

2014

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32 Miss. C. L. Rev. 345 (2013-2014)

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FACING 21ST CENTURY REALITIES

*Judith L. Maute**

I. INTRODUCTION

ABA President Carolyn Lamm was prescient in appointing the Ethics 20/20 Commission to anticipate the need of changes to the Rules of Professional Conduct by increased use of technology and globalization. In the field of computer technology, “Moore’s law” predicts that the number of transistors on a computer chip double about every two years, although the pace may have quickened further with the latest mobile devices.¹ During the Commission’s three year journey, it received input from diverse sources, culled through many proposals, and on August 6, 2012 successfully presented a set of recommendations to the ABA House of Delegates. Standing alone, ABA Model Rules and comments have no force of law; each jurisdiction must make its own decisions whether to adopt some or all of the amendments, or make local modifications.

Part II of this article summarizes technology amendments in Resolution 105A and Resolution 105B’s major revisions to the marketing provisions contained in Rules 7.1 through 7.3. Part III briefly reviews the deliberations and revisions of Delaware, the only state to have considered the August 2012 amendments. Part IV compares the relevant current Mississippi rules and attempts to evaluate from a pragmatic viewpoint the feasibility and possible barriers to adopting these revisions. Part V discusses some of the precautions that maybe in order, depending on the nature of a given law practice. The article concludes with an admonition that lawyers must “get with the times.” If they are unable or unwilling to adapt their practices to the use of technology they are at risk of extinction.

Taken together, the revisions to Rules 1.1 and 1.6 will nudge practicing lawyers further into the twenty-first century. For example, a small revision to Rule 1.1 commentary expands lawyers’ continuing legal education to “includ[e] . . . the benefits and risks associated with relevant technology.”² Lawyers and firms will be expected to take reasonable precautionary measures to minimize the security risks posed to all forms of technology used in the electronic transmission or storage of clients’ confidential information. Because of the rapid development of technology, an anticipated website will reflect those changes, avoiding the need for frequent rule amendments.

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1. *Moore’s Law Inspires Intel Innovation*, INTEL.COM, <http://www.intel.com/content/www/eu/en/silicon-innovations/moores-law-technology.html> (last visited Sept. 19, 2013).

2. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2012).

Preliminary review of Mississippi's marketing rules suggests there may be difficult internal struggles regarding possible adoption of Resolution 105B's marketing revisions or the risk of costly litigation challenges. Since the United States Supreme Court's 1995 decision in *Florida Bar v. Went for It, Inc.*,³ many states responded with more restrictive advertising rules which were then challenged on First Amendment grounds. A case recently decided by the Supreme Court addressed targeted solicitations by lawyers.⁴ As a practical matter, lawyer regulators in most jurisdictions do not want to spend scarce resources defending the constitutionality of such restrictive rules, preferring instead to go after bad lawyers who repeatedly harm clients. Meanwhile, on-line companies entice cost-conscious prospective clients with do-it-yourself forms, or "we'll do it for you" like LegalZoom. I urge states to abandon restrictive marketing rules and enhance access to justice with reasonably priced legal assistance from properly licensed attorneys. In the twenty-first century, the competitive marketplace demands that the organized bar not ignore the real threats to quality of justice presented by on-line services that cause more harm than good.

II. ETHICS 20/20 TECHNOLOGY AMENDMENTS: RESOLUTIONS 105A & 105B

This article considers the technology-related 2012 amendments contained in Resolutions 105A, mostly concerning the Rules of Professional Conduct on the terms of the client-lawyer relationship, while Resolution 105B pertains to marketing activities by lawyers. Other revisions adopted in August 2012, contained in Resolutions 105C through 105F, are beyond the scope of this work. Part A of this text relates to the former and Part B addresses the latter. As a general principle, I expect the Mississippi Bar Association and Mississippi Supreme Court will have little difficulty embracing the changes in Resolution 105A. By contrast, I expect the marketing revisions will provoke significant internal debate among members of the Mississippi Supreme Court, bar regulators, and the practicing bar.

A. *Resolution 105A: Modernizing the Client-Lawyer Relationship*

During the course of its work, the Commission received testimony and comments from many interested persons and entities, and then sifted through them, carefully gauging what revisions would be workable and acceptable to the House of Delegates and to local jurisdictions. As stated in its memo introducing the proposed revisions, "technology has irrevocably changed and continues to alter the practice of law in fundamental ways."⁵ Today, legal work is easily disaggregated among different law firms; there

3. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

4. *Maracich v. Spears*, 133 S. Ct. 2191 (2013) (holding that an attorney's solicitation of clients is not a permissible purpose covered under the Driver's Privacy Protection Act of 1994).

5. ABA Comm. on Prof'l Ethics 20/20 Introduction and Overview (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

are many new tools for marketing and business development; and the use of technology facilitates legal work and client communications.⁶

Overall, the technology amendments addressed here are modest, modernizing the rules to reflect current technology and enabling them to accommodate future changes without need for repeat revisions. Some revisions are minor tweaks, such as replacing the word “email” with “electronic communications” in the black-letter text to the terminology provision 1.0(n) defining “writing” or “written.” The revised comment on 1.0(k) on “screening”—to isolate conflicted lawyers—replaces the word “materials” with the broader term “information, including information in electronic form.” While minor, this change is of critical importance given the prevalence of electronic data in current practice.

Among the most important revisions is in renumbered Comment 8 to Rule 1.1 on Competence, that a lawyer’s responsibility to keep abreast of changes in law and practice includes “the benefits and risks associated with relevant technology.”⁷ Although a lawyer may only be disciplined for violating black-letter text, the new comment language amplifies the rule’s definition of competence in legal skills. For the many senior lawyers who are “digital immigrants”—born before 1985 and not yet naturalized citizens of the digital world—this expansion may nudge more senior lawyers to retire, adapt, or to hire younger lawyers skilled with technology—the so-called “digital natives” born after the technical revolution began.⁸ I expect that regulatory agencies will be conservative in expecting lawyers to jump on the technology bandwagon or risk serious discipline. By contrast, to the extent that courts consider the rules and comments as relevant to define the scope of duty in civil liability, in high-dollar or high-stakes representations, the new comment language may have a significant impact.⁹

Another minor change appears in revised Comment 4 to Rule 1.4 on Communication, replacing the sentence that “Client phone calls should be promptly returned or acknowledged” with “A lawyer should promptly respond to or acknowledge client communications.” As Professor Giesel so ably demonstrates in her work on Rule 1.18 and prospective clients, modern communication systems give new meaning to the word “talk,” to embrace emails and other electronic communications. Given the rapid development on the discoverability of emails, both Comment 4 and revised

6. *Id.*

7. *See infra* note 119.

8. *See* JOYCE RABY ET AL., *HOW PEOPLE Really Use Technology: Current Research on People, The Media, and the Message* 23-40 (Mar. 22, 2007), available at http://www.abanet.org/legalservices/ej/workshop_preview_2007.html (last visited Sept. 19, 2013) (providing a PowerPoint presentation by Lee Rainie, describing “digital natives” as persons born since 1985, as contrasted with “digital immigrants” who were born earlier); *See also*, Ursula Furi-Perry, *Millennial Lawyers*, YOUR ABA, available at www.americanbar.org/newsletter/publications/youraba/201211article01.html (last visited Sept. 19, 2013) (discussing value added to law firm practices from the technological skills of newer generations of lawyers).

9. *Spencer v. Barber*, 299 P.3d 388 (N.M. 2013).

Rule 1.1 Comment 8 heighten the importance of lawyers training their clients on communications that should not be put in writing and that employees do not have a reasonable expectation of privacy when using an employer's server.¹⁰

Arguably, the most important of *all* the August 2012 amendments is new black-letter text to Rule 1.6 on Confidentiality, adding new subsection (c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."¹¹

Revised and renumbered Comment 18 develops factors relevant for determining the reasonableness of a lawyer's efforts to safeguard confidential information against unauthorized access by third parties and unauthorized or inadvertent disclosure by those participating in the representation.¹² The factors include: the sensitivity of the information; the likelihood of disclosure absent appropriate safeguards; the difficulty and cost of implementing safeguards; and the extent to which the safeguards

10. As a digital immigrant, I cannot imagine appropriate client-lawyer communications done via Instant Messenger, Facebook or Twitter. Who knows what the future may hold. *See, e.g.*, OHIO S. CT. ETHICS OP. 2013-2 (April 5, 2013) (permitting lawyers to use text messages to solicit employment from prospective clients, providing compliance with other advertising ethics rules); 29 LAW. MAN. PROF. CONDUCT 238 (April 24, 2013) (labeled as "groundbreaking," the concept of marketing by text message exemplifies how all lawyer marketing activities is gauged to reach one's target audience, here perhaps personal injury prospective clients, based on police reports that are publicly accessible).

11. MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2012). Andrew Perlman, Chief Reporter to the Ethics 20/20 Commission, has been surprised by how people choose different changes as the "most important[.]" with some commentators agreeing with me on 1.6(c), others identifying the new comment language in Rule 1.1, and others identifying the new Rule 1.6(b)(7) allowing limited discretionary disclosures of client confidences "to detect and resolve conflicts of interest" before making lateral hires or changes in a firm's composition or ownership. Email from Andrew M. Perlman, Suffolk University Professor of Law and Director, Institute on Law Practice Technology and Innovation, to Judith L. Maute, William J. Alley Professor of Law, University of Oklahoma College of Law (June 3, 2013)) (on file with author).

12. *Id.* Cmt. 18. Red-lined revised Comment 18 provides in full:

[4618] Paragraph (c) requires a lawyer ~~must to~~ act competently to safeguard information relating to the representation of a client against ~~unauthorized access by third parties and against~~ inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. ~~See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, *See* Rule 5.3, Comments 3-4.~~

adversely affect the lawyer's ability to represent clients.¹³ While this expanded duty may frighten lawyers who are unfamiliar with technology, it is likely that disciplinary agencies will focus on what safeguards are appropriate for the nature of specific law practices and the stakes at risk. As in all areas of the law, reasonableness can only be judged in context. The ABA plans to construct a website that can be updated to reflect technological changes. Thus, it must be stressed that the mere fact of inadvertent or unauthorized disclosure or access to confidential information will not, standing alone, trigger discipline. A new sentence at the end of renumbered Comment 19 leaves open the possibility that other state or federal law may require additional action to protect data privacy.¹⁴ Overall, the technology-related amendments should prompt continuing education providers to sponsor programs educating lawyers about how to manage the different security systems available, as opposed to frightening attendees with scary stories about the risks. To appreciate the significance of new Rule 1.6(c), it is helpful to step back and do a historical comparison of client communications, file storage, and the methods of practicing law and legal research, contrasting common practices in 1980 (then) and in 2013 (now).

In 1980, lawyers and clients communicated by landline telephones, in-person, written correspondence sent through the mail or by fax machine and written phone messages. Today, cell-phones, smart phones, laptops, and notepads are ubiquitous. Virtual meetings sometimes take place electronically using videoconferencing, teleconferencing services, and software such as Skype or Gotomeeting.com. While virtual conferencing saves travel time and money, unless adequate security precautions are in place to prevent unauthorized people from lurking, sensitive confidential information may get in the wrong hands. Detailed discussions among multiple actors often occur by email, with important legal consequences such as the waiver of the attorney-client privilege if non-privileged persons are on the distribution list. Inherent dangers abound with email communications: they are easily printed, forwarded to unintended recipients, retained by disgruntled employees, or servers are hacked. Unless lawyers and law firms develop sufficient knowledge about the risks of technological communications, unauthorized third persons may acquire a treasure trove of confidential information about firm clients.

Client files used to be committed to paper and stored in lockable file cabinets and placed in long-term storage facilities. Photocopiers replaced the need for carbon paper. Today, modern computer systems store the bulk of legal documents, whether in a self-contained law firm server, or in one of the many cloud storage facilities. Cloud computing is defined as systems that allow "the end user to access data stored on someone else's servers via an Internet connection, rather than those located onsite. It uses shared resources, including software and servers, to deliver information

13. *Id.*

14. *Id.* at cmt. 19.

and services to the end user.”¹⁵ The recent Global Cloud Survey Report predicts the legal sector’s interest will peak within three years and will have “grand scale adoption by most law firms within five years.”¹⁶ Two-thirds of respondents were concerned that their firms’ use of the cloud would worry clients.¹⁷ Security and client confidentiality was the greatest concern (over 80%), with data location, compliance, and regulatory issues also top concerns.¹⁸ As reported in the ABA Journal, the data reflected “A Split in the Cloud,” with 46% disapproving and 45% approving moving key applications to the cloud.¹⁹ Security concerns are paramount, and will require that cloud providers be attentive to building secure firewalls impeding unauthorized access. Closer examination reveals that respondents from the largest firms opposed, having already invested in equipment and IT infrastructure.²⁰ Smaller firms, which had not made those investments, were most keen on movement to the cloud.²¹ “[S]maller, more agile firms are leading the way in outsourcing their entire IT infrastructure to an external cloud provider.”²² Despite the benefits of flexibility, mobility, business continuity, and cost savings,²³ these smaller firms will have to develop the knowledge base to evaluate suitability of individual providers. Professor Andrew Perlman, Chief Reporter to the Commission, believes that some firms will have difficulty adapting if they are not already in the habit of taking reasonable precautions.²⁴ BYOD (bring your own device) presents difficult security concerns, with at least 18% of respondents acknowledging

15. Nicole Black, *Introduction to The Tide Has Turned and the Cloud is Here: 2012 Global Cloud Survey Report*, at 4, <http://www.legalitprofessionals.com/wpcs/cloudsurvey2012.pdf> (last visited Sept. 19, 2013) (438 survey respondents from the following locations: United States and Canada (47%), Europe (44%) and Australia/Asia (9%). Off the respondents, 36% were law firm IT professionals, 24% legal IT consultants, 22% lawyers and paralegals, and 18% others.

16. *Id.* at 7.

17. Joanna Goodman, *Getting Ahead in the Cloud: LITP’s Cloud Survey*, at 13, available at <http://www.legalitprofessionals.com/wpcs/cloudsurvey2012.pdf> (last visited Sept. 19, 2013).

18. *Id.* at 20 (firms with over 1,000 fee earners opposed).

19. *Should Firms Move to the Cloud? Legal IT Professionals are Split*, ABA J, Feb. 2013, available at http://www.abajournal.com/magazine/article/should_firms_move_to_the_cloud_legal_it_professionals_are_split/ (last visited Sept. 19, 2013).

20. Black, *supra* note 15.

21. Goodman, *supra* note 17.

22. *Id.* at 25. This finding dovetails with Richard Susskind’s predictions. See generally, RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008) [hereinafter *THE END OF LAWYERS*]; RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013). See also, Thomas D. Morgan, *The Last Days of the American Lawyer 4-5*, available at http://jay.law.ou.edu/faculty/Jmaute/Lawyer_21st_Century/The%20last%20days.pdf (technology as major factor challenging lawyers in United States, presenting risk of transforming lawyer work into commodities and free availability on Internet of what used to be lawyer work).

23. *Id.* at 23.

24. Andrew Perlman, Chief Reporter for the ABA Commission on Ethics 20/20, E-mail from Professor Andrew Perlman, Suffolk University Law School to Judith L. Maute, William J. Alley Professor of Law (June 3, 2013)(on file with author).

use of public cloud services like Gmail, Hotmail and DropBox for professional purposes without the firm's knowledge or approval.²⁵ Free or inexpensive download applications are especially vulnerable to hacking; once an unauthorized user gains access to a mobile device, it can pry deeper into other databases thought to securely preserve client confidences. Given our compulsive use of mobile devices, in which all technology adapters are at risk of being "in a continuous state of partial inattention,"²⁶ I predict the time will come when many legal employers will prohibit the co-mingling of personal and professional devices.²⁷ Large law firms and firms that represent clients in high stakes matters will likely develop strict policies on digital security acceptable use.²⁸

Related to the new Rule 1.6(c) are minor changes to the text and comments of Rule 4.4, on Respect for the Rights of Third Persons.²⁹ While minor in a linguistic sense, they are of significant importance given the "exponential growth in electronically-stored information."³⁰ Subsection (b) imposes a limited duty on a lawyer who receives a document, email, or other information when the recipient knows or reasonably knows it was not intended for the recipient. This provision—itsself controversial in the Ethics

25. Goodman, *supra* note 17; see also, Litter Publications, The "Bring Your Own Device" to Work Movement (May 12, 2012), <http://www.littler.com/publication-press/publication/bring-your-own-device-work-movement> (alerting to risks on data privacy, security and confidentiality).

26. Linda Stone, a former executive at both Apple and Microsoft, coined the phrase "continual state of partial inattention" to describe how many persons use their attention. See Linda Stone, *Continuous Partial Attention*, <http://www.lindastone.net> (last visited Sept. 21, 2013). Some experts contend this phenomenon, in which we have become "a nation of compulsive multitaskers," may alter brain functions, including learning abilities, critical thinking skills, and ability to concentrate in depth. See Kate N. Grossman, *Stop Interrupting Yourself - If You Keep Multitasking-Talking on the Phone, Emailing, Downloading Music and Watching TV All at Once-You May Damage Your Ability to Think Deeply, Learn and Remember*, CHI. SUN-TIMES, Mar. 4, 2007, at B1. For more current thought on this growing field of neuroscience, see also, Kendra Cherry, *Multitasking: The Cognitive Costs of Multitasking*, <http://psychology.about.com/od/cognitivepsychology/a/costs-of-multitasking.htm> (last visited Oct. 1, 2013).

27. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2012) (prohibiting co-mingling of client or third persons' property with that of lawyer). The international firm, King & Spaulding recently blocked employees from accessing personal email on its computers because of security concerns, but installed a special wireless network for those with personal laptops and electronic devices. See Martha Neil, *King & Spaulding Blocks Employee Access to Personal Email Accounts, but Offers An Alternative*, ABA J (April 16, 2013, 2:30 PM), http://www.abajournal.com/news/article/king_spaulding_blocks_employee_access_to_personal_email_accounts_but_offers_/.

28. See Jennifer Smith, *Lawyers Get Vigilant on Cybersecurity: Pressure Grows as Mobile Devices, Email Make Sensitive Data More Vulnerable*, WALL ST. J. (June 26, 2012), <http://online.wsj.com/article/SB10001424052702304458604577486761101726748.html> (discussing sophisticated cyberattacks against major law firms by criminals and state-sponsored hackers to gain sensitive confidential information about pending transactions and undercut clients' bids and efforts of firms to improve security). Cf. BP CODE OF CONDUCT, <http://www.bp.com/en/global/corporate/sustainability/our-people-and-values/our-code-of-conduct.html> (last visited Sept. 21, 2013).

29. The ABA significantly amended Rule 1.18, on prospective clients. Because Professor Geisel's Symposium article gives detailed consideration to that amendment, it is omitted from treatment here.

30. Ann M. Murphy, *Is it Safe? The Need for State Ethical Rules to Keep Pace with Technological Advances*, 81 FORDHAM L. REV. 1651, 1657-58 (estimating that over 90% of all information is created and stored electronically).

2000 process—imposes a limited duty to notify the sender upon the inadvertent receipt of materials.³¹ The black-letter text of (b) added reference to “electronically stored information.” Revised Comment 2 includes several significant clarifications. It defines inadvertent disclosures: “A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.” This new language encompasses a wide array of inadvertent electronic disclosures, “including email and other forms of electronically stored information, including embedded data (commonly referred to as metadata) . . . Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.” That sentence reflects the majority view of ethics opinions imposing a duty of care to scrub metadata from documents being sent outside the firm.³²

Prior Comment 2 stated that (b) did not “address the legal duties of a lawyer who received a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the send[er].” Amended Comment 2 replaces the word “wrongfully” with the word “inappropriately,” thus, avoiding tortured analysis of when conduct was wrongful as opposed to inadvertent. For some years, courts have struggled with the definition of inadvertent, for purposes of determining whether to allow claw-back of documents claimed to be protected by the attorney-client privilege or work product doctrine, and whether to disqualify counsel who used the inadvertently revealed documents.

A long line of cases address whether the privilege is waived by inadvertent disclosure in discovery, industrial espionage, “dumpster diving” or other wrongful conduct by an opponent in obtaining otherwise privileged documents.³³ Depending on the circumstances of disclosure, modern

31. See generally, ELLEN J. BENNETT, ELIZABETH J. COHEN, MARTIN WHITTAKER, ANNOTATED MODEL RULES OF PROF'L CONDUCT 432-34 (7th ed. 2011) (discussing controversy for doing too little); see also, Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 FORDHAM. L. REV. 1965, 1973 (observing inconsistent inconsistency between amended Federal Rule of Civil Procedure Rule 26(b)(5) and Model Rule 4.4(b)).

32. See *Metadata Ethics Opinions Around the U.S.*, ABA, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadachart.html.

33. REST. OF THE LAW GOVERNING LAWYERS §79, cmt. h. (2000); Murphy, *supra* note 30, at 1652-53 (now possible consensus that “inadvertence means essentially a ‘boo-boo’” or a mistake); Merits Incentives, LLC v. Eighth Judicial Dist. Ct., 262 P.3d 720, 726 (Nev. 2011) (case of first impression, where Rule 4.4(b) not applicable, lawyer who receives documents from anonymous source must promptly notify opposing counsel or risk disqualification under non-exhaustive list of factors identified in *In re Meador*, 968 S.W.2d 346 (Tex. 1998)); Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096 (Cal. 2007) (inadvertent possession of work product materials and subsequent use of warranted disqualification); Burt Hill, Inc. v. Hassan, No. Civ.A. 09-1285, 2010 WL 419433, at *5 (W.D. Pa. 2010) (inherent power invoked to preclude use of “anonymous source” documents raising “red flags” for any reasonable attorney, but denying disqualification motion where counsel relied on ethics expert opinion that retention and review of documents was permissible); Maldonado v. New Jersey, 225 F.R.D. 120 (D.N.J. 2004) (where no direct evidence on how plaintiff acquired protected work product, privileged not waived, but warranted disqualification of plaintiff's counsel).

courts *may* allow claw-back reinstating the privilege, and much damage to client interests is already done because the opponent procured the underlying information. In federal litigation, recent amendments to the procedural and evidence rules parallel and give teeth to Model Rule 4.4(b).³⁴ Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure more specifically addresses standards and obligations concerning privilege or work product claims of inadvertently disclosed documents.³⁵ Pre-existing language in Comment 2 acknowledges that other laws may impose further duties.³⁶ Five years ago, Rule 502 of the Federal Rules of Evidence was amended to resolve long-standing disputes about inadvertent disclosure and to respond to complaints about the “escalating costs of electronic discovery.”³⁷

B. Resolution 105B: Reaffirms Underlying Principles of Bates, Tweaks for Marketing Technology

Most of this Resolution concerns marketing and communications with prospective clients. Although the Internet existed when the ABA adopted the “Ethics 2000” amendments in 2002, technology has grown exponentially since then, warranting tweaks to reflect the newer forms of technology and be open to future changes. The amendments reflect the competitive realities of the legal marketplace, including the dramatic increase in self-help or do it yourself online programs. I read the first paragraph of the Commission’s Report attached to the Resolution as reaffirming the underlying principles of *Bates v. Arizona*.³⁸ It states:

Lawyers regularly use the Internet to disseminate information about the law and legal services as well as to attract new clients. In general, this development has had the *salutary effect of educating the public about the existence of legal rights and options, the availability of particular types of legal services and their cost, and the background of specific lawyers*.³⁹

34. See generally Perlman, *supra* note 31, at 1973 –75.

35. *Id.* at 1974.

36. “Whether the lawyer is required to take additional steps, such as returning the document or in electronically stored information, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document or electronically stored information has been waived.” MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 2 (2012).

37. Liesa L. Richter, *Making Horses Drink: Conceptual Change Theory and Federal Rule of Evidence 502*, 81 FORDHAM L. REV. 1669 (2013); 28 U.S.C. § 502, advisory committee’s notes (1996).

38. *Bates v. Arizona*, 433 U.S. 350 (1977).

39. (Emphasis added). Note 1 states the Commission asked the ABA Center for Professional Responsibility to prepare an informational report on the constitutional limits to lawyer advertising rules involving Internet.

1. Changes in Marketing Activities & Evolution of Supreme Court Commercial Speech Doctrine Relating to Lawyers

Some historical context is helpful in understanding the amendments. Recall when *Bates* was first decided in 1977. Traditionalists were appalled at the concept that legal services could be viewed as a marketplace commodity. Even then, all lawyers engaged in some form of marketing targeted at the kind of clients they sought to represent; the open question was whether those whose marketing techniques were not yet authorized would be allowed to communicate with the 70% of the population having “unmet, legitimate legal needs.”⁴⁰ Disciplinary Rules under Canon 2 of the 1969 Code of Professional Responsibility heavily restricted lawyer communications about their work, willingness, and availability to handle certain types of matters. Indeed, the fact that *Bates* and other courts held unconstitutional some of those provisions was partly responsible for creation of the Kutak Commission, which drafted the 1982 Proposed Model Rules of Professional Conduct, and adopted as modified by the ABA House of Delegates in 1983.

The legal marketplace has been transformed into a competitive, commercial market, partly attributable to advertising.⁴¹ In retrospect, the simple ad disputed in *Bates* pales in comparison to later outrageous or hilarious television ads.⁴² Before technological advances, lawyers’ marketing was primarily done through business cards, billboards, Yellow Pages in phonebooks and their pricey back covers, newsletters, television commercials, and Martindale-Hubbell. Now most lawyers have websites, some have blogs, or use lead generators such as Rocketlaw.com or Martindale-Hubbell’s sponsored Law.com.

Social media websites like Facebook present numerous ethical problems while the more professional LinkedIn seems widely accepted.

40. Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrines*, 13 HASTINGS CONST. L.Q. 487, 531 (1986) (citing B. Curran, *The Legal Needs of the Public: The Final Report of a National Survey*, at 228-37 (1977)) [hereinafter *Scrutinizing Advertising*].

41. This transformation is also attributable to the proliferation of law schools since the end of the Vietnam War. When men were drafted, women were first admitted in significant numbers; like Rosie the Riveter, women refused to abandon their new toehold in the legal marketplace. Law schools expanded their capacity, and new schools came into existence. Today, there is a crisis in legal education because of mounting student loan debt and graduates who cannot pass the bar or obtain suitable employment enabling them to repay their loans.

42. See e.g., Jim “the hammer” Shapiro ads at <http://www.youtube.com/watch?v=Q5hn8bhEpMY>. He was suspended for misrepresentation in New York, see *In re Shapiro*, 780 N.Y.S.2d 680 (N.Y. App. 2004), and in Florida, *The Florida Bar v. Shapiro*, 914 So.2d 956 (2005), 966 So.2d 970 (2007) (reinstated); the popular Robert Vaughn lawyer ads purportedly cost \$20,000 a year to run the same ad in different jurisdictions; it seems they succeeded at bringing in new clients. See the ads at http://www.youtube.com/watch?v=7jK9FxEcAp8&feature=player_embedded. Wisconsin advertising pioneer Ken Hur, whose hilarious ads projected a down-to-earth, polyester clad lawyer; his most famous had him wearing beads, long necklaces and scuba gear, asking potential bankruptcy customers: “If you’re in over your head, we’ll put you through bankruptcy for only \$100.” George Hesselberg, *Longtime Madison Lawyer Ken Hur Dies at 87*, WISCONSIN STATE JOURNAL (Jan. 4, 2012). http://host.madison.com/news/local/crime_and_courts/longtime-madison-lawyer-ken-hur-dies-at/article_4704eeda-3668-11e1-9bb9-0019bb2963f4.html.

Ethics opinions are split on the permissibility of using daily deals such as Groupon.⁴³ Today, the few lawyers who do not use email tend to be quite senior and have support staff who handle their email traffic. Many lawyers are finding that technology, while improving efficiency, may impair their effort at work-life balance.

Since *Bates*, the Supreme Court has repeatedly addressed issues of lawyers' speech. Early on, there were distinct lines between truthful and non-misleading advertising which was allowed subject to time, place, and manner regulations and in person solicitation for pecuniary gain, which could be banned.⁴⁴ Starting in 1985 with *Zauderer*,⁴⁵ the distinction started to blur. *Zauderer* placed a print ad targeted at women who may have been injured by the Dalkon Shield, listing the types of problems it allegedly caused, that readers should not assume claims were time-barred, that the firm would represent on a contingent fee basis, and that no fees would be owed unless there was recovery.⁴⁶ The Court held that this was permissible solicitation, presenting little risk of overreaching or coercion.⁴⁷ It upheld a public reprimand for failing to disclose potential liability for advanced costs.⁴⁸ A few years later in *Shapiro*, the Court granted relief to a lawyer

43. See THOMAS E. SPAHN, *The Ethics of Email and Social Media: A Top 10 List, Hypotheticals and Analyses*, 206-11 (April 2013), <http://www.nsba.org/SchoolLaw/Publications/School-Law-Seminar-2013/The-Ethics-of-Email-and-Social-Media.pdf> (answering "maybe" to question whether a law firm could "offer the sort of 'daily deals' that have become increasingly popular", citing several state ethics opinions that explicitly approved with qualifiers, including NEBRASKA LEO 12-13 (2012), MARYLAND LEO 2012-07 (2012), SOUTH CAROLINA LEO 11-05 (2011); NEW YORK LEO 897 (2011), NORTH CAROLINA LEO 2011-10 (2011). *But see*, INDIANA LEO 1 (2012) (probably unethical and "fraught with peril"); PENNSYLVANIA LEO 2011-027 (2011) (possibly violating Model Rules 5.4(a), 1.7, 7.1 and 7.2); ALABAMA LEO RO 2012-01 (2012). St. Louis lawyer Craig Redler ran a Groupon for a simple estate plan but was inundated with calls from other lawyers (myself included) on how it worked; it generated a decent amount of business but cost him far more in time than the business generated. *See* Debra Bruce, *Did a Groupon Really Work For a Solo Lawyer?*, SOLO PRACTICE UNIVERSITY (Jan. 19 2012), <http://solopracticeuniversity.com/2012/01/19/did-a-groupon-really-work-for-a-solo-lawyer>.

44. See *Scrutinizing Advertising*, *supra* note 40, at 502-503, 505, 509-513 (discussing *In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 477 (1978); *In re Primus*, 436 U.S. 412 (1978)).

45. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

46. *Scrutinizing Advertising*, *supra* note 40, at 504.

47. *Zauderer*, 471 U.S. at 642 ("a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. . . the substantial interests that justified the ban . . . upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement."). The Court upheld a public reprimand for failing to disclose potential liability for advanced costs. *Id.* at 652.

48. *Id.* at 652. I have never seen a case where the lawyer actually sought reimbursement of costs from a client when there was no recovery. Indeed, Model Rule 1.8(e)(1) now expressly permits reimbursement of advanced costs to be "contingent on the outcome of the matter." Model RULES OF PROF'L R. 1.8(e)(1). Ironically, in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339-41 (2010) the Court employed the *Zauderer* standard to uphold compelled speech of lawyers and other debt relief agencies.

seeking to mail targeted solicitations to persons named in foreclosure actions suggesting they could delay foreclosure by filing a bankruptcy petition.⁴⁹ Yet again, it found the state could further its legitimate interests by compelling additional speech, such as having the envelope indicate it was advertising material, and notifying the recipient where to complain about the letter.⁵⁰ Throughout, the Court's standard commercial speech analysis focused on application of the *Central Hudson* formula as applied to regulated industries.⁵¹ Justice O'Connor, who opposed advertising from the very start, in 1995 finally persuaded a fifth justice to join what had been her long series of dissents.⁵² *Florida Bar v. Went For It, Inc.*, is the watershed 1995 decision taken as inviting states to re-regulate lawyer advertising.⁵³ Most ethics experts consider as "junk science" the data presented by the Florida Bar to support its 30 day ban on all communications with prospective clients following an accident or disaster causing death or substantial bodily harm. It found the state had legitimate interests in the legal profession's reputation, to protect victims and their families from privacy intrusions. Applying the *Central Hudson* test, the Court found the regulation was narrowly drawn in proportion to the interests served.⁵⁴

The Supreme Court's 2010 pronouncement relating to lawyers' commercial speech is fascinating. In *Milavetz, Gallop & Milavetz, P.A. v. United States*, a bankruptcy law firm sought a declaratory judgment that provisions of the bankruptcy code did not apply to lawyers because they were not within the purview of "debt relief agenc[ies]" and hence not required to make disclosures to avoid misleading prospective bankruptcy petitioners.⁵⁵ In her second opinion dealing with lawyers, Justice Sotomayor adroitly navigated the Bankruptcy Code finding that attorneys were just like other service providers who provide bankruptcy assistance within the

49. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 479 (a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never "'shou[t] at the recipient" or "gras[p] him by the lapels . . . as can a lawyer engaging in face-to-face solicitation.")

50. *Id.* at 477-78 (finding "no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements [and offering less restrictive alternatives] . . . to minimize mistakes [including to] . . . require the letter to bear a label identifying it as an advertisement . . . or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not.)

51. See generally, Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 101, n. 105 (2011) (summarizing the *Central Hudson* test generally used in commercial speech cases, "just as it would for advertising restrictions imposed on any other regulated industry").

52. Note her strong dissent in *Shapero* on the need to re-examine the fundamental underpinnings of commercial speech doctrine as applied to lawyers which gave insufficient weight to the state's interest in maintaining professional standards.

53. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

54. Tarkington, *supra* note 51, at 101, n. 105 (stating "the regulator must establish three prongs: 'First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."').

55. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). The Court's decision was unanimous, although Justice Thomas did not join Part III of the opinion, which forms the heart of the instant discussion.

meaning of the Bankruptcy Abuse Prevention and Consumer Protection of Act of 2005 (BAPCA).⁵⁶ By seeking exemption, the attorneys unsuccessfully claimed that they were special; in 2008 Professor Laurel Terry wrote of a paradigm shift in which internationally, lawyers were being treated just like other service providers.⁵⁷ *Milavetz* makes that point for U.S. lawyers. This holding then required the Court to construe §526(a)(4) regarding what kind of advice was prohibited and whether the compelled disclosures of §528 violated the commercial speech rights of all debt relief agencies. Substantial evidence supported finding congressional intent to prohibit advising a debtor to load up on pre-bankruptcy debt in bad faith for the purpose of expanding the discharge, but that prepetition debts incurred for a valid purpose for groceries, and other purchases “reasonably necessary for the support or maintenance of the debtor” and the debtor’s dependents.⁵⁸ This statutory construction avoided the need to address the First Amendment vagueness claim.⁵⁹ The Court then proceeded to evaluate the compelled speech using *Zauderer* and not *Central Hudson* as the standard, finding the “required disclosures (in both *Zauderer* and *Milavetz*) were intended to combat the problem of inherently misleading commercial advertisements.”⁶⁰ Accordingly, the lesser standard of scrutiny provides that:

Unjustified or unduly burdensome requirements offend the First Amendment by chilling protected speech, but “an advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the state’s interest in preventing deception of consumers.”⁶¹

56. *Id.* at 238. Her first opinion for the Court was *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (holding that disclosure orders adverse to the attorney-client privilege do not qualify for intermediate interlocutory appeal). Renee Newman Knake alerted the academic ethics community to the Supreme Court’s new found interest in the legal profession. Renee Newman Knake, *The Supreme Court’s Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499 (2010).

57. Laurel S. Terry, *The Future Regulation of the Legal Profession: the Impact of Treating the Legal Profession as “Service Providers,”* 2008 JNL OF PROF’L L. 189, 208.

58. *Milavetz*, 559 U.S. at 241-248. “Covered professionals remain free to ‘tal[k] fully and candidly about the incurrence of debt in contemplation of filing a bankruptcy case.’” *Id.* at 244. Notably the Court cited as *Cf.* ABA Model Rule 1.2(d) prohibiting a lawyer from knowingly counseling or assisting in a client’s crime or fraud, but allows good faith effort to determine whether conduct is lawful. “Even if the statute were not clear in this regard, we would reach the same conclusion about its scope because the inhibition of Frank discussion serves no conceivable purpose within the statutory scheme.” *Id.*

59. *Id.* at 246-48.

60. *Id.* at 250. *See supra* note 55.

61. *Id.* at 248-50. This standard makes imminent good sense in the bankruptcy context because of other, often draconian, consequences if bad faith is found. Margaret Tarkington reads the case as protecting the attorney-client relationship because of its attorney-friendly interpretation and not from the first amendment. Tarkington, *supra* note 51, at 34. I disagree. While Ben Barton persuasively argues that there is entrenched judicial bias favoring lawyers, that thesis does not apply here because of the Court’s use of the service provider paradigm. *See* BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS LEGAL SYSTEM* (2011) and Terry, *supra* note 57.

Another lawyer speech case recently decided by the Supreme Court is *Maracich v. Spears*.⁶² The issue in *Maracich* was whether federal privacy law allows lawyers to obtain state records on car owners to solicit potential clients for an anticipated lawsuit against dealerships.⁶³

2. Summary of Resolution 105B Amendments

For simplicity's sake, this section addresses the amendments in numerical order. Professor Geisel's piece addresses Rule 1.18 in detail; for present purposes, the only relevant observation is the narrower focus on communications with particular persons about prospective representation. No change was made to the blackletter text of Rule 7.1 Communications concerning a Lawyer's Services. It was last revised as part of the Ethics 2000 project, with the language basically codifying the standard set forth in *Bates*.⁶⁴ The only Ethics 20/20 amendment to Rule 1.18 appears in Comment 3, replacing the term "prospective client" with "the public," thus, clarifying that the marketing rules applied more generally.⁶⁵

Likewise, the text of Rule 7.2 on Advertising remains unchanged, with several comment revisions. Comment 1 inserts language to expand the purpose of advertising, assisting the public in "learning about and" obtaining legal services.⁶⁶ Again, that idea harkens back to *Bates*. Comment 2 expands the list of permissible information to include the lawyer's email address and website.⁶⁷ Pre-existing Comment 3 acknowledged that "[q]uestions of effectiveness and taste and advertising are matters of speculation and subjective judgment."⁶⁸ As amended, it adds to television "the

62. *Maracich v. Spears*, No. 12-25 (2013).

63. *Id.* *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) might have predicted a different outcome in *Mariach v. Spears*, 131 S. Ct. 2191 (2013). *Sorrell* invalidated a state statute restricting the sale, disclosure, and use of pharmacy records that showed the prescribing pattern of individual doctors; like the lawyers in *Mariach*, it involved data mining for commercial purposes. *Id.* at 2659. The Supreme Court, per Justice Kennedy, held that heightened scrutiny applied because the statute imposed a specific, content-and speaker-based burden on protected expression, and that the burden was not justified in the State's asserted interests in doctors' confidentiality, avoidance of harassing sale behavior, and protecting doctor-patient relationships. *Id.* at 2662. Nor did the statute permissibly advance the state's asserted goals of lowering medical costs and promoting public health. *Id.* at 2670. To my surprise, the Supreme Court in *Mariach* did not cite *Sorrell* in either the majority or dissenting opinion. Instead, the majority relied on *Zauderer* to uphold significant restrictions on lawyers' commercial speech.

64. As modified by the 1980 *Central Hudson* test used when examining a banned communication. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2000). Communications concerning a Lawyer's Services provides: "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 contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

65. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 3 (2012).

66. MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2012).

67. *Id.* at cmt. 2.

68. *Id.* at cmt. 3. Indeed at a recent Association of Professional Responsibility Lawyers (APRL) meeting, panelists and participants debated whether there was any role for legal ethics rules regulating advertising. As a practical matter, other laws generally regulate advertising and it is impossible to regulate taste. It was reported citation to decisions from the Second, Fifth and Eleventh Circuits that invalidated portions of new state rules adopted after *Went for It*. Today's consumers are smart, informed, and have varying perceptions of what is good taste and what is effective to the targeted audience. See 29 LAW. MAN. PROF. CONDUCT 105 (Feb. 13, 2013), available at <http://lawyersmanual.bna.com/mopw2/>

Internet, and other forms of electronic communication” as “among” the most powerful media formats for getting information to the public, especially persons of low and moderate incomes.⁶⁹ A prohibition of such formats would substantially impede the flow of information. Finally, Comment 3 clarifies that any real-time electronic exchanges “initiated by the lawyer” are covered by Rule 7.3(a) on Solicitation.⁷⁰

Significant revisions appear in Comment 5. Rule 7.2(b) identifies specific, limited circumstances in which a lawyer may give something of value for recommending the lawyer’s services. The amended comment defines a recommendation as one that “endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities.”⁷¹ New language permits paying,

others for generating client leads, . . . [provided] the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral.⁷²

As I understand this language, lawyers are free to participate with a large range of entities that list the lawyer, location, practice areas and ratings by others, so long as the entity itself does not state or imply that it has evaluated the quality of the lawyer’s services, or the suitability for the Internet searcher’s legal problem, or that it is financially disinterested. Lawyers may complete a survey to get some preferential listing, and even manipulate algorithms so that their names can appear higher in the list. In reflecting on this from a historical perspective, it reminds me of earlier battles concerning pre-paid legal services and Super Lawyer or “Best Lawyer” designations.⁷³ That is, methods to attract attention of potential clients

3300/split_display.adp?fedfid=29667591&vname=mopcnotalissues&wsn=497118500&searchid=2011172&doctypeid=4&type=date&mode=doc&split=0&scm=3300&pg=0. At present, there is a circuit split on the permissibility of trade names or mottos that state or imply an ability to obtain results, making ripe for review that narrow issue. Contrast *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (upholding restriction) with *Public Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir. 2011) (invalidating restriction).

69. *Id.* at cmt. 3.

70. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) cmt. 3 (2012).

71. MODEL RULES OF PROF’L CONDUCT R. 7.2(b) cmt. 5 (2012).

72. *Id.*

73. See Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915 (2001), New Jersey first prohibited participation in “Super Lawyer” or “Best

which first caused great angst within the organized bar are now accepted as commonplace.⁷⁴

Finally, revised Rule 7.2 Comments 6 and 7 tweak the language concerning pre-paid legal service programs, replacing references to “prospective clients” with “the public.”⁷⁵ This is consistent with the revisions to Rule 1.18 and Rule 7.1 Comment 3. Despite some scuttlebutt about possible pyramid schemes involving pre-paid providers, the Commission avoided getting into the fray, leaving resolution to pending litigation and the court of public opinion.

The only changes to Part 7, generally titled “Information About Legal Services,” blackletter text is in Rule 7.3, now aptly re-named “Solicitation of Clients.”⁷⁶ Both the change in title and blackletter text reflect the decision to distinguish carefully between duties owed to “prospective clients” in Rule 1.18 and communications to the public at large as opposed to targets of a solicitation.⁷⁷ What I find most significant is that new Rule 1.18 Comment 1 *finally* defines the long-accepted distinction between targeted solicitation and advertising to the general public.⁷⁸ Likewise, revised and renumbered Comments 2 and 3 reflect the lesson from *Shapero* that mailed, emailed, and other electronic forms of communicating “that do not involve real-time contact and do not violate other laws governing solicitations” do not carry the potential for abuse “inherent in direct in-person, live telephone or real-time electronic solicitation” that are banned; rather the permissible solicitations help inform the public about potential need for legal services and those lawyers available for such work.⁷⁹

In sum, the amendments of Resolution 105B are quite moderate—literally tweaks to bring flexibility permitting adaptation to new forms of

Lawyer” programs in 2006, later vacated and ultimately permitted with qualifications. In 2011, the Ethics 20/20 Commission announced there was no need to amend rules concerning lawyer rating agencies even though lawyers and firms are ranked or rated by “hundreds of entities.” See 27 LAW. MAN. PROF. CONDUCT 297 (2011), available at http://lawyersmanual.bna.com/mopw2/3300/split_display.adp?fedfid=20887943&vname=mopcnottallissues&wsn=498298500&searchid=20111704&doctypeid=4&type=date&mode=doc&split=0&scm=3300&pg=0.

74. Maute, *supra* note 73, at 916, 920. It must be noted that the ABA, while a powerful trade group, tends to be dominated by more elite lawyers who have the financial resources and institutional support to enable their active participation. Certainly that is the history of the organization and despite outreach efforts probably remains true today.

75. MODEL RULES OF PROF'L CONDUCT R. 7.2 (2012).

76. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2012).

77. MODEL RULES OF PROF'L CONDUCT R. 1.18 (2012).

78. New Comment 1 provides:

“A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if similarly it is in response to a request for information or is automatically generated in response to Internet searches. I made that distinction in 1986.” See *Scrutinizing Advertising*, *supra* note 40, at 495-96.

79. MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. (2012).

technology. By emphasizing the value of greater public access to information about the law is heightening focus on access to justice for persons of low and moderate incomes.

III. DELAWARE TECHNOLOGY AMENDMENTS BASED ON ABA RESOLUTION 105A

Given that Delaware's former Chief Justice Norman Veasey chaired the ABA Ethics 2000 Commission and that the state was an early adopter of those amendments, it is no surprise that it was the first to act on the August 2012 Ethics 20/20 amendments.⁸⁰ On August 28, 2012, three weeks after the ABA House of Delegates voted for their adoption, the chair of the Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct received the Delaware Supreme Court's request to consider them and created five subcommittees.⁸¹ They worked efficiently, having only two full Committee meetings. At its first meeting, November 9th, the Technology and Confidentiality Subcommittee on Resolution 105A reported need for further study on issues involving metadata and some concern about the lack of bright lines defining what is "reasonable," especially relating to inadvertent disclosure of information in email communications.⁸² The chair of the subcommittee dealing with Resolution 105B, on Prospective Clients/Advertising, facilitated the Committee's full discussion and approval of those amendments.⁸³ Before the final Committee meeting held December 4, substantial research was done and distributed in advance. After further consideration, the Committee recommended the Supreme Court to adopt without change all of resolutions 105A and 105B.⁸⁴

A November 5th memo to the Committee from the Technology & Confidentiality subcommittee on Rule 1.6(c) contrasted differing views about what reasonable efforts would be required.⁸⁵ Where the ABA Business Law section criticized the Ethics 20/20's lack of specific, affirmative minimum requirements, the ABA Science & Technology Law Section maintained that "[i]ndustry best practices to create a secure system are published and are well-known."⁸⁶ It endorsed adoption of the new text, noting that existing Comments 16 and 17 referenced a degree of flexibility on reasonableness, and the practical difficulty of developing a "bright line"

80. Joan C. Rogers, *Delaware Adopts Most Ethics 20/20 Updates, but Omits Proposals on Easing Bar Admission*, 29 *LAW. MAN. PROF. CONDUCT* 71 (2012); see biography of E. Norman Veasey at <http://www.weil.com/enormanveasey> (2013).

81. Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Delaware Lawyers' Rules of Professional Conduct, DE Order 13-0003 (Del. Jan. 15, 2013); Letter from Karen L. Valihura, Permanent Advisory Committee on the Delaware Lawyers' Rules of Professional Conduct, to the Hon. Randy J. Holland, Supreme Court of Delaware (Dec. 13, 2012), available at courts.delaware.gov/odc/docs/ReportPermAdvComm.pdf [hereinafter Valihura letter].

82. *Id.* at Valihura letter.

83. *Id.*

84. *Id.*

85. *Id.* at Exhibit C, at 3-8.

86. *Id.* at 5.

test.⁸⁷ To address this uncertainty, subcommittee Chair Robert K. Beste, Jr. suggested possible revisions to comments suggesting that “what steps a lawyer must take in given circumstances is the product of a subjective analysis of the peculiar circumstances that may exist from time to time, and some presumptive language that good-faith efforts by an attorney are sufficient to withstand” disciplinary inquiry.⁸⁸ In the end, this proposal was not submitted by the Committee for consideration to the Supreme Court.⁸⁹ The subcommittee found the changes to Rule 4.4 and comments “entirely appropriate” and merely reflect extension of the rules to changing technology.⁹⁰

Subcommittee member Diane M. Coffey prepared a memorandum suggesting a new proposed Delaware Rule 4.4(c) providing “a lawyer shall not, without leave of the court, take steps to uncover metadata when the sender has expressly indicated, either orally or in writing, any intent to remove the metadata and the lawyer knows or reasonably should know that the metadata contains attorney work.”⁹¹ Her survey of ethics opinions and scholarship concerning whether a lawyer-recipient *can examine* a document for metadata, concluded that the authorities are split.⁹² Two decisions of the Delaware Court of Chancery addressed discoverability of metadata but were silent on the “ethical repercussions of metadata mining.”⁹³ Thoughtful analysis found that a flat ban on mining for metadata would chill the discovery process.⁹⁴ ABA Ethics 20/20 amendments to Rule 4.4(b) address only the recipient-lawyer’s duty *to notify* the sender where the recipient knows or reasonably should know the document was inadvertently sent, and deliberately avoids recipient lawyer’s ethical obligations concerning the knowledge gleaned from said document.⁹⁵ Ms. Coffey argued in support of a new subsection (c), consistent with work-product doctrine that encourages lawyers to memorialize their thoughts with confidence those documents would not be discoverable absent particularized need.⁹⁶

Skadden associate Jessica Raatz prepared a supplemental memorandum which confirmed the Coffey memo’s “comprehensive overview of the

87. *Id.* at 7-8.

88. *Id.* at 8.

89. *Id.* at 9-10.

90. *Id.* at 9.

91. *Id.* at Exhibit H, at 1.

92. *Id.* at 1-4.

93. *Id.* at 3-4. An unpublished 2007 decision ordered production of metadata in a case involving back-dating of documents where there was a particularized need for the native format; another unpublished 2008 decision found that 2005 document production rules required a particularized showing of need. *Id.*

94. *Id.* at 5.

95. MODEL RULES OF PROF'L CONDUCT R. 4.4 cmt. 2 (2012).

96. Valihura letter, *supra* note 81, at Exhibit H, 5-7 (noting the overarching problem as “that of ‘unringing the bell;’” once opposing counsel has seen the information regardless of any claw back the damage is done). Proposed Delaware Rule 4.4(c) “specifically seeks to prevent attorneys from intentionally seeking out information that they know they are not intended to see.” *Id.* at 6.

inadvertent disclosure of metadata.”⁹⁷ An eleven page attachment is a detailed chart summarizing ABA and state metadata ethics opinions.⁹⁸ On the question of the sender’s duty when transmitting metadata, the chart reflected a strong consensus that the sender has a duty of reasonable care.⁹⁹ Similarly, there was a strong consensus requiring the recipient to notify the sender that metadata was found, provided the receiving lawyer knew or reasonably should have known the transmission was inadvertent.¹⁰⁰ It is noteworthy that many of these opinions pre-dated the Ethics 2000 amendments, reflecting that both the original and amended Rule 4.4(b) were fair restatements of the law. The chart suggests why the proposed new subsection (c) did not gain traction; because the ethics opinions were about evenly divided, indicating the issue remained undecided, and it made good sense for Delaware to stay its hand.¹⁰¹ I surmise that adoption of that unique provision might have caused unwanted problems to Delaware-based corporations.

The Prospective Clients/Advertising subcommittee prepared and presented a memo analyzing the amendments in Resolution 105B. Because Delaware had already approved the Ethics 2000 revisions, the Committee was fully comfortable approving those changes.¹⁰² In the end, the Committee decided to recommend adoption without change to the ABA Resolutions 105A and 105B.¹⁰³ At least on these two components of the August 2012 revisions, the Delaware deliberations were quick and easy, consistent with the adage of “Veasey does it.”¹⁰⁴

97. *Id.* at Exhibit I, at 1.

98. See *Metadata Ethics Opinions Around the U.S.*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html (last visited Sept. 20, 2013).

99. Valihura letter, *supra* note 81, at Exhibit I, Tab 1. The chart identified 18 opinions total, including ABA Formal Opinions, and those from Alabama, Arizona, Colorado, Florida, Maine, Maryland, Minnesota, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Vermont, Washington, Washington, D. C., West Virginia, and Wisconsin.

100. *Id.* The chart identified 14 such opinions, including from the ABA, Arizona, Colorado, Florida, Minnesota, New Hampshire, New York, North Carolina, Pennsylvania, Vermont, Washington, Washington D. C., West Virginia, and Wisconsin. *Id.* Maryland and Oregon found no such duty and the issue is not addressed by Alabama or Maine. *Id.*

101. *Id.* On the question of whether the recipient could review or “mine” metadata, seven opinions allowed, nine opinions prohibited, and two found that the answer depended on the facts. *Id.* Those allowing included the ABA, Colorado, Maryland, Oregon, Vermont, Washington, and Wisconsin. *Id.* Opinions concluding that the recipient had an ethical duty to refrain from data mining included Alabama, Arizona, Florida, Maine, New Hampshire, New York, North Carolina, Washington D.C., and West Virginia. *Id.* Minnesota and Pennsylvania declined a categorical opinion, finding case by case, fact-specific inquiry appropriate. *Id.*

102. *Id.* at 3 & Ex. D.

103. Rogers, *supra* note 80.

104. Lisa G. Lerman & Philip G. Schrag, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 118 (3d ed. 2012).

IV. FEASIBILITY OF REVISING MISSISSIPPI RULES OF PROFESSIONAL CONDUCT IN ACCORDANCE WITH RESOLUTIONS 105A AND 105B

A. *Perceptions of Mississippi Lawyers*

During my brief visit to Jackson, I enjoyed Southern hospitality at its best. Everyone with whom I interacted was most gracious and eager to help in any way possible. In many respects, it reminded me of people in my adopted home state of Oklahoma. Because Mississippi College School of Law is a Baptist institution, I suspect its community of administration, faculty, staff, students, and alumni are far more genteel than some from the larger and older “Ole Miss” legal community. I understand that there are only about 8,000 active practicing lawyers, whose licensure requires membership in the Mississippi Bar, which is a quasi-governmental agency separate from but designated the regulatory authority by the Mississippi Supreme Court.¹⁰⁵ Dean Jim Rosenblatt gave me a quick tour of the town and the judicial center, which confirmed my impression that legal practice in the state tends to be kinder and gentler than jurisdictions with many more lawyers.¹⁰⁶

The Bar produced the 2012 Economic Survey, packed with interesting statistical data.¹⁰⁷ Consistent with national and Oklahoma statistics, about 63% of Mississippi lawyers work in firms of one to five attorneys.¹⁰⁸ One third of the state’s lawyers have been in practice 26 or more years, which statistically is the cohort most likely to be disciplined based on national data.¹⁰⁹ This is highly relevant to the technology amendments, because, in a definitional sense, they (like me) are all “digital immigrants” born before 1982, when personal computers first became available. Oklahoma General Counsel tells of the increased number of lawyers who “stayed in practice 15 minutes too long,” including one who used to be a very good criminal defense lawyer who represented the underserved African-American community. I know some superb senior lawyers and judges who cannot be bothered by modern technology. As long as their firm practices are successful enough to employ competent support staff, those lawyers can remain in practice indefinitely. But for those lacking sufficient work to keep them busy and those who are sole practitioners, they must either learn to

105. Telephone interview with Adam Kilgore, General Counsel, Mississippi Bar Ass’n (April 29, 2013).

106. Email from Dean Jim Rosenblatt, Mississippi College School of Law to Judith L. Maute, William J. Alley Professor of Law, University of Oklahoma College of Law (Mar. 4, 2013) (on file with author).

107. 2012 *Economic Survey*, THE MISSISSIPPI BAR (Sept. 2012), available at <http://www.msbar.org/media/556969/2012%20Economic%20Survey%20Report.pdf>.

108. *Id.* at 5.

109. *Id.* According to the 2011–2012 Mississippi Bar Statistical Report chart showing the age of lawyers against whom formal bar complaints were filed, 72% of attorneys were 45 years or older (45–54: 29%; 55 and over: 43%). *Bar Complaint Statistical Report 2011–2012*, THE MISSISSIPPI BAR, available at <http://www.msbar.org/media/247405/36d.pdf>. Lawyers 45 years or older constitute 57% of all lawyers practicing in Mississippi (45–54: 19%; 55 and over: 38%). *Id.*

master technology or abandon the practice of law.¹¹⁰ Last year, I researched to moderate an ethics panel and learned that nationwide, the paradigm of disciplined lawyers were those who were isolated, overwhelmed by work load and life circumstances, and lacking an adequate support system. That may not be such a problem in Mississippi, in which many lawyers practice in firms with five or fewer lawyers and report under 1000 billable hours.¹¹¹ Surprisingly, over 50% of respondents claim not to engage in any marketing activity.¹¹²

B. Pragmatic Assessment on Feasibility of Amending Mississippi Rules Addressed in Resolutions 105A and 105B

1. Resolution 105A

The Mississippi Supreme Court and Bar should anticipate relatively little opposition to these amendments. Before the Symposium, I gave a similar presentation to our Rules of Professional Conduct Committee which only drew fire from a confirmed Luddite new to the committee and unfamiliar with the rules. The Mississippi Rule 1.1 comment parallel to ABA Comment 6 is identical to the prior version, so the additional language on “the benefits and risks associated with relevant technology” should easily pass muster by those formulating the rules. They should anticipate pushback from some of the 72% of lawyers aged 45 and older. Not knowing the state’s process for promulgating new rules, I can only suggest lawyer education.¹¹³ The new Rule 1.6(c) requiring “reasonable efforts to prevent” inadvertent or unauthorized disclosure, or unauthorized access to client confidences might meet with greater resistance from Bar members, which can be countered with good education about the problems firms elsewhere have encountered.¹¹⁴ Because Mississippi amended Rule 4.4 in accordance with the Ethics 2000 revisions, I would not anticipate any resistance to accepting the Ethics 20/20 revisions.

Mississippi did not adopt any version of Rule 1.18 dealing with prospective clients, for reasons that do not appear of record.¹¹⁵ I encourage adoption of the revised rule because it greatly clarifies and avoids messy

110. *2012 Economic Survey*, *supra* note 107, at 24 (survey shows 23.7% have insufficient quantities of work and 27.6% are sole practitioners).

111. *Id.* at 32-33.

112. *Id.* at 20 (survey shows 51.6% do “none”).

113. The Oklahoma Access to Justice Committee has worked over eight years on a package of limited scope representation proposals; during that time other bar leaders have learned that it has worked well in other jurisdictions. In this instance, we have derived a benefit from being a “late adopter,” with Tennessee, Mississippi and most recently Alabama amending their rules. Alabama improved upon our formulation of Rules 4.2 and 4.3, and prepared forms for use in civil litigation, which it has authorized Oklahoma to use. We are awaiting creation of a new Access to Justice Commission to avoid other political resistance.

114. Spahn and Pera materials contained references that firms did not self-identify for these security breaches, for obvious reasons relating to professional reputation and potential civil liability. *See supra* note 43.

115. *See supra* note 61.

and expensive disqualification disputes arising when there is a claimed conflict of interest because a lawyer previously communicated with a person about possible representation and now the lawyer represents a client with interests adverse to that person. Perhaps even more important, Rule 1.18 gives solid guidance on how a lawyer should avoid getting too much information from a prospective client before formal retainer.

2. Resolution 105B

Without question, these revisions will cause the greatest controversy. It is obvious that Mississippi Rules 7.1 through 7.7 have consumed a great deal of time with numerous Supreme Court amendments culminating in the current version adopted in October 2004.¹¹⁶ The Office of General Counsel immediately focused “on forming Policies and Procedures as required by the Court and determining the Bar’s role in the process.”¹¹⁷ The Office functions as a custodian, receiving submissions of advertisements when submission is required; it does not engage in any pre-approval process but maintains the records for three years.¹¹⁸ These records are available to the Court upon request.¹¹⁹ The Office also provides optional advisory opinions under Rule 7.5(d).¹²⁰ Primary consideration in formulating advisory opinions or the rare Bar Complaint about advertising focuses on Rule 7.1, which has been the subject of four amendments. This Rule’s opening clause prohibits “false, misleading, deceptive or *unfair* communications about . . . [a] lawyer’s services.” The word “unfair” defies definition and thus renders the Rule subject to constitutional challenge.¹²¹ The Bar website contains a long list of ethics opinions on advertising.¹²² Research produced only one recent disciplinary case on solicitation, *Mississippi Bar v. Turnage*, imposing a four-month suspension on a lawyer’s use of a non-lawyer to solicit over 100 clients for prospective insurance litigation.¹²³ It is

116. MISS. R. PROF’L CONDUCT R. 7.1–7.4; *see also* email from Adam Kilgore, General Counsel, Mississippi Bar Association, to author (April 30, 2013, 3:00 PM) (on file with author).

117. Kilgore, *supra* note 116.

118. *Id.*

119. *Id.*

120. *Id.*

121. APRL participants debated hypothetical lawyer advertisement prohibitions based on rules that were recently the subject of constitutional challenge, including those that “describe or characterize the quality of services”; “promise results”; “[u]se visual or verbal depictions. . . [irrelevant to] selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence”; “[s]tate or imply . . . [one’s status] as a ‘specialist’, ‘expert’ or ‘authority’ in a particular practice area”; “[i]nclude visual or verbal descriptions, depictions, or portrayals of persons or events that are manipulative or likely to confuse the viewer”; or “[u]tilize any background sound other than instrumental music.” *See* 29 LAW. MAN. PROF. CONDUCT 103, for discussion of APRL debate (2013).

122. Mr. Kilgore informed me that the Bar had completed a review discarding outdated opinions, which will soon appear on its website. Telephone Interview with Adam Kilgore, General Counsel, Mississippi Bar Ass’n (April 29, 2013).

123. *Mississippi Bar v. Turnage*, 919 So. 2d 36, 43–44 (2005) (violating Rules 5.3(b), (c), 7.2(I), 7.3(a), 8.4(a),(d)). Turnage graduated from the University Of Mississippi School of Law and was licensed in 1991, long after the ABA adopted the original Model Rules in 1983. His ignorance may reflect the widespread disrespect given to the required course in professional responsibility, a very difficult course to teach a resistant student body.

obvious the lawyer was unfamiliar with the relevant Rules of Professional Conduct and promptly undertook appropriate remedial action after learning of the violation.

The surprising response to the 2012 Economic Study conducted by the Bar perhaps can be explained because the voluminous Mississippi marketing regulations chilled honest answers or because the respondents did not appreciate the many types of permissible marketing. Long ago, I formed a working hypothesis that one can tell by the length and complexity of a state's rule that state's desire to chill or prohibit lawyer marketing.¹²⁴ In preparing for my talk, I compared the word count of Mississippi Rules 7.1 through 7.7 and the comparable ABA Rules 7.1 through 7.5, and found that the Mississippi Rules were over six times the word count of the ABA Rules.¹²⁵ During my visit, I saw one of the television ads by a notorious state lawyer and identified other more appropriate ways to discipline the lawyer in question.¹²⁶ If any local good can come from my participation in this Symposium, I wish for a thoughtful, enforceable reworking of the current rules that are both cumbersome and redundant. While the specific contents of most the marketing rules are unobjectionable, streamlining is needed to avoid spending precious enforcement dollars defending a constitutional challenge brought by lawyers seeking to enjoin enforcement. Florida and New York can afford and are willing to defend their rules. In my experience, it is rare for a consumer to file an advertising complaint; more often they are filed by lawyers who are offended, or arranged for by those the advertising lawyer is seeking to sue.¹²⁷ Besides the high cost of defense, current United States Supreme Court jurisprudence casts doubt on the outcome. Scarce enforcement dollars are far better spent disciplining lawyers who repeatedly neglect client matters, causing untold harm to many poorly represented clients and dishonest lawyers who steal from clients and others.

124. See *supra* note 37.

125. Judith Maute, Address at the Mississippi College Law Review Symposium (2013). Word technology facilitated this search, with Mississippi marketing rules having 5537 words and the ABA counterparts only 851 words.

126. See *supra* note 42. Other empirical research establishes that personal injury "mills" do all right for minor claims because the carriers pay out for nuisance value, but do poorly for bona fide claims involving serious injuries. See generally, Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633 (2013). Arizona recently ordered a six month suspension for inadequate supervision of associates and non-lawyer staff where it was impossible for lawyers to represent competently all the clients; the firm employed 38 lawyers and 228 non-lawyers; undoubtedly unauthorized practice occurred. Law firm manager is suspended six months for 'Hands-off' supervision of subordinates, 27 LAW. MAN. PROF. CONDUCT 18 (2011). These mills also present significant unauthorized practice issues where most of the work is performed by paralegals, other non-lawyer employees, and law students with grossly inadequate lawyer's supervision.

127. That was the case in *In re Primus*, 436 U.S. 412 (1978). Petitioner Edward Maracich was employed at one of car dealerships and initiated the class action. Kimberly Robinson, *Lawyers May Be on Hook for \$200 Million For Using DMV Information to Solicit Clients*, 29 LAW. MAN. PROF. CONDUCT 356 (June 19, 2013).

V. CYBER-SECURITY AND REASONABLE PRECAUTIONS UNDER REVISED RULES 1.1 & 1.6(C)

When providing legal services to clients, lawyers and law firms must take reasonable precautionary measures to minimize the security risks posed to all forms of technology used in the electronic transmission or storage of clients' confidential information.¹²⁸ Lawyers should be responsible stewards of their clients' confidences. The rapid pace of technological development challenges the legal profession to keep abreast with it. The new revisions provide general guidelines designed to address the many issues arising from the integration of technology into the rendition of legal services. This section focuses on revised Comment 8 of Rule 1.1, a new subsection (c) in Rule 1.6 on Confidentiality and its revised Comment 18.

A. *Rule 1.1 Competence and Revised Comment 8: Expanded Duty of Competence*

Rule 1.1 addresses the duty of competence, the most fundamental duty owed to clients. Revised and renumbered Comment 8 expands the duty. As modified, it provides:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.¹²⁹

The red-lined additional phrase stresses the need for lawyers' ongoing education concerning advancements in technology. The "relevant" qualifier might, but should *not* be interpreted to mean that lawyers need only acquire knowledge about the specific types of technology that they actually use to render legal services. Rather than continuing education programs that frighten lawyers about technology's risks, it should be construed to promote continuing education programs that familiarize lawyers with how technology can be used safely, making their work efforts more efficient and cost-effective.¹³⁰ That would have the salutatory effect of making legal services more affordable to persons of moderate means, which if publicized well could bring consumers back to the legal marketplace and away from

128. Michael Downey, *Law Firm Online Activity Policy*, 19 PROF. LAW. 4, 19 (2009) ("Law firms can and should take steps to mitigate their risks from . . . activity. This article and its sample policy provide a starting point that, with education and reinforcement, should help a firm design and implement its own online activity or social networking policy.").

129. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (amended Aug. 2012).

130. See, e.g., Jim Calloway's Law Practice Tip Blog, <http://jimcalloway.typepad.com> (last visited Sept. 25, 2013). Mr. Calloway, a nationally recognized tech guru, is director of the Oklahoma Bar Association Management Assistance Program.

self-help programs and other online providers. Lawyers who eschew innovative technology are destined to go the way of the dodo bird, becoming extinct by failure to adapt to modern conditions.¹³¹

Revised Comment 8 supports three important takeaway points. One, deliberate ignorance of technology is inexcusable. Two, if a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should either hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant who understands the practice of law and associated ethical constraints. Three, lawyers and law firms are accountable "for keeping reasonably informed about the rapidly changing technology, security threats, and legal developments in the field."¹³² It must be said, however, that there is no need for non-tech lawyers to go ballistic, opposing local adoption of the amended comment fearing that it will doom them to discipline. Rather, as recognized in the preliminary section on Scope,

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. . . . 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*.¹³³

Because Comment 8 is under the heading "Maintaining Competence" and the first portion of the comment uses the term "requisite knowledge and skill," that a lawyer *should* keep abreast of changes, there is a strong basis to find an expanded *duty*. Nevertheless, no disciplinary counsel is going to waste precious enforcement resources in isolated instances where a senior lawyer is behind on technology but where such lapses cause no client harm. These lawyers will lose in the marketplace but typically will not face discipline.

By contrast to the non-scary probable interpretation of Comment 8, breaches of amended Rule 1.6(c) and related comments bear risk of both discipline and civil liability. These amendments link to competence by requiring reasonable precautions when using technology for electronic transmission and storage of confidential client information. A security breach, i.e. any unauthorized access to or inadvertent disclosure of information, is not an automatic violation of either Rules 1.1 or 1.6. Rather, it prompts a

131. See generally, Susskind, THE END OF LAWYERS, *supra* note 22; See *DoDo Bird: Extinct*, BAGHEERA.COM, http://www.bagheera.com/inthewild/ext_dodobird.htm (for a discussion of the circumstances leading to the DoDo Bird's extinction, including loss of flight capability and food source for sailors).

132. Jason Gonzalez & Linn Freedman, *Mobile Devices and Attorney Ethics: What are the Issues?*, 38 FAM. L. REP. 1163, 1164 (2012) (citations omitted), available at http://www.nixonpeabody.com/files/141019_Privacy_Alert_12_08_2011.pdf. Recall that the ABA plans to construct a website to provide information and analysis of technology changes. If it is well-done, user-friendly, and has accessible personnel to assist users, the website should allay concerns about potential risk of discipline.

133. MODEL RULES OF PROF'L CONDUCT Scope cmt. 14 (2012) (emphasis added).

review of what measures the lawyer took to ensure the security of the information, considering the “totality of the circumstances” about the breach and the sensitivity of the information the data contained. The next section addresses what precautions may be in order, depending on the circumstances.

B. Cyber-Security: Reasonable Precautions to Preserve Client Confidences

New Rule 1.6(c) and Comment 18 firmly link a lawyer’s fiduciary duty to preserve confidential client information with the use of technology. The revised comment provides broad and flexible guidelines on what may be appropriate security measures in different contexts. The flexibility and avoidance of specific requirements reflects pragmatism, dispensing with need for further amendments as new technologies emerge.¹³⁴

1. Types of Technology Used in Performing Legal Services

Increased numbers of lawyers use technology in their work. Whereas in 2007, only 38% of lawyers used a smartphone, by 2012 the number rose to 89%.¹³⁵ Lawyers who use web-based software rose from 13% in 2008 to 21% in 2012.¹³⁶ An ABA Technology Survey found that lawyers identified the most important benefits of using software as a service solution in the practice of law: (1) easy browser access from anywhere (70.5%); (2) 24/7 availability (55.8%); (3) low cost of entry and predictable monthly expenses (54.5%); (4) eliminate need for IT staff and software management (46.8%); (5) robust data backup and recovery (44.9%); and (6) quick startup time (42.9%).¹³⁷ The first two benefits also risk electronic security breaches. Because information is easy to access and available at any time, hackers have ample time and opportunities to gain access to the information.

Lawyers use a variety of technological mediums to transmit and store electronic data in their legal practices. Google Docs (46.2%) is a popular document creation and collaboration system. Clio (12%) is a popular cloud-based practice management system. Both involve storing many documents in the cloud for extended periods. SaaS and various Cloud services are also used for document storage. Before selecting a storage server, lawyers should obtain current information about their security updates. Other devices used in practice include smartphones, laptops, tablets, desktops, servers, and portable hard drives/thumb drives. The use of technology in

134. See *supra* notes 10-14.

135. Robert Ambrogi, PowerPoint Presentation, *10 Ways Technology is Rewiring Law Practice: And What It Means to You*, <http://www.slideshare.net/ambrogi/ambrogi-firm-future2012> (last visited Oct. 3, 2013) (citing ABA LEGAL TECHNOLOGY SURVEY (2012)).

136. *Id.*

137. *Id.*

the practice of law presents two separate confidentiality issues: (1) transmission of data over the Internet, and (2) storage of electronic data.¹³⁸ The unique elements of the two issues require consideration when determining which reasonable precautions are best suited to secure the information.¹³⁹

2. Threats to Cyber-Security

In addition to its many benefits, there are also serious security threats from electronic transmission and data storage. To protect legitimate client concerns for confidentiality, these threats must be addressed. Threats to the security of confidential information include attacks by hackers,¹⁴⁰ inadvertently sending unsecure data (either by lawyer, lawyer's agent, or client), data corruption, and lax security protocols allowing unauthorized access to data. The amendments require lawyers to take reasonable precautions as suitable for the context.

3. Possible Precautions as Reasonable Under the Circumstances

There are several proactive steps that can qualify as reasonable precautions to secure confidential client information. One method is data encryption.¹⁴¹ TrueCrypt is a free encryption service that provides excellent protection.¹⁴² Encrypting e-mails can prevent secure contents from being revealed if inadvertently sent to the wrong party. Even if the Cloud or SaaS service being used encrypts its files, encrypting data before sending it to the Cloud or SaaS offers additional protection against anyone trying to intercept while in transit and employees of the service that may be able to view it before filing the data.

Another proactive step is to create a firewall, preventing unwanted intruders from accessing your device. A firewall is at its strongest when it is used along with an IDS (intrusion detection system) and IPS (intrusion prevention system).¹⁴³ You can use a VPN (virtual private network) or SSH (secure shell) tunnel to transmit information securely. Both encrypt

138. Pa. Bar Ass'n Comm'n on Legal Ethics & Prof'l Responsibility, Formal Op. 2011-200, 8 (Nov. 2011) (citing St. B. Ass'n of N.D. Ethics Comm'n. Op. 99-03 (June 21, 1999)).

139. Gonzalez, *supra* note 132 at 1165 ("Cloud computing can benefit attorneys enormously, enabling them to increase efficiency by 'outsourcing' tasks such as hosting electronic discovery, timekeeping, case management, and billing. The entrusting of sensitive data to third parties, of course, can lead to significant security concerns—for example, your data could be intercepted or compromised when you send it to the third party, the third party could mishandle or misuse the data once they receive it, or the third party may not give back or properly dispose of the data when the engagement terminates.") (citing Cloud Security Alliance, *Top Threats to Cloud Computing V1.0*, (March 2010), <http://pub.bna.com/lw/cloudsecurity.pdf>).

140. Michael A. Riley and Sophia Pearson, *China-Based Hackers Target Law Firms to Get Secret Deal Data*, BLOOMBERG (Jan. 31, 2012), <http://www.bloomberg.com/news/print/2012-01-31/china-based-hackers-target-law-firms.html> (discussing that eighty major U.S. firms experienced cyber attacks last year).

141. James Ellis Arden, *Sharing Means Caring*, 29 GPSOLO 76 (Sept. 2012) ("[E]ncrypt whatever you're sending to the cloud—before you send it. That way, no interceptor, insider or outsider, will be able to access and read the contents of your files.").

142. See TRUECRYPT, <http://www.truecrypt.org/> (last visited Oct. 3, 2013).

143. Sharon D. Nelson, John W. Simek & Michael C. Maschke, *THE 2012 SOLO AND SMALL FIRM TECHNOLOGY GUIDE: CRITICAL DECISIONS MADE SIMPLE* (2012).

whatever data is being transmitted. A VPN hides your ‘true’ IP (internet protocol) address, making it harder for anyone trying to track and intercept the information to do so. A SSH tunnel creates a private, secure “pathway” through the Internet from one computer to another. Its security is enhanced by the fact that tunnels must be established on both sides of the connection, i.e. both computers/servers. Consistent and secure back-up of client information in multiple locations protects against a total loss of or corruption of data at one location. This preserves the permanence of information needed for competent and ethical representation.

Eliminating metadata¹⁴⁴ from an electronic document is a critical step when transmitting a document to persons not authorized to see confidential information. While removing the metadata from the document is possible, it has become standard practice to convert the document to a portable document format (PDF).¹⁴⁵ This removes the metadata, but preserves the visible data of a document. Installing anti-virus, anti-malware, and anti-spam software onto devices will not stop a sophisticated cyber attack, but will protect against most viruses and malware. Another standard precaution is to have strong passwords or passphrases containing a variety of hexadecimal characters.¹⁴⁶ Passphrases are more secure than passwords, because they require at least four separate combinations of hexadecimal characters with a space in between each. The more characters and types of characters there are in a password or passphrase the more secure it will be. When using a laptop or desktop, there should be both a password required at startup and exiting the screensaver. Password manager tools are becoming increasingly popular as an alternative to remembering dozens of passwords or passphrases. These tools, with names like LastPass, KeePass and 1Password, allow you to create and use long passwords that are random strings of letters and characters, which could not be remembered by most users. You have one strong password to log into your password manager and then copy and paste the passwords for all other websites and services.¹⁴⁷ Limiting access to confidential information only to authorized persons is a fundamental fiduciary and ethical duty. By “implementing electronic audit trail procedures,” the user is able to monitor who is accessing the data.¹⁴⁸ Mobile devices are often lost or stolen. Lawyers should have passwords for all these devices and should install “find” and “wiping”

144. Gonzalez, *supra* note 132 at 1164-65 (“Metadata generally includes the identity of the author, the date the document was created, and the program used to create it, and it also can include edits, comments, and prior document drafts. This information can be highly sensitive and can easily be inadvertently produced, as much of it is hidden during normal document viewing.”).

145. *E.g.*, Document_Image.pdf.

146. *E.g.*, numbers, letters and symbols.

147. Email from Jim Calloway, Director, Management Assistance Program, Oklahoma Bar Association, to Judith L. Maute, William J. Alley Professor of Law (Oct. 2, 2013) (on file with author).

148. Pa. Bar Ass’n Comm’n on Legal Ethics & Prof’l Responsibility, Formal Op. 2011-200, 8 (Nov. 2011).

features to the device.¹⁴⁹ What is considered a reasonable precaution will vary by each device and how it is operated.¹⁵⁰

There are many ways to exercise reasonable precaution in ensuring the security of confidential electronic data. A lawyer or firm should combine various methods, determining what is reasonable based upon the totality of circumstances regarding the data, in order to prevent disclosure of or access to information relating to the representation of clients.

4. Takeaway Points on What Precautions Are Reasonable

The Commission has stated often that there is no expectation of “one-size-fits-all,” but rather, what counts is as reasonable depends on the nature of a particular practice, and the stakes involved. Because all of the Rules of Professional Conduct are rules of reason, lawyers need not fear a draconian response by disciplinary entities expecting all lawyers to have state of the art, expensive and hard to use security measures in place.¹⁵¹

A prudent approach to successful technology security includes implementing various layers of protection.¹⁵² By restricting access to the confidential information at multiple points, a lawyer significantly increases the odds that the clients’ information is secure. Lawyers make it more difficult for unauthorized individuals trying to obtain the confidential data. Also, it lessens the likelihood that confidential data will be inadvertently disclosed, because it would require the information to pass through a series of ‘portals’ before reaching its final destination.

The use of technology to transmit and store confidential information electronically brings new and unique challenges for the profession. The technology revisions addressed in this Article are an important step towards addressing those challenges. Their underlying purpose should not be treated as establishing grounds for liability. Rather, they provide guidance for lawyers in a profession being transformed by its growing use of technology in the performance of legal services. The American Bar Association,

149. Gonzalez, *supra* note 132 at 1164 (“A ‘find’ feature, as its name suggests, allows the device’s internal technology to show its geographic location if it gets lost. The owner then can use another computer to look up the location of the lost device and . . . retrieve it. A ‘wiping’ feature can be set up to make the device ‘wipe’ or delete all its contents if someone. . . repeatedly enters an incorrect password or, alternatively, can allow the user to send a command to the lost device instructing it to immediately delete its contents.”).

150. *Id.* at 1167 (“Each of these technologies presents unique security vulnerabilities: for example, Bluetooth exploits have been reported that allow hackers, by simply standing near a Bluetooth-enabled mobile device, to run malicious software that can surreptitiously read the victim’s phone call lists, text messages, photographs, calendars, contacts, and even make long-distance phone calls using the victim’s device.”).

151. ABA COMMISSION ON ETHICS 20/20 RESOLUTION 105A AND REPORT at 3, available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_authcheckdam.pdf (last visited Oct. 3, 2013).

152. Examples of measures one can use to heighten technology security include the following: installing a firewall, anti-malware and anti-virus software, and encrypting confidential data; limiting access to confidential information; vigilant monitoring of security; proper training; placing legally binding obligations on service providers; having recovery methods in place; backing up confidential information on a secure, offline medium; and immediately notifying all parties whose interest are affected when a security breach occurs.

besides approving these revisions, is undertaking to educate lawyers on cyber-security.¹⁵³ Regardless of whether a jurisdiction adopts all the revisions, to keep up with the changing times and function in modern society, lawyers must begin taking reasonable precautions to minimize the security risks threatening electronically transmitted and stored data relating to the representation of clients.

VI. CONCLUSION: LAWYERS MUST GET WITH THE TECHNOLOGY PROGRAM OR RISK OBSOLESCENCE

In today's practice environment, there is no room for technophobes. The path-breaking work of Richard Susskind, Thomas Morgan, and others are bringing home in no uncertain terms, that the practice of law is undergoing profound changes. Only a small amount of legal work is "bespoke" in the sense used by Susskind, one-to-one, hand-crafted, "highly tailored for the specific needs of particular clients" and not later recycled.¹⁵⁴ For law firms and individual lawyers to stay in business, earning enough for a comfortable life and repaid student loans, they must create standardized, then systematized work programs packaged to sell to multiple clients, requiring limited individualized revisions.¹⁵⁵ It is imperative that law schools start preparing current students for their inevitable future.¹⁵⁶

We all must learn to manage technology or it will destroy us. I think of the computer Hal in Stanley Kubrick's 1968 movie "2001: A Space Odyssey," in which the spaceship computer destroyed the universe. As Dave, the captain instructed HAL to open the pod bay doors, HAL responded "I'm sorry Dave. I'm afraid I can't do that." HAL knew that there were plans to disconnect him.¹⁵⁷ The film ends with a moonshot with a human embryo enclosed, suggesting that humankind creates technology that will destroy it when humans do not keep pace with the technology.¹⁵⁸

153. James Podgers, *Raising the Alarm: ABA President Urges Lawyers to Recognize, Respond to Threat of Cyberattacks*, 99 ABA 2, 55 (2013) ("Among other efforts. Bellows says, the ABA is producing a guidebook on how to protect electronic files from cyber attacks. The association also is planning to offer members more CLE programs concerning cyber security and is creating a Web portal that will contain educational materials.").

154. See Susskind, *THE END OF LAWYERS*, *supra* note 22 at 18, 29.

155. *Id.* chart at 29, 269 (chart forecasting to 2018).

156. See generally, DAVID I. C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* (MATTHEW BENDER & CO. 2009).

157. *2001: A Space Odyssey: Quotes*, IMDb, http://www.imdb.com/title/tt0062622/quotes?ref_=TT_q1_3.

158. Many lawyers have experienced HAL. He entered my life April 10, 2010 and was a resilient beast to kill. While I had fun on a Friday afternoon, IT staff installed a new computer and program. The next week I brought my laptop to a bar meeting and tried to access the agenda I had prepared, but when I tried to get my email, HAL said I was not an authorized user. IT had to uninstall the new computer in order to fix the problem. Busy lawyers under time restraints cannot afford the stress of such incidents.

MISSISSIPPI COLLEGE LAW REVIEW

VOLUME 32

2014

ISSUE 3

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SUBSCRIPTIONS: The *Mississippi College Law Review* is published annually in three installments. The subscription rate is \$36.00 per year. Please make your check payable to *Mississippi College Law Review*. The *Law Review* renews all subscriptions automatically unless the subscriber provides timely notice of cancellation. New orders, address changes, subscriptions, cancellations, and similar correspondence should be directed to:

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VOLUME 32

ISSUE 3

Member, National Conference of Law Reviews

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