in the morning after I have a chance to visit with the executive committee. There are more than a few

chomping at the bit wanting to make certain that the whole world knows that one rogue attorney doesn't mean the whole firm is corrupt. I need to slow them down and work toward bringing them into alignment on how to respond and move forward.

Narrator: *Several weeks have passed and, in addition to doing all that they can to facilitate the various investigations in progress, the Brown Barker firm now has to defend itself in several civil suits relating to the theft brought by Stone & Jeffries. Ian's role has been expanded to advise the firm on the PR surrounding these civil suits. Jennifer has just video called in to talk about these latest developments.*

Jennifer: Ian, I'm calling from Brown Barker and we've got a problem.

Ian: Fill me in.

Jennifer: We've just learned that Stone recently added some social media functionality to their website to include a twitter feed, blog capabilities, links to court documents, the whole shebang. There is even a "contact us" link for use by reporters. The site actually seems to be developing a following. Already there are several public discussions going on in response to blog postings. So far, the firm isn't participating in this public commentary, other than apparently acting as a moderator because two comments have been removed. They're certainly keeping a watchful eye on the discussion.

Ian: Wait, slow down. I care about all this because?

Jennifer: I'm sorry. This just makes me so angry. You care because this section of their website is focused exclusively on the civil suits they have against Brown Barker.

Ian: Oh no.

Jennifer: Oh yes and it gets worse. My guess is that Stone's intention with this goes beyond putting pressure on Brown. This really seems to be an attempt to garner as much free press as they can in order to rebrand themselves as a white knight who is here to protect and serve the masses. The imagery in use with the enhancements is unbelievable.

Ian: How are things over there now?

Jennifer: Let's just say there is a significant amount of venting going on; some of which would make even a sailor blush.

Ian: Got it. Ok. We need to get on top of this as quickly as we can. I don't want anybody at the firm talking to anyone about anything. Make that as clear as you can. I will clear my calendar, take a look at the site, and get over there as quickly as I can. One thought worth passing along until I can get there that Stone's actions may have a significant unintended consequence. Knowing the lawyers over at Stone as well as we do, I can guess they've done a very efficient job of painting Brown out to be a greedy out of control money grubbing firm whose very culture was responsible for harboring the likes of a common thief. They may not have said that directly but the implication will be there.

Jennifer: Actually, you're not too far off.

Ian: I thought so. What they're not seeing is that their media efforts are going to accelerate the ability of Brown Barker's insurance company to get out, thereby jeopardizing Stone's own efforts to obtain a full recovery for their clients.

Jennifer: I think this wouldn't be a covered loss anyway.

Ian: And that very well may be. Unfortunately for Stone, their efforts have practically guaranteed that outcome and that's a problem. Honestly, I've never understood the overly aggressive plaintiff lawyer carrying a big club and beating their chest. In my experience they've done as much harm to themselves as they've done to the opposition, sometimes even more. Stone did not fully think this through.

Jennifer: While we're on the topic of Stone, are their actions unethical?

Ian: Now you see; that's why you and I work so well together. We think alike. While I'm getting up to speed and getting over there, you're going to be on the phone with ethics counsel to have that very question answered. I expect to be there within the hour.

Questions to Consider:

- A) We are our partners keepers, ethically speaking. Do you agree or disagree with this statement, and why? Given RPC 5.1, can one ever truly be innocent of another partner's wrong doing? In malpractice, a firm doesn't defend itself from an error of a partner by claiming innocence. It doesn't fly. Should it be different when dealing with unethical conduct? Perhaps with this issue, the answer isn't black or white. Is there a middle ground here? If so, define the middle ground as you see it keeping in mind the RPCs.
- B) Ian references that some in his client firm desire to rush out and publically proclaim the firm's innocence. He will shortly advise that they slow down. Put yourself in

Ian's shoes. What would your advice be to the firm? Ethically speaking, are there limitations as to what one can say in response to public awareness of wrongdoing at the firm?

- C) Stone has turned to social media in order to get as much publicity about this active matter as they can. Are there any ethical restrictions to using social media in this fashion? Part of what Stone has done with their website is to create a forum for public discourse. While they seem to be monitoring the discussion to some degree, what ethical and/or risk management concerns do you see by a firm providing such a forum?
- D) Attorneys at both Stone and Brown Barker have a desire to speak through the press, albeit for very different reasons. Ethically, when and when can't you speak to the press in general? Are there limitations as to what you can say? Does it matter if you are speaking in defense of your firm verses defending a client or going after the other side? Are you ethically "free and clear" if you are simply providing commentary or insights on a matter in which no one at your firm is involved? Approach this last question considering both the press interview situation and your personally posting commentary to something like a personal or firm Blog.

Reference Points for these Questions:

Rule 3.6 Trial Publicity

Rule 4.1 Truthfulness in Statements to Others

Rule 5.1 Responsibilities of a Partner, Managers, and Supervisory Lawyers

Rule 7.1 Communications Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Direct Contact with Prospective Clients

Rule 8.4 Misconduct

Vignette Three - "The Reality of Lost Virtue"

Narrator: *In this final vignette, we open in Kira Baskett's office. She has just taken a call from a colleague and personal friend, Anthony Zapata, who practices family law in the Fairfax area.*

Kira: Hi, Tony, nice to see you. What can I help you with?

Tony: Listen Kira, I'm sorry to bother you but I've got a rather sensitive situation here and I wanted to discuss this with you before making any decisions and advising my client.

Kira: Sure Tony, fill me in.

Tony: A woman recently stopped in to see about trying to obtain full custody of her daughter and modifying the support order. We visited a bit and the situation does warrant my getting involved; but there's a real twist to this one.

Kira: Seems like there always is.

Tony: Isn't that the truth. Unfortunately, however, this twist involves one of your own.

Kira: Uh, oh. I don't like the sound of this.

Tony: Just listen. It turns out that Andrew was the attorney who represented this client through the initial divorce. While his legal work is what I would expect of him...

Kira: Meaning it's fine?

Tony: Yes, it's fine. The problem was in how he handled the client relationship. This is why this individual came to me as opposed to returning to see Andrew. Look, Andrew and this woman had a personal relationship that has come to an end and she is rather upset about it.

Kira: Personal relationship, now are you suggesting what I think you're suggesting?

Tony: This is hard, so let me just put it out there. As best as I can tell, Andrew and this individual became romantically involved, and I use that term loosely, at some point during his representation of her and this relationship continued past his finishing with the divorce.

Kira: Are you kidding me?

Tony: I wish I were.

Kira: Now, what did you mean when you said you use the term “romantically involved” loosely? They were either involved or not, so which is it?

Tony: Here’s where it gets crazy. At the moment, it appears that these two never, shall we say, “consummated” the relationship. That said, they have had quite an intimate and steamy Internet based relationship.

Kira: I’m sorry; what?

Tony: I know. The bottom line is they had computer sex for well over a year. He apparently ended it when his wife started to become suspicious and my client is having trouble letting go. She is confused, angry, hurt, she feels abused, the whole nine yards.

Kira: Ok. Boy, I don’t know what we do with this. Now you say it started while he was handling her divorce?

Tony: Yes, and that’s why I’m calling you. You and I both know that when James hears about this, Andrew is in for a very rough ride.

Kira: Look, I really do appreciate your speaking with me first. This will give Bob and me a chance to discuss and get a handle on it before we visit with James and Andrew.

Tony: This was my thinking too. But...

Kira: ...but you have your client’s interests to think about, and I know that’s why you really called.

Tony: I decided to call for a number of reasons. Part of my problem is that as I’ve looked into this there isn’t a prohibition against having sex with a client in our disciplinary rules. On top of that, even if there were, would this count as having a sexual relationship with a client? I honestly have no idea.

Kira: Neither do I; but I know you well enough to know that you have a game plan already in play. Your client is in good hands.

Tony: Kira, I...

Kira: Come on Tony, you and I go back quite a few years, so let’s just leave it at this. Thank you. I really appreciate the professional courtesy of letting

me know what's coming. With any luck, maybe this will help us work together to get your client through this in such a way that she can just get on with her life. Now with that said, Andrew's personal and professional life are about to get seriously messy; but that's something he brought on himself. Look, I need to get going, please tell your wife I said hello, ok.

Tony: I'll be sure to do that. I'm sorry about all this, Kira.

Kira: Me too. One of us will be in touch.

Narrator: *In this final scene, we come full circle and end where we began, in the office of James Parker as he starts another day on an Internet video call. Today's call is with Kira and they are discussing Andrew's imminent departure.*

Kira: I agree. Andrew's decision to get some help and take time away from the practice has turned out to be the best thing for all concerned. How are things between him and his wife?

James: Truthfully, not good; but I don't think it's completely over yet. His manning up and taking responsibility may, in the end, be what keeps the family together.

Kira: What's the status of his files?

James: Well, notice has just gone out on all the files that he was primarily responsible for so I suspect that we're going to be hearing any day now. Given that he was the only one of us doing the divorce work, I am expecting that we'll handoff those files. One or two are too late in the game for us to get out, but I've put in a call to Pat Davidson and I'm confident that he'll be able to help us to wrap those up.

Kira: Are his accounts in good shape?

James: Yeah, overall, they are. He did a good job with retainers up front on the domestic files. All the other matters, those were billed out monthly, so I'd say there's probably ten grand outstanding and, of that, no more than two grand that's over 90 days out.

Kira: Not bad.

James: No, I agree. I still need to look at two or three retainer situations to see where he was with those. It may be that we may need to refund a little but overall I'm pretty pleased.

Kira: I can live with that. Let me know if there is anything I can do to help out.

James: Thanks, I appreciate that. Hey, by the way did Ian touch base with you on the latest on the Brown Barker situation?

Kira: No, what's up?

James: Well, you are not going to believe this. Remember Stone's social media efforts to paint Brown Barker as the evil firm who should not be trusted with other people's money?

Kira: How can one forget that? I mean talk about pushing boundaries to the extreme.

James: Well, in a strange twist of fate, Stone has now ended up with serious mud on their face. Actually, it's even worse.

Kira: Do tell!

James: It seems one of Stone's partners was recently contacted by an overseas firm to assist in a corporate collections matter so he did a little due diligence and verified that the firm was legit. Personal and corporate identities checked out. He agreed to get involved and was even able to obtain a signed retainer agreement and details of the amount owed. Shortly after getting involved, a check for several hundred thousand showed up. He received instructions to deposit the check into his trust account. He did have the foresight however to tell the firm he'd be unable to disburse the funds until the check had cleared. After about four or five days, the client contacted him again expressing legitimate business needs for the funds. Well, he checked with the bank and he found out that the funds were available. So, after taking his fee, he sent the remaining funds overseas.

Kira: I know where this goes. I had a call from another attorney in the area a few weeks ago with a very similar sounding story. Now, let me guess. Two or three days go by then the bank called; the check was a forgery and now Stone's trust account is overdrawn by a significant amount.

James: Bingo!

Kira: I'm not surprised. These scams are getting so very sophisticated. One trick the scammers are using involves taking advantage of the fact that the check clearing process isn't a one step process. See, what they do is they alter the bank routing number on the forged check so that the bank named on the check doesn't match the routing number. This further slows down the process. The local bank clears the check but it will take the bank on which it was drawn extra time to discover the fraud. By that time, money

has been wired and, trust me, once those funds hit a foreign account they are gone for good.

James: Really, I didn't know that.

Kira: I know, and Stone's firm isn't the only one to get hit by any means. I'll admit there is a little bit of divine justice here but I wish it wasn't quite so severe. They're in for a rough ride.

Questions to Consider:

- A) Andrew became intimately involved with a client online. Is this unethical in and of itself? If not, should it be? Why or why not? The partners at the firm certainly were unaware of Andrews's actions and thus can be considered innocent in this situation. How about the firm as a whole? Consider rule 5.1? Does the firm have a problem?
- B) Andrew's personal use of social media is just one example of how unintended consequences can arise. Such problems are very real. Information leakage (anonymous post of information to an external site), the unintended creation of a conflict of interest (all who have been friended by firm attorneys), ex parte communications (attorney and judge discuss a pending matter on Facebook), a client confidence is shared (someone within a firm discusses an active matter in a blog), the unintentional creation of an attorney client relationship (responding to a posted question), solicitation (a well intentioned but misguided staff member creates a targeted MySpace page), misrepresentation (judge discovers that attorney's reason for requesting a trial delay was a lei after visiting attorney's Facebook page) are additional examples of what is a very long list. What can and should a firm do to address such problems? Are there any ethical requirements in this regard?
- C) Attorneys do need to withdraw from matters from time to time and for a variety of reasons. Can an attorney take a lien on a client file if there is an outstanding balance? If so, how does one actually do this? How late in the game can it go before it becomes too late to withdraw? How does one actually withdraw from various types of matters? Can you keep your file and bill the client for their copy? Retainer funds remain on account. How quickly must you deal with that? What must be turned over to the client? How quickly must all this be turned over? What other issues do you see and how are they best resolved?
- D) Kira is correct when she shares that scams have become ever more sophisticated and that many attorneys have been victimized. The approaches vary as will the amount involved. The range has been running from a low of ten to twenty thousand to a high of well over a million. Do we have a duty to do a little due diligence on or investigate perspective clients? If so, how far does this go? What duties do we

have to those clients whose funds we hold in trust? What must one do if there is an overdraft in the firm's trust account? What if the shortfall is hundreds of thousands of dollars? A common statement made by attorneys is along the lines of "I would never fall prey to these kinds of scams." This is exactly how the attorneys who were eventually victimized felt too. What steps might one take to avoid finding yourself in Stone's shoes?

Reference Points for these Questions:

Rule 1.1 Competence

Rule 1.3 Diligence

Rule 1.8 Conflict of Interest: Prohibited Transactions

Rule 1.15 Safekeeping Property

Rule 1.16 Declining or Terminating Representation

Rule 4.1 Truthfulness in Statements to Others

Rule 5.1 Responsibilities of a Partner, Managers, and Supervisory Lawyers

Rule 7.1 Communications Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Direct Contact with Prospective Clients

Rule 8.4 Misconduct

Selected Excerpts from The South Dakota Rules of Professional Conduct

Preamble: A Lawyer's Responsibilities

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

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

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

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

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

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

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

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

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

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

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

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

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

Scope

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

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

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

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

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or

incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0. Terminology.

(a) *“Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.*

(b) *“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.*

(c) *“Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.*

(d) *“Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.*

(e) *“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*

(f) *“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.*

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(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. 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.

Comment:

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal

agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently

represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[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 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 relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

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

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a

lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Rule 1.4. Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) *keep the client reasonably informed about the status of the matter;*

(4) *promptly comply with reasonable requests for information; and*

(5) *consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.*

(b) *A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.*

(c) *If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:*

(1) *"This lawyer is not covered by professional liability insurance;" or*

(2) *"This firm is not covered by professional liability insurance."*

(d) *The required disclosure in 1.4(c) shall be included in every written communication with a client.*

(e) *This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.*

Comment:

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably

to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[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.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

[8] The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance

and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead - one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provide in Rule 1.4(c),(d) and (e). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

Rule 1.6. Confidentiality of Information.

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

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

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) 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;

(4) to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used; or

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

Comment:

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule

1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's

disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[7a] In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3 not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct. Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by [Rule 1.4](#). If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such

disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

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

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[14] 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 [Rule 1.16\(a\)\(1\)](#). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor [Rule 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. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in [Rule 1.13\(b\)](#).

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a client 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](#).

[16] 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.

Former Client

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

Rule 1.8. Conflict of Interest: Current Clients, Specific Rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client and the gift is not significantly disproportionate to those given to other donees similarly related to donor. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement, or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced.

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

Comment:

[1]... thru [16]...

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds

shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation. A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) Preserving Identity of Funds and Property of Client.

(1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein.

(ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

(i) Promptly notify a client of the receipt of his funds, securities, or other properties.

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(iii) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to his client regarding them.

(iv) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) A lawyer may elect to create and maintain an interest-bearing account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:

(i) No earnings from such an account shall be made available to a lawyer or firm.

(ii) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

(iii) An interest-bearing trust account may be established with any bank authorized by federal or state law to do business in South Dakota and insured by the Federal Deposit Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

(iv) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors unless reduced to offset bank administrative costs. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

(4) Lawyers or law firms electing to deposit client funds in a trust savings account shall direct the depository institution:

(i) To remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the South Dakota Bar Foundation;

(ii) To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(iii) To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(e) Considerations

(1) This is a voluntary program based upon the willing participation by attorneys and law firms, whether proprietorships, partnerships or professional corporations.

(2) The program shall apply to all clients of the electing, participating attorneys or firms whose funds on deposit are either nominal in amount or to be held for a short period of time.

(3) The following principles shall apply to clients' funds which are held by attorneys and firms who elect to participate in the program:

(i) No earnings from the funds may be made available to any attorney or law firm.

(ii) Upon request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor are to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys to either invest clients' funds or to advise clients to make their funds productive.

(iii) Clients' funds which are nominal in amount or to be held for a short period of time shall be retained in an interest-bearing checking or savings trust account, with the interest (net of any service charge or fees) made payable to the South Dakota Bar Foundation.

(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm. Such judgment is not subject to review.

(v) Notification of clients whose funds are nominal in amount or to be held for a short period of time is unnecessary for those attorneys and firms who choose to participate in the program. This is not to suggest that many attorneys will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in an attorney or firm advising all clients of their willingness to advance the administration of justice in South Dakota beyond their individual abilities in conjunction with other public-spirited members of their profession. Participation in the program will involve no more than a firm desire to participate, coupled with the attorney's or firm's communication of that desire to an authorized financial institution. That communication should contain only an expression of the attorney's or firm's desire to participate in the program and, if the institution has not already received appropriate notification, advice regarding the Internal Revenue Service's approval of the taxability of earned interest or dividends to the Foundation.

(4) The following principles shall apply to those clients' funds held in trust accounts by attorneys or firms who elect NOT to participate in the program:

(i) No earnings from the funds may be made available to any attorney or firm.

(ii) Upon request of a client, earnings may be made available to client whenever possible on deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney-client

relationships do not compel attorneys either to invest clients' funds or to advise clients to make their funds productive.

(iii) Clients' funds which are nominal in amount or to be held for short periods of time, and for which individual income generation and allocation is not arranged with a financial institution, must be retained in a noninterest-bearing, demand trust account.

(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.

(5) Interest paid to the South Dakota Bar Foundation will be used for the following purposes:

(i) To help prevent crime;

(ii) To facilitate and improve the delivery of civil and criminal legal services and the administration of justice;

(iii) To encourage law-related education in the schools (K-12);

(iv) To encourage law-related education of adults including seminars and programs for charitable, civic and senior citizens groups;

(v) To give the general public information about how the courts and lawyers function; and

(vi) To issue publications educating the public about the United States legal system.

Comment:

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, § 16-18-20.2.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed.

However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Rule 1.16. Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment:

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the

representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Rule 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment:

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a

legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed Commentary is great and the likelihood of prejudice to a proceeding by the Commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 4.1. Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes

the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

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

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

Comment:

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems

frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.

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

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

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

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

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

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

Comment:

[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. 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.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

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

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

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

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

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

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

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

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

(5) in all cases, the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates 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 of this jurisdiction, provided that the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45.

Comment:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] 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. This Rule 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 Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[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) 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).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.

Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal

legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[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.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[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.

[22] All legal services are subject to South Dakota sales tax and lawyers utilizing pro hac vice, multijurisdictional practice, or reciprocal licensing must obtain a sales tax license pursuant to Chapter 10-45 of the South Dakota Codified Laws.

Rule 7.1. Communications Concerning a Lawyer's Services.

(a) Definitions.

For the purpose of this Rule 7.1, the following terms shall have the following meanings:

(1) "communication" means any message or offer made by or on behalf of a lawyer concerning the availability of the lawyer for professional employment which is directed to any former, present, or prospective client, including, but not limited to, the following:

(i) any use of firm name, trade name, fictitious name, or other professional designation of such lawyer;

(ii) any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such lawyer;

(iii) any advertisement, regardless of medium, of such lawyer, directed to the general public or any significant portion thereof; or

(iv) any unsolicited correspondence from a lawyer directed to any person or entity; and

(2) “lawyer” means an individual lawyer and any association of lawyers for the practice of law, including a partnership, a professional corporation, limited liability company or any other association.

(b) Purpose of Communications.

All communications shall be predominantly informational. As used in this Rule 7.1, “predominantly informational” means that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and that the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.

(c) False or Misleading Communications.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading;

(2) contains a prediction, warranty or guarantee regarding the future success of representation by the lawyer or is likely to create an unjustified expectation about results the lawyer can achieve;

(3) contains an opinion, representation, implication or self-laudatory statement regarding the quality of the lawyer’s legal services which is not susceptible of reasonable verification by the public;

(4) contains information based on the lawyer’s past success without a disclaimer that past success cannot be an assurance of future success because each case must be decided on its own merits;

(5) compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated;

(6) states or implies that the lawyer actually represents clients in a particular area of practice when the lawyer refers a significant number of such clients to other lawyers for representation with respect to all or a significant aspect of the particular practice area;

(7) states or implies that the lawyer is experienced in a particular area of practice unless significant experience in such practice area can be factually substantiated;

(8) states or implies that the lawyer is in a position to improperly influence any court or other public body or office;

(9) states or implies the existence of a relationship between the lawyer and a government agency or instrumentality;

(10) states or implies that a lawyer has a relationship to any other lawyer unless such relationship in fact exists and is close, personal, continuous and regular;

(11) fails to contain the name and address by city or town of the lawyer whose services are described in the communication;

(12) contains a testimonial about or endorsement of the lawyer, unless the lawyer can factually substantiate the claims made in the testimonial or endorsement and unless such communication also contains an express disclaimer substantively similar to the following: "This testimonial or endorsement does not constitute a guaranty, warranty, or prediction regarding the outcome of your legal matter";

(13) contains a testimonial or endorsement about the lawyer for which the lawyer has directly or indirectly given or exchanged anything of value to or with the person making the testimonial or giving the endorsement, unless the communication conspicuously discloses that the lawyer has given or exchanged something of value to or with the person making the testimonial or giving the endorsement;

(14) contains a testimonial or endorsement which is not made by an actual client of the lawyer, unless that fact is conspicuously disclosed in the communication;

(15) contains any impersonation, dramatization, or simulation which is not predominantly informational and without conspicuously disclosing in the communication the fact that it is an impersonation, dramatization, or simulation;

(16) fails to contain disclaimers or disclosures required by this Rule 7.1 or the other Rules of Professional Conduct;

(17) contains any other material statement or claim that cannot be factually substantiated.

(d) *Lawyers Responsible for Communication.*

Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes a communication in violation of this rule may be subject to discipline for the failure of the communication to comply with the requirements of this rule.

Comment:

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[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.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising.

(a) Definition.

“Lawyer” is defined in Rule 7.1(a)(2).

(b) Permitted Advertising.

Subject to the requirements of Rules 7.1 and 7.3, 7.4 and 7.5, a lawyer may advertise legal services through written, recorded, internet, computer, e-mail or other electronic communication, including public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television and other electronic media, and recorded messages the public may access by dialing a telephone number, or through other written or recorded communication. This rule shall not apply to any advertisement which is broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is reasonably expected by the lawyer not to be received or disseminated in the State of South Dakota.

(c) Record of Advertising.

A copy or recording of an advertisement shall be kept by the advertising lawyer for two years after its last dissemination along with a record of when and where it was used.

(d) Prohibited Payments.

Except as provided in Rule 1.17 and except as provided in subparagraph (c)(13) of Rule 7.1, a lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule and may pay the usual charges of a not-for-profit legal service organization;

(2) pay the usual charges of a not-for-profit 501(c)(3) or 501(c)(6) qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17.

Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

(e) Prohibited Cost Sharing.

No lawyer shall, directly or indirectly, pay all or part of the cost of an advertisement by another lawyer with whom the nonadvertising lawyer is not associated in a partnership, professional corporation or limited liability company for the practice of law, unless the advertisement conspicuously discloses the name and address of the nonadvertising lawyer, and conspicuously discloses whether the advertising lawyer contemplates referring all or any part of the representation of a client obtained through the advertisement to the nonadvertising lawyer.

(f) Permissible Content.

The following information in advertisements and written communications shall be presumed not to violate the provisions of this Rule 7.2:

(1) Subject to the requirements of Rule 7.5, the name of the lawyer, a listing of lawyers associated with the lawyer for the practice of law, office addresses and telephone numbers, office and telephone service hours, and a designation such as “lawyer,” “attorney,” “law firm,” “partnership” or “professional corporation,” or “limited liability company.”

(2) Date of admission to the South Dakota bar and any other bar association and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the State of South Dakota or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer is certified subject to the requirements of Rule 7.4.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Information concerning fees and costs, or the availability of such information on request, subject to the requirements of this Rule 7.2 and the other Rules of Professional Conduct.

(9) A listing of the name and geographic location of a lawyer as a sponsor of a public service announcement or charitable, civic or community program or event. Such listings shall not exceed the traditional description of sponsors of or contributors to the charitable, civic or community program or event or public service announcement, and such listing must comply with the provisions of this rule and the other Rules of Professional Conduct.

(10) Schools attended, with dates of graduation, degree and other scholastic distinctions.

(11) Public or quasi-public offices.

(12) Military service.

(13) Legal authorships.

(14) Legal teaching positions.

(15) Memberships, offices and committee assignments in bar associations.

(16) Memberships and offices in legal fraternities and legal societies.

(17) Memberships in scientific, technical and professional associations and societies.

(18) Names and addresses of bank references.

(19) With their written consent, names of clients regularly represented.

(20) Office and telephone answering service hours.

(g) Permissible Fee Information.

(1) Advertisements permitted under this Rule 7.2 may contain information about fees for services as follows:

(i) the fee charged for an initial consultation;

(ii) availability upon request of a written schedule of fees or an estimate of fees to be charged for specific legal services;

(iii) that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery, provided that the advertisement conspicuously discloses whether percentages are computed before or after deduction of costs, and only if it specifically and conspicuously states that the

client will bear the expenses incurred in the client's representation, regardless of outcome, except as permitted by Rule 1.8(e);

(iv) the range of fees for services, provided that the advertisement conspicuously discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client, that the quoted fee will be available only to clients whose legal representation is within the services described in the advertisement, and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(v) the hourly rate, provided that the advertisement conspicuously discloses that the total fee charge will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and that the client is entitled without obligation to an estimate of the fee likely to be charged;

(vi) fixed fees for specific legal services, provided that the advertisement conspicuously discloses that the quoted fee will be available only to a client seeking the specific services described.

(2) A lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee or rate for at least ninety (90) days unless the advertisement conspicuously specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(h) Electronic Media.

Advertisements by electronic media, such as television and radio, may contain the same information as permitted in advertisements by print media, subject to the following requirements:

(1) if a lawyer advertises by electronic media and a person appears in the advertisement purporting to be a lawyer, such person shall in fact be the advertising lawyer or a lawyer employed full-time by the advertising lawyer; and

(2) if a lawyer advertises a particular legal service by electronic media, and a person appears in the advertisement purporting to be or implying that the person is the lawyer who will render the legal service, the person appearing in the advertisement shall be the lawyer who will actually perform the legal service advertised unless the advertisement conspicuously discloses that the person appearing in the advertisement is not the person who will perform the legal service advertised.

(3) Advertisements disseminated by electronic media shall be prerecorded and the prerecorded communication shall be reviewed and approved by the lawyer before it is broadcast.

(i) Law Directories.

Nothing in this Rule 7.2 prohibits a lawyer from permitting the inclusion in reputable directories intended primarily for the use of the legal profession or institutional consumers of legal services and contains such information as has traditionally been included in such publications.

(j) Acceptance of Employment.

A lawyer shall not accept employment when he knows or should know that the person who seeks his services does so as a result of conduct prohibited under this Rule 7.2.

(k) Lawyers Responsible for Advertising.

Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes an advertising in violation of this rule may be subject to discipline for the failure of the advertisement to comply with the requirements of this rule.

(l) Mandatory Disclosure.

Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least \$100,000, using the specific language required in Rule 1.4(c)(1) or (2).

Comment:

[1] To assist the public in 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 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 advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one 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 solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

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

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. 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, 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. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers 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 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 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. 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; (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 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, 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 to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Disclosure of Lack of Malpractice Insurance

[9] For purposes of the disclosure requirement of Rule 7.2(1), all advertising shall contain the specific disclosure language found at Rule 1.4(c)(1) or (2). The alphabetical listing of the name, address and phone number of the lawyer's office in a telephone directory, whether white pages or yellow pages, is not advertising for purposes of the disclosure rule. The mere use of bold face type in the alphabetical section of the phone book, white pages or yellow pages, does not constitute advertising for purposes of the disclosure. All yellow page block ads, regardless of content, constitute advertising and requires disclosure of the absence of professional liability insurance. There was no attempt to mandate a minimum decibel level for radio and television advertisements, nor size of type in newspaper, yellow page or billboard advertisements. However, the lawyer purchasing such advertisements is responsible for the content of the advertisement and must make reasonable efforts to insure that the disclosure is adequately communicated in the media selected.

Rule 7.3. Direct Contact with Prospective Clients.

(a) A lawyer shall not by in-person, 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, live telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) The solicitation involves coercion, duress, or harassment.

(c) A copy of every written or recorded communication from a lawyer soliciting professional employment from a prospective client shall be deposited no less than thirty days

prior to its dissemination or publication with the Secretary-Treasurer of the South Dakota State Bar by mailing the same to the Office of the State Bar of South Dakota in Pierre, postage prepaid, return receipt requested.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client 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 recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2). Where the communication is written, the label shall appear in a minimum 18-point type or in type as large as the largest type otherwise used in the written communication, whichever is larger. This labeling requirement shall not apply to mailings of announcements of changes in address, firm structure or personnel, nor to mailings of firm brochures to persons selected on a basis other than prospective employment.

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

[2] 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 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 communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer

and a prospective client 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] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or 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 members or beneficiaries.

[5] 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 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 may violate the provisions of Rule 7.3(b).

[6] 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. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

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

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular

matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not

violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.