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## “The More Things Change, the More They Remain the Same:” Lawyer Ethics in the 21st Century

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# ARTICLE

*Gregory C. Sisk*

## “The More Things Change, the More They Remain the Same:” Lawyer Ethics in the 21st Century

**Abstract.** At an accelerating pace since the recession, our legal profession has been undergoing structural changes in the delivery of many legal services. At the same time, longstanding principles of ethics continue to govern the day-to-day lives of practicing lawyers.

This article lays out four examples of how meaningful change in lawyer practice has been accomplished since the turn-of-the-century with continued adherence to bedrock professional concepts. First, the rules now embrace the multi-jurisdictional practice of law, while the disciplinary authority of each jurisdiction is emphatically confirmed and strengthened. Second, rules on lawyer advertising are streamlined to grant largely open-ended permission for lawyers to communicate about legal services, while direct solicitation of clients by lawyers remains strictly prohibited. Third, new exceptions to the confidentiality rule permit (and perhaps require) disclosures to prevent and mitigate financial harm, but are confined to circumstances where the lawyer’s legal services were abused and thus largely parallel to the longstanding crime-fraud exception to the attorney-client privilege. Finally, proposals to allow lawyers to engage in multi-disciplinary practice have faltered again and again, and, in any event, have typically been modest in ensuring that ultimate control of entities engaged in legal practice be reserved to lawyers.

In sum, while rules of professional conduct are not static and are constantly under evolutionary revision, the foundational concepts of lawyer ethics remain deeply-rooted.

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1. Several parts of this article are adapted in part with permission from West Academic Publishing from the author's portion of the first new hornbook in thirty years on legal ethics. Gregory C. Sisk, *Legal Ethics and the Practice of Law*, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION §§ 4-1.6, 4-2.1, 4-2.2, 4-2.3, 4-2.4(b) & (d)(1), 4-2.4(h)(1), 4-2.5(a)–(b), 4-6.1, 4-6.3(c)(1), 4-6.3(c)(4), 4-6.6(a), 4-6.6(c), 4-6.6(d), 4-6.6(h); 4-7.9(c) (2018). With copyright permission from Thomson Reuters, earlier versions of some material integrated into the West Academic Press hornbook had previously appeared in GREGORY C. SISK, IOWA PRACTICE: LAWYER AND JUDICIAL ETHICS (2015).

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## INTRODUCTION

“The more things change, the more they remain the same.” This familiar aphorism is a translation from a sarcastic epigram by French writer Jean-Baptiste Alphonse Karr, dating back more than 150 years.<sup>2</sup> A similar saying, expressing resignation about the vanities of human beings, comes down to us from nearly two-and-a-half millennia ago. In Ecclesiastes 1:9, Solomon declares: “Nothing is new under the sun!”<sup>3</sup> While these idioms are world-weary, they also recognize a deeper and sometimes positive reality, which is that the fundamentals of human nature and aspirations are more solidly-placed than we often acknowledge.

President Ronald Reagan was fond of quoting American revolutionary Tom Paine that “[w]e have it in our power to begin the world over again.”<sup>4</sup> But, as George Will insisted emphatically, no, we don’t. Characterizing Reagan as a political romantic, Will labeled Paine’s oft-quoted assertion as “preposterous.”<sup>5</sup> Whether we see the past as a “repository of moral wisdom”<sup>6</sup> or simply as the inescapable predicate to whatever may be the next step in human history, the principles, traditions, understandings, and historical arrangements that preceded us may not simply be cast aside with abandon.

While change, meaningful change, is possible, healthy and successful change will be built upon longstanding moral foundations and shaped by attention to human experience. Positive change should be the ongoing culmination of the finest accomplishments of those who toiled before us. And so, it has been with the law and rules of professional responsibility in the past couple of decades and since the dawn of the new twenty-first century.

In recent years, and at an accelerating pace since the recession, our profession has been undergoing structural changes in the delivery of many

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2. *Plus ça change, plus c'est la même chose*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plus%20%C3%A7a%20change,%20plus%20c'est%20la%20m%C3%Aame%20chose> [https://perma.cc/TA5U-GQKR].

3. *Ecclesiastes* 1:9 (New International, rev. ed. 2011).

4. Ronald Reagan, Remarks Announcing Candidacy for the Republican Presidential Nomination (Nov. 13, 1979) (transcript available at <https://www.presidency.ucsb.edu/documents/remarks-announcing-candidacy-for-the-republican-presidential-nomination-2> [https://perma.cc/E7DG-KB4G]).

5. George F. Will, Opinion, *The Limits of Sunniness*, WASH. POST (Feb. 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/09/AR2007020901931.html> [https://perma.cc/S9SL-RAPY].

6. *Id.*

legal services. In our new hornbook, Professor Bill Henderson describes these changes, including the dramatic shift of the center of gravity among lawyers from serving the legal needs of individuals and small businesses to serving the legal needs of organizations (both corporations and governments);<sup>7</sup> the efforts of large corporate clients to control legal costs by seeking out alternatives to the traditional law firm;<sup>8</sup> and “advances of technology that substantially replace large tranches of work traditionally performed by lawyers.”<sup>9</sup>

At the same time, longstanding principles of ethics continue to govern the day-to-day lives of practicing lawyers. The lives of most lawyers in the coming decades will be different, as the legal profession adapts even more to the global economy, to new technology that will transform many aspects of legal services into intelligent automation of transactional and other documents, and to the increased recognition of para-professional services for tasks traditionally undertaken by lawyers. Lawyers will remain essential, however, with critical analysis, creative lawyering, and attentive client representation. And the ethical rules that govern legal representation will continue to closely resemble those with which we are familiar today—and which have been with us, in one form or another, for many decades.

This article lays out four examples of how meaningful changes in legal services have been accompanied with continued adherence to bedrock professional concepts. Some of the discussion is adapted from, and more detailed information about these topics is available in, our brand-new West Academic Publishing hornbook, the first addition to the venerable hornbook series on professional responsibility in some 30 years: *Legal Ethics, Professional Responsibility, and the Legal Profession* (2018).

First, the rules now embrace the multi-jurisdictional practice of law by authorizing practice across jurisdictional lines under many circumstances and incorporating choice of law rules.<sup>10</sup> At the same time, the disciplinary authority of each jurisdiction of practice has been emphatically confirmed and strengthened, meaning that a lawyer who conducts a multistate practice must be attentive to the regulations and ethical requirements that apply in each jurisdiction where she practices.

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7. William D. Henderson, *The Legal Profession and Legal Services: Nature and Evolution*, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 1-1.1 (2018).

8. *Id.* § 1-2.1.

9. *Id.* § 1-3.1.

10. *See infra* Part I.

Second, rules on lawyer advertising are being streamlined to grant largely open-ended permission for lawyers to communicate about legal services, subject primarily to the basic precept that the communication not be misleading.<sup>11</sup> Indeed, shortly before this article was written, the American Bar Association (ABA) reworked—through abbreviation and consolidation—the provisions in the Model Rules of Professional Conduct (Model Rules) that govern communications about legal services.<sup>12</sup> But that most recent revision follows in a straight-line from developments over the past several decades. And in contrast with nearly every other commercial endeavor, direct solicitation of clients by lawyers remains rather strictly prohibited.<sup>13</sup>

Third, since the dawn of the new century, newly-articulated exceptions to the confidentiality rule have been added to allow disclosures to prevent reasonably certain bodily harm, to prevent and rectify financial harm, and to identify and address conflicts of interest.<sup>14</sup> Use of confidential information to prevent bodily harm rarely arises and serves the greatest of purposes.<sup>15</sup> Carefully evaluating confidential information to avoid a conflict of interest with changes in lawyer employment or a law firm has always been implicit and imposes little risk on the client.<sup>16</sup> The permission to apply a client's confidences to not only prevent but repair financial harm may appear to be a more profound departure from expectations of confidentiality. But this permission is carefully confined to circumstances where the lawyer's legal services were abused to accomplish the wrong, running largely parallel to the crime-fraud exception to the attorney-client privilege.<sup>17</sup>

We should be extremely cautious in making even modest adjustments to confidentiality, lest we inadvertently undermine the sensitive candid relationship between an attorney and a client. And we should regularly reassess whether a revision has achieved its purpose or the costs been too high. Nonetheless, the occasions for application of exceptions to confidentiality are few; the circumstances justifying disclosure are narrow; when disclosure is allowed (or required) a compelling (or at least arguably

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11. *See infra* Part II.A–F.

12. *See infra* Part II.F.

13. *See infra* Part II.G.

14. *See infra* Part III.

15. *See infra* Part III.B.

16. *See infra* Part III.C.

17. *See infra* Part III.D.

compelling) public interest is present. The heart of the confidentiality principle still beats steadfastly.

Finally, proposals are periodically floated to allow lawyers to engage in multi-disciplinary practice in partnership with other types of professionals.<sup>18</sup> These proposals have faltered again and again, encountering stubborn resistance to this date in all but a couple of jurisdictions. But even should such initiatives eventually be accepted, however reluctantly by the American legal profession, the proposals most likely to be adopted are modest in nature and designed to ensure that ultimate control of entities engaged in legal practice be reserved to lawyers.

#### I. MULTIJURISDICTIONAL PRACTICE IN A REGIME OF STRENGTHENED LOCAL JURISDICTION DISCIPLINARY AUTHORITY

The American regime of lawyer admission and professional regulation has long been geographically-fixed in state or territorial authority, generally belonging to a jurisdiction's highest court.<sup>19</sup> And yet the practice of law today is increasingly an interstate activity.<sup>20</sup> A lawyer located in one state may represent a client in another state about a matter that involves parties or property in yet a third state. Even the lawyer who primarily represents local clients may find that a client has become involved in a dispute when visiting another state or is party to a multistate transaction.

On the one hand, excessive barriers to interstate practice impair effective representation by lawyers and add unjustified costs to their clients.<sup>21</sup> On the other hand, state supreme courts and lawyer disciplinary bodies have jealously guarded their authority to control who is granted and who may retain a professional license.<sup>22</sup> Early in this new century, the Model Rules were revised in a manner that simultaneously approved the widespread (if somewhat underground) custom of temporary cross-border practice and

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18. See *infra* Part IV.

19. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.2.1 (1986).

20. See generally Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 699–700 (1975) (discussing the growth of interstate law practice); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 81–84 (1997) (stating the practice of law is “becoming increasingly multijurisdictional”); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345–57 (1994) (noting multijurisdictional practice has become more common in practice).

21. Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 694 (2002).

22. *Cf. id.* at 686 (“On one hand, the states have traditionally determined both the definition of the practice of law and who may practice law within their borders.”).



affirmed the power of state disciplinary authorities to police legal practice inside the borders of the jurisdiction.<sup>23</sup>

The trend toward multistate legal practice hardly emerged only at the turn of the century. And the work-around of temporary practice by a lawyer in a state other than the state of licensure persisted for decades before the legal ethics rules were revised to explicitly account for such practices. When the out-of-state lawyer obtained *pro hac vice* admission to represent a client in court, the court's imprimatur was accepted as resolving any question of propriety, even as to the lawyer's interaction with the client prior to formally being granted *pro hac vice* status. For non-litigation matters, because the client who has secured the services of the lawyer was unlikely to complain, temporary practice across a state line was unlikely to be recognized by the lawyer as unauthorized or detected by disciplinary officials.<sup>24</sup> Indeed, an influential study of multistate practice more than forty years ago reported that "there exist[ed] a large gray area, a no-man's land of unenforced or unenforceable proscriptions on professional activity," with courts "deliberately carv[ing] out" "isolated or incidental" professional activity across state lines as "not truly 'practice of law.'"<sup>25</sup>

That is not to say that the absence of a formal permission for multijurisdictional practice was always without consequence. Some unfortunate lawyers were sanctioned for the unauthorized practice of law in a state where they were not licensed.<sup>26</sup> And in one infamous case—*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*.<sup>27</sup>—the California Supreme Court discharged a California client from the obligation to pay fees for legal services that had been performed in California by New York lawyers.<sup>28</sup> Moreover, many ethically-sensitive lawyers may have hesitated to provide even temporary and behind-the-

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23. See Moulton, *supra* note 20, at 103–04 (explaining how the 1993 amendment to Model Rule 8.5 provided clarity in regard to ethical conflicts in multijurisdictional practice).

24. See Gillers, *supra* note 21, at 695 ("It [would] hardly occur to lawyers that such temporary presence will be deemed unauthorized law practice.").

25. Brakel & Loh, *supra* note 20, at 715–16.

26. Although, as Professor Gillers observed, "[W]hen lawyers are sanctioned for [unauthorized practice of law] it is generally for boorish conduct far more intrusive than temporary presence in another jurisdiction." Gillers, *supra* note 21, at 695.

27. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara Cty.*, 949 P.2d 1 (Cal. 1998).

28. *Id.* at 3. For discussion of the *Birbrower* decision and its catalytic effect on ethics rule reform, see generally 2 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 49.06 (4th ed. 2018) (discussing *Birbrower* and out-of-state practice by lawyers generally); Gillers, *supra* note 21, at 686–91 (acknowledging *Birbrower* in the context of licensing system changes).

scenes legal services that required entry into another state because of ethical qualms or risk aversion.

Nonetheless, revised rules explicitly authorizing such temporary multijurisdictional practice were more in the nature of confirming as legitimate what had already been occurring rather than opening the door to a brand-new area of professional endeavor.

In 2002, the American Bar Association adopted the proposal of its Commission on Multijurisdictional Practice<sup>29</sup> to revise the Model Rules of Professional Conduct to expressly acknowledge that there are occasions on which a client's right to the counsel of his choice or the interstate nature of a matter justifies affording limited or temporary permission to an out-of-state lawyer to provide legal services in the forum state. Importantly, as explained further later, the revised rule endorses the existing division of professional licensure by state or territory and indeed enhances the disciplinary authority of the jurisdiction in which the legal services are offered.<sup>30</sup> Thus, the rule reform reduces barriers to interstate practice, while still accounting for the state's interest in ensuring the quality and ethical behavior of attorneys practicing within the borders of the state.

Under Model Rule 5.5(c), a lawyer admitted to practice and in good standing in another United States jurisdiction may (1) temporarily provide legal services within the borders of a state (or territory) when the lawyer does so in association with a lawyer admitted in that state who actively participates in the matter; (2) provide legal services that are related to a pending or potential proceeding before a tribunal in another state if the lawyer is or reasonably anticipates being authorized by law or order to appear before the tribunal; (3) provide temporary representation in a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding; and (4) provide temporary legal services in a state in which the lawyer is not admitted if those services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."<sup>31</sup> Under Model Rule 5.5(d), a lawyer may more permanently (1) provide legal services in another state to the lawyer's

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29. See generally Gillers, *supra* note 21, at 712–16 (providing the history and proposals of the Commission on Multijurisdictional Practice).

30. See *id.* (discussing the approved recommendations for amending Model Rules 5.5 and 8.5 to reflect the limited instances in which a client's right to the counsel of his choice or the interstate nature of a matter justifies affording limited or temporary permission to an out-of-state lawyer to provide legal services in the forum state and the attendant implications).

31. MODEL RULES OF PROF'L CONDUCT R. 5.5(c) (AM. BAR ASS'N 2018).

employer, or its organizational affiliates; and (2) provide legal services within another state as are authorized by federal or state law.<sup>32</sup> Each of these provisions, as well as special rules allowing legal services by a lawyer in another jurisdiction following a major disaster, are discussed in further detail in our new hornbook.<sup>33</sup>

However, as Professor Stephen Gillers observes, “The expanded authority that Rule 5.5 confers comes at a price. A lawyer who wishes, even on a temporary basis, to provide legal services in the jurisdiction must recognize the jurisdiction’s interest in disciplining him or her for misconduct in connection with those services.”<sup>34</sup>

Indeed, the breadth of local disciplinary authority now enshrined in the Model Rule is capacious. Beyond confirming a state’s disciplinary authority over those lawyers who are formally admitted to full or limited practice, Model Rule 8.5(a) extends disciplinary jurisdiction over any attorney who “provides or offers to provide any legal services in th[e] jurisdiction.”<sup>35</sup> If a lawyer not licensed in the state engages in temporary and limited practice as authorized by Rule 5.5, she may be disciplined for any violation of the state’s Rules of Professional Conduct that arises out of that temporary or limited practice.<sup>36</sup> In addition, an out-of-state lawyer who merely offers to provide legal services in the state, such as by targeting advertising toward potential clients located in the state, has submitted to that disciplinary authority.<sup>37</sup>

In addition, Model Rule 8.5(b) sets forth choice of law rules to determine which jurisdiction’s ethical regime should govern when either the lawyer is licensed in more than one state (or territory) or the professional conduct implicates more than one state (or territory).<sup>38</sup> This provision sets out simple rules that focus on the state in which the conduct occurred or had its predominant effect, thereby striking a balance between the disciplinary

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32. *Id.* R. 5.5(d).

33. *See* Sisk, *supra* note 1, § 4-1.6(b) (detailing the application of the special rule allowing attorneys to represent clients pro bono in a state where they are not admitted after a major disaster in that state).

34. Gillers, *supra* note 21, at 715.

35. MODEL RULES OF PROF’L CONDUCT R. 8.5(a).

36. *Id.* R. 5.5 cmt. 19.

37. Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801, 803, 810, 815–16 (2010).

38. MODEL RULES OF PROF’L CONDUCT R. 8.5(b).

interests of the states involved and the lawyer's reasonable expectations.<sup>39</sup> Comment 3 to Model Rule 8.5 explains that paragraph (b) is designed to ensure that "any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct."<sup>40</sup> The interpretation and application of Model Rule 8.5, with examples, is further discussed in our hornbook.<sup>41</sup>

Once again, it is important to emphasize that this is not a jurisdictional limitation on disciplinary authority. Model Rule 8.5(a) expressly states that any lawyer licensed or practicing law in a state is fully subject to that state's disciplinary authority.<sup>42</sup> Model Rule 8.5 thus confirms the jurisdictional authority of the particular state to discipline both those lawyers admitted to that state's bar, wherever their conduct may occur, and those lawyers not admitted in state who choose to provide or offer legal services in that state.

In sum, the rules have evolved to acknowledge and embrace the realities of multijurisdictional practice, largely confirming informal and longstanding (if ethically uncertain) practices. At the same time, this evolutionary expansion of lawyer practice authority was accomplished with the simultaneous strengthening and expansion of the disciplinary authority of each jurisdiction of practice.

## II. A STREAMLINED AND PERMISSIVE APPROACH TO LAWYER ADVERTISING, WHILE PROHIBITING DIRECT PERSONAL SOLICITATION

### A. *From 1977 to Today: Streamlining the Regulations on Lawyer Advertising*

When it comes to lawyer advertising, everything—or nearly everything—changed in 1977. The revolution, if it can be called a revolution, came with *Bates v. State Bar of Arizona*,<sup>43</sup> in which the Supreme Court held that commercial speech by lawyers is entitled to meaningful protection under the

39. See, e.g., *In re Disciplinary Action Against Overboe*, 745 N.W.2d 852, 861–62 (Minn. 2008) (holding a lawyer admitted to practice in Minnesota and North Dakota, (1) when he deceptively labeled a personal bank account as a trust account to avoid claims by judgment creditors, the North Dakota rules would apply because the account was in a North Dakota bank and judgment creditors were in North Dakota, but (2) when he made misrepresentations to and failed to cooperate with the Minnesota disciplinary authority, Minnesota rules would apply as the predominant effects were in Minnesota).

40. MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 3.

41. See Sisk, *supra* note 1, § 4-1.6(d) ("Paragraph (b) of Rule 8.5 is not a jurisdictional limitation on disciplinary authority, and indeed paragraph (a) of the same rule confirms that any lawyer licensed or practicing law in a state is subject to that state's disciplinary authority.")

42. MODEL RULES OF PROF'L CONDUCT R. 8.5(a).

43. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

Free Speech Clause of the First Amendment.<sup>44</sup>

Everything that has happened since 1977, including recent revisions to the Model Rules drafted by more than one ABA commission, have been variations on the same theme—that of streamlining restrictions on lawyer advertising down toward the core prohibition on false or misleading statements. At the same time, the bar on direct solicitation of unsophisticated clients through real-time promotions by a lawyer has remained solidly in place, with relatively minor clarifications and sensible exceptions.

That even *Bates* was truly revolutionary, rather than restorative, may be questioned. To be sure, by 1977, most states had adopted an outright prohibition of both solicitation and advertising by lawyers.<sup>45</sup> During the twentieth century, bar associations had succeeded in banning lawyer advertising as crass and commercial, beneath the dignity of the legal professional, and likely to undermine respect for lawyers and for the judicial system.<sup>46</sup> Nonetheless, there is considerable evidence that throughout the nineteenth century in America, lawyer advising was common, accepted, or at least little remarked upon.<sup>47</sup> Indeed, legendary trial lawyer Abraham Lincoln placed an advertisement for his legal services in a local newspaper promising that “all business entrusted to them will be attended to with promptness and fidelity.”<sup>48</sup> Even into the early twentieth century, when the ABA promulgated the first national template for legal ethics through the 1908 Canons of Ethics, lawyer advertising was officially condoned.<sup>49</sup>

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44. *Id.* at 383.

45. See generally James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2484–91 (2008) (discussing the general prohibitions against advertising and solicitation in the ABA's 1908 Canons of Ethics, which were not superseded until 1970 by the 1969 Model Code of Professional Responsibility).

46. See, e.g., *id.* at 2484–86 (explaining how the ABA's 1908 Canons of Ethics “marked a major change in American legal ethics” by prohibiting the previously accepted practice of lawyer advertising because, by the beginning of the 20th century, “it was commonly believed that a lawyer who acted like a tradesman in getting a client . . . would be less likely to act ‘professionally’ in representing that client”).

47. See Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 *N.Y.U. L. REV.* 1084, 1084–85 n.2 (1983) (“Prior to the twentieth century, lawyer advertising was generally considered acceptable.”); William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War To Govern Client Development*, 37 *ARIZ. ST. L.J.* 255, 262 (2005) (noting “[l]awyer advertising was not uncommon in the nineteenth century”).

48. Hornsby, *supra* note 47, at 262 (quoting LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 1 (1980)).

49. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE* 1167–68 (2013–2014).

Through the *Bates* decision in 1977, the Supreme Court began the process of undoing the twentieth century agenda of bar associations to impose legally-enforced rules of advertising etiquette. The Court questioned the assertion that lawyer advertising would diminish the reputation of attorneys, refused to place any weight on professional dignity, and rejected the argument that advertising by lawyers “inevitably will be misleading.”<sup>50</sup> The Court instead concluded that “[a] rule allowing restrained advertising would be in accord with the bar’s obligation to ‘facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.’”<sup>51</sup> Indeed, the Court highlighted the words of an Arizona state court judge who had dissented below, arguing that “the case should [be] framed in terms of ‘the right of the public as consumers and citizens to know about the activities of the legal profession,’ rather than as one involving merely the regulation of a profession.”<sup>52</sup>

In the four decades since *Bates*, the myriad demands and Byzantine style of rules regulating lawyer advertising have been stripped down to the essential of protecting consumers of legal services from false or misleading advertising.

#### B. *The Core Prohibition on False and Misleading Statements About Legal Services*

With the first iteration of the Model Rules of Professional Conduct in 1983, Rule 7.1 established the general standard for all communications by a lawyer about legal services to any listener: statements may not be “false or misleading.”<sup>53</sup> This standard well-comports with the Supreme Court’s ruling in *Bates*, which extended constitutional free speech protection to advertising of legal services and ruled that “[a]dvertising that is false, deceptive, or misleading of course is subject to restraint.”<sup>54</sup>

For a time, both in the Model Rules and even more so in the various state versions of lawyer ethics rules, this simple proposition was accompanied by

50. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368–73 (1977).

51. *Id.* at 377 (quoting MODEL CODE OF PROF’L RESPONSIBILITY, Ethical Consideration 2–1 (AM. BAR ASS’N 1976)).

52. *Id.* at 358 (citation omitted) (quoting *In re Bates*, 555 P.2d 640, 648 (Ariz. 1976) (Holohan, J., dissenting)).

53. MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 (AM. BAR ASS’N 1983) (prohibiting “a false or misleading communication about the lawyer or the lawyer’s services”). In its original version, however, Rule 7.1 went further to offer multiple definitions and examples and warnings about what would be false and misleading. HAZARD, *supra* note 28, § 59.02.

54. *Bates*, 433 U.S. at 383 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72, n.24 (1976)).

sometimes mind-numbing and detailed regulations regarding the mailing of advertising letters, a plethora of confusing and space-consuming disclaimers that had to accompany any advertising, and, especially, suffocating strictures on television advertising. Over time, these have been pruned away in the Model Rules and most states, again by getting back to the basics of *Bates*—that is, preventing false and misleading communications by lawyers about legal services.

### C. *Retreating on Strict Regulation of Direct Mail*

The rules regarding direct mail advertising by lawyers have traveled a rather considerable distance in the decades after the ban on lawyer advertising was lifted in 1977. The full story of this journey, along with the rule changes and court decisions, is set out in our new hornbook.<sup>55</sup>

When state ethics rules were initially revised to permit limited advertising by lawyers, in generally reluctant compliance with the Supreme Court's free speech decision in *Bates*, the newly-allowed forms of communication about legal services generally did not include direct mail to specific individuals. A lawyer's targeting of a direct letter to a potential client was then regarded by many states as carrying the same dangers of invasion of privacy and overreaching as are present with in-person solicitation by lawyers.<sup>56</sup>

Then, in 1988, in *Shapero v. Kentucky Bar Association*,<sup>57</sup> the Supreme Court overturned a state rule that permitted mailing by lawyers to the general public, but prohibited mailings that were directed to a specific recipient thought to need legal services for a particular matter.<sup>58</sup> The Court ruled that "the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable."<sup>59</sup> The *Shapero* Court rejected the analogy of targeted direct-mail to prohibited in-person solicitation of clients, the latter of which involves "the coercive force of the personal presence of a trained advocate" and the "pressure on the potential client for an immediate yes-

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55. See Sisk, *supra* note 1, § 4-2.4(d) (outlining the history of advertising by direct mail following the lift of the advertising ban in 1977).

56. See Steven Wechsler, *Direct Mail Solicitation by Attorneys: A Pragmatic Approach to a New Rule*, 39 SYRACUSE L. REV. 973, 983–94 (1988) (discussing early reaction of organized bar to direct mail, even after *Bates*, with many states and the Model Rule prohibiting targeted mailing as impermissible solicitation).

57. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988).

58. *Id.* at 477–78.

59. *Id.* at 473–74.

or-no answer to the offer of representation.”<sup>60</sup> Reasoning that “the mode of communication makes all the difference,” the Court observed that a letter “can readily be put in a drawer to be considered later, ignored, or discarded.”<sup>61</sup>

Recalcitrant states then imposed rules strictly regulating the allowed contents of direct mail and requiring advance clearance by disciplinary authorities for mailings aimed toward identified persons believed to have specific legal problems.<sup>62</sup> Over time, these too have largely faded away. Preclearance procedures rarely were meaningfully applied and usually accomplished nothing more than increasing the number of documents filed away in state bar file cabinets. Today, mail sent to members of the public generally is regarded as advertising, subject to the basic rule that it not be false or misleading.<sup>63</sup>

#### D. *Pruning Cumbersome Disclaimer Requirements*

In the immediate aftermath of the Supreme Court’s *Bates* ruling upholding the constitutional right of lawyers to advertise, some states imposed the duty to include stringent and often lengthy disclaimers.<sup>64</sup> A few went so far as to force the advertising lawyer to advise readers not to rely on advertisements to make the important choice of a lawyer<sup>65</sup> or discouraging consumers from initiating unwarranted litigation.<sup>66</sup> Because of these

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60. *Id.* at 475 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 642 (1985)).

61. *Id.* at 475–76.

62. See Sisk, *supra* note 1, § 4-2.4(d)(1) (explaining “[s]ome states instituted a clearance procedure for mailings that were addressed to persons or groups who might need specific legal services because of a condition or occurrence known to the lawyer,” while “[o]ther states required the lawyer to submit a copy of the communication to the state bar or supreme court”); Rex R. Perschbacher & Debra Bassett Hamilton, *Reading Beyond the Labels: Effective Regulation of Lawyers’ Targeted Direct Mail Advertising*, 58 U. COLO. L. REV. 255, 258 (1987) (recommending “a pre-filing or preclearance system” that would use “selective prescreening of targeted direct mail advertising” to “prevent the abuses found in targeted direct mail efforts”).

63. See Gregory C. Sisk & Ellen L. Yee, *Lawyer Advertising in Iowa After 2012*, 62 DRAKE L. REV. 549, 551–53 (2014) (describing the abandonment of pre-approval procedures for targeted mailing in Iowa).

64. Jim Rossi & Mollie Weighner, *An Empirical Examination of the Iowa Bar’s Approach to Regulating Lawyer Advertising*, 77 IOWA L. REV. 179, 197–98 (1991).

65. Iowa, for example, required that every lawyer advertisement include this extended disclaimer: “The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.” GREGORY C. SISK & MARK S. CADY, *LAWYER AND JUDICIAL ETHICS: IOWA PRACTICE* § 11:2(c)(4).

66. *Id.*



unwieldy requirements, communication of even basic information generally was limited to traditional forms of advertisement that afforded sufficient space to lay out each of the required disclaimers in the size of type mandated by a rule. Thus, having the law firm or lawyer name appear on the uniforms of a youth baseball team sponsored by the lawyer or firm or otherwise being listed as a contributor to a civic charity was impossible because of the demanding disclaimer requirements.

Today, under the Model Rules, excessive and cumbersome advertising disclaimers are a thing of the past, and lawyer advertising is subject only to the general prohibition on communications that are “false or misleading.”<sup>67</sup> And in *Zauderer v. Office of Disciplinary Counsel*,<sup>68</sup> the Supreme Court emphasized that “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”<sup>69</sup> The Court pointedly rejected the “traditional justification” for prohibiting advertisements suggesting legal action, that is, “the fear that lawyers will ‘stir up litigation.’”<sup>70</sup> Given that litigation is a legitimate and accepted means by which to resolve disputes and vindicate rights in this society, making injured persons aware of their legal rights and thereby facilitating their access to legal redress is a positive public good. Accordingly, the Court held that an attorney could not be prevented from engaging in “truthful and nondeceptive advertising [that] had a tendency to or did in fact encourage others to file lawsuits.”<sup>71</sup>

#### E. *Eliminating Strict Limitations on Broadcast Advertising*

The most constricting—and for a time most persistent—post-*Bates* restriction on lawyer advertising was lodged against the supposed greater dangers of broadcast communications. The complete story of bar regulations on broadcast advertising and the likely invalidity of strictures still imposed by a small number of states is told in our new hornbook.<sup>72</sup>

The State of Iowa, for example, long had a deserved reputation for maintaining exceptionally stringent rules regarding broadcast advertising.

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67. MODEL RULES OF PROF'L CONDUCT R. 7.1 (AM. BAR ASS'N 2018).

68. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

69. *Id.* at 651.

70. *Id.* at 642.

71. *Id.* at 643.

72. See Sisk, *supra* note 1, § 4-2.4(b) (explaining the history of advertisement by broadcast media in the state of Iowa).

Before 2013, the Iowa rules provided that information could be communicated over radio or television “only by a single nondramatic voice, not that of the lawyer, and with no other background sound,” and a television advertisement could not display anything other than the words in print being read by the announcer.<sup>73</sup>

Iowa had justified tight controls on television advertising by lawyers as preventing the negative effects of such advertising on public perceptions of the legal profession.<sup>74</sup> A majority of the Iowa Supreme Court in the 1980s had upheld such restrictions on broadcast lawyer advertising, viewing prohibitions on background sound, visual displays, and dramatic elements as merely removing “the tools which would manipulate the viewer’s mind and will.”<sup>75</sup>

Iowa has now joined the overwhelming majority of states in regarding electronic broadcasts as just another media for lawyer advertising. In 2012, the Iowa Supreme Court accepted the recommendation of a study committee to abandon the severe restrictions on broadcast advertising of lawyer services.<sup>76</sup> Through adoption of the former Comment 3 to Model Rule 7.2, Iowa like most other states now acknowledges that:

Television, the internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, the internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public.<sup>77</sup>

A handful of states continue to impose special restrictions on use of broadcast media for lawyer advertising. Those restrictions range from relatively modest limitations or required disclaimers to an outright ban on use of dramatization. On the modest end of the range, Missouri, Montana,

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73. Sisk & Yee, *supra* note 63, at 567–68 (quoting IOWA RULES OF PROF'L CONDUCT R. 32:7.2(e)).

74. See Rossi & Weighner, *supra* note 64, at 222–23 (describing an Iowa State Bar Association study which concluded that “the public and the legal profession would benefit from ‘dignified’ lawyer advertising”); John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 772–73 (1997) (discussing Iowa Bar Association studies supporting “the proposition that television commercials have a negative impact on the public’s perception of the legal profession”).

75. *Comm. on Prof'l Ethics & Conduct v. Humphrey*, 355 N.W.2d 565, 571 (Iowa 1984), *vacated*, 472 U.S. 1004 (1985).

76. Sisk & Yee, *supra* note 63, at 560–64.

77. IOWA RULES OF PROF'L CONDUCT R. 32:7.2 cmt. 3 (2018).

Nevada, New York, North Carolina, Rhode Island, and Utah require disclosure if actors are used to portray a lawyer or client or if fictionalized scenes are depicted,<sup>78</sup> with Florida also barring use of any “celebrity” spokesperson.<sup>79</sup> Going a step further, Arizona, Louisiana, Pennsylvania, South Dakota, and Texas demand that the person portraying a lawyer on electronic media actually be a lawyer at the advertising law firm.<sup>80</sup> On the far end of the spectrum, Arkansas and New Jersey appear to stand alone in prohibiting any “dramatization.”<sup>81</sup> New Jersey broadly outlaws use of “drawings, animations, dramatizations, music, or lyrics” in lawyer advertising,<sup>82</sup> perhaps the most intrusive regulation of broadcast media use by lawyers that remains in effect in any state.

The most restrictive jurisdictions, however, are outliers, both in terms of numbers and vulnerability to legal challenge. As then-dissenting Iowa Supreme Justice Larson described “the restrictions on *technique*” imposed by such rules as a prohibition on dramatization, this is “in fact a prescription for dullness.”<sup>83</sup> The only apparent justifications for excluding dramatization from broadcast advertising are to preserve the supposed “dignity” of the profession or to prevent an objectionable appeal to emotion.

Whether an insistence upon “dignity” in lawyer advertising could survive the extension of constitutional free speech protection to lawyer advertising is doubtful.<sup>84</sup> In *Zauderer*, the Supreme Court commented:

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78. MO. RULES OF PROF'L CONDUCT R. 4-7.1(i) (2019); MONT. RULES OF PROF'L CONDUCT R. 7.1(i) (2017); NEV. RULES OF PROF'L CONDUCT R. 7.2(b) (2018); N.Y. RULES OF PROF'L CONDUCT R. 7.1(c)(3) (2017); N.C. RULES OF PROF'L CONDUCT R. 7.1(b) (2017); R.I. RULES OF PROF'L CONDUCT R. 7.1(c) (2017); UTAH RULES OF PROF'L CONDUCT R. 7.2(b) (2018).

79. FLA. RULES OF PROF'L CONDUCT R. 4-7.15(c) (2019).

80. ARIZ. RULES OF PROF'L CONDUCT R. 7.2(e) (2019); LA. RULES OF PROF'L CONDUCT R. 7.2(c)(1)(j) (2016); PA. RULES OF PROF'L CONDUCT R. 7.2(f) (2018); S.D. RULES OF PROF'L CONDUCT R. 7.2(h) (2019); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.02(a)(7), 7.04(g), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A. (Tex. State Bar R. art. X, § 9).

81. ARK. RULES OF PROF'L CONDUCT R. 7.2(e) (2019); N.J. RULES OF PROF'L CONDUCT R. 7.2(a) (2018).

82. N.J. RULES OF PROF'L CONDUCT R. 7.2(a) (2018).

83. *Comm. on Prof'l Ethics & Conduct v. Humphrey*, 355 N.W.2d 565, 572 (Iowa 1984) (Larson, J., dissenting), *vacated*, 472 U.S. 1004 (1985).

84. See HAZARD, *supra* note 28, at § 59.09 (saying that the “undignified” standard is the “kind of vague and subjective criteria [that] could not long survive the Supreme Court’s application of the commercial speech doctrine to lawyer advertising”); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 454–57 (2006) (criticizing the “dignity of the profession” rationale for restricting lawyer advertising and saying that “[t]he regulation of lawyer advertising on the grounds that it is demeaning to the profession raises profound First Amendment difficulties”).

More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights.<sup>85</sup>

In the prominent decision of *Alexander v. Cahill*,<sup>86</sup> the United States Court of Appeals for the Second Circuit invalidated a New York regulation prohibiting advertisements that rely on irrelevant techniques, saying that “[q]uestions of taste or effectiveness in advertising are generally matters of subjective judgment.”<sup>87</sup> A “dignity” stipulation might also prove vulnerable to challenge as being too vague and subjective to serve as a legitimate standard by which to police speech by lawyers.<sup>88</sup>

As for adjuring any emotional appeal, such a vague justification is difficult to reconcile with the general purpose of advertising and the right to raise difficult subjects. Any effective marketing strategy is designed to elicit a favorable response from the listener and thus to produce a positive sentiment about the lawyer who is the subject of the advertisement. A lawyer should not worry that she may violate an ethical prohibition through efforts to encourage the public (by appropriately non-misleading and verifiable communications) to feel good about the advertising lawyer. Nor should a lawyer be inhibited from raising sensitive topics when communicating with the public about legal services, which may include making people aware of potential harm that they may suffer from defective products, reminding members of the public of their civil rights and the dangers of governmental or societal oppression, or describing the nature of potential or pending litigation on controversial subjects. Even if the presentation of this information has the effect of provoking strong emotional reactions in some listeners, that potential response cannot be the measure of what is permissible.

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85. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647–48 (1985).

86. *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010).

87. *Id.* at 93.

88. See ROTUNDA & DZIENKOWSKI, *supra* note 49, at 1211–12 (saying efforts to prohibit “undignified” lawyer advertising “are typically unconstitutional and fruitless, because questions of effectiveness and taste in advertising are matters of ‘speculation and subjective judgment’”).

F. *Post-2000 Acceleration of Streamlining and Consolidation of Rules on Communication About Legal Services*

Since the turn of the century, the American Bar Association has continued the trend of streamlining the regulations of lawyer advertising and other communications about legal services.

Most significant, and most welcome, the ABA's Ethics 2000 Commission<sup>89</sup> pared the keynote Model Rule 7.1 down to two sentences, of which the first—that the lawyer shall not make a “false or misleading communication” about legal services—is the essence.<sup>90</sup> As Professors Geoffrey Hazard and William Hodes and attorney Peter Jarvis put it, “it would have been preferable to strip Rule 7.1 down to the essential definition of false or misleading speech” from the beginning of the Model Rules era.<sup>91</sup> Fortunately, just that was accomplished when the ABA in 2002 approved the Ethics 2000 recommendation and transferred elaboration about what is false and misleading from the black-letter rule into the comments.<sup>92</sup>

And to take streamlining a major step further, just this past summer of 2018, the ABA adopted the proposals on lawyer communications of the ABA Standing Committee on Ethics and Professional Responsibility that was based on recommendations from the Association of Professional Responsibility Lawyers.<sup>93</sup> Lucian Pera, the chair of the ABA's Center for Professional Responsibility, explained the new simplified format as a response to a “breathtaking variation in advertising rules” in the states.<sup>94</sup> What were five rules has been condensed into three rules,<sup>95</sup> such as by

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89. See 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 1.18 (4th ed. 2018) (describing the ABA's Ethics 2000 project and the changes proposed and adopted to the Model Rules).

90. MODEL RULES OF PROF'L CONDUCT R. 7.1 (AM. BAR ASS'N 2018).

91. HAZARD, *supra* note 28, § 59.02.

92. *Id.*

93. Mindy Rattan, *ABA Revamps Lawyer Ad Rules, But Critics Want More*, 34 ABA/BNA LAWS. MANUAL ON PROF'L CONDUCT 447, 447–48 (2018); *ABA House Approves Changes in Membership Dues, Rules for Lawyer Advertising*, AM. BAR ASS'N (Aug. 6, 2018) [https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/aba\\_house\\_approvesc/](https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/aba_house_approvesc/) [<https://perma.cc/Z7JT-H4RD>].

94. Lee Rawles, *ABA Model Rules on Lawyer Advertising to be Modernized*, ABA J., (Aug. 6, 2018, 4:23 PM), [http://www.abajournal.com/news/article/model\\_rules\\_on\\_lawyer\\_advertising\\_to\\_be\\_modernized](http://www.abajournal.com/news/article/model_rules_on_lawyer_advertising_to_be_modernized) [<https://perma.cc/EFM6-FDV5>].

95. See MODEL RULES OF PROF'L CONDUCT R. 7.1–7.3 (streamlining the previous version of lawyer advertising regulations); see also Rawles, *supra* note 94 (stating the ABA House of Delegates passed Resolution 101, condensing Rules 7.1 through 7.5, as such “amendments were necessary to clarify and simplify” the standards governing lawyer advertising).

moving directions on appropriate firm names from a separate rule into comments to the cornerstone rule<sup>96</sup> and integrating regulations on specialization in a particular field into a general rule on lawyer advertising.<sup>97</sup>

With these latest changes, the focus on the false-and-misleading standard for enforcement is ever more plain. As Professor Ronald Rotunda explained the 2018 pruning, if there is any problem with lawyer advertising, “it has to do with misleading speech. If the disciplinary authorities focused their limited resources in that area, clients would be better off.”<sup>98</sup>

#### G. *Maintaining and Clarifying the Ban on Direct Solicitation by Lawyers of Clients*

In contrast with liberalized advertising rules over the past several decades, the prohibition on personal solicitation of prospective clients remains nearly absolute.<sup>99</sup> While the definition has become more targeted and common-sense (and informally conventional) exceptions have been clarified, the ban on direct personal solicitation of ordinary consumers of legal services remains solidly in place. A more detailed explanation of this solicitation ban, its purposes and narrow exceptions, may be found in our new hornbook.<sup>100</sup>

Shortly after *Bates*, the Supreme Court strongly affirmed the constitutional validity of the traditional ban on personal solicitation in its 1978 decision in *Ohralik v. Ohio State Bar Association*.<sup>101</sup> The case involved solicitation by a lawyer of an injured person in a hospital shortly after an accident—the classic “ambulance chasing” scenario.<sup>102</sup> Subsequently, in *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court again characterized face-to-face solicitation as “a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud.”<sup>103</sup>

96. See MODEL RULES OF PROF'L CONDUCT R. 7.1 cmts. 5–8 (replacing previous Rule 7.5).

97. See *id.* R. 7.2(c) (replacing previous Rule 7.4).

98. David L. Hudson Jr., *Drastic Change Needed in “Outdated and Unworkable” Lawyer Advertising Rules, Says Report*, ABA J. (Oct. 2015), [http://www.abajournal.com/magazine/article/all\\_around\\_for\\_streamlining](http://www.abajournal.com/magazine/article/all_around_for_streamlining) [<https://perma.cc/XQU8-96BJ>] (quoting Professor Ronald D. Rotunda, who served as a committee member of the Association of Professional Responsibility Lawyers during the amending process for Rule 7).

99. See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 2 (explaining that a lawyer's personal solicitation of potential clients is “overreaching,” as such conduct “subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter”).

100. See Sisk, *supra* note 1, § 4-2.5 (discussing the prohibition on direct solicitation).

101. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449, 457–67 (1978).

102. *Id.* at 449–50, 459 n.16.

103. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985) (citing *Ohralik*, 436 U.S. at 464–65).

The “coercive force of the personal presence of a trained advocate” and the “pressure on the potential client for an immediate yes-or-no answer to the offer of representation” justifies strong controls on this form of solicitation.<sup>104</sup>

Forty years later, the Model Rules maintain this prohibition. As revised just last year, Model Rule 7.3(b) states that “[a] lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain.”<sup>105</sup>

In 2012, the Ethics 20/20 Commission<sup>106</sup> revisions added a comment emphasizing that it is the “targeted” nature of a communication which is both “initiated by the lawyer” and “directed to a specific person” that triggers the ban.<sup>107</sup> In 2018, the ABA elevated that clarifying definition into the black-letter of Rule 7.3.<sup>108</sup>

Accordingly, as said in Comment 2 to Model Rule 7.3, whenever communication is in a form that involves a direct back-and-forth exchange by the lawyer with a prospective client—what the comment describes as “the private importuning of the trained advocate in a direct interpersonal encounter”—the “situation is fraught with the possibility of undue influence, intimidation, and overreaching.”<sup>109</sup>

Under what is now Model Rules 7.3(b)(1) and (2), communications with certain categories of persons are exempted from the proscription on direct solicitation, namely another “lawyer” and those with whom the lawyer “has a family, close personal, or prior business or professional relationship.”<sup>110</sup> Not only is risk of abuse attenuated in such circumstances, the exceptions comport with real-world expectations and undoubtedly were often invoked even before the Model Rules made them explicitly available.

From the first incarnation of the Model Rules in 1983, the solicitation ban was not applied to the lawyer’s family or prior professional relationships.<sup>111</sup> As proposed by the Ethics 2000 Commission, the ABA in

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104. *Id.* at 642.

105. MODEL RULES OF PROF’L CONDUCT R. 7.3(b) (AM. BAR ASS’N 2018).

106. For a description of the ABA’s Ethics 20/20 project and the changes proposed and adopted to the Model Rules, see HAZARD, *supra* note 89, § 1.19.

107. See HAZARD, *supra* note 28, § 61.02 (describing the addition of Comment 1 to Model Rule 7.3, as proposed by the Ethics 20/20 Commission).

108. MODEL RULES OF PROF’L CONDUCT R. 7.3(a).

109. *Id.* R. 7.3 cmt. 2.

110. *Id.* R. 7.3(b)(1)–(2).

111. ROTUNDA & DZIENKOWSKI, *supra* note 49, at 1233–35.

2002 added “close personal” relationships to those of “family.”<sup>112</sup> A rule which said otherwise would likely be ignored. A lawyer hardly may be expected to remain silent about his professional work or to refuse to offer suggestions about legal problems to those persons in the lawyer’s own family or the lawyer’s inner social circle.

Although it might have always been assumed that the direct solicitation rule had no purchase when one lawyer talks with another lawyer, such an explicit exclusion was not added to Model Rule 7.3 until 2002.<sup>113</sup> When one lawyer offers legal services to another lawyer, the familiarity of the prospective client with the nature of legal practice greatly reduces the risk that the recipient of the communication will be misled or improperly influenced in the choice of counsel.

As part of the latest 2018 revisions and streamlining of the Model Rules on lawyer communications about legal services, a new exclusion was added: “[P]erson[s] who routinely uses for business purposes the type of legal services offered by the lawyer.”<sup>114</sup> As a matter of commonsense in the modern business world, a business person or entity that “routinely uses” a specific type of legal services generally would be in a superior and informed position to evaluate the quality of offered legal services. In this way too, the most recent revision harkens back to the purpose for the direct solicitation ban as approved by the Supreme Court forty years ago in *Ohralik*—to protect persons who are unsophisticated, injured, or otherwise distressed from “the overtures of an uninvited lawyer”<sup>115</sup> may be intrusive, an invasion of privacy, and directed at a person vulnerable to improper influence.

In sum, under the post-2000 Model Rules, lawyer advertising is forthrightly accepted (even if not universally admired). Regulation of advertising is now more sharply focused on preventing false or misleading communications. By contrast, although more carefully defined and increasingly targeted to the evil of direct solicitation of vulnerable persons, the ban on direct solicitation by lawyers of ordinary persons continues in force.

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112. *Id.* at 1228–30; Carl A. Pierce, *Ethics 2000 and the Transactional Practitioner*, 3 TRANSACTIONS: TENN. J. BUS. L. 7, 23 (2002).

113. ROTUNDA & DZIENKOWSKI, *supra* note 49, at 1228–30. Surprisingly, even today, “more than a third of the states include no exception from the direct solicitation rule for communications to other lawyers.” Sisk, *supra* note 1, § 4-2.5(b)(1).

114. MODEL RULES OF PROF'L CONDUCT R. 7.3(b)(3).

115. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978).



III. DESIGNING EXCEPTIONS TO CONFIDENTIALITY THAT PRESERVE  
THE CORE PRINCIPLE AND DO NOT UNDERMINE  
ATTORNEY-CLIENT PRIVILEGE

A. *The Principle of Attorney-Client Confidentiality and Recent Clarifications or  
Expansions of Exceptions to Confidentiality*

The confidential nature of the attorney-client relationship is the foundation for everything that the lawyer does. If the lawyer is to effectively and fairly represent the client—rich or poor, confident or vulnerable, well-educated or working class, sophisticated in legal affairs or unfamiliar with the legal system—the lawyer must be able to instill trust. Confidentiality is the cornerstone of that trust.

If the lawyer is to be able to counsel clients to do the right thing, legally and morally, the lawyer must have full access to information from the client. The free flow of information depends on the assurance of confidentiality. Thus, the traditional ethical directive to the lawyer to maintain the client's confidences and the additional security given to attorney-client communications through the testimonial/evidentiary attorney-client privilege fortify the vital professional purposes of building a strong attorney-client relationship and ensuring that the lawyer obtains the information necessary to serve the client well.

The legal profession has always jealously guarded the sacred principle of confidentiality. Yet confidentiality has never been absolute. When the client abuses the attorney-client relationship by seeking legal advice for the purpose of defrauding another or violating the law, for example, the privilege otherwise attaching to client communications is lost and the lawyer may be required to reveal those discussions by court order or subpoena (whether or not the lawyer is permitted to voluntarily disclose that information).<sup>116</sup> In addition, imperative reasons of public interest may justify disclosure of client information as necessary, for example, to prevent serious harm to another.

Since the turn of the century, the American Bar Association has clarified

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116. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.").

the breadth of confidentiality in Model Rule 1.6,<sup>117</sup> as well as articulated or clarified certain exceptions to the lawyer's duty to maintain client confidentiality. In this article, I focus on three of those post-2000 exception drafts: (1) the 2000 clarification that the exception allowing disclosure to prevent bodily harm does not turn on whether the client was involved in a crime and does turn on the lawyer's reasonable certainty that the harm will occur; (2) the 2003 adoption of disclosures to both prevent future economic harm and mitigate or rectify past economic harm; and (3) the 2012 adopted of an exception to allow firms to resolve conflicts of interest when the client would not be prejudiced by the disclosure.<sup>118</sup> As explained below, properly understood and viewed in the context of human realities, conventional practices, or longstanding limitations on the attorney-client privilege, these three changes should not undermine the core of the confidentiality principle.

B. *The Permission to Disclose Confidential Information to Prevent Reasonably Certain Death or Substantial Bodily Harm*

Professor Monroe Freedman, who was a nationally-recognized zealous advocate on behalf of the principle of confidentiality and a strong opponent of most proposals to carve out exceptions to confidentiality, nonetheless long argued for broad discretion by a lawyer to reveal confidential information when necessary to prevent a person's death or serious bodily harm:

The most compelling reason for a lawyer to divulge a client's confidence is to save a human life. There are two reasons to require divulgence in such a case. First, the value at stake, human life, is of unique importance. Second, the occasions on which a lawyer's divulgence of a client's confidence is the only thing that stands between human life and death are so rare that a requirement of divulgence would pose no threat to the systemic value of lawyer-client trust.<sup>119</sup>

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117. *Id.* R. 1.6.

118. For the legislative history of these three changes, see generally ROTUNDA & DZIENKOWSKI, *supra* note 49, at *Rule 1.6 Authors' 1983 Model Rules Comparison*.

119. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 102-03 (Matthew Bender 1990); see also Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict Between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 LOY. L.A. L. REV. 1761, 1767 (1996) ("[S]aving a life takes precedence over preserving a confidential communication."); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 923-24, 940-48 (1995)

As followed in most states, Model Rule 1.6(b)(1) now authorizes, but does not require, the lawyer to reveal confidential information “to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.”<sup>120</sup>

Through the ABA’s 2002 standard of the lawyer’s “reasonable belief” as to whether disclosure is necessary to prevent death or substantial bodily harm, the rule directs that the circumstances be evaluated from the perspective of the lawyer at the time and not through hindsight distorted by the unfortunate tragedy that death or substantial bodily harm did subsequently occur.

When a client makes threatening statements about a third-party to his lawyer—comments typically made in a burst of anger or to vent stress<sup>121</sup>—the lawyer in most circumstances should not file a report with law enforcement, which would create burdens on law enforcement, impose unnecessary concerns or fears on others, and undermine the lawyer-client relationship. While the lawyer should not let any threat of violence pass without cautioning the client and receiving reassurance from the client that no actual harm is intended, the permission to disclose is reserved for those situations in which a reasonable lawyer would believe, based upon familiarity with the client and knowledge of the circumstances, that this threat is something more than the common episode of client frustration being vehemently expressed.

Perhaps the most common scenario implicating this exception will not be when a client genuinely threatens physical harm to another person, but rather when the client may be a danger to herself. Lawyers in such situations should be given ample room to make judgments about how best to evaluate the person, how to involve other professionals better able to judge the mental state of the client, and how to preserve the lawyer-client relationship if possible. Moreover, mental health professionals report that it is notoriously difficult to predict whether an individual actually will carry through on a threat of self-harm.

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(discussing the adopted version of Rule 1.6 which permitted disclosure of confidential information to the extent necessary to prevent the client from committing a crime that—based on the lawyer’s belief—is likely to result in substantial bodily harm or death).

120. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1).

121. *See In re Grand Jury Investigation*, 902 N.E.2d 929, 933 (Mass. 2009) (noting clients need to be given “breathing room to express frustration and dissatisfaction with the legal system and its participants” and that the “expression of such sentiments . . . may serve as a springboard for further discussion regarding a client’s legal options”).

It already is difficult to encourage lawyers to undertake representation of persons with diminished capacity or who are emotionally vulnerable, even though they may be the ones who most desperately need legal assistance. Those heroic lawyers, often in legal aid offices, who represent the most emotionally troubled and disadvantaged in our society, should not be second-guessed by disciplinary authorities for what in hindsight might appear to be a less than perfect handling of a thorny client representation.

C. *The Permission to Disclose Confidential Information to Prevent, Mitigate, or Rectify Economic Harm Involving Abuse of the Attorney-Client Relationship*

Subparagraphs (b)(2) and (b)(3) of Model Rule 1.6 are among the most recent and have been among the more controversial of the exceptions to confidentiality. These two overlapping provisions authorize the disclosure of confidential information when the lawyer reasonably believes such revelation is necessary, not only to prevent, but also to mitigate or rectify reasonably certain and substantial injury to the financial or property interests of others caused by the client's fraud or crime and in furtherance of which the lawyer's services were used.<sup>122</sup>

These straightforwardly are "whistle-blower" provisions. In the narrow circumstances of client crime or fraud to which these provisions apply, the lawyer's authority to disclose the information necessary to prevent economic harm generally runs directly adverse to the client's interest and in favor of third persons outside the attorney-client relationship. Because lawyers rightly resist being placed in the position of adjudging their clients guilty of misconduct and then turning the clients in to the authorities or another party, any provision that appears to introduce such an expectation naturally will meet with resistance from large segments of the practicing bar.

The controversy surrounding these provisions was illustrated by their tenuous reception by the American Bar Association. In 2001, proposed paragraph (b)(2) was soundly rejected by a substantial margin of the ABA's House of Delegates, in the wake of which, proposed paragraph (b)(3) was then withdrawn.<sup>123</sup> At the August 2003 meeting of the House of Delegates, paragraphs (b)(2) and (b)(3) were reconsidered and then adopted by the slim

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122. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)-(3).

123. See HAZARD, *supra* note 89, §§ 1.18, 10.34 (noting (b)(2) "was so roundly defeated in 2001 that a related second proposal . . . was withdrawn by the Commission as similarly doomed"); see generally HAZARD, *supra* note 28, § 49.06.

margin of 218–201.<sup>124</sup> In fact, before the narrow approval of paragraph (b)(3) in 2003 after its withdrawal in the face of certain defeat only two years prior, the ABA had twice previously (in 1983 and 1991) turned away similar proposals to authorize disclosure of confidential information to rectify financial injury from past wrongdoing.<sup>125</sup> The impetus for the reversal of position by the ABA in 2003 lay in the corporate scandals of Enron, WorldCom, and Tyco, in which lawyers failed to prevent and even facilitated financial irregularities.<sup>126</sup>

“Even before the ABA adoption of subparagraph (b)(3) in 2003, eighteen states permitted disclosure of client confidences to correct past fraudulent or criminal harm.”<sup>127</sup> “As of 2015, about two-thirds of the states have incorporated subparagraph (b)(3) or something like it into their respective ethical regimes.”<sup>128</sup>

Subparagraph (b)(2) of [Model] Rule 1.6 is the *prevent-future-economic-harm exception* to confidentiality, authorizing the lawyer to disclose confidential information when the lawyer reasonably believes it necessary “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”<sup>129</sup>

As a future-oriented measure, subparagraph (b)(2) is not a meaningful departure from past professional expectations. Disciplinary Rule 4–101(C)(3) of the former Model Code of Professional Responsibility provided that “[a] lawyer may reveal . . . [t]he intention of his client to

124. *Conference Report: ABA Annual Meeting, Model Rules: ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosure*, 19 ABA/BNA LAWS. MANUAL ON PROF'L CONDUCT 467, 467 (2003).

125. See Strassberg, *supra* note 119, at 923–24, 939–40 (noting the ABA House of Delegates intended to limit the scope of exceptions to Model Rule 1.6).

126. See HAZARD, *supra* note 89, § 1.18 (“Most conspicuous were the collapse of the Enron Corporation and that of Worldcom Incorporated, which became the two largest bankruptcies in U.S. history.”).

127. Sisk, *supra* note 1, § 4-6.6(d)(1); E. Norman Veasey, *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. 1, 18 (2002).

128. Sisk, *supra* note 1, § 4-6.6(d)(1); see also *Comparison of State Confidentiality Rules, ABA Model Rule 1.6 (b) (2) and (3): Revealing Confidential Information in Cases of Financial Harm*, AM. B. ASS'N (Sept. 29, 2017), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_6b2\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6b2_3.pdf) [https://perma.cc/7NAL-45SR] (comparing state confidentiality rules).

129. Sisk, *supra* note 1, § 4-6.6(d)(1); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (AM. BAR ASS'N 2018).

commit a crime and the information necessary to prevent the crime.”<sup>130</sup> Although subparagraph (b)(2) of Model Rule 1.6 permits disclosure to prevent fraudulent, as well as criminal, conduct, the kind of deliberate misrepresentation that constitutes fraud almost invariably constitutes criminal behavior as well. Importantly, because subparagraph (b)(2) permits disclosure only when the lawyer’s services have been used “in furtherance” of the crime of fraud, this provision is somewhat narrower than former Disciplinary Rule 4–101(C)(3), which appeared to permit disclosure to prevent a future crime whether or not the attorney-client relationship had been abused (a position still taken in about one-third of the states).

Subparagraph (b)(3) of Model Rule 1.6 is the *rectify-past-economic-harm exception* to confidentiality, authorizing the lawyer to disclose confidential information when the lawyer reasonably believes it necessary “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”<sup>131</sup> The very strict standards for application of this rule, from the careful language in the text, are emphasized in our new hornbook.<sup>132</sup>

By authorizing a lawyer to reveal confidential information not only to prevent future financial harm by fraud or crime, but also to uncover past wrongdoing by the client during the course of the representation, subparagraph (b)(3) is a new entry into the exceptions to confidentiality that are recognized in the Model Rules.

The Code of Professional Responsibility did not permit a lawyer to (voluntarily) disclose confidential information about a client’s past wrongdoing, whether the misconduct caused economic harm or not and whether the behavior was criminal or not. Indeed, when a client confessed to a lawyer that he had committed a past wrong, criminal or civil, the protection of confidentiality had been at its zenith (and still today remains absolute in most circumstances where the client has not also made actual use of the attorney-client relationship to advance the illegitimate scheme).

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130. MODEL CODE OF PROF’L RESPONSIBILITY, DR 4–101(C)(3) (AM. BAR ASS’N 1980) (footnote omitted).

131. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(3).

132. See Sisk, *supra* note 1, § 4-6.6(d)(2) (discussing the “exacting prerequisites” under which a lawyer may reveal information subject to attorney-client privilege).

Yet subparagraph (b)(3) is not wholly unprecedented because its authorization of disclosure runs parallel to the longstanding crime-fraud exception to the attorney-client privilege.<sup>133</sup>

If rather than seeking legitimate legal advice, the client solicits information and services from the lawyer in order to facilitate criminal or fraudulent conduct, the attorney-client privilege is forfeited. “It is a mistaken notion to think that an attorney has the right to assist in the perpetration of a fraud, and a mistaken notion to think that one having in mind the perpetration of a fraud or a crime can safely entrust this knowledge to an attorney any more than to anybody else.” When the client is engaged in criminal or fraudulent conduct, and is using legal services in an effort to advance or conceal that behavior (with or without the attorney’s knowledge), the illegitimacy of the objective prevents formation of an authentic attorney-client relationship with the attendant protection of the privilege. Importantly, for the privilege to be lost, the client must pervert the attorney-client relationship toward the proscribed end.<sup>134</sup>

The alignment between the confidentiality and privilege exceptions is further confirmed by the careful restriction of the permission to disclose in both subparagraphs (b)(2) and (3) to those situations in which the lawyer’s services were or are being used “in furtherance” of the client’s crime or fraud. Still, the crime-fraud exception to the attorney-client privilege remove[s] the protection of the privilege when invoked as an objection to an inquiry from others . . . but d[oes] not in itself allow or impose any duty on the lawyer to blow the whistle on the client.<sup>135</sup>

Moreover, as discussed on the following page, when this provision is read together with another provision of the Model Rules, the provisions for disclosure to prevent and rectify economic harm “may be elevated from the permissive into the mandatory category, thus introducing a new obligation for the lawyer to disclose client confidences, even without being asked.”<sup>136</sup>

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133. *Id.* § 4-6.6(d)(1); *see also id.* § 4-6.3(c)(1) (discussing the crime-fraud exception to the attorney-client privilege).

134. *Id.* § 4-6.3(c)(1) (footnotes omitted); *see also Zacharias, supra* note 20, at 78 (“The theory of the crime-fraud principle is that a client who uses a lawyer to further an ongoing or future crime is not, in fact, using the lawyer as a lawyer.”).

135. Sisk, *supra* note 1, § 4-6.6(d)(1).

136. *Id.*

Read and applied separately, the exceptions to confidentiality set forth in Model Rule 1.6(b) are entirely permissive in nature, as indicated by the deliberate use of the word “may.” . . .

However, those permissive provisions in Rule 1.6 must now be read together with Rule 4.1(b) of the Model Rules . . . which forbids a lawyer from knowingly “fail[ing] to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” The duty imposed in Model Rule 4.1(b) is expressly mandatory in nature, but the scope of that duty has been limited by confidentiality. [Model] Rule 4.1(b) states that revelation is not required when “disclosure is prohibited by Rule 1.6.” Yet precisely because subparagraphs (b)(2) and (3) of [Model] Rule 1.6 now *do* authorize revelation of confidential information to prevent or rectify economic harm caused by fraud or crime, disclosure is no longer “prohibited” by Rule 1.6 when those exceptions to confidentiality are triggered.

In other words, with the amendments to [Model] Rule 1.6(b) that were approved by the American Bar Association in 2003, confidentiality no longer stands as an obstacle to the duty to disclose under Rule 4.1(b), at least under certain (perhaps most) circumstances. As Professors Ronald Rotunda and John Dzienkowski explain: “When Rule 4.1(b) is mandatory unless limited by Rule 1.6, the expansion of permissive disclosure in Rule 1.6 will lead to mandatory disclosure under Rule 4.1(b) to third persons in the context of financial crimes likely to cause substantial injury.”

Accordingly, when the stringent requisites for both [Model] Rule 1.6(b)(2) or (3) *and* Rule 4.1(b) are present in a case, the lawyer is *required*, and not merely authorized, to make the disclosure. Somewhere in the combined operation of subparagraphs (b)(2) and (3) of Rule 1.6 and of Rule 4.1(b) may be found a newly vitalized and mandatory duty to disclose information about client fraud or crime . . . .<sup>137</sup>

Because this area of professional responsibility is still evolving and the parallel nature of these rules is uncertain, we address this problem at greater length in our hornbook.<sup>138</sup>

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137. *Id.* § 4-6.6(d)(3) (footnotes omitted); MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (AM. BAR ASS'N 2018); *see also* Sisk, *supra* note 1, § 4-11.2(c) (“Accordingly, ever fewer circumstances remain under which the lawyer’s duty in Rule 4.1(b) to disclose information to avoid assisting client crime or fraud would be constrained by a conflicting duty to maintain client confidences.”).

138. Sisk, *supra* note 1, §§ 4-6.3(c)(1), 4-6.6(d)(1), 4-6.6(d)(3).



D. *The Permission to Disclose Confidential Information to Detect and Resolve Conflicts of Interest*

As the most recent change to the exceptions to confidentiality adopted by the ABA in 2012, Model Rule 1.6(b)(7) authorizes the lawyer to use confidential information “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”<sup>139</sup>

This revision simply expresses what had always been implicit. While this exception facilitates a lawyer’s efforts to identify conflicts of interest when the lawyer is switching firms or when two firms are considering a merger, the permission to use confidential information is limited in content and strictly restricted to instances where the client would not be harmed. Thus, while the lawyer ordinarily does not need to obtain client consent to disclose such basic information as the client’s identity and the type of matter involved, the information disclosed should be quite limited and may be used only to detect and resolve conflicts.

Moreover, even though the other lawyers with whom the information is shared are also bound to protect its further dissemination, the lawyer may not share information if the attorney-client privilege would be compromised or if the client’s interests would be harmed. Thus, if a client has shared sensitive information such that even a summary of the client matter would be embarrassing or could be used against the client, then the limited permission to use the information in the rule is withdrawn.

E. *The Continuing and Independent Force of the Attorney-Client Privilege*

Understanding that the attorney-client privilege is designed to provide an immunity from legally-compelled processes to provide evidence or testimony,<sup>140</sup> the exceptions to confidentiality set forth in the Model Rules that allow sharing of certain information are *not* exceptions to the privilege.

That a lawyer may be permitted under the rules to divulge client confidences does not necessarily mean that the lawyer may be called as a

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139. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.6(b)(7).

140. See 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES 52 (Thomson-West 2012) (explaining when the elements of the privilege have been satisfied and no exception to the privilege applies, “communications between the attorney and client will be protected” and further that “this protection is absolute”).

witness in a legal proceeding or otherwise be required to provide evidence that would be admissible against the client. The exceptions in the ethics rules do not and cannot direct introduction of attorney-client communications into evidence in any proceeding or allow inquiry about such communications through any legally-compelled process. Unless an exception to confidentiality under the rules is co-extensive with a recognized exception to the attorney-client privilege, the lawyer is authorized by a confidentiality exception in the rules to disclose information only in the manner and to the extent necessary to prevent or correct the harm or achieve the other stated purpose—but not to testify or give evidence against the client.

Two not-so-hypothetical scenarios serve to illustrate the point that the exceptions to confidentiality in the rules (allowing sharing of confidential client information) may or may not correspond to exceptions to the attorney-client privilege (allowing testimony or evidence about lawyer-client communications):

First, suppose that a lawyer learned from a confidential dialogue with his client that the client intends to commit a violent attack on someone, but the client has not used legal advice in furtherance of that unlawful objective so as to vitiate the privilege. As discussed above, under Rule 1.6(b)(1) of the Model Rules, the lawyer would be permitted to disclose the information if the anticipated attack were reasonably certain to result in death or substantial bodily harm. After revealing the planned attack in a manner designed to prevent the harm, the lawyer would not be free nor could he be compelled to testify as a witness against the client in a subsequent criminal prosecution. The testimonial/evidentiary privilege would remain intact. The lawyer might be permitted (and perhaps required in some states) to share information gleaned from attorney-client communications with the target of the planned attack or with law enforcement. But the privilege against introduction of the lawyer's revelation into evidence would not be abrogated.

In *Newman v. State*,<sup>141</sup> a lawyer in a divorce and child custody matter disclosed his client's threats either to kill her own children and frame her estranged husband for the murder or to hire a hitman to kill her husband, relying on the ethics rule permitting disclosure of confidential information

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141. *Newman v. State*, 863 A.2d 321 (Md. 2004).

to prevent death or substantial bodily harm.<sup>142</sup> At the subsequent criminal prosecution of the woman for conspiracy to commit murder and other felonies, the trial court—over objections—required the lawyer to testify against his former client, relating what he had disclosed to prevent the criminal harm (and more).<sup>143</sup> On appeal, the Maryland Court of Appeals correctly ruled that the lawyer’s disclosure under the ethics rule exception to confidentiality did not defeat the defendant’s assertion of attorney-client privilege at the criminal trial nor did the crime-fraud exception apply because the lawyer’s legal advice was not used in furtherance of any criminal conduct.<sup>144</sup> Because the lawyer therefore should not have been required to testify, the conviction was reversed and the case remanded for a new trial.<sup>145</sup> As the Maryland court ruled in *Newman v. State*, a disclosure under the ethics rule:

is not sufficient to obviate the attorney-client privilege and admit the statements as evidence against the attorney’s client, not only because of the chilling effect of the obverse, but also because it pits the attorney, as advocate and adviser, against the client, when the client is charged with a crime. To permit a Rule 1.6 disclosure to destroy the attorney-client privilege and empower the attorney to essentially waive his client’s privilege without the client’s consent is repugnant to the entire purpose of the attorney-client privilege in promoting candor between attorney and client.<sup>146</sup>

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142. See generally *id.* at 324 (detailing the conflict of attorney-client privilege the attorney faced when relying on the ethics rules permitting attorney disclosure of confidential information to prevent substantial criminal harm).

143. *Id.*

144. *Id.* at 328–37; see also *In re Grand Jury Investigation*, 902 N.E.2d 929, 934 (Mass. 2009) (holding that, while an attorney properly exercised discretion to warn that a client had made angry and threatening statements against a judge, that the statements remained privileged and the attorney could not be compelled to testify about the statements in a grand jury investigation of the client); *Purcell v. District Attorney*, 676 N.E.2d 436, 437–41 (Mass. 1997) (ruling that, while the lawyer under ethics rules properly revealed to law enforcement threats made by the client while consulting the lawyer that the client would burn down his apartment building, the trial court erroneously denied the lawyer’s motion to quash a subpoena to testify regarding those incriminating statements in a prosecution of the client for attempted arson because the crime-fraud exception to the attorney-client privilege did not apply as the communications were not for the purpose of assisting or furthering the threatened criminal conduct).

145. See *Newman*, 863 A.2d at 328 (explaining the decision to reverse and remand the decision of the court of appeals was because the court required Friedman to erroneously testify about communications subject to attorney-client privilege).

146. *Id.* at 333.

Second, and by contrast, if a lawyer were to learn that her client had used the lawyer's legal advice in furtherance of a fraudulent scheme that if undisclosed would cause substantial injury to another person's financial interests, the lawyer would be permitted (and perhaps required) under Model Rules 1.6(b)(2) and (3) and 4.1(b) to disclose the information as necessary to prevent the harm from being realized. And because the client had used legal advice in furtherance of fraud or crime, the privilege would be lost and the lawyer could choose to or be compelled to be a witness against the client.

The United States Court of Appeals for the Ninth Circuit in *In re Grand Jury Proceedings*<sup>147</sup> upheld a subpoena to the attorney for the target of a grand jury investigation when "evidence independent of the communications between the client and the attorney" made the required prima facie showing to the trial court that the client had used legal service "in furtherance of the ongoing unlawful scheme."<sup>148</sup> Even then, because no showing was made that the lawyer "knowingly participated in any criminal activity," the court required the lawyer to testify only as to factual matters, "but upheld her refusal to testify to 'opinion work product' or 'mental impressions' formulated in the course of her representation."<sup>149</sup>

#### F. *The Core of Attorney-Client Confidentiality Endures*

The core of attorney-client confidentiality remains robust in the United States, notwithstanding some redefinition and limited expansion of exceptions under the Model Rules since the turn of the century. The occasions for application of exceptions to confidentiality are few; the circumstances justifying disclosure are narrow; when disclosure is allowed (or required) a compelling (or at least arguably compelling) public interest is present.<sup>150</sup> While a vigorous debate continues within the legal profession as to exactly which exigent circumstances justify disclosure of client confidences and how the balance between public interest and fiduciary trust should be struck, nearly everyone agrees that exceptions to confidentiality

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147. *In re Grand Jury Proceedings*, 867 F.2d 539 (9th Cir. 1989).

148. *Id.* at 541 (citation omitted) (citing *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972); *United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (en banc)).

149. *Id.* (citing *In re Antitrust Grand Jury*, 805 F.2d 155, 163-64 (6th Cir. 1986); *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 63 (7th Cir. 1980)).

150. See generally Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1330-56 (2003) (discussing the nature of and justifications for the exceptions to attorney-client confidentiality).

should be few in number and narrow in application. The heart of the confidentiality principle still beats steadfastly.

In sum, the promise of confidentiality offered by the lawyer to the client continues to be as good as gold, excepting only those rare circumstances where the client's own persistence along a wrongful path or other disturbing potential for great harm tarnishes that expectation of confidentiality.

#### IV. A SKEPTICAL ATTITUDE TOWARD MULTIDISCIPLINARY LAW PRACTICE BUT WITH POSSIBLE OPENING TO LAWYER-CONTROLLED ALTERNATIVES

Elsewhere in the world, legal services by lawyers are offered in a variety of multidisciplinary practice forms, with major accounting firms playing a substantial role in the legal market.<sup>151</sup> But in the United States, the traditional bar on lawyers practicing in a partnership with non-lawyers persists despite perennial challenges and recurring proposals to allow some form of multidisciplinary practice.<sup>152</sup>

Advocates for alternative structures of law firms, including shared control, partnership, and investment by nonlawyers, contend that more flexibility would enhance access to justice by more people, facilitate easier access by firms to available funding, strengthen the delivery of services by integration with other professional services, and thereby provide more cost-effective and higher quality services.<sup>153</sup> In his contribution to our new hornbook, Professor Henderson declares that “the future of law is multidisciplinary.”<sup>154</sup> Arguing that “legal complexity will increasingly require the integration of non-legal disciplines and methodologies,” Henderson predicts that the “interdependency of lawyers with other

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151. GEORGETOWN LAW: CTR FOR THE STUDY OF THE LEGAL PROFESSION, 2015 REPORT ON THE STATE OF THE LEGAL MARKET 11 (2015), <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf> [<https://perma.cc/LSP6-DK6N>].

152. See generally Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interest of Lawyers?*, 42 CAP. U. L. REV. 907 (2014) (providing a history of the ethics rules precluding nonlawyer ownership in law practice firms, the prevalence of such structures in other countries, and the arguments for and against approval of multidisciplinary practice).

153. See Memorandum from ABA Comm'n on the Future of Legal Servs. to ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individual Clients and Client Entities 7–9 (Apr. 8, 2016), [https://www.americanbar.org/content/dam/aba/images/office/president/alternative\\_business\\_issues\\_paper.pdf](https://www.americanbar.org/content/dam/aba/images/office/president/alternative_business_issues_paper.pdf) [<https://perma.cc/V53A-YSHG>] [hereinafter Memorandum from ABA Comm'n on the Future of Legal Servs].

154. Henderson, *supra* note 7, § 1-3.1(b).

professionals” will “alter status hierarchies among professionals.”<sup>155</sup> He warns that lawyers who resist this trend “will lose influence” in the resolution of legal problem and provision of legal services.<sup>156</sup>

Yet when the question is raised whether an American lawyer may practice law in partnership with a nonlawyer or through a corporate entity or other business organization in which a layperson is an owner or director, the traditional answer and the prevailing answer in nearly every state today is emphatically “no.” The fear is that the lawyer who becomes financially dependent on or entangled with another professional who is not subject to the ethical rules of the legal profession will be unable to protect the client from unscrupulous behavior by lay persons. Moreover, the nonlawyer interloper, motivated by profit and unregulated by ethics rules, may disrupt the intimate and confidential attorney-client relationship. The proscription on practicing law in a business form in which laypersons hold such positions as partners, owners, or directors is designed to prevent interference by a layperson with the attorney-client relationship.

Accordingly, under Model Rule 5.4(b) and (d), a lawyer may not practice law in any arrangement under which a layperson holds a position of authority or control so as to intrude into the lawyer’s relationship with a client or to control or direct the lawyer’s exercise of professional judgment. Model Rule 5.4(b) states that a lawyer must not “form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”<sup>157</sup> Model Rule 5.4(d) prohibits the lawyer from practicing through “a professional corporation or association authorized to practice law for a profit” if: (1) “a nonlawyer owns any interest” in the entity, other than the temporary ownership of an interest by the fiduciary representative of a lawyer’s estate; (2) “a nonlawyer is a corporate director or officer” or holds a similar position in another association; or (3) “a nonlawyer has the right to direct or control the professional judgment of a lawyer.”<sup>158</sup>

Even under current rules, there are several exceptions or workarounds that allow lawyers to work collaboratively with other professionals. First, a lawyer may employ another professional, such as a certified public accountant or a medical practitioner, to serve as part of the legal team. When that person remains a subordinate of the lawyer and is not placed into

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155. *Id.*

156. *Id.*

157. MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (AM. BAR ASS'N 2018).

158. *Id.* R. 5.4(d).

either a superior or co-equal position of authority, such as a partner, shareholder, or co-director of a law firm, the ethics rule prohibition is not triggered.

Second, Model Rule 5.4(d) applies only to corporations or associations that “practice law for a profit.” Thus, a lawyer may practice law through a government agency or through a non-profit association in which nonlawyers participate as officials, directors, or officers in determining how legal services will be provided to or on behalf of members of the public or beneficiaries under the public interest mission of the non-profit association.

Third, as an increasingly common practice choice for lawyers, a lawyer may be hired as an employee of a client, thus taking on the role of “house counsel.” Although the nonlawyer employer obviously has substantial authority over the lawyer-employee, that authority is being exercised by the client rather than by another layperson who interposes herself as an intermediary between a lawyer and client. While the house counsel appropriately takes many directions from the employer-client, the lawyer remains responsible to comply with the ethical expectations of the profession.

At present, there is little prospect that multidisciplinary practice will be embraced by most states. While such proposals are frequently surfaced, they tend to be quickly rejected by bodies framing lawyer ethics rules. And, notably, if such a proposal ever does receive a positive reception by either the American Bar Association or more than an isolated state,<sup>159</sup> the successful revision likely will maintain strong controls to ensure priority of lawyer control and continuing adherence to lawyer ethics rules.

In 2016, after the ABA Commission on the Future of Legal Services started to open the door to consideration of multidisciplinary alternatives, the door was quickly slammed shut as opposition emerged.<sup>160</sup> Indeed, earlier that same year, the American Bar Association’s House of Delegates adopted a resolution on regulatory objectives for legal services that reaffirmed “existing ABA policy prohibiting nonlawyer ownership of law

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159. The District of Columbia is often cited as an exception because it does permit a nonlawyer professional to have a financial interest or exercise managerial authority in a law firm. But the D.C. rule does not allow the law firm to offer nonlegal professional services other than to assist in the delivery of legal services and further demands the nonlawyer participants to be actively involved in the firm, thereby precluding outside passive investment in a law firm by nonlawyers. D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (2019); *id.* R. 5.4(b) cmts. 7–8.

160. Samson Habte, *ABA Futures Report Calls for Change, Drains Critics*, 32 ABA/BNA LAWS. MANUAL ON PROF'L CONDUCT 521, 521 (Aug. 24, 2016).

firms.”<sup>161</sup> Earlier in 2011, the ABA’s Ethics 20/20 Commission opened discussion for possible revisions to Model Rule 5.4 but then decided not to move forward with any proposal.<sup>162</sup> Significantly, the discussion draft circulated by the Ethics 20/20 Commission would have allowed nonlawyer partnership but subject to a percentage cap on nonlawyer participants so as to maintain lawyer control.<sup>163</sup>

In sum, in the overwhelming majority of states, a lawyer in the private practice of law may not be placed in a practice setting where a person without legal training and a law license, and who thus is not accountable under the ethics standards of the legal profession, possesses the power to determine how legal services will be marketed and offered, how a lawyer will interact with a client, what advice a lawyer may give to a client, how legal services will be billed, etc. If that changes, however, any multidisciplinary practice authorized under the ethics rules likely will adhere to ultimate lawyer control over legal services and safeguards to ward against nonlawyer dilution of ethical responsibilities.

#### CONCLUSION

As Justice Ruth Bader Ginsburg said at her confirmation hearings, “Generally, change in our society is incremental, I think. Real change, enduring change, happens one step at a time.”<sup>164</sup> The practice of law is changing. And the ethics rules are changing as well. But the changes in the Model Rules, understood in fuller context, are small steps and not any great leap away from traditional principles of professional ethics.

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161. Ronald C. Minkoff, *ABA Model Regulatory Objectives: Why They Matter to You*, N.Y. LEGAL ETHICS REP., <http://www.newyorklegaethics.com/aba-model-regulatory-objectives-why-they-matter-to-you/> [<https://perma.cc/J35A-RJY2>]; ABA Working Grp. to Advance Well-Being in the Legal Prof. et al., Res. 105 (Feb. 2016) (adopted).

162. See Memorandum from ABA Comm’n on the Future of Legal Servs., *supra* note 153, at 2 (soliciting comment on alternative business structures).

163. Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs ABA Comm’n on Ethics 20/20 to ABA Entities, Courts, Bar Associations (state, local, specialty and international), Law Schools, and Individuals (Dec. 2, 2011), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111202-ethics\\_20\\_20\\_alps\\_choice\\_of\\_law\\_proposals\\_cover\\_memo\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics_20_20_alps_choice_of_law_proposals_cover_memo_final.pdf) [<https://perma.cc/RB73-7HLY>].

164. MARY ZAIA, YOU CAN’T SPELL TRUTH WITHOUT RUTH: AN UNAUTHORIZED COLLECTION OF WITTY & WISE QUOTES FROM THE QUEEN OF SUPREME, RUTH BADER GINSBURG 59 (2018).



In sum, while rules of professional conduct are not static and are constantly under evolutionary revision, the foundational concepts of lawyer ethics remain deeply-rooted.

As Yogi Berra said, “It’s tough to make predictions, especially about the future.”<sup>165</sup> And, yet, I will venture this prediction. A century from now, we will still have lawyers, they will still play an essential role as advocates, intermediaries, and creative problem-solvers in our society. And the basic principles of legal ethics that we uphold today will still be upheld.

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165. *Yogi Berra Quotes*, FAMOUS QUOTES & QUOTATIONS, <http://www.famous-quotes-and-quotations.com/yogi-berra-quotes.html> [<https://perma.cc/K9F4-RLXG>].