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SYMPOSIUM ON LEGAL ETHICS FOR THE TRANSACTIONAL LAWYER

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FACEBOOK, TWITTER, AND LINKEDIN – OH MY! THE ABA ETHICS 20/20 COMMISSION AND EVOLVING ETHICAL ISSUES IN THE USE OF SOCIAL MEDIA

John G. Browning*

“The Internet has opened new channels of communication and self-expression . . . . Countless individuals use message boards, date matching sites, interactive social networks, blog hosting services and video sharing websites to make themselves and their ideas viable to the world. While such intermediaries enable the user-driven digital age, they also create new legal problems.”

- Fair Housing Council of San Fernando Valley v. Roommates.com, LLC

“If I’m applying the First Amendment, I have to apply it to a world where there’s an Internet, and there’s Facebook, and there’s movies like . . . ‘The Social Network,’ which I couldn’t even understand.”

- U.S. Supreme Court Justice Stephen Breyer

I. INTRODUCTION

Social networking platforms like Facebook, Twitter, LinkedIn, and YouTube have caused a paradigm shift in how people communicate and share information. Facebook is a site on which Americans spend 10.5 billion minutes daily (not including mobile users)\(^3\) and reaches 1 billion users worldwide.\(^4\) Twitter, the

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1. 489 F.3d 921, 924 (9th Cir. 2007).
microblogging site which enables users to “tweet” messages of 140 characters or less, was processing approximately 5,000 tweets per day within a year of its launch in 2006; today, the site administers over 340 million tweets each day.\(^5\) Sixty-five percent of all adult Americans have at least one social networking profile.\(^6\)

While the legal profession’s embrace of social media was initially little more than the digital equivalent of a perfunctory handshake, it is certainly warming to the idea. According to one recent study by ALM Legal Intelligence, nearly 85% of U.S. law firms are employing social media for marketing purposes.\(^7\) Another study, the 2012 ABA Legal Technology survey, found 88% of the responding firms reported having a LinkedIn presence, while 58% use Facebook, and another 13% are on Twitter.\(^8\) Twenty-two percent of the firms surveyed indicated that they maintained a blog (an increase of 15% from the previous year).\(^9\)

There are reasons for becoming social media-savvy that go beyond mere marketing of one’s firm or practice. In an age in which seemingly everyone is sharing (or oversharing) even the most mundane details of their lives online, lawyers are flocking to social networking sites like prospectors during the Gold Rush, hoping to mine these digital treasure troves for nuggets of crucial, sometimes game-changing, information.\(^10\) Social media content has been used in all types of litigation, ranging from personal injury cases and criminal proceedings to family law matters, commercial litigation, employment cases, and intellectual property cases.\(^11\) Activity on social networking sites has helped to determine jurisdictional issues, and a growing number of countries and at least

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9. Id.
three U.S. states now permit substituted service of process via social media sites for those hard to reach through traditional means of service.\textsuperscript{12}

Despite their utility, emerging technologies translate to new ethical quandaries for lawyers. Before an attorney “friends” a client or tweets about his or her latest big deal or courtroom triumph, he or she should consider how the paradigm shift that social networking represents is shaping the ethical landscape for lawyers. This article will examine such ethical issues in light of the changes to the Model Rules of Professional Conduct approved following the ABA Commission on Ethics 20/20 proposed amendments with particular regard to a lawyer’s duty to provide competent representation, a lawyer’s communications with a client and duty of confidentiality, and a lawyer’s use of technology where client development is concerned.

Ethics rulings from around the country, as well as heightened scrutiny by the Kentucky Bar itself, make the subject of attorney advertising in the age of social media a particularly important one for Kentucky practitioners. Some legal scholars have argued that new media platforms like Facebook or Twitter mandate the creation of new rules of ethics for attorneys, while at least one commentator has advocated that lawyers uncomfortable with such new technology should simply avoid it.\textsuperscript{13} This article, however, will demonstrate that neither of these positions represents a pragmatic or viable approach to the ethical questions raised by lawyers’ use of social media.

While the advent of social networking has irrevocably altered the legal landscape, these new forms of communication are still governed by the same common denominator: they remain forms of communication, albeit electronically stored and transmitted rather than memorialized on paper. As the recent amendments to the ABA Model Rules of Professional Conduct reflect, the “old” rules fit the “new” technology just fine in fulfilling the goals of adequately protecting both the profession and public. The Commission itself concluded in


\textsuperscript{13} \textit{See e.g.}, CHRISTINA SKINNER, \textit{The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short} 18, 2011 AMERICAN INNS OF COURT WARREN BURGER PRIZE ESSAY, available at http://www.innsofcourt.org/Content/File.aspx?id=6231; Steven C. Bennett, \textit{Ethics of Lawyer Social Networking}, 73 ALB. L. REV. 113, 137 (2009) (“[T]he constant addition of social networking tools to the array of communications methods that lawyers use every day has already made [the ABA Guidelines] incomplete.”); Kathleen Elliot Vinson, \textit{The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It}, 41 U. MEM. L. REV. 355, 358 (2010) (calling for the adoption of “written guidelines, specifically and directly addressing the use of social networks and its potential to affect the legal community”). For the “head in the sand” view, see Samuel C. Stretton, \textit{Changing Times Mean Changing Ethics Issues for Lawyers}, THE LEGAL INTELLIGENCER (May 9, 2012), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1336346972922 (“If there is ever a rule that a lawyer can’t practice if he or she is not technologically proficient, it will be a sad day in the practice of law.”).
making its December 28, 2011 report: “In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul.”

II. THE ABA ETHICS 20/20 COMMISSION AND THE DUTY OF COMPETENT REPRESENTATION

In 2009, then-ABA President Carolyn Lamm announced the creation of the Commission on Ethics 20/20.14 Its purpose was to conduct a thorough review of the Model Rules of Professional Conduct and the regulation of the legal profession against the backdrop of advances in technology and the globalization of legal practice.15 Over the course of three years, the commission studied how both technology and globalization are affecting the practice of law as well as how the regulation of the profession should be updated in light of this impact. The commission noted:

Technology affects nearly every aspect of legal work, including how we store confidential information, communicate with clients, conduct discovery, engage in research and market legal services. Even more fundamentally, technology has transformed the delivery of legal services by changing where and how those services are delivered (e.g., in an office, over the internet or through virtual law offices), and it is having a related impact on the cost of, and the public’s access to, these services.16

After the study concluded, the commission circulated its report, invited comment, and ultimately submitted six resolutions to the ABA House of Delegates for consideration at the ABA’s annual meeting in August 2012 (a second set of resolutions will be submitted for consideration in 2013). While several of these involved issues related to the globalization of legal practice, such as outsourcing of legal services and admission standards, Resolution 105A: Technology and Confidentiality as well as Resolution 105B: Technology and

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15. Id. (“Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as e-mail, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.”).

Client Development are most germane to this article. In its overview report filed in May 2012, the commission cited the impact of technology by noting that it “has irrevocably changed and continues to alter the practice of law in fundamental ways. Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve.”

While technology can both increase the quality and reduce the cost of legal services, the commission noted in its August report accompanying both resolutions: “Lawyers . . . need to understand that technology can pose certain risks to clients’ confidential information and that reasonable safeguards are ethically required.”

At the very heart of the changes proposed by the commission and approved by the ABA was one at the core of the practice of law: competence. Model Rule 1.1 stipulates, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The commission’s change can be found in the comments to Rule 1.1, specifically Comment 6, which now provides as follows: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

These new words mandate that competency mean more than just keeping up with statutory developments or common law changes in one’s particular field, but also having sufficient familiarity with and proficiency in technology that may affect both the substantive area of practice itself and how the lawyer delivers these services. Regarding the latter, the commission in its August 2012 report noted: “For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.”

The commission further explained that staying current with “the benefits and risks associated with relevant technology” pertains to “how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery. These tasks now require lawyers to have a firm grasp on how electronic information is created, stored, and retrieved.”

17. Id. (discussing legal risks, benefits, and duties of technology in legal practice).
20. ABA MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 6 (as amended Aug. 2012) (changes noted in italics).
Clearly, an understanding of social networking sites like Facebook is important to all of these lawyerly tasks in the digital age. With more and more family lawyers making often devastating use of incriminating content from social networking sites—a February 2010 survey by the American Academy of Matrimonial Lawyers revealed that 81% of respondents used such evidence in their cases—how can a family law practitioner truly claim that she has met her obligation of competence if she fails to search the Facebook pages of both her client and the adverse spouse? In an era in which a growing number of states are passing laws outlining how to administer an individual’s digital assets—such as the decedent’s Facebook page—is a wills and estate planning specialist truly addressing all of his clients’ needs if he does not know what Facebook is? While the updated Rule 1.1, Comment 6 is silent as to the specifics, the sheer pervasiveness of social media in our modern society coupled with its relative ease of use demonstrates that a lawyer who elects to ignore social media is not providing competent representation.

Although not addressed in the changes promulgated by the ABA, Model Rule 1.3’s duty of diligence has some bearing on this discussion as well. Comment 1 to this Rule provides that a lawyer must “act . . . with zeal in advocacy upon the client’s behalf.” If one is to be truly diligent in proceeding with zealous advocacy, then is the failure of a divorce lawyer to check the Facebook page of her client’s soon-to-be-ex spouse for potentially game-changing online evidence a failure to act diligently? In an era when so much information is available online and at a time when the majority of one’s peers are making effective use of such information, the answer must be “yes.” Nevertheless, the commission’s revision of the standard of competent representation is hardly a radical shift from the norms of practice. On the contrary, it reflects not just the realities of practice in the 21st Century, but also a growing trend among courts throughout the United States to hold lawyers professionally accountable when it comes to making use of social media and other online resources. In Griffin v. Maryland, a Maryland appellate court quoted approvingly, “as a matter of professional competence,” that lawyers should be investigating social media avenues in their cases. In another case, Cannedy v. Adams, a California appellate court held that an attorney’s failure to investigate and introduce evidence from a social networking site—a profile containing the recantations of a purported molestation victim—could constitute ineffective assistance of counsel.

23. ABA MODEL RULES OF PROF’L CONDUCT R. 1.3 (2012).
Courts in a number of states considering due diligence issues have recognized a kind of implicit “duty to Google.” In *Munster v. Groce*, an Indiana appellate court was incredulous that the plaintiff’s attorney, trying to serve the absent defendant Groce, had failed to Google him as a matter of due diligence. It noted that the court itself had done so, and immediately obtained search results that yielded a different address for Groce, as well as an obituary for Groce’s mother listing numerous relatives who might have known his whereabouts. Meanwhile, in *Dubois v. Butler*, a Florida appellate court questioned the effectiveness of an attorney who had only checked directory assistance in an effort to get an address at which to serve the missing defendant. The court called such a method in the age of the Internet and social media the equivalent of “the horse and buggy and the eight track stereo.” Elsewhere, in the Louisiana case of *Weatherly v. Optimum Asset Management*, the appellate court considered the validity of a tax sale of an office condominium where the sheriff’s office had sent notice to the property’s former owner/assignor but never notified the current owner/assignee. Notice was published in a local newspaper, which proved of little help to Weatherly, the current owner, who lived out of state. Weatherly sued to annul the tax sale while the new owners defended it on the grounds that Weatherly was not reasonably identifiable for purposes of the notice requirement. The court upheld the trial judge’s own performance of an Internet search that found Mr. Weatherly, concluding that he was “reasonably identifiable” and that the adverse party had not met its responsibility to exercise due diligence.

In 2010, the Missouri Supreme Court created a new standard in providing competent representation in the digital age—the duty to conduct online research during the voir dire process. During the voir dire phase of a medical malpractice trial, plaintiff’s counsel inquired about whether anyone on the venire panel had ever been a party to a lawsuit. While several members of the panel were forthcoming, one prospective juror (Mims) was not. Following a defense verdict, plaintiff’s counsel researched Mims on Missouri’s PACER-like online database, Case.net, and learned of multiple previous lawsuits involving the

27. *Id*.
29. *Id*.
31. *Id*.
32. *Id*.
33. *Id* at 123.
34. *Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010).
35. *Id* at 555.
36. *Id*.
The trial court granted a motion for new trial based on Mims’ intentional concealment of her litigation history, but the Missouri Supreme Court reversed.38 The court reasoned:

However, in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search . . . when, in many instances, the search could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled.39

In light of this, the court imposed a new affirmative duty on lawyers, holding that “a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and must present to the trial court any relevant information prior to trial.”40

In short, being social media and Internet-savvy may soon cease to be a point of distinction for a lawyer. It is instead becoming a benchmark of professional competence, given the change in Rule 1.1 taken together with the demonstrated trend toward requiring lawyers to make use of online resources such as social networking platforms. While no Kentucky court has yet been presented with the opportunity to address this issue, this state is no stranger to the issues raised by social media. Kentucky is one of a handful of states to address the issue of judges’ social networking activities; the Kentucky Bar is considering heightened regulation of attorney advertising in the age of social media and several decisions have dealt with the discoverability and use of content from social networking sites in litigation. Accordingly, the prudent practitioner, whether transactional in focus or litigation-oriented, will work to meet this expectation of competency.

III. CONFIDENTIALITY

Another area rife with potential ethical pitfalls in the age of Facebook and Twitter is that of client communications and acting competently to preserve client confidentiality. Here again, the ABA Commission on Ethics 20/20 has weighed in with a change to Model Rule 1.6 (Confidential Information). A new section, 1.6(c), provides, “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information

37. Id.
38. Id. at 551, 559.
39. Id. 558-59.
40. Johnson, 306 S.W.3d at 559.
relating to the representation of a client.” While the earlier version of Rule 1.6 set forth the lawyer’s duty not to reveal a client’s confidential information, it did not indicate what ethical obligations lawyers have to prevent such revelations and to safeguard a client’s confidential information in the digital age.

The proposal behind adding 1.6(c) identified three discrete scenarios involving technology and the inadvertent disclosure of confidential information. First, information can be unintentionally disclosed, as when an email is sent to the wrong person. In addition, information can be accessed without authority, such as a data security lapse or a third party hacking into a lawyer’s email account or a law firm network. The third type of disclosure occurs when employees/agents of the lawyer, or the lawyer himself, releases it without authority—for example, when confidential information is posted on a blog, a Facebook wall, etc.

Rule 1.6(c) imposes an ethical obligation on attorneys to take reasonable efforts to prevent such disclosures. This could conceivably include implementing encryption and other data security measures, developing a social media policy for the attorneys and staff, and of course exercising common sense when engaging in the use of social media. Comment 16 to the Rule acknowledges that disclosures can still occur even if the lawyer takes all reasonable precautions. Yet, even if such precautions cannot possibly ensure the protection of a client’s confidential information in every circumstance, the black letter of Rule 1.6 nevertheless imposes on lawyers the duty to take reasonable precautions.

As far as guidance on the steps that might be considered “reasonable,” the Commission declined to go into specifics, primarily because “technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available.” However, the commission did identify a non-exhaustive list of factors that lawyers should take into consideration when safeguarding clients’ confidential information. These include (1) the sensitivity of the information itself; (2) the likelihood of disclosure if additional safeguards are not employed; (3) and the extent to which these measures might adversely affect the attorney’s ability to represent the clients (such as making a piece of software too difficult to use).

Such issues are hardly new ground for ethics authorities. In 2010, the State Bar of California Standing Committee on Professional Responsibility and

41. ABA MODEL RULES OF PROF’L CONDUCT R. 1.6(c) (as amended Aug. 2012).
42. Report to the House of Delegates, supra note 18, at 5.
43. Id.
44. Id.
Conduct issued Formal Opinion No. 2010-179. In it, the committee confronted the issue of whether an attorney violates the duties of confidentiality and competence by using technology to transmit or store confidential client information when the technology might be susceptible to unauthorized access by third parties. Such a concern is particularly timely given the proliferation of smartphones and tablets that enable attorneys to work virtually from just about anywhere as well as the rapid adoption of “bring your own device” (BYOD) policies in many work environments. Like the ABA Commission, California’s committee identified a number of factors to take into consideration in determining whether an ethical violation had occurred, including the urgency of the situation as well as the client’s instructions and circumstances. The ABA’s Standing Committee on Ethics and Professional Responsibility has also entered the fray. In Formal Opinion 11-459, this committee discussed the duty to protect the confidentiality of email communications with one’s client. It imposed a duty on the lawyer to warn the client about the risk of sending or receiving electronic communications to which a third party may gain access. In particular, the committee called for lawyers to first consider whether, given the client’s situation, “a significant risk” exists that third parties will have access to the communications and, if so, to take “reasonable care to protect the confidentiality of the communications by giving appropriate tailored advice to the client.”

Given the popularity of social media and the degree to which so many—including clients—have employed sites like Facebook and Twitter as avenues of communication, it’s easy to envision lawyers tweeting about a key ruling or griping about a client who misled him about the facts of a case. For attorneys with a social as well as professional relationship with the client, a general counsel’s seemingly casual invitation via Facebook to a weekend barbecue might also include a reference to an upcoming matter of business: e.g., “I’m worried about our CFO’s deposition. He makes a lousy witness and has an axe to grind. See you Saturday.” Lawyers who aren’t careful about their own communications, or who fail to remind clients to use more secure channels, run the risk of revealing case strategy or even privileged information to a whole host of third-party readers of Facebook walls, followers on Twitter, and even potential strangers receiving this information via “re-tweets.”

46. Id. at 1.
47. Id. at 3-5.
49. Id. at 3.
50. Id.
With sites like Facebook regularly tweaking their user privacy options, it is not enough to depend simply on the integrity of one’s privacy settings. Checking in on FourSquare or revealing one’s location through other sites with geolocation features can expose something deemed private to curious eyes. Even having one’s LinkedIn contacts list or Facebook “friends” publicly viewable poses the risk of disclosing a confidential relationship. Consequently, practitioners not only should take care to police their own communications using social media, but also they should advise their clients about potential threats to the confidentiality of their online messages.

Sadly, there is no shortage of examples of online breaches of confidentiality. In 2006, an Oregon lawyer posted confidential personal and medical information about a former client on a listserv and the result was a ninety day suspension.51 In Muniz v. United Parcel Service, the plaintiff’s attorney (who had prevailed in an employment action and was now making an application for fees) faced a potentially volatile situation when the other side sought the plaintiff firm’s postings on social networking sites and on a listserv maintained by a plaintiff attorneys’ organization (California Employment Lawyers Association, or CELA).52 The attorney allegedly posted comments criticizing the judge as “defense-biased” and criticized the aggressive tactics of the defense counsel.53 While the magistrate refused to compel the production of the postings on relevance grounds, he did not address whether such postings could be considered subject to the attorney work product privilege and there were, no doubt, some tense moments for plaintiff’s counsel.54

In September 2012, Miami-Dade County (Florida) public defender Anya Cintron Stern was defending Fermin Recalde on murder charges of stabbing his girlfriend to death in 2010.55 When Recalde’s family brought him fresh clothing to wear during trial, corrections officers held up the items for routine inspection.56 Stern used her cellphone to snap a photo of Recalde’s leopard print underwear; then, the thirty one-year old attorney posted the photo to her Facebook page with a caption derisively referring to the family’s belief that this was “proper attire for trial.”57 Ms. Stern also allegedly posted an earlier update on Facebook that called her client’s innocence into question.58 Although Stern’s

53. Id. at *8.
54. Id.
56. Id.
57. Id.
58. Id.
Facebook page was set to private, someone who saw the post notified Judge Leon Firtel, who granted a mistrial in the case.59 Miami-Dade Public Defender Carlos Martinez promptly fired Stern, stating, “When a lawyer broadcasts disparaging and humiliating words and pictures, it undermines the basic client relationship and it gives the appearance that he is not receiving a fair trial.”60

In May 2010, former Illinois assistant public defender Kristine Ann Peshek was fired from her job as well and received a sixty-day suspension of her license on top of that for violating Rule 1.6 by making comments on her blog.61 Peshek frequently referred to clients by their first names, nicknames, or jail identification numbers.62 She also described, in sometimes graphic detail, the clients’ cases, drug use, and other embarrassing and potentially harmful information, sometimes caustically critiquing their courtroom testimony. In addition, Peshek was not shy about the judges she appeared in front of, going so far as to refer to one as “Judge Clueless.”63

While not all of the instances of lawyers’ online ethical lapses necessarily involve breaches of confidentiality, one universal theme is poor judgment. Just as social media has yielded an abundance of “what were you thinking” examples of litigants making questionable postings, attorneys have been guilty of becoming online cautionary tales. Consider the following examples:

- In disbarment proceeding filed in December 2011, the South Carolina Supreme Court made note of certain comments and postings made by attorney Michael T. Hursey, Jr. on his MySpace page.64 These included profanity, nudity, and discussions of drug use along with the name of his law firm and the city where he practiced.65
- In July 2012, Brooklyn Assistant District Attorney Justin Marrus (son of a New York Supreme Court judge) had his Facebook page posted on a national media outlet. The page showed Marrus in blackface, holding a Confederate flag, and simulating prison rape.66 A spokesman for the D.A.’s office said, “We think [the photos] are abhorrent, stupid, and childish. We’re asking Mr. Marrus for a full explanation of his conduct, which is totally unacceptable. And we will take appropriate action.”67

59. Id.
60. Id.
62. Id.
63. Id.
64. In re Hursey, 179 S.E.2d 670 (S.C. 2011).
65. Id. at 671.
67. Id.
• In February 2011, Jeffrey Cox, then a deputy attorney general in Indiana, tweeted about using “live ammunition” on pro-labor protesters in Madison, Wisconsin, in addition to a number of similar politically charged comments on a blog he maintained. The Indiana AG’s office terminated him, stating, “We respect individuals’ First Amendment right to express their personal views on private online forums, but as public servants we are held by the public to a higher standard and we should strive for civility.” Cox later commented, “I think that in this day and age that tweet was not a good idea.”

• In March 2012, it was revealed that Sal Perricone, a federal prosecutor in New Orleans, had made hundreds of online posts on NOLA.com under a pseudonym, where he commented on cases in which he was involved, judges, political figures, and his boss, U.S. Attorney Jim Letten. The matter has been referred to the Justice Department’s Office of Professional Responsibility.

• In February 2012, an ethics complaint was brought against Illinois attorney Jesse Raymond Gilsdorf for “conduct prejudicial to the administration of justice” and “making extra judicial statements that . . . would pose a serious and imminent threat to the fairness of an adjudicative proceeding.” Gilsdorf allegedly attempted to sway public opinion against the prosecutor of his drug client by having a video of an undercover drug buy (entitled “Cops and Task Force Planting Drugs”) posted on YouTube in April 2011 and then linking to it on Facebook.

• In Miller v. State, defendant Miller’s robbery conviction was overturned because the prosecutor played the jury a YouTube video during closing argument that was “irrelevant, prejudicial, and confused issues,” and which had not been admitted into evidence.

• In State v. Usee, a prosecutor who made racially insensitive comments on her public Facebook page was accused of prosecutorial misconduct.


69. Id.

70. Id.


72. Id.


74. Id.

and improperly influencing the jury.\textsuperscript{76} The comments, made during the attempted murder case, concerned "keeping the streets safe from Somalis" (the defendant was a Somalian immigrant).\textsuperscript{77} The appellate court did not overturn the conviction.\textsuperscript{78}

- In Guadalupe County, Texas in May 2011, assistant district attorney Larry Bloomquist was found in contempt and fined for violating a court’s gag order by posting a Facebook status update about an ongoing felony trial.\textsuperscript{79}

- In July 2012, former Norfolk, Virginia assistant prosecutor Clifton C. Hicks was charged with the felony of making a written threat to kill or do bodily injury after he allegedly threatened his former employer, Commonwealth’s Attorney Greg Underwood, in a series of Facebook posts.\textsuperscript{80}

The single most active area of controversy involving the ethical pitfalls that can accompany a lawyer’s use of social media concerns the gathering of facts and case investigation using social networking platforms, as well as the duty to preserve such evidence and not engage in spoliation. This topic has spawned ethics opinions from a number of jurisdictions (including bar associations in Philadelphia, New York, and San Diego) tackling such issues as pretexting or "false friending" in order to gain information from a party or witness. In addition, lawsuits and ethics complaints have arisen in various jurisdictions over lawyers’ alleged misrepresentations in order to gain access to a Facebook page, and over lawyers engaging in spoliation of evidence by deleting (or directing their clients to delete) damaging social media content. Similarly, an emerging active realm of ethical inquiry involves judicial social networking activity and under what circumstances a judge can have Facebook “friends” who are lawyers. A number of jurisdictions nationwide have examined this subject and issued ethics opinions (Kentucky is one of them). However, these areas are more germane to an attorney whose practice is litigation-focused and consequently is beyond the scope of this article. A number of legal scholars have examined these ethical issues involving litigators’ and judges’ use of social media.\textsuperscript{81}

\textsuperscript{76} 800 N.W.2d 192 (Minn. Ct. App. 2011).
\textsuperscript{77} \textit{Id.} at 200.
\textsuperscript{78} \textit{Id.}
\textsuperscript{81} See generally, \textbf{John G. Browning}, \textit{The Lawyer’s Guide to Social Networking: Understanding Social Media’s Impact on the Law} 149–72 (West 2010); John G. Browning,
IV. LAWYERS’ USE OF TECHNOLOGY AND CLIENT DEVELOPMENT

Another area addressed by the ABA Ethics 20/20 Commission was that of lawyers’ use of technology for client development purposes. The changes called for by the Commission and approved by the ABA involve amendments to Model Rules 1.18 (Duties to a Prospective Client); 7/1 (Communications Concerning a Lawyer’s Services); 7.2 (Advertising); 7.3 (Direct Contact with Prospective Clients); and 5.5 (Unauthorized Practice of Law). The commission took note of the increasing importance that the Internet and particularly online social and professional networking sites have played in client development in a 2010 issues paper that it circulated, noting that with Facebook and LinkedIn:

[L]awyers can determine who has access to the profile or particular information in the profile by creating online “links” to specified individuals. (In the case of Facebook, this linking is called “friending.”) A lawyer can create those links (or “friends”) by inviting particular people to accept an electronic invitation to become connected or by accepting a similar invitation from other people. People who have linked to the lawyer’s profile (or who have become “friends” of the lawyer’s profile) can often access more information about the lawyer from the profile and receive electronic notifications when the lawyer posts new information on the profile. Lawyers can also contact specific people who have linked to their profiles, usually by generating an email through the networking site.

With lawyers turning to blogs and social media platforms for business development in greater numbers than ever before, and with greater success, valid concerns arise with respect to inadvertently creating an attorney-client relationship. Unlike with typical lawyer websites, attorneys using social networking sites might not be able to control the flow of information from


83. Id.

84. Id.

85. A February 2012 survey by ALM Legal Intelligence revealed that not only were roughly 85% of the responding firms using social media and 70% were blogging, but that roughly half of the respondents reported that such efforts resulted in new business leads.
prospective clients and might not be able to include disclaimers and similar protections against receiving the kind of information that could conceivably trigger ethical obligations under Model Rule 1.18. Online contact from a client who thinks he or she is getting legal advice can take the form of comments on a lawyer’s blog, friending the attorney on Facebook, following him on Twitter, and using one or more of these portals to engage the lawyer or firm about the specifics of a given legal situation. Relevant case law prior to the advent of such new media demonstrated that it could take very little to create an attorney-client relationship. The scenario becomes even more problematic when combined with the near-instantaneous nature of digital communications and the increased tendency for many to conduct both business and personal matters online.

No ethics opinion prior to the adoption of the ABA Ethics 20/20 Commission’s proposed amendments has directly confronted social networking sites and avoiding the inadvertent creation of an attorney-client relationship. However, one opinion—that dealt with a lawyer hosting or participating in a radio call-in show—does provide some guidance by way of analogy. In the California State Bar’s Formal Opinion No. 2003-164, the ethics opinion emphasized that the attorney/host should (1) remind callers that they are communicating in a public forum, so nothing they say is confidential; and (2) encourage callers to seek advice from an attorney about their specific legal concerns or questions. Similarly, the digital lawyer who blogs or connects with others through a site like Facebook should avoid answering fact-specific questions, instead tailoring a response to a broader legal issue (such an approach also helps broaden the interest and appeal to the online audience the lawyer is addressing with his blog post or Facebook posting). In question-and-answer fora on sites like AVVO and LinkedIn, lawyers should similarly avoid addressing highly specific facts and wherever possible expressly state that the answer should not be construed as legal advice.

The ABA Commission took a reasonable approach in Resolution 105B, stating that the danger of an inadvertent creation of such a relationship exists only when the lawyer gives the prospective client a “reasonable expectation” that he or she is willing to enter into an attorney-client relationship. By taking the precautions described above, attorneys engaging in social media communications should be able to avoid creating such expectations. If the lawyer invites the prospective client to submit information about possible representation without sufficient warnings or cautionary statements making it reasonably clear that no attorney-client relationship is being created, the attorney could be inviting the imposition of duties under Rule 1.18. However, lawyers shall also note that the

87. Id. at 4.
Commission recognized a reality of 21st century law practice—namely, that consultations with prospective clients could certainly take place online. The commission amended Rule 1.18 to explicitly include electronic communications, stating, “Whether communications, including written, oral, or electronic communications constitute a consultation depends on the circumstances.”

The Commission also closely examined and amended Model Rule 7.2 (Advertising). The subject of lawyer advertising via social media has created its own subset of ethical conundrums, yet the scenarios that arise tend to reinforce a central theme of this article—that the ethical missteps by lawyers via social media—would be just as ethically dubious if they occurred in a more traditional forum. Breaching client confidentiality or misrepresenting one’s self to the public would be just as subject to ethical approbation if the acts or statements took place in letters or print media as if they happened on Facebook or Twitter.

For example, Dannitte Mays Dickey was reprimanded by the South Carolina Supreme Court in 2012 for making misleading statements about and misrepresenting facts regarding his legal skills and experience; making statements likely to create unjustified expectation about results; making statements comparing his services with others in ways that could not be factually substantiated; and by giving descriptions and characterization of the quality of his services. Dickey graduated from law school in 2008 and was admitted to the bar in May 2010. He set up profiles at various sites, including LinkedIn, lawyers.com, lawguru.com, and others, which falsely stated that he had graduated from law school in 2005; that he had handled matters in federal court; and listed him as engaged in roughly 50 practice areas in which (in reality) he had little or no practice experience. He also used a variant of the word “specialist” contrary to South Carolina’s rules requiring specific certification before one can hold one’s self out as having specialized skills in a given area of law.

Yet, while these overstatements and exaggerations appeared on sites like LinkedIn, they would have been equally deserving of disciplinary action had they appeared on a billboard, television commercial, print advertisement, or Yellow Pages listing. It is the offending content, rather than the medium, that matters. In other contexts, such as defamation cases or cyberbullying, the perceived anonymity of the Internet somehow arguably contributes to the conduct or statement of the bad actor in question. No such argument, however,

90. Id.
91. Id. at 522-23.
92. Id. at 523.
has been advanced to justify why special rules of ethics need to be crafted for lawyers engaged in the use of social media. The ethical missteps reported to date, such as Mr. Dickey’s, could just as easily have taken place in other fora.

For Kentucky practitioners, the subject of social media activities as lawyer advertising has received particular attention. The Kentucky Bar Association proposed a regulation in November 2010 that would bar attorneys from attempting to solicit clients via social networking platforms like Facebook and MySpace unless the social media communications are submitted to the Bar’s Advertising Commission and subject to the payment of a $75 filing fee.93 The proposed new AAC Regulation No. 17: Social Media SCR 3.130-7.020(1)(j) states:

“Advertise” means to furnish any information or communication containing a lawyer’s name or other identifying information, and an “advertisement” is any information containing a lawyer’s name or other identifying information, except the following . . . Information and communications by a lawyer to members of the public in the format of blog journals on the Internet that permit real time communication and exchanges on topics of general interest in legal issues provided there is no reference to an offer by the lawyer to render legal services. Communications made by a lawyer using a social media website such as MySpace and Facebook that are of a non-legal nature are not considered advertising; however, those that are of a legal nature are governed by SCR 3.130-7.02(1)(j).94

The proposed measure has been criticized as a response to Louisville attorney Christian Mascagni, who posted to the more than 2,000 “friends” on his Facebook page prior to the Breeder’s Cup weekend that he wanted “Breeder’s Cup and weekend partiers to call if you get into trouble or need out of jail before Monday.”95 Mascagni said his social networking outreach has “picked up a lot of business on Facebook,” particularly in a target demographic of club-hopping millennials in their twenties and thirties, for whom traditional advertising would be of questionable value.96 He says that after he helped a bartender client win a drunken driving case, she wrote about it on her Facebook page, and the resulting exposure to her 3,000 friends led to Mascagni receiving approximately 150

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94. Id.
96. Id.
friend requests the following day.\textsuperscript{97} Says Mascagni, “You’d be surprised how many calls I’ll get when someone is arrested and just looks me up through Facebook.”\textsuperscript{98}

The proposed regulation has also generated considerable criticism for everything from vagueness, possible unconstitutionality, and even a conspiracy by the Bar’s old guard. Louisville attorney Peter Ostermiller called the measure’s wording “clumsy and vague,” and decried the lack of commentary that would expand upon the supposed problem the Bar intended to address.\textsuperscript{99} Retired Judge Stan Billingsley of the blog LawReader.com commented: “Technically, as written, simply listing your name brings an attorney within the purview of the rule. Should we use an alias?”\textsuperscript{100} The blog BluegrassBulletin.com described the proposed rule as the work of a good ol’ boy network at the bar, “driven in large measure by the politics of the big firms and the Supreme Court” that wants to “ignore the kind of solicitation that takes place at country clubs and over martinis but want to tell lawyers what they can and can’t say on Facebook about their availability to represent their friends.”\textsuperscript{101}

The Kentucky Bar Association, in proposing the measure, invited public comment on it until December 15, 2010. However, to date, the measure has yet to be officially adopted and listed on the Kentucky Bar Association’s official website. This could be due, in part, to the criticisms of the measure or, perhaps, due to the constitutional challenges that have been brought in response to recent efforts to curb lawyers’ online advertising or speech. For example, in Louisiana, proposed regulations over attorney Internet advertising were challenged and declared unconstitutional in a federal court ruling.

In another case, Richmond, Virginia criminal defense attorney Horace F. Hunter was disciplined by the state bar over his law blog.\textsuperscript{102} The bar claimed the blog was advertising and contained information about cases Hunter handled that could be detrimental or embarrassing to the clients he discussed.\textsuperscript{103} Hunter was ordered to add a disclaimer to the blog to make clear that it is advertising and to provide a disclaimer along with any discussion of cases to put “the case results

\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{103} Id.
in a context that is not misleading.”104 Hunter challenged the ruling on First Amendment grounds, and in a June 2012 ruling, a three judge panel sided with him, concluding that the ruling violated Hunter’s free speech rights.105 It also overturned the state bar disciplinary finding of misconduct, agreeing with Hunter that he did not violate client confidentiality since the descriptions of cases he had handled came from the public record (the court still did uphold the requirement of a disclaimer stating that other clients’ results could vary, however).106

What guidance, therefore, can practitioners in Kentucky take from the current state of advertising regulations insofar as attorneys’ presence on social media is concerned? For example, is an attorney courting trouble by having a profile on LinkedIn (arguably the most professional and business-oriented social networking site)? In all likelihood, the answer is “no.” LinkedIn, under most circumstances, is probably exempt from the advertising rules pursuant to SCR 3.120(7.02)(1)(d) that create an exemption for “regularly published professional directories” from the definition of “advertising.” However, beware of testimonials from LinkedIn connections, which could run afoul of state bar advertising rules, as well as connections recommending the attorney to others. The existence of such recommendations likely triggers a responsibility on the part of the attorney to police his or her profile in order to make sure that statements in such a “recommendation” are factual and do not create an unjustified client expectation, in violation of SCR 3.130(7.15)(b)(2).107

Twitter presents another possible scenario. If a lawyer tweets about a recent court ruling that might be of interest to people following him or her (for example, the Supreme Court’s Affordable Care Act decision), then it would not be considered advertising in all probability. However, if someone tweets that he had just been in a motor vehicle accident and a lawyer following him responds by tweeting, “I can help. I handle car wreck cases all the time on contingency. Call me #Lawyer,” then such a tweet would constitute direct contact under SCR 3.130(7.09). It would need to contain the disclaimers referenced in subsection (3) (alternatively, the lawyer’s Twitter profile page should contain the “This is an Advertisement” disclaimer) and it should be submitted to the Advertising Review Commission.

Attorneys maintaining even a “plain vanilla” Facebook page or a blog that is purely informational rather than business-driven would be well advised to exercise caution. SCR 3.130(7.02)(1) defines “advertisement” as “any

104. Id.
105. Id.
107. At least one bar has taken the position that its version of SCR 3.130(7.15)(b) applied to recommendations on LinkedIn. See S.C. Bar Ethics Advisory Op. No. 09-10 (2009).
information or communication containing a lawyer’s name or other identifying information.” Under so sweeping a definition, an op-ed piece about tort reform could be classified as an “advertisement.” A more rational, pragmatic approach can be found in ABA Formal Opinion 10-457 (2010), discussing attorneys’ websites (and, by implication, social networking profiles). This opinion recognizes that a lawyer may provide a variety of information to the public on his or her website. The determinative factor will be whether the communication is calculated to promote the lawyer’s practice (which would push it into the realm of advertising).

The ABA Ethics 20/20 Commission’s amendments contain other changes that directly address the intersection of ethics, attorney advertising, and social media. The amended version of Rule 7.3, governing the solicitation of clients, clarifies when a lawyer’s online communications may be considered solicitation.108 While solicitation is prohibited if it takes place “by in-person, live telephone, or real-time electronic contact” where a significant motive for the lawyer is “pecuniary gain,” the new comments to Rule 7.3 make it clear that such communication will only constitute solicitation when the lawyer “offers to provide, or can be reasonably understood to be offering to provide” legal services to a specific person.109 As Resolution 105B clarified, a lawyer’s communication “typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.”110 Accordingly, statements contained on a Facebook page, a mass email blast, or a tweet touting a particular practice area would not be considered solicitations because they would be directed to the general public and not a specific person.

Another emerging area addressed by the Commission is online advertising under Rule 7.2. The realm of “pay per click” advertising (in which a lawyer pays a fee to a third party each time an Internet user clicks on an advertisement that directs the user to the lawyer’s website) has mushroomed over the years thanks to such programs as Google AdWords. Such “lead generation” services existed in a murky area of the law; while it was not an impermissible sharing of fees with non-lawyers (the fee is paid regardless of whether or not an attorney-client relationship results), it was not clear was whether it was an impermissible payment for “recommending” the lawyer’s services. The new comments to Rule 7.2 bless the practice of paying for such lead-generating services, provided

109. Id. at 6.
110. Id.
certain safeguards are in place. The lead generator cannot vouch for the attorney’s credentials, abilities, or results. In addition, it cannot claim to have determined that this particular lawyer is appropriate for the client based on any analysis of the potential client’s legal issue. Finally, it cannot create or give the impression that it is making the referral with compensation.

According to the commentary in 105B, these changes were necessary in response to the uncertainty surrounding the ethical propriety of new marketing programs, such as Legal match, Total Attorneys, and Groupon (the deal of the day website that sends subscribers emails offering discounts on various products or services, which the subscriber can then purchase online). Groupon, in particular, has received considerable attention as lawyers have begun offering legal services through this site, alongside advertisements for restaurants, spas, and home improvement services that already populate it. Ethics opinions from four states—South Carolina, North Carolina, Minnesota, and New York—have given a cautious “thumb’s up” to the concept of lawyers offering their services on Groupon with certain caveats. For example, the New York ethics opinion mandates that “[t]he offered discount must not be illusionary, but must represent an actual discount from an established fee for the named service” so as not to be misleading. In addition, the North Carolina Bar requires that the funds be deposited into a trust account and treated as advance payments for legal fees. The New York opinion, in contrast, concludes that an attorney may treat the payment as an earned retainer, while the South Carolina opinion is silent on the issue.

Other jurisdictions have not been as welcoming when considering the ethical implications in lawyer’s use of Groupon to offer legal services. Both Indiana and Alabama have issued ethics opinions prohibiting lawyers from using Groupon as a marketing tool. Among the reasons cited are concerns surrounding the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the prospective client, and the potential for violations of Rule 1.1 (Competence) and Rule 1.3 (Diligence) because of the lack of any

112. Id. at 4.
113. Id. at 3.
114. Id.
115. Id. at 4.
meaningful consultation before payment occurs.\textsuperscript{120} Alabama’s Office of General Counsel raised the twin concerns that under Groupon’s model, “the purchaser may be retaining a lawyer that does not possess the requisite skills or knowledge necessary to competently represent the purchaser,” and there is “no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired.”\textsuperscript{121} Additionally, the Alabama ethics opinion expressed concern with Groupon’s business model of requiring a fifty percent share of each customer’s payment, which would make it impossible for lawyers to comply with Rule 1.16(d)’s requirement for attorneys to provide a full refund if the services are not performed or Rule 1.15(a)’s stipulation concerning unearned fees being placed in a lawyer’s trust account until earned.\textsuperscript{122}

A final area of concern for practitioners using social media in the post-ABA Ethics 20/20 Commission “brave new world” harkens back to Model Rule 7.2’s prohibition against a lawyer giving anything of value to a person for recommending the lawyer’s services. What about situations not involving a lead generator like AdWords (which, of course, is not making a recommendation)? The Commission’s comments to Rule 7.2 do not address, for example, a \textit{quid pro quo} scenario in which one attorney promises to endorse another on LinkedIn in return for a similar glowing recommendation on the site; it could be argued that something of value is being exchanged.

The same question could be posed regarding Facebook “likes.” For example, a firm that offers a give-away like a T-shirt, ballcap, etc., to individuals who visit its Facebook page and “like” them on Facebook could be accused of giving something of value in exchange for a recommendation in violation of Rule 7.2. The Commission’s comments to Rule 7.2, despite leaving it largely unchanged, give a different social media example in which a law firm distributed free T-shirts with the firm name and logo and then offered people a chance to win a prize so long as they post a photo on Facebook wearing the firm’s shirt. According to the Commission, under these circumstances, “The firm arguably gave people something ‘of value’ (the shirt and the opportunity to win a prize) for ‘recommending the lawyer’s services’ and thus might be viewed as running afoul of the existing version of Rule 7.2.”

Consequently, attorneys not only need to be aware of the changes to the Model Rules of Professional Conduct in the wake of the ABA Ethics 20/20 Commission’s work, but also should consider viewing their ongoing client development through the prism of social media, taking into consideration how social networking affects conduct even under those Rules that remained unchanged.

\begin{flushleft}
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\end{flushleft}
V. CONCLUSION

Technology has enabled lawyers to communicate about themselves and their practices more efficiently than at any time in the history of our profession, and has similarly empowered the consuming public to obtain more information about lawyers than ever before. While the emergence of social media platforms like Facebook and Twitter has taken such communication and information sharing to new heights, it has also posed new questions and challenges for lawyers in satisfying their ethical obligations. The amendments implemented by the ABA Ethics 20/20 Commission come at a critical time. Importantly, the guidance they provide is all the more meaningful because it does not represent that radical a departure from the familiar; it is an object lesson in fine-tuning rather than overhaul. Given the truism that law can never hope to keep pace with technological innovation, complete overhauls of existing ethics rules or the creation of entirely new rules designed to govern the use of social media in a professionally responsible manner would be doomed to failure anyway. Existing rules that are brought up to date to accommodate technology’s seismic effect on the legal landscape, when combined with a healthy dose of common sense, should be sufficient.
LEGAL ETHICS, COMMERCIAL PRACTICE, AND THE CERTAINTY IMPERATIVE: A CAUTIONARY NOTE

Diane Lourdes Dick

I. INTRODUCTION

The American Bar Association (“ABA”) Commission on Ethics 20/20 (the “Commission”), broadly charged with modernizing the Model Rules of Professional Conduct (the “Model Rules”), recently circulated a revised draft resolutions in respect of Model Rule 1.7. Rule 1.7 is one of a series of conflicts-of-interest rules codified in the Model Rules. In a move that stands to impact the application of all such conflicts-of-interest rules, the Commission recommends that the ABA amend Rule 1.7 to allow a lawyer and client to agree that a representation will be governed by the conflicts rules of a particular jurisdiction, provided that certain requirements are met. Specifically, the attorney would be required to obtain the client’s “informed consent,” confirmed in writing. Additionally, under the proposed amendments, a lawyer and client would be required to choose the law of a jurisdiction that has a sufficient nexus to the representation, and the resulting application of such jurisdiction’s conflicts-of-interest rules must not result in the application of a rule to which informed client consent is not permitted under the rules of the jurisdiction that would otherwise apply to the representation. As a result, the chosen law would govern the analysis of all potential conflicts, including

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2. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2012).

3. See id.

4. ABA Draft Resolution, supra note 1, at 1.

5. Id. A previous draft would have required that the attorney advise the client to seek independent counsel regarding any choice of law agreement. ABA Comm’n on Ethics 20/20, Revised Draft Resolution for Comment—Model Rule 1.7 (July 11, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120711_third_draft_resolutions_and_report_conflicts_and_choice_of_law.authcheckdam.pdf [hereinafter July ABA Draft Resolution].

6. ABA Draft Resolution, supra note 1, at 1.
imputation of conflicts within law firms under Model Rule 1.10,\(^7\) except that it cannot provide a safe harbor with respect to conflicts that would have been nonwaivable absent the choice of law agreement.\(^8\)

According to the Commission’s report, the proposal to allow conflicts-specific choice of law agreements is intended to respond to the demands faced by commercial attorneys in the interstate and international legal marketplace, where clients, engagements, and their attendant conflicts often straddle multiple jurisdictions with inconsistent conflicts rules.\(^9\) Soliciting input from practicing attorneys and related interest groups, the Commission weighed the realities of the modern legal landscape and identified a need for “certainty,”\(^10\) “uniformity,”\(^11\) and “predictability”\(^12\) in the law governing conflicts of interest.\(^13\) And, although the Commission stopped short of creating a bright-line rule\(^14\) – instead drafting a set of standards that must be applied to each unique set of circumstances – the Commission chose to incorporate the revisions into the text of Rule 1.7 in an effort to provide sure guidance.\(^15\)

However, the interests identified by the Commission in support of the amendments are markedly different from the interests that historically drove the ABA’s promulgation of attorney conflicts rules. Since their initial promulgation, the attorney conflicts provisions of the Model Rules have been anchored in client-centered interests.\(^16\) Generally, conflicts rules have been firmly rooted in

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8. ABA Draft Resolution, supra note 1, at 1.
10. Id. at 1. The report provides, in pertinent part: “The Commission’s proposal, if adopted, could mitigate some of the uncertainty.”
11. Id. at 5 (“The Commission’s proposal is intended to provide more predictability to clients and their lawyers by permitting them to agree in advance to be bound by the conflict rules of a particular jurisdiction.”); see also ABA Comm’n on Ethics 20/20, For Comment: New Drafts Regarding Choice of Rule Agreements for Conflict of Interest and Choice of Law Issues Associated with Fee Division Between Lawyers in Different Firms (Sept. 18, 2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120918_ethics_20_20_co_chair_cover_memo_comment_drafts_on_fee_division_model_rule_1_7_final_posting.authcheckdam.pdf [hereinafter Cover Memo] (“[The choice of law agreements contemplated by the amendments to Rule 1.7] could help lawyers and their clients predict with more accuracy than Model Rule 8.5(b) (Choice of Law) allows”).
12. ABA Draft Report, supra note 9, at 1.
13. Id.
14. Id.
15. In a very early draft of the proposed revisions, the new language was added to a Comment and the text of Rule 1.7 was unchanged. Id. at 2.
16. See infra note 17 and accompanying text.
the principles of fairness, loyalty, and independent judgment, which interests tend to support broad prohibitions against conflicted representations. Where the Model Rules have permitted exceptions, drafters cited both a need to improve access to legal services in remote or underserved communities, and to respect client autonomy. In stark contrast, the proposed revisions to the Model Rules’ conflicts provisions seem to reflect attorney-focused and market-oriented interests. And, although the Commission suggests that attorneys and clients will be benefited by, and have a need for, greater certainty, uniformity, and predictability in attorney conflicts rules, the benefits of the proposed amendments seem likely to accrue most directly to attorneys and large law firms serving as intermediaries in the interstate and international market for legal services.

The Commission’s black letter approach and its many references to certainty, predictability, and uniformity are also deeply reminiscent of a broader trend in commercial law that I’ve previously written about: what I call the “Certainty Imperative.” The Certainty Imperative is a rapidly spreading and deeply entrenched rhetoric, pursuant to which certain vague value concepts are used to justify the adoption of laws and policies that advance the interests of large commercial institutions. By anchoring statutory changes and legal decisions in auspiciously noble goals, such as the achievement of greater “certainty,” “predictability,” and “uniformity,” the Certainty Imperative shifts focus away from or even completely masks outcomes that are inconsistent with other important societal goals, such as fairness and equity in a particular case. Indeed, as one commentator warns, “[a] number of risks are inherent in a crude reliance on . . . unanalyzed value-concepts such as legal certainty . . . [T]here is the obvious danger that the concept of ‘legal certainty’ becomes fetishized, and stands in the way of any real evaluation of the merits of law reform.”

In this Essay, I caution the ABA to ensure that recent reform efforts, such as those that have generated the proposed amendments to Rule 1.7, remain firmly anchored in the important, client-centered interests of fairness, loyalty, and independent judgment, and do not reflect the rampant, fetishized Certainty

18. See infra notes 47-49 and accompanying text.
19. See ABA Draft Report, supra note 9, at 1.
20. See id. at 2.
22. Id. at 1473.
23. Id. at 1474.
24. Id. at 1475.
25. Id.
Imperative that has dominated commercial law in recent decades. Even more, I challenge rule makers to carefully monitor the practice of supporting legal reforms with inexplicit references to certainty, predictability, and uniformity.

By engaging on a deeper level with the application of these value concepts to the proposed amendments to Rule 1.7, legal scholars, rule drafters, and policymakers in legal ethics and commercial law can help to ensure that the Certainty Imperative does not take root in the law governing attorney conduct. This Essay proceeds as follows: Part II briefly describes Rule 1.7 and related attorney conflicts rules, along with the Commission’s proposed amendments thereto. This Part concludes with a discussion of the goals and interests identified by the Commission in proposing amendments to Rule 1.7. Further exploring certainty, uniformity, and predictability as value concepts, Part III describes the Certainty Imperative as a dominant paradigm in commercial law. Part IV more closely examines the Commission’s references to certainty, predictability, and uniformity, and questions whether the Certainty Imperative is becoming similarly entrenched in the law governing attorney conduct. Part IV also attempts to reconcile the goals of certainty, predictability and uniformity with more traditional interests that underlie attorney ethics rules, and notes areas of potential conflict. Part V concludes.

II. BACKGROUND: MODEL RULE 1.7

Rule 1.7 is part of a larger uniform set of standards intended to serve as a model for state regulatory law governing the legal profession. The ABA originally adopted the Model Rules in August 1983, replacing the 1969 Model Code of Professional Responsibility. To date, attorney licensing authorities in forty-nine states, the District of Columbia, and the U.S. Virgin Islands have adopted codes of professional responsibility that are based on the Model Rules as initially published by the ABA. Not every state has adopted all the subsequent amendments. The ABA has made periodic revisions to the Model Rules, with the most substantial redrafting taking place in 2002. The ABA

27. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2012).
Commission on Ethics 20/20’s proposed revisions, if adopted, would constitute the most substantial revisions to the Model Rules since 2002.

Rule 1.7, which pertains to conflicts that have the potential to impact current clients, is the first in a series of Model Rules addressing attorney conflicts of interest. Model Rule 1.8 addresses specific, personal-interest conflicts that can arise with respect to current clients. Model Rule 1.9 addresses conflicts that can arise in respect of former clients. And Model Rule 1.10 sets forth the mechanisms by which conflicts can be imputed to attorneys within the same law firm.

Generally speaking, Rule 1.7 prohibits an attorney from engaging in a representation where the client’s interests will be “directly adverse” to the interests of another client or where there is a “significant” risk that the representation will be “materially limited” by the attorney’s “responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer,” unless each client gives informed consent, confirmed in writing, and the attorney reasonably believes that assumption of the new representation will not adversely impact any client. The requirement that affected clients give informed consent means the attorney must provide adequate disclosure of the potential legal and practical effects of both the waiver and the proposed representation. Although most conflicts, including future conflicts, can be waived by clients under the rule, certain conflicts are deemed to be inherently nonwaivable. For instance, an attorney may not represent directly adverse litigants, notwithstanding the clients’ willingness to provide consent.

Although the ABA has made periodic revisions to the Model Rules, the substance and spirit of Rule 1.7 has remained fairly consistent over the years. In fact, the text of the rule was not changed at all in the first nineteen years following its initial promulgation, and, in that same period, the comments were revised only to include a sentence addressing the practice of conflicts-checking. In 2002, the rule underwent significant redrafting, to clarify the operation of the rule and to strengthen its expression of the important interests sought to be advanced. However, although the 2002 revisions dramatically changed the text

32. See Model Rules of Prof'l Conduct R. 1.7, 1.8 & 1.10 (2012).
37. See Model Rules of Prof'l Conduct R. 1.0(e) (2012) (defining “informed consent”).
42. ABA Comm'n on Evaluation of the Rules of Prof'l Conduct, Report with Recommendation to the House of Delegates, Reporter's Explanation of Changes to Model Rule 1.7 (Aug. 2001),
of both the rule and the comments, most of the changes were not meant to be substantive in nature; rather, they were intended merely to provide amplification and clarification of the existing substantive rules.

As the comments to Rule 1.7 articulate, particularly as amplified by the 2002 amendments, the rule is designed to protect important, client-centered interests of fairness, loyalty, and independent judgment. In particular, Comment 1 explains, “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” Although it may seem contrary to these interests that the rule provides a mechanism whereby clients may waive conflicts (thereby allowing attorneys to represent directly adverse interests in certain cases), ABA reports from the early 1980s reveal that the drafters sought to protect clients in less populated areas, where there was limited access to legal services. The drafters believed that a blanket prohibition on all representations to the extent that the attorney is also representing an adversely situated client would only further exacerbate the obstacles that many clients already face in remote or rural areas. Additionally, client waiver provisions of this sort promote the important goal of client autonomy.

Of course, much has changed in the last thirty years, and the drafters’ early interest in the needs of small-town clients has given way to modern focus on the unique issues that arise in an increasingly multijurisdictional, cross-border practice environment. While the profession’s shifting focus was foreshadowed by numerous articles in professional journals in the 1990s and early 2000s addressing cross-border practice, the modern sea of change is most clearly reflected in the ABA’s decision in 2000 to convene a Commission on Multijurisdictional Practice to study potential reforms to the Model Rules. In fact, certain of the 2002 amendments, such as the revisions to Rules 5.5 and 8.5, were in response to this commission’s research findings. Similarly, just as the ABA has taken a deep interest in the cross-border nature of modern legal

available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule17rem.html [hereinafter Reporter’s Explanation of Changes to Model Rule 1.7].

43. The 2002 amendments required that informed consent be “confirmed in writing.” Id.
46. Id.
48. Id.
52. Id.
practice, so, too, has the ABA evidenced a growing interest in the application of the Model Rules to the transactional environment.\(^{53}\) Indeed, this emerging interest is clearly reflected in the 2002 revisions to Rule 1.7. For instance, the 2002 amendments added Comment 7, which explains how directly adverse conflicts might arise in transactional practice.\(^{54}\)

In the years following the 2002 amendments, the ABA has continued to study the application of the Model Rules to an increasingly cross-border, multijurisdictional, and highly sophisticated commercial practice environment. In fact, the very decision to convene the Commission on Ethics 20/20 in 2009 was rooted in a desire to “perform a thorough review of the [Model Rules] and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”\(^{55}\) The Commission’s earliest work products included issues papers on multijurisdictional practice\(^{56}\) and on choice of law in cross-border practice.\(^{57}\)

With respect to conflicts of interest, the latter report identified several scenarios in which application of the Model Rules yielded uncertain outcomes due to the complex, cross-border nature of modern practice.\(^{58}\) For instance, the report provided a hypothetical in which a single firm maintains offices in two jurisdictions: an attorney in the firm’s New York office represents a client in a transactional matter, while an attorney in the firm’s Country Q office seeks to commence a new representation that would oppose the existing client in an unrelated matter.\(^{59}\) Under the conflicts of interest rules in Country Q, the new representation would be permissible even without client consent because the New York attorney’s conflict would not be imputed to the attorney in Country Q.\(^{60}\) However, Model Rule 1.10, as adopted in New York, treats all of the firm’s lawyers as one person for conflicts purposes.\(^{61}\) Accordingly, the attorney in

53. See infra note 54 and accompanying text.
58. Id. at 2-4.
59. Id. at 3.
60. Id.
61. Id. at 3; see MODEL RULES OF PROF’L CONDUCT R. 1.10 (2012).
Country Q would need to obtain informed consent from the client in order to proceed with the representation.62 The report concluded the hypothetical with a query: “Can [the attorney in Country Q] undertake the engagement?”63 Addressing the choice of law question, the report noted that it is unclear under the current rules whether attorneys can specify “in their original engagement letters with their clients that the conflicts rules in a designated jurisdiction (or in the Model Rules) would govern their relationship.”64

Other attorney interest groups have raised similar concerns about the potential inconsistencies in attorney conflicts provisions of the Model Rules, and have called for greater certainty and uniformity. For instance, Attorneys’ Liability Assurance Society, Inc., the nation’s leading provider of attorney malpractice insurance for large law firms, remarked: “one of the challenges facing lawyers and clients when they undertake legal matters across multiple jurisdictions is the differing rules of professional conduct and, in particular, differing rules on conflicts of interest that must be observed in the representation.”65 Similarly, attorneys serving on the Law Firm General Counsel Roundtable, an association comprised of general counsel and risk managers of more than thirty large law firms, recently protested “the lack of a single, uniform set of rules governing professional conduct across the country—a lack that often results in conflicting, inconsistent, and unpredictable results from one jurisdiction to another[.]”66

The Commission’s proposed amendments to Rule 1.7 are intended to respond to criticisms of this sort, and to provide enhanced certainty, uniformity, and predictability in the law governing attorney conflicts. As described above, the Commission recommends that the ABA amend Rule 1.7 to allow a lawyer and client to agree that a representation will be governed by the conflicts of interest rules of a particular jurisdiction, provided that certain requirements are met.67 Specifically, the attorney would be required to obtain the client’s “informed consent,” confirmed in writing, to the choice of law decision.68 Additionally, under the proposed amendments, a lawyer and client would be required to choose the law of a jurisdiction that has a sufficient nexus to the

63. Id.
64. Id.
67. ABA Draft Resolutions, supra note 1, at 1.
68. Id.; MODEL RULES OF PROF’L CONDUCT R. 1.7 (c)(1) (2012).
representation, and would not be permitted to use the choice of law mechanism to bypass a local rule that would render a conflict nonwaivable.  

Agreements of this sort would stand at the intersection of two exceedingly complex areas of the law—conflicts of law and choice of law—where clients are unlikely to have previous experience. Yet the most recent draft of the proposed amendments omits an earlier draft’s requirement that the lawyer encourage the client to seek independent counsel with respect to a choice of law agreement. In many cases, absent guidance from independent counsel, “informed consent” may not be particularly meaningful.

The Commission’s publications cast light on how these choice of law agreements will likely manifest in practice. For instance, although the proposed amendments speak of a choice of law “agreement” between the lawyer and client, in practical terms the choice of law decision is unlikely to be manifested in a free-standing, choice of law contract between the attorney and client. Rather, as the Commission’s issues paper suggests, the “agreement” is likely to be included as a sentence or two within the initial engagement letter. Indeed, this is currently a popular method among law firms for obtaining advance waivers from clients.

The danger is that these agreements may expose clients to conflicts rules that provide less stringent loyalty obligations than would otherwise govern the representation. Yet concerns of this sort appear to be neglected, while the Commission’s reports focus on the proposed amendments’ ability to deliver certainty, uniformity, and predictability. Of course, to the extent that “certainty” in this context simply refers to a person’s ability to predict the jurisdiction whose law will apply to any attorney conflicts issues, it is tautological to say that the proposed amendments will enhance certainty for lawyers and their clients. Clearly, there is a benefit to lawyers and law firms when they can identify with certainty the conflicts rules that will apply to any given representation. Without a doubt, this is why law firm general counsels and attorney malpractice insurance providers have lobbied for increased certainty. But what is the benefit to be gained by clients from the certainty, uniformity, and predictability offered by the proposed amendments? To be sure, in a world of continued uncertainty, attorneys would be forced to err on the side of caution by

69. Id.; MODEL RULES OF PROF’L CONDUCT R. 1.7 (c)(3)(4) (2012).
70. See July ABA Draft Resolution, supra note 5.
71. ABA Draft Resolution, supra note 1, at 1; MODEL RULES OF PROF’L CONDUCT R. 1.7(c)(4) (2012).
72. See infra notes 73 and 74 and accompanying text.
73. See supra note 57 and accompanying text.
75. ABA Draft Report, supra note 9, at 5.
seeking informed consent from their clients to any potential conflict, taking into account a range of potential conflicts rules that might apply. Such an outcome is arguably beneficial to clients to the extent that it provides them with increased disclosures and a higher degree of loyalty from their attorneys. Until we have a clear sense as to how certainty, uniformity, and predictability in the attorney conflicts rules might benefit clients, there is a danger that these value concepts might be used as mere rhetoric to cloak reforms that ultimately serve attorney self-interest.

The following section explores these questions as they have emerged in commercial law, with particular focus on the potentially dangerous consequences that arise when the vague value concepts of certainty, uniformity, and predictability are permitted to take root as rhetorical justifications for law reform.

III. THE CERTAINTY IMPERATIVE IN COMMERCIAL LAW

In a previous work, I explored what I call the “Certainty Imperative” in commercial law.76 The Certainty Imperative is a legal paradigm that infuses the goal of market stability into the deeply entrenched, normative theme of legal certainty.77 The Certainty Imperative manifests as a pervasive rhetoric in the commercial law context, and most notably in finance and lending law. It commonly takes the form of policy arguments that place tremendous emphasis on the value concepts of certainty, predictability, and uniformity.78 Typically focused on the needs of large commercial institutions, the Certainty Imperative promotes bright-line rules that provide “all prospective lenders the certainty that is so important to the effective operation of markets,”79 or that deliver “guiding principle[s] for those whose daily activities must be limited and instructed” by laws and regulations governing commercial transactions.80 The Certainty Imperative tends to manifest in rather spirited language: for instance, expressions that a legal reform might “throw credit markets into confusion and destabilize

76. Dick, supra note 21, at 1466.
77. Id.
78. E.g., Pinter v. Dahl, 486 U.S. 622, 652 (1988) (explaining that the securities market “demands certainty and predictability”); In re Symons Frozen Foods Inc., 432 B.R. 290, 300 (Bankr. W.D. Wash. 2010) (resolving a conflict of laws question pertaining to statutory liens based in part upon the court’s belief that “the application of Washington law . . . is supported by its effect of . . . creating certainty in the market”).
79. In re Bulson, 327 B.R. 830, 844 (Bankr. W.D. Mich. 2005) (“[S]ome line must be drawn so that the lenders generally can make rational decisions when underwriting loans . . . . [T]he outcome . . . is at least one that a lender could have anticipated and adjusted for accordingly.”).
[an] area of law," 81 or “disrupt orderly credit markets.” 82 The Fourth Circuit even suggested that a ruling adverse to the expectations of lenders 83 might send tremors through the industry, causing “untold and unknown consequences that cannot now be fully foreseen,” “undefinable instability,” and even “widespread confusion.” 84 Adding further fuel to an already fiery verbiage, the Certainty Imperative is frequently articulated in legal advocacy efforts in the commercial law sector, manifesting in litigation briefs, lobbying efforts, and legislative proposals. 85

As noted above, the Commission on Ethics 20/20 repeatedly cites the interests of certainty, uniformity, and predictability, using language that is deeply reminiscent of the Certainty Imperative. 86 However, there is one important distinction: the Commission repeatedly notes that these goals are important to both attorneys and clients. 87 In contrast, in the commercial law context, expressions of the Certainty Imperative do not suggest that the advancement of certainty, uniformity, and predictability offers direct benefits to borrowers or consumers. 88 Rather, courts and legislatures acknowledge that the benefits of certainty, uniformity, and predictability accrue mainly to large financial institutions and other market intermediaries. At the same time, they

81. Smith v. Anderson, 801 F.2d 661, 665 (4th Cir. 1986) (“[T]he loan transaction here complied with the careful requirements of state and federal law. To supplement those requirements with ones of our own devising would throw credit markets into confusion and destabilize this area of law.”).

82. Algemene Bank Nederland v. Hallwood Indus., Inc., 133 B.R. 176, 180–81 (W.D. Pa. 1991) (explaining that under a loan assumption agreement, the assignor remained liable to the holder after the holder was unable to recover from the assignee because of involuntary bankruptcy; to find otherwise “would not only be unwarranted but would also disrupt orderly credit markets”).

83. Where the expectation of lenders is reasonable and based on an agency interpretation in a particularly complex field of law. Cetto v. LaSalle Bank Nat’l Ass’n, 518 F.3d 263, 277 (4th Cir. 2008).

84. Id.


86. See supra notes 10-12.

87. ABA Draft Report, supra note 9, at 5; Cover Memo, supra note 12, at 1.

88. See, e.g., A.I. Credit Corp. v. Gov’t of Jamaica, 666 F. Supp. 629, 633 (S.D.N.Y. 1987) (“Our holding could have a devastating financial impact . . . [on the borrower]. But it is not the function of a federal court . . . to evaluate the consequences to the debtor of its inability to pay nor the foreign policy or other repercussions . . . . Such considerations are properly the concern of other governmental institutions.”).
intimate an *indirect* benefit that will flow to borrowers or consumers: the willingness of financial institutions to lend.\(^89\) For instance, in *Sharon Steel Corp. v. Chase Manhattan Bank*,\(^90\) the Second Circuit succinctly summarized the importance of uniformity in construing boilerplate provisions: “uniformity in interpretation is important to the efficiency of capital markets.”\(^91\) The court further explained:

> [T]he creation of enduring uncertainties . . . would decrease the value of all debenture issues and greatly impair the efficient working of capital markets. Such uncertainties would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice.\(^92\)

In other words, the Certainty Imperative in commercial law asserts that borrowers and consumers ultimately benefit *indirectly* when the legal construct provides certainty, uniformity and predictability in a manner that *directly* benefits lenders. The following section explores these value concepts in the context of attorney ethics, with a particular emphasis on the direct or indirect benefits that clients can expect to receive when legal reforms are premised upon the advancement of certainty, uniformity and predictability.

### IV. AN EMERGING CERTAINTY IMPERATIVE IN THE LAW GOVERNING ATTORNEY CONDUCT?

Is the Certainty Imperative taking root in the realm of attorney ethics? Clearly, we see an emergence of the same unarticulated value concepts of certainty, uniformity, and predictability.\(^93\) Of course, to some extent the Commission’s heavy reliance on these value concepts may simply reflect a studied reflection on broader commercial law issues, such as sophisticated cross-border transactional practice and the increasingly global economy, where legal certainty is the subject of much discourse.\(^94\) But the Commission’s newly articulated goals might also signal a more dangerous sea of change in attorney ethics reform efforts, whereby unarticulated value concepts might be used as rhetorical devices to support legal reforms that would fail under a more traditional client-centered analysis.

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89. Dick, *supra* note 21, at 1474.
90. 691 F.2d 1039 (2d Cir. 1982).
91. *Id.* at 1048.
92. *Id.*
93. *See supra* notes 10-12.
94. ABA Draft Report, *supra* note 9, at 1.
As a recent essay by legal ethics commentator Lawrence Fox suggests, recent reform efforts might have already reached such a perilous point. In his scathing review of proposals submitted to the Commission by the Law Firm General Counsel Roundtable, Fox asserts that some reform participants have chosen to sacrifice client loyalty in an effort to protect attorney economic interests and to enable large law firms to practice law in a less restrained, market-based manner. Although the General Counsels’ proposals claim to be client-centered, Fox argues that the proposals radically reduce the duties owed by an attorney to certain “sophisticated clients.” In a published response to Fox’s critique, attorneys from the Law Firm General Counsel Roundtable explain that the reforms are necessary to enable attorneys and large law firms to compete in an increasingly global and competitive market for legal services. The authors note that the “world of legal practice” has changed, and describe the “mutual needs of sophisticated clients and their lawyers to be able – by mutual consent and when they choose – to determine with certainty how the conflict of interest rules should apply in their relationships.” However, consistent with the Commission’s own vague use of “certainty” as a value concept to support legal reform, the authors never articulate the direct benefits that would accrue to clients from the increased certainty.

In fact, the response hints at an attorney and market focus, defending reform proposals that are “grounded in the realities of today’s complex and highly competitive market for legal services,” and noting the “evolving marketplace in which lawyers actually live and work.” Finally, the response admits to a “serious concern”: “the burdens of unnecessarily restrictive regulations on the practice of law.” In language reflecting a neoclassical economic analysis of legal ethics rules, the authors note the process of deregulation that is already underway in “many parts of the world, most notably in England,” and note that such “changes will liberate clients with global businesses and law firms not constrained by the U.S. regulatory structure.” The authors close with a
warning: “[u]nless the rules governing the practice of law in the United States can be modified to be more in line with the prevailing norms in the rest of the world, U.S.-based and qualified lawyers are likely to be constrained in their ability to compete globally for legal business.”

A closer reading of the response to Fox’s critique suggests an indirect benefit that would purportedly accrue to clients when the law provides attorneys and law firms with enhanced certainty, uniformity, and predictability. The response suggests that the conflicts provisions of the Model Rules operate to restrain today’s ever-expanding large law firms in the market for legal services, and that reforms are needed to provide increased certainty, uniformity, and predictability to attorneys and law firms. And, just as the Certainty Imperative in commercial law promises indirect benefits to borrowers and consumers in the form of an increased willingness on the part of large commercial institutions to engage in transactions, the response seems to suggest that, as an indirect benefit to clients, attorneys will be more willing and able to serve in a broader range of matters. These are undeniably attorney and market-focused interests, premised on a belief that the rules governing attorney conduct should seek to advance the needs of the attorneys and large law firms that serve as intermediaries in a highly competitive and global market for legal services.

Notwithstanding its targeted mission to focus on the multijurisdictional practice climate, the Commission was also charged with proposing revisions that would serve the ABA’s broader goals of “protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.” Thus, the Commission, and the ABA more broadly, ought to engage more deeply with the goals and interests that motivate recent reform efforts, and ensure that they are consistent with these broader aims. In particular, I challenge rule makers to carefully monitor the emerging practice of supporting legal reforms with inexplicit references to certainty, predictability, and uniformity, and to ensure that legal reform efforts remain firmly anchored in the important, client-centered interests of fairness, loyalty, and independent judgment. Attorney and market-focused reforms must be strictly scrutinized in a profession where it is a true privilege and honor to serve clients. What is more, as the story of the Certainty Imperative in commercial law reveals, there is a danger in allowing unarticulated value concepts to become fetishized.

107. Id.
108. Id. at 597.
109. Id. at 594.
V. CONCLUSION

The Commission on Ethics 20/20 was convened by the ABA to “perform a thorough review of the [Model Rules] and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”\textsuperscript{111} As this mission statement suggests, much has changed in the last thirty years. The practice of law is increasingly cross-border, involving sophisticated transactions, complex technology, and greater competition. The Commission was also charged with proposing revisions that would advance the ABA’s broader vision of “protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.”\textsuperscript{112} As the latter rulemaking goals suggest, it remains a privilege and an honor to engage in the practice of law. What is more, the latter and former rulemaking goals are not inherently inconsistent, so long as the Commission remains focused on the traditional, client-centered interests that serve as bedrock principles of legal ethics and does not allow unarticulated, fetishized value concepts to divert reform efforts.

\textsuperscript{111} See About the Comm’n, supra note 55.
\textsuperscript{112} Introduction and Overview, supra note 110, at 1.
SHOULD BORDERS MATTER TO THE TRANSACTIONAL LAWYER?

Shannon “A.J.” Singleton

I. INTRODUCTION

Lawyer mobility, client needs, and the realities of modern multijurisdictional practice have once again prompted the American Bar Association (“ABA”) to modify existing Model Rules of Professional Conduct and to adopt a new Model Rule to address cross-border practice. The underlying aim of these changes is to assist attorneys in avoiding the unauthorized practice of law – because if permissible multijurisdictional practice is one side of the coin, the unauthorized practice of law is the other.

For the “litigator,” permissible cross-border practice is generally more easily defined and arguably more in the forefront of the attorney’s mind. The litigator knows that she cannot appear in court or file pleadings in a jurisdiction in which she is not licensed, unless she has been admitted pro hac vice. Some of the litigator’s more nuanced cross-border practice concerns may include: whether she can interview or depose witnesses in a jurisdiction in which she is not licensed, or whether she can represent a client in an arbitration taking place in a jurisdiction other than her own.

What of the “transactional attorney” and multijurisdictional practice? The transactional attorney, not representing a client before a tribunal, may not give the unauthorized practice of law more than a passing thought. But what if that same transactional attorney advertises in a jurisdiction in which he is not licensed, or opens an office outside his jurisdiction? Or represents a client located outside the attorney’s home jurisdiction? Or perhaps represents a client located in his jurisdiction, but regarding a transaction, the focus of which is in another jurisdiction? And finally, what if the attorney needs to quickly relocate

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1. Throughout this analysis, the author will use the pronouns “he” and “she” interchangeably.
2. For purposes of this discussion, “transactional attorney” refers to an attorney in private practice whose practice does not involve litigation or alternative dispute resolution. Such attorneys would include business or “corporate law” attorneys who advise clients on organizational structure and inter-business deals. It would also include attorneys whose practices are focused upon the law of real estate, banking, or trusts and estates.
his practice to a new jurisdiction in which he is not presently licensed to practice law?

This analysis will explore (1) the extent to which new ABA Model Rules would address some of these concerns through revisions to ABA Model Rule 5.5 on multijurisdictional practice and the Model Rule on Admission by Motion, and through the adoption of the new Model Rule regarding Practice Pending Admission; (2) why jurisdictions may not adopt these provisions anytime soon; and (3) some of the dangers of the unauthorized practice of law that may stalk the unwary transactional lawyer.

II. THE AMENDMENTS TO ABA MODEL RULE 5.5 AND THE MODEL RULE ON ADMISSION BY MOTION, AND THE ADOPTION OF THE ABA MODEL RULE ON PRACTICE PENDING ADMISSION, WOULD LESSEN THE BURDEN ON THE RELOCATING ATTORNEY

In August 2012, the ABA House of Delegates approved multiple resolutions submitted by the ABA Commission on Ethics 20/20. A number of complementary initiatives included (1) an amendment to ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law); (2) adoption of a new ABA Model Rule on Practice Pending Admission; and (3) an amendment to the ABA Model Rule on Admission by Motion. The combined effect of the first two changes (i.e., amending Model Rule 5.5 and adopting the Rule on Practice Pending Admission) “would enable lawyers to practice in a new jurisdiction while the lawyer actively pursues admission through one of the procedures that the jurisdiction authorizes, such as admission by motion or passage of that jurisdiction’s bar examination.”3 The effect of the third change (i.e., amending the Rule on Admission by Motion) “would allow lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows (i.e., after three, instead of five, years of practice).”4

In 2002, at the recommendation of the ABA’s Commission on Multijurisdictional Practice, the ABA House of Delegates revised the then-existing ABA Model Rule 5.5 to allow greater cross-border practice. Since 2002, technological developments have further complicated the issues surrounding a lawyer’s “systematic and continuous presence” under Model Rule 5.5. The ABA Commission on Ethics 20/20 specifically recognized these changes and, for the benefit of clients (to allow them their choice of counsel with respect to their various jurisdictional needs) and for attorneys (to allow greater

ease in moving to another jurisdiction when client needs or life changing events prompt such a move), stated:

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports. The Resolutions accompanying this Report [re: a new Rule for Practice Pending Admission and the “conforming amendment” to Model Rule 5.5] are designed to address the ethics and regulatory issues associated with a lawyer’s establishment of a practice in a new jurisdiction.

* * *

This proposal recognizes the reality that, in today’s legal services marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction can take considerable time. Subject to numerous restrictions to protect clients and the public, the new Model Rule [re: Practice Pending Admission] is designed to permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.5

The new ABA Model Rule on Practice Pending Admission attempts to address the gap in time between (1) when an attorney moves to a new jurisdiction to establish a systematic or continuous presence in that jurisdiction; and (2) when the attorney becomes fully licensed to practice in that new jurisdiction. Absent rules addressing this lag time, the moving attorney is in a quandary as to the limits of her capacity to practice.

The new Rule would only apply to those attorneys licensed to practice in another U.S. jurisdiction and who have been “actively engaged” in the practice of law for three of the last five years. Such lawyers may provide legal services in the new jurisdiction “through an office or other systematic or continuous presence” for no more than one year (365 days), and so long as the lawyer complies with a number of other requirements.6 For example, the lawyer must not be disbarred or suspended in any jurisdiction, nor be subject to any discipline or pending disciplinary proceeding in any jurisdiction.7 The lawyer must not have been previously denied admission to the new jurisdiction, nor failed to pass

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5. ABA Report 105D, supra note 3, at 1.
6. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1) (2012).
7. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(a) (2012).
that jurisdiction’s bar examination.\textsuperscript{8} If the lawyer intends to practice law in the jurisdiction under the authority granted by this Rule, the lawyer must provide written notice to the jurisdiction’s disciplinary counsel and admissions office.\textsuperscript{9} Within forty-five days of establishing her systematic presence in the jurisdiction, the lawyer must also submit a completed application for full admission by motion or by examination.\textsuperscript{10}

Further, the lawyer relying upon the Rule on Practice Pending Admission must associate with another lawyer who is already fully licensed to practice in the new jurisdiction, with that association being akin to a local counsel relationship like that under ABA Model Rule 5.5(c)(1).\textsuperscript{11} Importantly, the lawyer relying upon the Rule must also comply with the advertising and solicitation rules of the new jurisdiction so that the lawyer’s clients and the general public understand that the lawyer’s authority to practice is limited until she can become fully licensed in the jurisdiction.\textsuperscript{12} The new Rule also provides similar opportunities for foreign legal consultants.\textsuperscript{13}

The list of requirements continues. If the lawyer becomes subject to a disciplinary action, or disciplinary sanctions, during the pendency of her application for full admission, the lawyer must notify the jurisdiction’s disciplinary counsel and admissions office, which may consider any such actions when determining whether the lawyer should be fully admitted.\textsuperscript{14} If the lawyer withdraws her application for admission, or if the application is denied, the lawyer’s limited authority to practice under the Rule is terminated.\textsuperscript{15} The lawyer’s authority to practice under the Rule is also terminated if she does not file an application for admission within forty-five days of establishing her office or systematic presence,\textsuperscript{16} or if she fails to continuously comply with other

\begin{itemize}
\item \textsuperscript{8} ABA Model Rule on Practice Pending Admission (1)(b) (2012).
\item \textsuperscript{9} ABA Model Rule on Practice Pending Admission (1)(c) (2012).
\item \textsuperscript{10} ABA Model Rule on Practice Pending Admission (1)(d) (2012).
\item \textsuperscript{11} ABA Model Rule on Practice Pending Admission (1)(f) and cmt. (2012). (More of a concern for “litigators,” the Rule also requires that, before the lawyer is formally and fully admitted to practice in the jurisdiction, she must still be admitted \textit{pro hac vice} prior to appearing before any tribunal that would otherwise require it of attorneys not licensed to practice in the jurisdiction. ABA Model Rule on Practice Pending Admission (3) (2012)).
\item \textsuperscript{12} ABA Model Rule on Practice Pending Admission (1)(g) and cmt. 3 (2012). The rule and comment note that “[t]he lawyer cannot hold himself out to the public as a fully licensed attorney until he becomes one.” Further explaining: “[b]ecause such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites and letterhead.”
\item \textsuperscript{13} ABA Model Rule on Practice Pending Admission (2) (2012).
\item \textsuperscript{14} ABA Model Rule on Practice Pending Admission (4) (2012).
\item \textsuperscript{15} ABA Model Rule on Practice Pending Admission (5)(a) (2012).
\item \textsuperscript{16} ABA Model Rule on Practice Pending Admission (5)(b) (2012).
\end{itemize}
requirements of the Rule. Further, when a lawyer’s authority to practice under the Rule is terminated, she must close her office within thirty days; end her systematic and continuous presence in the jurisdiction; notify all clients, and all opposing counsel and co-counsel in pending matters, that she is no longer authorized to practice; and do whatever is necessary to protect her client’s interests. She also may not commence any new representations that would constitute the practice of law in that jurisdiction.

The corresponding change to Model Rule 5.5 recognizes that the lawyer not licensed to practice in the jurisdiction may nonetheless provide legal services in the jurisdiction through an office or other systematic and continuous presence, if the services are authorized by federal or other law or rule (such as the new “Model Rule on Practice Pending Admission”). The change specifically acknowledges that the lawyer may not only provide legal services in the jurisdiction in which she is not yet licensed, but may do so through establishment of an office in the jurisdiction.

The restrictions set forth in these complementary Rules (especially as to the Model Rule on Practice Pending Admission) try to balance the needs of clients and lawyer mobility, on the one hand, and protection of the public, on the other. However, given the ease with which these changes would allow a not-yet-licensed attorney to establish a systematic presence in the jurisdiction, some jurisdictions may see these changes as going beyond what is necessary to recognize a Practice Pending Admission Rule, if the jurisdiction even adopts such a Rule.

As shown below, states’ hesitancy to adopt such a provision may be inferred from their hesitancy to adopt the ABA Model Rule on Admission by Motion. In August 2002, the ABA adopted its Model Rule on Admission by Motion, which allows an experienced lawyer licensed in one jurisdiction to become fully admitted to practice in another jurisdiction without having to pass the jurisdiction’s bar examination. The Model Rule allows the experienced lawyer to essentially “apply into” admission in the other jurisdiction. However, the ABA Commission on Ethics 20/20 found that the admission by motion process was time consuming and frustrated the attorney’s ability to represent clients. The lag time also affected the attorney’s career choices. Pursuant to the Model Rule, the applicant must (1) be licensed in another state, territory, or the District

17. ABA Model Rule on Practice Pending Admission (5)(c) and (e) (2012).
24. Id. at 2-3.
of Columbia; (2) hold an appropriate law degree from an approved law school; (3) have been “primarily engaged in the active practice of law”\(^{25}\) for a certain number of years; (4) establish that he or she is in good standing in all jurisdictions of licensure, and not subject to any current disciplinary sanctions or pending charges; and (5) establish “character and fitness to practice law.”\(^{26}\) Before August 2012, the ABA Model Rule required that the attorney applicant be engaged in the active practice of law for five of the prior seven years immediately preceding the filing of her application for admission by motion. The August 2012 changes to the Model Rule reduce that timetable to three of the last five years.\(^{27}\)

III. THE ABA’S NEW AND REVISED MODEL RULES REGARDING PERMISSIBLE CROSS-BORDER PRACTICE ARE NOT LIKELY TO BE ADOPTED BY JURISDICTIONS IN THE NEAR FUTURE

Passage of these measures by the ABA House of Delegates is one thing; adoption by any given jurisdiction is quite another. The ABA itself and various commentators have recognized that states are hesitant to ease restrictions on cross-border practice, and various jurisdictions have identified a variety of reasons for guarding admission to practice in their respective jurisdictions.\(^{28}\) In fact, in arguing for reduction of the “time-in-practice” requirement to three of the past five years for Admission by Motion, the ABA Ethics 20/20 Commission discounted a number of arguments against such a reduction, including: (1) insufficient competence of a third-year attorney; (2) bar exam passage as an

\(^{25}\) See ABA Model Rule on Admission by Motion (2) (2012) (“Active practice” includes (a) representing client(s) in private practice; (b) serving as a lawyer for a federal, state or local government authority or agency; (c) teaching law at an approved law school; (d) serving as a federal, state or local judge, or judicial law clerk; and (e) serving as in-house counsel.).

\(^{26}\) ABA Model Rule on Admission by Motion (1) (2012).

\(^{27}\) ABA Model Rule on Admission by Motion (1)(c) (2012).

\(^{28}\) See, e.g., ABA Report 105E, supra note 4, at 5 (“The Commission concluded that the widespread adoption of admission by motion procedures is a positive development, but also found that a number of jurisdictions have not yet adopted an admission by motion process or have adopted a process that imposes unnecessary restrictions and requirements. Thus, in addition to proposing the amendments described above, the Commission also urges the eleven jurisdictions that have not adopted the Model Rule to do so and urges other jurisdictions with admission by motion procedures to eliminate any restrictions, such as reciprocity requirements, that do not appear in the Model Rule.”); Arthur F. Greenbaum, Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment, 43 AKRON L. REV. 729, 767 (2010) (While analyzing many jurisdictions’ divergent treatment of the issue of multijurisdictional practice, Prof. Greenbaum maintained a positive outlook for the future: “Once experience with a modern multijurisdictional regime proves positive across a number of jurisdictions, the outliers that have not yet adopted a rule [allowing multijurisdictional practice] are likely to follow. And as the forces that created the movement to multijurisdictional practice continue to accelerate, it is likely that the permissible scope of multijurisdictional practice also will broaden.”).
indication of knowledge of the laws of the particular jurisdiction; and (3) taking and passing an “easier” bar to then move to a more challenging jurisdiction.\textsuperscript{29} Other, more cynical explanations for states’ hesitancy to relax cross-border practice restrictions include monopolistic control over the practice of law.

Regardless of the reasons for maintaining such restrictions, past history of the acceptance (or not) of the ABA’s Model Rule on Admission by Motion reflects the hesitancy of states to allow systematic cross-border practice and the free movement of an attorney’s practice from a jurisdiction in which he is licensed to one in which he is not. The ABA itself has recognized that eight years after the ABA’s adoption of the Model Rule on Admission by Motion, 11 states – California, Delaware, Florida, Hawaii, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, and South Carolina – have not adopted any rule that allows an attorney to simply move for admission based on his years of practice in a sister state.\textsuperscript{30} Most of the other 40 jurisdictions in the United States (including the District of Columbia) that have adopted some form of admission by motion include the “five-out-of-seven years in active practice” provision originally proposed by the ABA. However, many jurisdictions place significantly greater burdens on the applicant. Some jurisdictions require that the applicant certify that a percentage (usually a majority) of his or her practice will be conducted in the new jurisdiction.\textsuperscript{31} Many more jurisdictions require “reciprocity,” meaning the applicant can only take advantage of the jurisdiction’s admission by motion option if the applicant’s home jurisdiction allows attorneys from the other jurisdiction to be admitted by motion. Some jurisdictions with a “reciprocity requirement” even require that the applicant establish that the home jurisdiction has a no less stringent admission by motion process.\textsuperscript{32} Neither

\textsuperscript{29} ABA Report 105E, \textit{supra} note 4, at 3-4. Charles Wolfram’s work, \textit{Symposium: Ethics and the Multijurisdictional Practice of Law: Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by the Transactional Lawyer}, 36 S. TEX. L. REV. 665 (1995), provides a compelling piece challenging many of the arguments against allowing more permissible cross-border practice. Even back in 1995, Wolfram recognized: “Innovations in telecommunications and transportation have made keeping in touch with distant clients almost as effective as communication with clients in the same community. For their part, lawyers’ reputations, at least in some specialties, have also spread beyond an otherwise confining web of state lines.” \textit{Id}. at 669.


\textsuperscript{31} See, \textit{e.g.}, \textit{IND. ADMISSION AND DISCIPLINE R. 6(1)(i)} (requiring, in part, that the applicant file “an affidavit of the applicant’s intent to engage in the practice of law as defined in Section 1(a) predominantly in Indiana,” with “predominantly” meaning that “the applicant’s practice in Indiana must exceed, or be equal to, his or her practice in all other jurisdictions combined”).

\textsuperscript{32} See, \textit{e.g.}, \textit{KY. SUP. CT. R. 2.110(1) and (3)} (allowing for admission by a person licensed in the highest court of another state or the District of Columbia and who has been engaged in the
“home practice” nor “reciprocity” is part of the old or revised ABA Model Rule on Admission by Motion; yet, as of 2010, 26 of the 40 jurisdictions that allow either admission by motion or its equivalent required some form of reciprocity from the applicant’s home jurisdiction.

Kentucky’s own experience with revising its version of Rule 5.5 further shows that jurisdictional borders are here to stay for the foreseeable future. Prior to the 2009 revisions, Kentucky’s version of Rule 5.5 did not address permissible cross-border practice:

SCR 3.130 (5.5) Unauthorized practice of law.
A lawyer shall not:
(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The Kentucky Bar Association (KBA) Ethics 2000 Committee33 proposed significant changes to Kentucky’s version of Rule 5.5. In addition to a nearly wholesale change to the Rule’s commentary, the Committee proposed that Kentucky modify its Rule 5.5 as follows:

SCR 3.130 (5.5) Unauthorized practice of law; multijurisdictional practice of law (as proposed by the KBA Ethics 2000 Committee).
(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
   (1) except as authorized by these Rules or other law, establish or maintain an office or other presence in this jurisdiction for the practice of law; or
   (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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33. The KBA Board of Governors created the KBA Ethics 2000 Committee on July 1, 2003 to investigate changes to the ABA Model Rules and to recommend changes to Kentucky’s version of the Rules of Professional Conduct. The Committee’s November 16, 2006 Report became the basis for many changes adopted by the Kentucky Supreme Court, effective July 15, 2009.
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction if such services:

1. comply with SCR 3.030(2),\textsuperscript{34} or do not require compliance with SCR 3.030(2), and are legal services undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or

2. are in, or reasonably related to, a pending or potential proceeding before a tribunal or alternative dispute resolution proceeding in another jurisdiction for a client, or prospective client pursuant to Rule 1.18, if the services arise out of, or are reasonably related to, the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission pursuant to SCR 3.030(2); or

3. are not within paragraph (c)(2) and arise out of, or are reasonably related to, the representation of the lawyer’s client in the jurisdiction in which the lawyer is admitted.

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

1. comply with SCR 2.111 regarding a Limited Certificate of Admission to Practice Law in this jurisdiction; or

2. are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer is authorized to provide legal services under this Rule shall be subject to the Kentucky Rules of Professional Conduct and shall comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and assume responsibility for, the representation of the client.\textsuperscript{35}

In explaining its deviation from the then-existing ABA Model Rule version of Rule 5.5, the KBA Ethics 2000 Committee stated that it:

disagreed with the scope of the [ABA Model] Rule in allowing out-of-state lawyers to practice in Kentucky . . . . The key modification in [subpart c] was to add the requirement that for the covered temporary

\textsuperscript{34} KY. SUP. CT. R. 3.030(2) provides: “A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules of the Supreme Court of Kentucky, pays a one time per case fee of two hundred seventy dollars ($270.00) to the Kentucky Bar Association, and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court. No motion for permission to practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee.”

\textsuperscript{35} KBA Ethics 2000 Comm., Report, at 5-16 (Nov. 16, 2006).
legal services to be authorized the services must “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” This limitation is for the protection of the public with regard to new client matters.  

The KBA Ethics 2000 Committee concluded that the ABA Model Rule:

went too far in allowing lawyers from other jurisdictions to temporarily provide legal services in new client matters unrelated to their practice in the jurisdiction they are authorized to practice. The changes the Committee recommends are considered a reasonable balance between the need to recognize in the Rules the realities of multijurisdictional practice as it exists today and the need to protect the public by limiting circumstances in which lawyers unfamiliar with Kentucky law are permitted to provide legal services in Kentucky.

The Kentucky Supreme Court accepted most of the Committee’s recommendations on Rule 5.5, including its modification of Kentucky Rule 5.5(c)(3). The only substantive change that the Kentucky Supreme Court made to what the Commission proposed was to change Kentucky Rule 5.5(c)(1) to read: “comply with SCR 3.030(2), or they do not require compliance with SCR 3.030(2) due to federal statute, rule or regulation . . . .” The Kentucky Supreme Court’s acceptance of the Commission’s recommendation on deviating from the ABA Model Rule approach, plus the Court’s additional change on its own initiative, suggests that the Court carefully considered the recommendations and the implications of a revised Rule 5.5 with respect to permitting cross-border practice in the Commonwealth. It also shows that Kentucky was not willing to go as far as the ABA Model Rule suggested with respect to permissible cross-border practice.

These examples show just how protective state supreme courts and their respective bar associations are regarding their borders and how concerned they are about ensuring that attorneys practicing within their borders are licensed there.

IV. PITFALLS FOR TRANSACTIONAL ATTORNEYS WITH RESPECT TO THE UNAUTHORIZED PRACTICE OF LAW

Suffice it to say, the above-noted experience suggests that we are not likely to see the unhindered movement of attorneys from one jurisdiction to another in the near future. States may generally accept temporary forays into their borders

36. Id. at 5-20.
37. Id. at 5-21.
38. KY. SUP. CT. R. 3.1.30 (Rule 5.5(c)(3)).
39. KY. SUP. CT. R. 3.1.30 (Rule 5.5(c)(1)).
for the attorney licensed in another jurisdiction, but they are unlikely to allow a systematic presence anytime soon.

That being the case, attorneys need to be mindful that jurisdictions will look harshly upon an out-of-state attorney who systematically “practices law” within their borders. One difficulty is that the “practice of law” does not fit easy definitions. For example, Kentucky defines the practice of law as “any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services . . . .”

This definition, like that of many other jurisdictions, is very broad and encompasses a variety of areas. Courts also jealously guard their duty to regulate the practice of law, and to protect the public from the unauthorized practice of law. Kentucky, for example, recognizes: “Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf.”

Likewise, South Carolina recognizes: “Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law.”

In terms of either the lawyer licensed in another jurisdiction or, more often, the person or entity that is not a licensed attorney at all, the notion of the unauthorized practice of law appears obvious. Because of the differences in a litigation practice and a transactional practice, the likelihood that the transactional attorney will fall victim to the unauthorized practice of law is more pronounced.

With respect to the litigator, if the litigator is not licensed to practice in the particular jurisdiction where a case is pending, it is universally accepted that he or she will need to be admitted pro hac vice for that particular jurisdiction; additionally, states require that an out-of-state attorney associate with a locally licensed attorney who actively participates in the representation. Many states will allow an attorney not licensed to practice in that jurisdiction to take a deposition or review documents as contemplated by Rule 5.5. But there are some states whose pro hac vice requirements are more onerous and require,

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41. Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 782 (Ky. 1964).
for example, the litigator to identify all cases in the past five years in which his or her law firm’s attorneys have been admitted pro hac vice in that jurisdiction.43

Regardless of the subtle differences in pro hac vice procedures among jurisdictions, at least with respect to litigation, the court acts as a “goal keeper” against the unauthorized practice of law. In contrast, a transactional attorney lacks a similar “goal keeper” to assess when the attorney is approaching, or has crossed, the (indefinite) line of unauthorized practice. Consequently, concerns over the unauthorized practice of law are a significant issue for the transactional attorney. Transactional attorneys who have practiced in jurisdictions in which they are not licensed have encountered disciplinary problems, have subjected themselves to personal jurisdiction in those locations, and have even opened themselves up to private causes of action for the unauthorized practice of law.

A. Unauthorized Practice of Law May Prevent a Lawyer From Becoming Licensed in the Jurisdiction

In In re Application of Steven B. Jackman for Admission to the Bar,44 New Jersey postponed a candidate’s admission to the bar because he had practiced transactional law in New Jersey for a number of years without a license.45 The candidate had been licensed to practice law in Massachusetts, did so for six years, and then became an associate in a New Jersey law firm.46 He applied to take the New Jersey bar exam; however, he was working on a very large transaction and his managing partner asked him to forego taking the exam at that time.47 The managing partner told him it was “a good idea” for him to take the bar exam at some point,48 but the managing partner also told him it was not necessary for him to take the New Jersey bar exam to practice corporate law in New Jersey.49 Over approximately a seven-year period in which he did not sit for the New Jersey bar exam, the candidate actively practiced merger and acquisition law and general corporate law in New Jersey.50 He met and consulted with clients, signed legal documents, and negotiated with other attorneys on behalf of his clients – while billing his services as a senior

43. See, e.g., IND. ADMISSION AND DISCIPLINE R. 3(2) (2012). Subsection (a)(4)(vi) requires the out-of-state attorney seeking pro hac vice admission in Indiana to identify, by caption and case number, all cases or proceedings in which either he or any member of his firm has appeared pro hac vice before an Indiana court or administrative agency in the last five years.
44. 761 A.2d 1103 (N.J. 2000).
45. Id. at 1103-04.
46. Id. at 1104.
47. Id.
48. Id.
49. Id. at 1104.
50. Jackman, 761 A.2d at 1105.
associate. After not making partner at the New Jersey law firm in any of the four years in which he was eligible, the candidate joined a New York law firm which required him to take both the New York and New Jersey bar examinations.

Even though the candidate had passed the New Jersey bar exam, the New Jersey Bar Association’s Committee on Character and Fitness denied his admission, finding that the candidate had engaged in the unauthorized practice of law during his almost seven years with the New Jersey law firm. Because of his unauthorized practice, the candidate was deemed unfit to be admitted to practice in New Jersey. In ruling that the candidate’s admission be delayed until January 2001, the New Jersey Supreme Court recognized that there was no exception to the state’s license requirement for one engaged solely in transactional practice and not appearing in court. Interestingly, the Court also specifically noted the difference between regularly providing legal services in New Jersey and the more incidental or temporary provision of services to a New Jersey client by a non-New Jersey licensed attorney. Addressing prior New Jersey opinions, the Court recognized:

Both Appell and In Re Waring involved transitory legal activities in New Jersey by out-of-state attorneys employed by out-of-state firms that were countenanced by the Court because of the unique facts of those cases. In those cases the out-of-state attorney was not practicing long term as a member of an in-state law firm. Appell and In Re Waring permitted the use of out-of-state attorneys only to participate in a single transaction. [The candidate’s] actions during the almost seven year period he served as an associate at the New Jersey law firm … without a New Jersey license, was patently distinct. His activities were not authorized by the past precedent of either Appell or In Re Waring.

The Court likewise distinguished the candidate’s systematic presence with Opinion 33, in which the New Jersey Supreme Court found overly broad the Committee on the Unauthorized Practice of Law’s opinion regarding use of out-of-state attorneys by New Jersey government bodies on state and municipal bond matters. Because New Jersey law firms lacked expertise in that area, the Court

51. Id. at 1104.
52. Id. at 1104-05.
53. Id at 1103.
54. Id. at 1104.
55. Id. at 1106.
56. Jackman, 761 A.2d at 1108 (citing In re Waring’s Estate, 221 A.2d 193 (N.J. 1966); Appell v. Reiner, 204 A.2d 146 (N.J. 1964)).
57. Id. at 1108-09 (citing In re Opinion 33 of the Comm. on the Unauthorized Practice of Law, 733 A.2d 478 (N.J. 1999)).
58. Jackman, 761 A.2d at 1108 (citing In re Opinion 33, 733 A.2d at 478).
had recognized that, for a number of years, it was necessary for New Jersey to use out-of-state attorneys.\textsuperscript{59} While acknowledging that those out-of-state attorneys had engaged in the practice of law, the Court also applied a “public interest” test to balance the risks and benefits of allowing such practice.\textsuperscript{60} The Court ultimately determined that an out-of-state bond counsel may practice bond law in New Jersey if she associates with New Jersey-licensed bond counsel who retains responsibility for the representation.\textsuperscript{61}

It should be noted that New Jersey is one of the jurisdictions that has not adopted an admission by motion rule. This might indicate that New Jersey and other states who likewise have not adopted admission by motion procedures are more sensitive to the unauthorized practice of law by out-of-state transactional attorneys. The exceptions noted by the New Jersey Supreme Court might be particularly helpful to the transactional attorney. It would appear that New Jersey, as with many other states, will allow temporary practice consistent with the exceptions found in ABA Model Rule 5.5. Likewise, if there is a particular lack of expertise within the jurisdiction and the attorney not licensed to practice in that jurisdiction affiliates with a locally licensed attorney, who retains responsibility for the matter, it is equally likely that the attorney may not be deemed to have engaged in the unauthorized practice of law. The problem in \textit{In re Application of Steven B. Jackman} arose because the attorney seemingly gave no consideration to the fact that he had maintained a systematic presence in a jurisdiction in which he was not licensed. It is also patently clear that this type of situation presents an easy opportunity for the candidate to be caught, \textit{i.e.} when seeking admission to a state bar in which the attorney has had a longstanding systematic presence in the jurisdiction. It should also be noted that under the ABA’s new Rule on Practice Pending Admission, the candidate would be in no better position because he had waited nearly seven years to seek admission to the New Jersey Bar and had allowed his Massachusetts license to become “inactive.”

\textbf{B. Opening an Office in a Jurisdiction Where the Attorney is not Licensed is Likely to Lead to Unauthorized Practice Charges}

Some states, such as Florida, are especially sensitive to out-of-state attorneys opening offices in their jurisdiction. In \textit{Florida Bar v. Savitt},\textsuperscript{62} the Florida Bar initiated injunction proceedings to stop the unauthorized practice of law against a New York-based law firm and its attorney. The law firm was opening an office

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} 363 So. 2d 559 (Fla. 1978).
in Miami and putting in charge a partner who was not licensed in Florida.\textsuperscript{63} Pursuant to a Joint Motion and Stipulation of Settlement approved by the Florida Supreme Court, the law firm agreed that, instead of attorney Savitt, a Florida-licensed attorney would supervise the office.\textsuperscript{64} The non-Florida licensed attorneys working in the office could provide assistance to the Florida-licensed attorneys; however, the firm would be required to identify to clients and others those lawyers not licensed to practice in Florida.\textsuperscript{65} In addition, the non-Florida licensed attorneys would be permitted to provide advice on matters of federal law or the law of other jurisdictions, so long as the non-Florida licensed attorney was only in Florida on a temporary basis and it was specifically noted that the lawyer was not licensed in Florida.\textsuperscript{66}

Similarly, in \textit{Cleveland Bar Ass’n v. Misch},\textsuperscript{67} an Illinois-licensed attorney, living in Ohio, engaged in the unauthorized practice of law by working out of an Ohio office, advising Ohio clients on Ohio tax matters, representing a client before the Ohio Board of Tax Appeals, and drafting buy-sell agreements for Ohio companies.\textsuperscript{68} The respondent attorney argued that he was a “consultant” retained by an Ohio law firm to advise clients on various corporate matters, including buy-sell agreements and restructuring, ostensibly under the supervision of the Ohio law firm’s attorneys.\textsuperscript{69} The respondent used the firm’s Ohio office and stationary (without noting that he was not licensed in Ohio), and directly advised firm clients on Ohio law matters, with no supervision by an Ohio-licensed attorney.\textsuperscript{70} Admitted to practice before the United States District Court for the Northern District of Ohio, the respondent was designated on firm invoices as “Federal Court Counsel.” The Ohio Supreme Court found that the respondent’s conduct constituted the unauthorized practice of law and enjoined the respondent from further practice in Ohio.\textsuperscript{71}

\textbf{C. Practicing the Law of a Foreign Jurisdiction Can Lead to Availing Oneself to Personal Jurisdiction}

The unlicensed attorney can also subject himself to personal jurisdiction in a foreign jurisdiction if he advises clients on the law of that jurisdiction and promotes his alleged expertise on that jurisdiction’s laws. For example,

\begin{itemize}
  \item \textsuperscript{63} \textit{Id.}
  \item \textsuperscript{64} \textit{Id.} at 560.
  \item \textsuperscript{65} \textit{Id.}
  \item \textsuperscript{66} \textit{Id.} at 561.
  \item \textsuperscript{67} 695 N.E.2d 244 (Ohio 1998).
  \item \textsuperscript{68} \textit{Id.} at 246-47.
  \item \textsuperscript{69} \textit{Id.} at 247.
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.} at 248.
\end{itemize}
Delaware courts have exercised personal jurisdiction, pursuant to Delaware’s Long Arm Statute, over non-Delaware licensed attorneys. In *Sample v. Morgan*, the Court denied the defendant lawyer’s and law firm’s motion to dismiss for lack of personal jurisdiction. The Court concluded that it was “constitutionally permissible to exercise jurisdiction over the lawyer and law firm” when they directed their conduct towards Delaware by regularly advising on Delaware law. The Court specifically posed the question thusly:

The question presented is a straightforward one. May a corporate lawyer and his law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law when the lawyer and law firm: i) prepared and delivered to Delaware for filing a certificate amendment under challenge in the lawsuit; ii) advertise themselves as being able to provide coast-to-coast legal services and as experts in matters of corporate governance; iii) provided legal advice on a range of Delaware law matters at issue in the lawsuit; iv) undertook to direct the defense of the lawsuit; and v) face well-pled allegations of having aided and abetted the top managers of the corporation in breaching their fiduciary duties by entrenching and enriching themselves at the expense of the corporation and its public stockholders? The answer is yes.

The defendant lawyer and law firm should have reasonably expected, under the circumstances, that they could be required to defend themselves in a lawsuit in Delaware, especially when the underlying action was based on the law firm’s advice and representation.

**D. Some Jurisdictions Recognize a Private Cause of Action for Unauthorized Practice of Law**

Some jurisdictions even allow a private cause of action for “unauthorized practice of law,” and some of those do not require the plaintiff to allege the existence of an attorney-client relationship with the lawyer. In *Fogerty v. Parker, Poe, Adams & Bernstein, LLP*, the Alabama Supreme Court affirmed in part, but reversed in part, the trial court’s dismissal of the plaintiffs’ claims against a North Carolina law firm. The law firm represented an Alabama

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72. 935 A.2d 1046 (Del. Ch. 2007).
73. Id. at 1065.
74. Id. at 1048.
75. Id. at 1047 (emphasis added).
76. 961 So. 2d 784 ( Ala. 2006).
77. Id. at 785.
company in which the plaintiffs had invested.  

Plaintiffs were minority members in three Alabama closely held companies, all of which were failing real estate ventures in Gulf Shores, Alabama.  

The plaintiffs requested the ability to inspect the company books in order to investigate the status of their investment and the representations that majority members had made to them.  

The North Carolina law firm, supposedly representing the majority members, told the plaintiffs that they would not be allowed to inspect or copy the company books; that Alabama law purportedly did not entitle them to review the books; and that legal action would be pursued against the plaintiffs if they continued to seek a review of the books or claim that the majority members had committed fraud.  

When the plaintiffs filed suit against the majority members, they also asserted claims against the North Carolina law firm for unauthorized practice of law.  

The law firm moved to dismiss the claims against it, arguing that plaintiffs were not clients of the firm; that plaintiffs’ exclusive remedy was a claim under the Alabama Legal Services Liability Act (“ALSLA”); and that there is no cause of action in Alabama for the unauthorized practice of law or violation of the Alabama Rules of Professional Conduct.  

The trial court granted the law firm’s motion, and plaintiffs appealed.  

In reversing the trial court’s decision, the Alabama Supreme Court disagreed with the defendant law firm’s assertion that ALSLA was plaintiffs’ exclusive remedy.  

The Court held that ALSLA only applies to legal malpractice allegations against attorneys duly licensed to practice in Alabama.  

ALSLA simply did not apply because the North Carolina lawyers were not licensed to practice in Alabama.  

The Court also noted that ALSLA applies only to claims by the recipient of the legal services (i.e., the client) against his or her lawyer.  

More importantly, the Court reaffirmed a private cause of action for unauthorized practice of law under Alabama Code § 34-3-6.  

The Court also held that plaintiffs had sufficiently stated a claim for the unauthorized practice of law by alleging:  

1. that the North Carolina attorneys were not licensed to practice law in Alabama; and 2. that those attorneys had made representations concerning Alabama law for the majority members of the company and for the

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78.  Id. at 786.  
79.  Id.  
80.  Id.  
81.  Id.  
82.  Fogerty, 961 So. 2d at 786-87.  
84.  Fogerty, 961 So. 2d at 787.  
85.  Id. at 789  
86.  Id.  
87.  Id.  
88.  Id. at 790-91
company itself; and (3) that the plaintiffs were injured as a result. The North Carolina law firm sought to overturn Alabama precedent that recognized the private cause of action for the unauthorized practice of law – *Armstrong v. Brown Service Funeral Home West Chapel.* However, the Alabama Supreme Court refused to do so and noted that the *Armstrong* case was “consistent with the law in other jurisdictions recognizing the unauthorized practice of law as a private cause of action.”

Some states, such as South Carolina, have specifically rejected a private cause of action for the unauthorized practice of law. Although it dealt with non-attorney insurance adjusters, the holding of *Linder v. Insurance Claims Consultants, Inc. a/k/a ICC, Inc.*, recognizes that there is no private cause of action in South Carolina for the unauthorized practice of law. The South Carolina Supreme Court specifically stated: “We do not, however, authorize a private right of action. Furthermore, there are statutes which prevent the unauthorized practice of law, and while they state that such activity will be deemed a crime, they do not sanction a private cause of action.” Interestingly, the South Carolina Supreme Court also specifically noted that the respondents were only entitled to compensation for those actions that did not constitute the practice of law. Stated differently, the respondents were not entitled to any compensation for any actions that constituted the unauthorized practice of law.

Still other states, one example being Ohio, recognize a private cause of action for the unauthorized practice of law, but require that the state’s highest court first determine that the particular defendant has engaged in the unauthorized practice of law. At least as to Ohio, it is not enough that the

89. Id.
91. Fogerty, 961 So. 2d at 791.
92. South Carolina has also taken an interesting stance on the “attorney at law” exception to South Carolina’s Consumer Credit Counseling Act (“the S.C. Act”) (S.C. CODE ANN. §§ 37-7-101 to 37-7-122 (West 2003)). In *Lexington Law Firm v. S.C. Dep’t of Consumer Affairs*, 677 S.E.2d 591 (S.C. 2009), a Utah-based law firm with no South Carolina-licensed attorneys filed a declaratory judgment action, claiming that it was entitled to the “attorney at law” exemption to the licensing requirements of the S.C. Act. The South Carolina Supreme Court reversed summary judgment in the law firm’s favor because it expressly held that the “attorney at law” exception applied only to South Carolina-licensed attorneys. *Lexington Law Firm*, 677 S.E.2d at 594-95. The Court was also unimpressed with the law firm’s contradictory arguments that, on the one hand, it was entitled to the “attorney at law” exception, but on the other hand, it was not engaged in the “unauthorized practice of law,” but merely “conducting a business.” *Id.* at 595.
94. *Id.* at 623.
95. *Id.* at 622.
96. Greenspan v. Third Fed. Sav. & Loan Ass’n, 912 N.E.2d 567, 572 (Ohio 2009) (The court recognized that prior to the General Assembly’s 2004 amendment to Ohio Revised Code § 4705.07, there was no private cause of action for the unauthorized practice of law. However,
defendant has allegedly engaged in conduct for which the Ohio Supreme Court has found someone else guilty of the unauthorized practice of law. Rather, Ohio requires that the Ohio Supreme Court first determine that the particular defendant has personally engaged in the unauthorized practice of law before a plaintiff can assert such a claim against that person.97

Florida, on the other hand, recognizes a private cause of action for the unauthorized practice of law, but while the plaintiff must allege that the Florida Supreme Court has determined that the conduct in question constitutes the unauthorized practice of law, it is not necessary for the Supreme Court to have determined that the specific defendant has personally engaged in the unauthorized practice of law. The Court may have made that determination, for example, through review of proposed advisory opinions of the Florida Bar’s Standing Committee on Unauthorized Practice of Law or through other actions filed by the Florida Bar.98 Thus, a Florida court will not entertain a private cause of action if the Florida Supreme Court has had no occasion to determine whether the type of conduct constitutes the unauthorized practice of law. Such a complaint alleging an issue of first impression may be dismissed without prejudice or the case may be stayed until a determination can be made as to whether such conduct constitutes the unauthorized practice of law. As the Florida Supreme Court has explained: “if the actions complained of have been ruled on by this Court, then a plaintiff may be able to state a cause of action with proper pleading, even though the defendant accused of the unauthorized practice of law has not been subject to a Florida Bar proceeding.”99

specifically noting its responsibility for determining the unauthorized practice of law, the Court stated: “the General Assembly avoided invading this court’s exclusive jurisdiction over the practice of law by creating a statutory scheme under which a claimant may commence a civil action for the unauthorized practice of law only ‘upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law.’ . . . Moreover, the statute provides that ‘[t]he court in which the action for damages is commenced is bound by the determination of the supreme court regarding the unauthorized practice of law and shall not make any additional determinations regarding the unauthorized practice of law.’” (citing OHIO REV. CODE ANN. § 4705.07(C)(2) (West 2008))); see also Lowry v. Legalzoom.com, Inc., No. 4:11-CV-02259, 2012 U.S. Dist. LEXIS 100155, *4 (N.D. Ohio, July 19, 2012) (“Once the Supreme Court of Ohio has exercised its exclusive jurisdiction to determine that a specific party has engaged in the unauthorized practice of law, an aggrieved person may seek damages in a civil action against that specific party arising from such conduct.”).

97. Columbus Bar Ass’n v. Am. Family Prepaid Legal Corp., 916 N.E.2d 784, 800-01 (Ohio 2009).

98. See Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905, 907 (Fla. 2010) (noting that while a private plaintiff is not jurisdictionally barred from seeking recovery for damages caused by the unauthorized practice of law, to state a cause of action, the plaintiff must allege that “this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law,” and failure to do so warrants dismissal).

99. Id. at 908.
V. CONCLUSION

Irrespective of technological advancements or the specialization or globalizaton of the legal world, when it comes to the practice of law, borders still matter. The new ABA Model Rules regarding multijurisdictional practice and Practice Pending Admission endeavor to ease the concerns of the lawyer moving from one jurisdiction to another. To the extent states adopt these Rules, they will make it easier for the lawyer to move his/her practice. But there remains a tacit understanding that the lawyer who has been “practicing law” in a jurisdiction in which he or she is not licensed is subject to discipline and/or civil or criminal liability. So long as there remain jurisdictional-specific rules prohibiting a lawyer who is licensed in one jurisdiction from unlimited practice in another, the transactional lawyer involved in cross-border transactions, in any capacity, must remain mindful of the permissible limits of his or her representation and advice.
TECHNOLOGY – A MOTIVATION BEHIND RECENT MODEL RULE REVISIONS

Louise Lark Hill*

After several years of work, in May 2012, the American Bar Association Commission on Ethics 20/20 (“Ethics 20/20”) presented proposals for updating the Model Rules of Professional Conduct (“Model Rules”) “to keep pace with social change and the evolution of law practice.”1 The American Bar Association (“ABA”) created Ethics 20/20 in 2009 “to tackle the ethical and regulatory challenges and opportunities arising from these 21st century realities.”2 Ethics 20/20 specifically addressed technology in its 2012 recommendations, since technology “affects nearly every aspect of legal work.”3 One area examined by Ethics 20/20 was the impact of technology on confidentiality, because “technology has transformed how lawyers communicate with their clients and store their clients’ confidences.”4 A second area examined was the interplay between technology and client development, because “[t]echnology is changing the way that clients find lawyers.”5 To modernize the Model Rules, as well as clarify and expand upon their principles, Ethics 20/20 suggested changes related to technology that focused on confidentiality and the marketing of legal services.6 With these changes, Ethics 20/20 sought “to address the needs of clients and lawyers in a technology-driven global economy while protecting the public and our system of justice.”7 The ABA warmly

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1. Ethics 20/20 Group Submits Final Proposals For Vote by ABA Delegates at Annual Meeting, 28 ABA/BNA LAW MANUAL ON PROF’L CONDUCT 309 (May 23, 2012).
3. Id. at 4. Carolyn B. Lamm, President of the ABA in 2009, “charged the Commission with conducting a plenary assessment of the ABA Model Rules of Professional Conduct and related ABA policies, and directed it to follow these principles: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.” Id. at 1.
4. Id. at 7.
5. Id. at 5.
6. Id. at 7-10. Ethics 20/20 filed six sets of recommendations for consideration by the ABA House of Delegates in the following four categories: outsourcing legal services; accommodating increased lawyer mobility; protecting client confidences with use of new technology; and using new technology for legal services marketing. See ABA/BNA Law. Manual, supra note 1, at 309.
7. See Ethics 20/20 Intro., supra note 2, at 7.
received the proposals for Model Rule changes in both of these categories. To this end, on August 6, 2012, the ABA House of Delegates approved these recommendations by a unanimous vote.8

There is nothing ground-breaking in the 2012 amendments to the Model Rules which address technology as it relates to confidentiality and client development. The changes tend to amplify and clarify existing principles,9 and it cannot help but be noticed that Ethics 20/20 avoided some controversial points. This notwithstanding, the context of these changes includes helpful information that should help lawyers as they engage in practice in the “21st century marketplace.”10 This article begins by looking at the use of technology in law practice with a particular focus on its evolution over time. Part II focuses on the recent Model Rule revisions related to technology and confidentiality and highlights changes in the text of the rules and the rule commentary. Part III addresses changes to the Model Rules related to the use of technology when marketing legal services and notes revisions to the language of the rules and the commentary. The article concludes by referencing the continuing work of Ethics 20/20 and noting upcoming matters slated for Ethics 20/20’s consideration.

I. EVOLUTION OF THE USE OF TECHNOLOGY IN LAW PRACTICE

Over the years, lawyers have taken advantage of available technology to communicate with clients. For the better part of a century, lawyers have used telephones for communication, with an expectation that their conversations with clients would be private.11 The Federal Wiretap Act reinforced this expectation of privacy by prohibiting intentional interception of communications and providing that interception does not waive any otherwise available privilege.12

8. Joan C. Rogers, Ethics 20/20 Rule Changes Approved by ABA Delegates with Little Opposition, 28 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 509 (Aug. 15, 2012). Also approved by unanimous vote were proposals for rule changes that address the outsourcing of legal services and easing the time-in-practice requirement for admission by motion. Measures that were ultimately approved by vote, but generated some opposition, were a recommendation to adopt a Model Rule on Practice Pending Admission and a recommendation to add a new exception to Model Rule 1.6(b) that would permit the disclosure of client information to detect and resolve conflicts of interest arising from a lawyer’s change of employment or from changes in the composition of a law firm. Id.
10. Id.
12. The Federal Wiretap Act provides that “[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.” 18 U.S.C. § 2517(4) (2012). The Act also forbids the
When facsimile transmissions began to be widely used in the 1980s, lawyers communicated with clients by fax, and it was not suggested that the mere use of a fax machine contravened an ethics rule regarding confidentiality. However, the ABA cautioned lawyers that when faxing material, they could not ignore their responsibility to maintain the confidentiality of client information.

With the advent of the cordless telephone, the expectation that a telephone communication would be private diminished. Inadvertent interception occurred frequently, because using a cordless phone “was like operating a radio station, the broadcast of which could be received by anyone in range.” The same was true of the analog cellular phone, which followed on the heels of the cordless phone. With the analog cell phone, “radio signals were transmitted to a base station in a geographic area, which were then transmitted via microwaves to disclosure or use of unlawfully intercepted communications and bars the introduction into evidence of unlawfully intercepted conversations. Id. at § 2515. Attorney-client privilege is a rule of evidence that applies in court proceedings to limit “the extent to which a party in litigation can force from an unwilling witness a statement or document that is protected as confidential.” Charles W. Wolfram, The U.S. Law of Client Confidentiality: Framework for an International Perspective, 15 FORDHAM INT’L L.J. 529, 541-42 (1992). It attaches to confidential communications made between lawyer and client for the purpose of obtaining or providing legal assistance. See id. at 542. Generally speaking, “[a] communication is confidential when the circumstances indicate that it was not intended to be disclosed to third persons other than (1) those to whom disclosure is in furtherance of the rendition of legal services to the client, or (2) those reasonably necessary for the transmission of the communication.” In re Asia Global Crossing, Ltd., 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005) (quoting H. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 503.15 at 503-57 (Joseph M. McLaughlin ed., 2d ed. 1997)). Confidentiality has both subjective and objective components. “The client must intend to give the communication in confidence and must reasonably understand it to have been so given.” Louise L. Hill, Gone but Not Forgotten: When Privacy, Policy and Privilege Collide, 9 NW. J. TECH & INTELL. PROP. 565, 567 (2011).

13. See David Hricik, Confidentiality & Privilege in High-Tech Communications, 60 TEX. B.J. 104, 110 (1997). A component of the U.S. law of confidentiality is a lawyer’s ethical obligation to maintain client confidences. See Hill, supra note 12, at 570. This obligation is “not limited to judicial or other proceedings, but rather appl[ies] in all representational contexts[,]” and covers all information relating to the representation, not only client communications. Arthur Garwin, Confidentiality and Its Relationship to the Attorney-Client Privilege, in ATTORNEY-CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 161 (Vincent S. Walkowiak ed., 5th ed. 2012). Model Rule 1.6(a), Confidentiality of Information, provides: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” MODEL RULE OF PROF’L CONDUCT R. 1.6 (2012).


15. See Hill, supra note 11, at 18.

the switch center of the cellular service provider, and transferred to local telephone service providers.\(^{17}\) These analog cellular calls could be intercepted by any receiver in the broadcast area capable of receiving cellular frequencies.\(^{18}\) Because of this, lawyers employed devices to protect against eavesdropping, such as using scrambling, conversion, or encryption techniques.\(^{19}\)

When ethics opinions from several states indicated that communications on cordless or cellular phones might not be considered confidential,\(^{20}\) lawyers shied away from their use for client conversations.\(^{21}\) Concerns about cellular call interception diminished with the advent of digital technology, which turns “voices into bits,” a format which “cannot be heard by simple radio frequency scanners.”\(^{22}\) In contrast to the analog phone, digital phones offered greater security and alleviated concerns about widespread eavesdropping.\(^{23}\) A greater expectation of privacy accompanied digital technology, even though it was “susceptible to interception by the sophisticated.”\(^{24}\)

As telephone technology was evolving, so was the computer and its use in the practice of law. Initially, law firms used computers to facilitate document production and storage, rather than as a mode of communication.\(^{25}\) In the early days of computer use, “the mainframe computing model allowed users to ‘operate on slices of a central server’s time and resources.’”\(^{26}\) Companies or firms either purchased their own mainframes, which were huge and use was “limited to experts,”\(^{27}\) or, more typically, leased time on the mainframe of another company.\(^{28}\) As technology progressed, mainframe computing gave way

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18. Id. at 19.
19. See Electronic Practice Guide, supra note 11, at 55:401. Older ethics opinions cautioned lawyers regarding the use of cordless and cellular phones and recommended that they warn those with whom they spoke that their conversations were not secure and not to discuss sensitive material. Id.
22. Id. at 20 (citing Electronic Practice Guide, supra note 11, at 55:401).
23. Id. at 20.
28. See Kattan, supra note 26, at 621.
to minicomputers. Eventually, both models gave way to the personal computer, which “has defined how we use computing ability.” In the traditional software licensing model, a customer obtained an executable software code from a vendor and installed the code on the customer’s own servers. Users who ran out of storage space or needed more computer power had to upgrade their hardware.

As technology continued to evolve, in addition to creating and storing electronic documents, computers also proved to be a way for lawyers to communicate with clients. By the mid-1990s, the Internet was widely used and e-mail became an integral form of communication. Although federal statutes prohibited intentional interception of e-mail, there was disagreement among lawyers about whether confidential client information could be sent via unencrypted e-mail. Many lawyers avoided using e-mail for sensitive client material, and used encryption or some generally accepted security system when communicating with clients. When the ABA addressed the matter of mandatory encryption of e-mail in 1999, an ABA Committee concluded that it was not necessary for a lawyer to use encryption when communicating with clients. However, the committee noted that unusual circumstances involving extraordinarily sensitive information might warrant enhanced security measures, just as in some situations, ordinary telephones and other normal means of communication could be inadequate to protect confidentiality. Not surprisingly, the use of computers and e-mail became and continue to be an integral part of legal practice. Not only are computers used for communication, but they are also employed in almost every aspect of the practice of law.

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29. Minicomputers “were ‘mini’ only in reference to room-sized mainframe computers.” Boone, supra note 27, at 417. Minicomputers and mainframes “dominated the use of computing from the late 1940s to the late 1970s and even into the early 1980s.” Id. at 428.

30. Id. “The invention of the microprocessor enabled the development of what we think of as the personal computer and thus brought the use of computing ability to ordinary people.” Id. at 417.

31. See Kattan, supra note 26, at 621-22.

32. See Joan C. Rogers, Ethics, Malpractice Concerns Cloud E-mail, On-line Advice, 12 ABA/BNA Laws. Manual on Prof’l Conduct 59 (1996).


35. ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 99-413 (1999). The committee reached this conclusion reasoning that the expectation of privacy for e-mail is the same as for ordinary telephone calls, and that the unauthorized interception of an electronic message is illegal. Id.

36. Id.


38. Id.
Now, in the second decade of the twenty-first century, the personal computing model, which gives users control over their own data with hard drive storage, is being eclipsed by the cloud. The concept of cloud computing “is a simple one--to harness the instantaneous remote access of the Internet and seemingly limitless storage for common use.” It is defined by The National Institute of Standards and Technology as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or cloud provider interaction.” A user’s “data can be held in any location to which the cloud provider has access,” which “may be distributed across multiple machines in multiple countries.”

Applying this concept to law practice, cloud computing provides lawyers with a cost-effective and convenient way to store material and to share electronic data with others, such as clients or other lawyers. The first law firms to take advantage of the cloud were large firms, where the volume of data exceeded their in-house capabilities or where multiple offices needed access to the same material. But, the cloud’s usefulness is not limited to the large law firms. For small firms, “the cost compression of cloud computing has made it the only financially viable model for managing electronically stored information.” Said to have “revolutionized business practices,” cloud computing allows “users of cloud services to off-load significant overhead and expenses for information technology (IT) functions while obtaining scalable and flexible computing services that do not depend on a specific location.”

43. See Joe Dysart, Head in the clouds: online applications too risky? One firm takes the plunge, 97.4 A.B.A. J. 29 (Apr. 2011). Cloud computing is not just about document management. Some law firms also use the cloud for things such as time tracking, scheduling, and billing. See Steven T. Taylor, Cloud Computing is Slowly Making Inroads into the Legal Profession as Security Worries Begin to Wane, 30 LEGAL PRAC. & OF COUNSEL MGMT. REP. 5, at 21 (2011).
44. See Dysart, supra note 43, at 29.
45. Hinkes & Gaukroger, supra note 42, at 48.
II. CHANGES TO THE MODEL RULES ADDRESSING TECHNOLOGY AND CONFIDENTIALITY

Electronic communications have transformed how lawyers communicate with their clients. While communications by telephone, in-person, fax, and letter are still commonplace, “lawyers regularly communicate with clients electronically, and confidential information is stored on mobile devices, such as laptops, tablets, smartphones, and flash drives, as well as on law firm and third-party servers (i.e., in the “cloud”) that are accessible from anywhere.” Because of this phenomenon, while retaining the profession’s basic regulatory construct of state-based judicial regulation, the ABA adopted changes to modernize the Model Rules by clarifying and expanding their underlying principles. These changes addressed technology and confidentiality, because “technology has transformed how lawyers communicate with their clients and store their clients’ confidences.”

Technology notwithstanding, lawyers are obligated to competently represent clients, maintain client confidences, safeguard client property, and make sure those with whom they work do the same. The Model Rules address Competence in the first substantive rule, Model Rule 1.1, requiring lawyers to provide “competent representation to a client,” which calls for “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” While not changing the substantive language of Model Rule 1.1, Ethics 20/20 added language to the rule’s commentary “to make explicit that a lawyer’s duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology’s benefits and risks.” Specifically, Ethics 20/20 amended commentary of Model Rule 1.1 to state as follows: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” This language offers “greater clarity regarding

46. Ethics 20/20 Intro., supra note 2, at 4.
47. See id. at 2, 7.
48. Id. at 7.
50. Ethics 20/20 Intro., supra note 2, at 8.
51. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2012). It was noted nearly a decade ago that with respect to transmitting electronic documents, “reasonable care may call for the lawyer to stay abreast of technological advances and potential risks . . . .” Hill, supra note 11, at 25 (quoting N.Y. State Bar Ass’n Op. 782, at 3 (Dec. 8, 2004)). More recently, “understanding relevant technology’s benefits and risks” has been recognized as a requirement of lawyer competence. Ethics 20/20 Intro, supra note 2, at 8.
this duty and emphasize[s] the growing importance of technology to modern law practice.\footnote{52}

Model Rule 1.6, Confidentiality of Information,\footnote{53} has revisions to the rule and its commentary. The purpose of these changes is to “make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used.”\footnote{54} Although former commentary to Rule 1.6 referenced this obligation, Ethics 20/20 “concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter of Rule 1.6 and described in more detail through additional Comment language.”\footnote{55} Ethics 20/20 added a new paragraph (c) to Model Rule 1.6, stating as follows: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”\footnote{56} In concert with this rule addition, Comment 18 of Model Rule 1.6 states:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the

\footnote{52} Id. In addition to changes in Model Rule 1.1’s commentary addressing competence and technology [at Comment 8 (formerly Comment 6)], two new comments (6 & 7) were added to Model Rule 1.1 to address “Retaining or Contracting with Other Lawyers.” Model Rules of Prof’l Conduct R. 1.1 cmts. 6, 7 & 8 (2012). Before retaining a lawyer outside one’s firm to assist in the representation of a client, a lawyer should obtain the client’s informed consent, and the lawyer “must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client.” Id. at cmt. 6. The lawyers from each firm “ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them.” Id. at cmt. 7.

\footnote{53} See supra note 13.

\footnote{54} Ethics 20/20 Intro., supra note 2, at 8.

\footnote{55} Id.

\footnote{56} Model Rules of Prof’l Conduct R. 1.6(c) (2012). In another resolution, the ABA added an exception to Model Rule 1.6(b) that permits the disclosure of client information to identify and resolve conflicts of interest when lawyers are considering changing firms, merging firms, or selling a law practice. See Rogers, supra note 8, at 509. Added to Model Rule 1.6 is (b)(7), which allows a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary “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.” Model Rules of Prof’l Conduct R. 1.6(b)(7) (2012).
access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]–[4].

With the Model Rule 1.6 changes, Ethics 20/20 recognized that lawyers “cannot guarantee electronic security” and the rules did not intend to impose a duty on lawyers “to achieve the unattainable.” Rather the changes identify factors for a lawyer to consider when determining whether precautions are reasonable. For instance, as noted in new Comment 18, the cost of safeguards, the difficulty of implementation of safeguards, and the sensitivity of information are things for a lawyer to consider when weighing the efficacy of precautions taken. The commentary makes it clear that inadvertent disclosure or unauthorized access, in and of itself, is not a violation of Model Rule 1.6. However, it stands to reason that failure to take reasonable precautions to prevent inadvertent disclosure or unauthorized access, may be a violation of the rule.

57. Model Rules of Prof’l Conduct R. 1.6 cmt. 18 (2012). The ABA amended Comment 19 to Model Rule 1.6 by adding a sentence to the end of the existing language. “Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.” Id. at cmt. 19.
59. Ethics 20/20 Intro., supra note 2, at 8.
60. Model Rules of Prof’l Conduct R. 1.6 cmt. 18 (2012).
61. Id.
62. Calling for lawyers to make reasonable efforts to prevent unauthorized access, inadvertent disclosure, or unauthorized disclosure of client information is similar to standards used to evaluate
Technology has increased the risk of inadvertent disclosure of confidential information.63 To encompass the kinds of information that can be inadvertently transmitted in light of emerging technology, the text of Model Rule 4.4, Respect for Rights of Third Parties, augments the word “document” by adding “electronically stored information” to the language of the rule and its commentary.64 Model Rule 4.4(b) now states “[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”65 Additionally, Ethics 20/20 added language to Model Rule 4.4’s commentary to define “inadvertently sent” and “document or electronically stored information.”66 To this end, Comment 2 to Model Rule 4.4 states that “document or electronically stored information’ includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form.”67

New commentary also provides that “[a] document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.”68 In addition, Comment 2 makes clear that the notification requirements of Model Rule 4.4 are triggered only if a lawyer receives metadata69 and knows or has reason to know that the metadata was inadvertently

whether inadvertent disclosure of confidential information waives attorney-client privilege. Most courts apply a balancing test to determine whether attorney-client privilege is waived if there is inadvertent disclosure, and courts evaluate: the reasonableness of precautions taken to prevent disclosure; the time taken to recognize the error; the scope of the production; the extent of the disclosure; and, considerations of fairness and justice. See J. Triplett Mackintosh & Kristen M. Angus, Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege, 38 INT’L LAW. 35, at 43 n.58 (2004). With respect to federal court litigation, Rule 502(b) of the Federal Rules of Evidence provides that disclosure of privileged material does not result in the waiver of attorney-client privilege, as long as: “(1) the disclosure is inadvertent; (2) the [party responsible for the disclosure] took reasonable steps to prevent disclosure; and (3) the [party responsible for the disclosure] promptly took reasonable steps to rectify the error” after it occurred. FED. R. EVID. 502(b).

64. Rogers, supra note 8, at 511.
66. Id. at R. 4.4 cmt. 2 (2012).
67. Id.
68. Id.
69. Metadata is “hidden information in digital documents . . . and does not appear in the final print-ready version of a final electronic document, but it can be easily accessed[,]” unless it has been scrubbed. Hill, supra note 11, at 22-23.
sent. 70 Ethics 20/20 intended these changes to “provide more guidance to lawyers who now regularly receive misdirected information, particularly information contained in electronic form.” 71

The revisions to Model Rule 4.4 do not address whether a lawyer may look for and use embedded information that is transmitted in electronic documents. Jurisdictions are divided concerning the use of metadata. Some jurisdictions take the position that a lawyer may examine and use “metadata for the client’s benefit without violating the Rules of Professional Conduct.” 72 Other jurisdictions take the position that it is improper for a lawyer to obtain information from metadata. 73 Perhaps Ethics 20/20 chose to avoid this controversial issue in order to generate and maintain a broad base of support for its proposed amendments. 74 Jurisdictions are in agreement that it is the responsibility of a lawyer who transmits electronic documents to “take reasonable measures to avoid the disclosure of confidential information imbedded in electronic materials.” 75

70. MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 2 (2012). The approach of “knows or has reason to know” of inadvertence for there to be notification of receipt under Model Rule 4.4, is similar to the standard taken by the District of Columbia when barring access to metadata. See infra note 74.

71. Ethics 20/20 Intro., supra note 2, at 9. During the ABA House of Delegates meeting in August 2012, a friendly amendment was offered to the proposed changes to Comment 3 of the rule. Rogers, supra note 8, at 511. Model Rule 4.4(b) calls for notification to the sender upon receipt of material that was inadvertently sent. Comment 3 of the Rule notes that lawyers may choose to return inadvertently sent material, but does not require returning material. Id. Ethics 20/20 updated Comment 3 to include “electronically stored information.” Id. A friendly amendment from Ellen J. Flannery called for a lawyer to have the option to “delete” electronically stored information, since “lawyers cannot “return” electronic information in the same way that they are able to return paper documents[.]” Id. As adopted by the ABA House of Delegates, Comment 3 to Model Rule 4.4 states:

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4. MODEL RULES OF PROF’L CONDUCT R. 4.4 cmt. 3 (2012).


74. See supra note 8 and accompanying text.

75. Hill, supra note 11, at 26.
Ethics 20/20 designed Model Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, to make sure that lawyers appropriately supervise any nonlawyers with whom they work. The primary target of the Model Rule 5.3 amendments is the phenomenon of lawyers increasingly outsourcing legal and law-related work. The term "outsourcing" refers to "taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider, either in the United States or in another country." To this end, the 2012 revisions specifically address matters relating to technology and nonlawyer service providers. While no changes were made to the language of the rule, the revisions changed Rule 5.3's title to substitute "Assistance" for "Assistants" and changed its commentary.

To provide additional guidance on the application of Rule 5.3 to outside nonlawyers, Ethics 20/20 added commentary to the rule to specifically address "Nonlawyers Outside the Firm." New Comment 3 provides as follows:

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

77. See Ethics 20/20 Intro., supra note 2, at 12. Although Model Rule 5.3 changes target outsourcing, the rule does not actually use the term "outsourcing" because "lawyers may incorrectly conclude that they are not engaged in 'outsourcing' when using nonlawyer services outside the firm." ABA Comm'n on Ethics 20/20 Rep. on R. 5.3, supra note 76, at 7.
78. Id. at 2. When giving examples of frequently outsourced law-related work, the Report notes "investigative services, offsite online data storage or online practice management tools (e.g., "cloud computing" services), and creation and maintenance of databases to manage discovery in litigation." Id. at 2. The Report goes on to state that "[o]utsourcing also occurs when lawyers retain other lawyers and law firms to conduct a range of services, such as legal research, document review, patent searches, due diligence, and contract drafting." Id.
79. Ethics 20/20 Intro., supra note 2, at 12.
reasonable assurance that the nonlawyer’s conduct is compatible with
the professional obligations of the lawyer.80

The ABA is interested in the protection of confidential information and in
procedures used to maintain confidentiality.81 Because the rules specifically
reference “using an Internet-based service to store client information” as an
example of using the assistance of nonlawyers, new Comment 3 emphasizes that
lawyers must use reasonable efforts to make sure client information remains
safeguarded and confidential when employing contemporary mechanisms such
as cloud computing.82 The revisions are mindful of the variations in scope and
application of confidentiality law between jurisdictions and state that “the legal
and ethical environments of the jurisdictions in which the services will be
performed” are a circumstance to be considered in fulfilling the obligations of
the lawyer.83 In addition, lawyers must be aware of the location of data stored on
the cloud as the location might impact which country’s law governs.84

80. Model Rules of Prof’l Conduct R. 5.3 cmt. 3 (2012). The commentary does not
indicate whether a lawyer must obtain client consent when disclosing confidential information to a
service provider who is outside the firm. The Ethics 20/20 Report on the Rule makes it apparent
that this omission was intentional by indicating that “there are many circumstances where such
consent is unnecessary.” ABA Comm’n on Ethics 20/20 Rep. on R. 5.3, supra note 76, at 7.
81. Id. at 3.
82. Model Rules of Prof’l Conduct R. 5.3 cmt. 3 (2012). Because an increasing number of
lawyers and law firms use the cloud for business functions and document storage, many bar
associations and jurisdictions have addressed ethical issues associated with cloud computing. The
tendency of these varied opinions is to allow the use of cloud computing while requiring explicit
safeguards. Not surprisingly, those who have reviewed the matter focus on preserving the security
and confidentiality of stored material. See N.C. Formal Ethics Op. 2011-6 (Jan. 27, 2012); Iowa
Ass’n Op. 842 (Sept. 10, 2010); Ariz. Ethics Op. 09-04 (Dec. 2009); Maine Ethics Op. 194 (June
83. Model Rules of Prof’l Conduct R. 5.3 cmt. 3 (2012).
84. In civil law countries, while “lawyer confidentiality obligations are complementary with
privilege against compelled disclosure, the two are ‘conceptually different nonetheless and
therefore mutually independent.’” Louise L. Hill, Disparate Positions on Confidentiality and
Privilege Across National Boundaries Create Danger and Uncertainty for In-House Counsel and
Their Clients, in 87 Legal Ethics for In-House Corporate Counsel, A-127, (Sept. 2007)
(quoting Eric Gippini-Fournier, Legal Professional Privilege in Competition Proceedings Before
the European Commission: Beyond the Cursory Glance, 28 Fordham Int’l L.J. 967, 974 (2005)).
For instance, in some countries only documents in the possession of the lawyer are protected. See
available at http://www.practicallaw.com/2-103-2508. “[O]ther document[s], even a letter of legal
advice from a lawyer, will not necessarily be privileged in the client’s hands.” Id. at 35. In many
countries the legal profession is bifurcated and, unlike the United States, the attorney-client
privilege does not extend to in-house lawyers. See Mary C. Daly, The Cultural, Ethical, and Legal
Challenges in Lawyering for a Global Organization: The Role of General Counsel, 46 Emory L.J.
1057, 1103-04 (1997). Therefore, documents stored on the cloud by in-house counsel that would
be considered confidential and privileged in the United States may not have this status in other
countries.
Changes to Model Rules 1.0 and 1.4 also reflect lawyers’ increased use of electronic information. The ABA devotes Model Rule 1.0 to Terminology, and the recent revisions update the definition of “writing” in Rule 1.0(n) by replacing the word “e-mail” with “electronic communication.” Ethics 20/20 concluded that the existing definition was “not sufficiently expansive given the wide range of methods that lawyers now use (or are likely to use in the near future) when memorializing an agreement.” Ethics 20/20 also updated Comment 4 to Model Rule 1.4, Communication. Rather than just addressing the return of client telephone calls, Ethics 20/20 changed commentary language to provide that “[a] lawyer should promptly respond to or acknowledge client communications.” “This language more accurately describes a lawyer’s obligations in light of changes in technology and evolving methods of communications.”

III. CHANGES TO THE MODEL RULE ADDRESSING TECHNOLOGY AND MARKETING LEGAL SERVICES

In addition to changes related to technology and confidentiality, Ethics 20/20 made significant changes to the Model Rules related to the profession’s use of technology when marketing legal services. Mindful of the availability of new marketing devices, the revisions added language to update and clarify the Model Rules, thus providing guidance to lawyers while upholding the principles of “preventing false and misleading advertising, protecting the public from undue influence of solicitations, and safeguarding the confidences of prospective clients.”

Ethics 20/20 made revisions to Model Rule 1.18, Duties to Prospective Clients, to clarify when electronic communications give rise to a prospective client relationship. This is a matter of great importance to lawyers because
prospective client status triggers a lawyer’s ethical duty with respect to maintaining confidentiality of the prospective client’s information. In defining a prospective client, the revisions replaced the word “discusses” with the word “consults” to clarify that “a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place.” Model Rule 1.18(a) now states “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

Seeking to give lawyers “guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship,” Ethics 20/20 added a new comment to indicate when a communication would constitute a consultation:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a “prospective client.” Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”

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CONDUCT R. 1.18(b) (2012). New language in Model Rule 1.18(b) replaces “had discussions with” with “learned information from.” Id.

91. ABA Comm’n on Ethics 20/20 Rep. on R. 1.18, supra note 90, at 2.
93. ABA Comm’n on Ethics 20/20 Rep. on R. 1.18, supra note 90, at 3.
94. MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt. 2 (Aug. 2012). The last sentence to the commentary “make[s] clear that a person is not owed any duties under Model Rule 1.18 if that person contacts a lawyer for the purpose of disqualifying the lawyer from representing an opponent.” ABA Comm’n on Ethics 20/20 Rep. on R. 1.18, supra note 90, at 3. “[G]iven the ease with which technology makes this ‘taint-shopping’ possible,” the Commission concluded the concept deserved to be mentioned. Id.
Ethics 20/20 designed these changes “to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer.”95 Since the ABA essentially used the term “prospective client” as a term of art in Model Rule 1.18, Ethics 20/20 changed the commentary of Model Rules 7.1, 7.2, 7.3, and 5.5 to eliminate references to this term in order to avoid confusion.96

Under Model Rule 7.2, Advertising, it is a violation to “give anything of value to a person for recommending the lawyer’s services” with some exceptions.97 This prohibition’s underlying purpose is to prevent lawyers from hiring “runners” who might engage in impermissible practices such as in-person solicitation.98 However, the rules allow lawyers to pay “the reasonable costs of advertisements” or “the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service.”99 Because of new marketing methods that have emerged via the Internet, it is not clear how to classify these new means for developing a client base.100 Ethics 20/20 determined that there was “considerable confusion concerning the kinds of Internet-based client development tools that lawyers are permitted to use, especially because of an ambiguity regarding the prohibition against paying others for a ‘recommendation.’”101

In order to further the underlying purpose of Model Rule 7.2(b),102 “while not unreasonably limiting lawyers’ ability to use new client development tools,”103 Ethics 20/20 modified commentary in Model Rule 7.2 to define the word “recommendation” as a “communication . . . [that] endorses or vouches for

95. Id. at 1. The revisions also include changes for clarity to Comments 1, 4, and 5. In Comment 1, the revisions replace the word “discussions” with the word “consultations.” In Comment 4, the revisions replace the phrase “initial interview” with “initial consultation.” In Comment 5, the revisions replace the word “conversations” with “a consultation.” MODEL RULES OF PROF’L CONDUCT R. 1.18 cmts. 1, 4 & 5 (2012).
96. In Comment 3 to Model Rule 7.1, the revisions substitute the term “the public” for “a prospective client.” MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 3 (2012). The revisions make similar changes to Comments 3, 6 and 7 to Model Rule 7.2 by eliminating or substituting language for the term “prospective client.” Id. at R. 7.2 cmts. 3, 6 & 7. In Model Rule 7.3, the revisions remove the term “prospective client” from the rule itself at 7.3(a), (b) and (c) as well as from Model Rule 7.3’s commentary. Id. at R. 7.3 & cmts. 2, 3, 4, & 6. Additionally, the revisions eliminate “prospective client” from Comment 5 to Model Rule 5.5. Id. at R. 5.5 cmt. 21.
97. Id. at R. 7.2(b).
98. See ABA Comm’n on Ethics 20/20 Rep. on R. 7.2, at 4 (Aug. 2012). “Another reason for the restriction is that nonlawyers typically do not have the expertise to know which lawyers are best able to handle a particular matter.” Id.
101. Id. at 1.
102. See supra note 98 and accompanying text.
a lawyer’s credentials, abilities, competence, character, or other professional qualities.”\textsuperscript{104} This definition permits “lawyers to use lead generation services, such as those that are increasingly prevalent online, but would require lawyers to ensure that the lead generators do not engage in the kind of conduct that the Model Rule was intended to prohibit.”\textsuperscript{105} As amended, Comment 5 to Model Rule 7.2 states:

Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for recommending the lawyer’s services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator’s communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).\textsuperscript{106}

Ethics 20/20 modified commentary to Model Rule 7.2 to include “the Internet, and other forms of electronic communication” when addressing types of media.\textsuperscript{107} These technical and substantive changes allow lawyers to use new

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 \item[104.] MODEL RULES OF PROF’L CONDUCT R.7.2 cmt. 5 (2012).
 \item[105.] ABA Comm’n on Ethics 20/20 Rep. on R. 7.2, supra note 98, at 4.
 \item[106.] MODEL RULES OF PROF’L CONDUCT R.7.2 cmt. 5 (2012).
 \item[107.] In Comment 3, rather than just referencing television, the revisions include the phrase “the Internet, and other forms of electronic communication” when noting powerful media which gets information to the public. Id. at R. 7.2 cmt. 3. Comment 2 to Model Rule 7.2 adds “email address, website” to the list of information that can be publicly disseminated. Id. at R. 7.2 cmt. 2. The
\end{itemize}
\end{footnotesize}
technology in client development practices, such as “pay-per-click” advertising, while ensuring the observance of Model Rule mandates, such as not misleading the public, not improperly sharing fees, and not permitting a nonlawyer to interfere with a lawyer’s professional independence. Continuing with the prohibition against channeling legal work and reminding lawyers not to use others to engage in contacts from which the lawyer would be precluded, commentary language prohibits “channeling professional work in a manner that violates Rule 7.3.”

In the amendments related to technology and new client acquisition, Ethics 20/20 revised commentary to Model Rule 7.3 as well as its title. Model Rule 7.3 “regulates a lawyer’s direct contacts with the public for the purpose of soliciting business” and precludes most kinds of in-person, live telephone, and real-time electronic solicitations. Previously titled “Direct Contact with Prospective Clients,” the title of Model Rule 7.3 is now “Solicitation of Clients.” Based on a belief that lawyers would benefit from a definition of “solicitation,” Ethics 20/20 proposed a new Comment 1 to the rule defining a solicitation. New Comment 1 states:

A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide legal services. In contrast, a lawyer’s communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

Using the phrase “reasonably understood to be offering to provide” in Comment 1 is meant “to ensure that lawyers are governed by the Model Rule even if their revisions eliminate the following sentence from Comment 3: “Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.” Id. Language added to commentary in Model Rule 7.3 negated the need for this sentence. See infra note 119 and accompanying text.

108. “Pay-per-click” advertising “is a form of lead generation where a lawyer pays a fee to a non-lawyer (e.g., Google) each time someone clicks on the lawyer’s advertisement and is taken to the lawyer’s website.” ABA Comm’n on Ethics 20/20 Rep. on R. 7.2, supra note 98, at 5.

109. See id.


112. MODEL RULES OF PROF’L CONDUCT R.7.3(a) (2012).

113. Id. at R. 7.3.


communications do not contain a formal offer of representation, but are nevertheless clearly intended for that purpose.” 116

In contrast, Ethics 20/20 designed the second sentence of Comment 1 “to clarify that a response to a request for information and an advertisement that is not directed to specific people are not ‘solicitations.’” 117 Because “technology has enabled various kinds of online interactions between lawyers and the public,” 118 Ethics 20/20 included clarifying language in renumbered Comment 3 (previously Comment 2), which now provides:

This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment. 119

Ethics 20/20 intended for this commentary and other revisions to Model Rule 7.3 to “clarify when a lawyer’s online communications constitute the type of direct ‘solicitations’ that are governed by the Rule.” 120

IV. CONCLUSION

The four categories of Ethics 20/20 recommendations considered and approved by the ABA are not the conclusion of Ethics 20/20’s work. 121 Early on, Ethics 20/20 “decided to split its recommendations into two sets of proposals, to make it easier for delegates to digest and evaluate the material.” 122 Ethics 20/20 is still discussing issues related to sharing legal fees, lawyer-client agreements for choice of conflict rules, the virtual presence of lawyers in

116. ABA Comm’n on Ethics 20/20 Rep. on R. 7.3, supra note 111, at 7. The following example is given: “if a lawyer approaches people at their homes and describes various legal services, the lawyer’s communications constitute a ‘solicitation’ even if the lawyer does not formally offer to provide those services, as long as a reasonable person would interpret the lawyer’s communications as an offer to provide those services.” Id.
117. Id.
118. Id. at 8.
119. MODEL RULES OF PROF’L CONDUCT R.7.3 cmt. 3 (2012).
120. Ethics 20/20 Intro., supra note 2, at 10.
121. See supra note 6.
122. ABA/BNA Law. Manual on Prof’l Conduct, supra note 1, at 309.
jurisdictions outside of their home state, and matters relating to inbound foreign lawyers. At the August 2012 meeting, “the delegates tabled indefinitely any vote on a proposed resolution that would reaffirm the ABA’s opposition to lawyers’ sharing fees with nonlawyers or partnering with them.” This action leaves the door open for Ethics 20/20 to consider this controversial issue in the future. As Ethics 20/20 moves forward with its review and recommendations for revision of the Model Rules, it will be interesting to see whether Ethics 20/20 addresses these looming issues conservatively.

An upcoming issue that the ABA may consider is a proposal for foreign-licensed lawyers to practice in the United States. On September 4, 2012, Ethics 20/20 circulated a revised draft of proposals that would allow foreign lawyers to practice law, to some extent, on a temporary basis in this country. This draft represents a departure from earlier suggestions “that the ABA should merge its model rule on foreign lawyers’ temporary practice with the model rule of professional conduct that governs multijurisdictional practice.” In apparent reaction to opposition voiced at prior public hearings, “[t]he new drafts envision less expansive authority for foreign-licensed lawyers to practice in the United States than the commission’s previous proposals . . . .”

Ethics 20/20 took a conservative approach in the first round of recommendations by primarily amplifying and clarifying existing principles. Motivated by the impact of technology on confidentiality and client development, the amendments in these two categories modernized the Model

123. See Rogers, supra note 8, at 509.
124. Id. The delegates also “rejected proposed guidelines for lawyers’ retention of testifying experts,” however, they approved standards which would require law schools accredited by the ABA to report employment data for their graduates that is accurate. Id.
125. Id. Additional recommendations to be considered at the ABA Midyear Meeting in February 2013 will be determined later this year. See ABA/BNA Law. Manual on Prof’l Conduct, supra note 1, at 309.
126. See New Ethics 20/20 Drafts on Foreign Lawyers Retreat From Breadth of Earlier Proposals, 28 ABA/BNA LAW. MANUAL ON PROF’L CONDUCT 571 (Sept. 12, 2012).
127. Id. The revised draft suggests the following:
   - “[A]mending Model Rule 5.5 (unauthorized practice, multijurisdictional practice) to permit foreign in-house counsel to work for their employers from an office in the United States, and to allow foreign lawyers to provide legal services in a U.S. jurisdiction when authorized to do so by federal or other law;”
   - “[A]dding foreign lawyers to the Model Rule for Registration of In-House Counsel; and”
   - “[U]pdating the ABA Model Rule on Pro Hac Vice Admission to provide limited authority for foreign lawyers to appear in litigation in the United States.”
128. Id.
129. Id.
Rules and expanded long-standing mandates. Other recommendations by Ethics 20/20 followed a similar pattern. Believing lawyers would benefit from clarification in areas where uncertainty had developed, Ethics 20/20 provided lawyers with useful information, but left some questions unanswered. This is not inconsistent with the commission’s charge to assess the Model Rules and related ABA policies, and to follow the ABA’s core principles. Perhaps due to this mandate, there was nothing ground-breaking in the recent amendments, as noted by legal ethics consultant William Freivogel, “the commission has utilized a minimalist approach.”

Because the bar warmly received and embraced the August 2012 recommendations, it will be interesting to see how Ethics 20/20 addresses the highly contentious matters still to be faced. Perhaps the warm reception of the first round of amendments will embolden Ethics 20/20 to take sides and to assert positions on matters where there is significant dispute. Then again, unanimity can be very nice, and, for the sake of generating wide-spread support for the revisions, perhaps an attempt will be made to avoid controversy during this second round. If the recent draft on foreign lawyer practice is any indication, the latter may be true, and Ethics 20/20 may maintain a conciliatory and conservative approach.

130. See supra notes 6 & 8 and accompanying text.
131. See supra note 3.
133. See supra note 8 and accompanying text.
COMPROMISING LOYALTY
(AND HOW THE ABA MADE THINGS WORSE)

David F. Chavkin*

I. INTRODUCTION

During the 2010-2011 academic year, my teaching package included two semesters of teaching in the General Practice Clinic evening section1 and a “live-client” professional responsibility course that attempts to bring together the three Carnegie Foundation report apprenticeships2 in an integrated program in which students provide assistance to low-income, elderly clients while learning about professionalism.3

Although this live-client ethics course is not a part of our clinical program4 and has different andragogical goals,5 there are certain requirements that flow from the representation of real clients with real problems situated in the real world. Probably the most significant of these requirements is the need for effective “conflict checking” on my part and on the part of students. Although

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* Professor of Law, American University, Washington College of Law. This article was supported by a summer research grant and was made possible through the outstanding research and other assistance provided by Allison Marie (J.D. 2013), my Dean’s Fellow during the 2011-12 and 2012-13 academic years.

1. This clinic model, designed to accommodate evening program students who work full-time during the day, is described at length in David F. Chavkin, Clinic Under the Stars: Giving Part-Time Students Their Due, 13 CLINICAL L. REV. 719 (2007).

2. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Jossey-Bass, 2007). As the authors explain: “[T]he metaphor of apprenticeship sheds useful light on the practices of professional education . . . . [W]e . . . extend it [the metaphor] to the whole range of imperatives confronting professional education. So we speak of three apprenticeships. The signature pedagogies of each professional field all have to confront a common task: preparing students . . . to think, to perform, and to conduct themselves like professionals.” Id. at 27.

3. This course model is described at greater length in David F. Chavkin, Experience is the Only Teacher, in THE ETHICS PROJECT IN LEGAL EDUCATION (Michael Robertson et al. eds., Routledge Publ’g Co. 2010).

4. The clinical program at the Washington College of Law includes clinics in which students engage in litigation (like our Criminal Justice Clinic), transactional representation (like our Community Economic Development Clinic), and a combination of both (like our General Practice Clinic). A full description of the range of clinical opportunities at the Washington College of Law may be found at http://www.wcl.american.edu/clinical/ (last visited on Mar. 28, 2013).

5. This three-credit course in “Professional Responsibility: Theory and Practice” is not as ambitious as a five-credit clinic course. While the course brings together the teaching of doctrine (the Model Rules of Professional Conduct) and values (the values that lawyers should develop for responsible and satisfying lawyering), it focuses far less on practice (the skills that lawyers need for effective lawyering).
this course does not use clinic space (so professional responsibility students are not co-located with clinic students), my involvement in both courses requires “conflict checking.” In addition, client files are commingled in both physical form and in electronic form in our computerized case management system. Students, nearly all of whom work during the day (in both legal and non-legal contexts), also bring with them potential conflicts that must be identified and assessed. Students may work for law firms on the opposite side of cases within the clinic; students may work in non-legal capacities for entities, like banks, that are suing clinic clients; students may work for government agencies, like the Department of Homeland Security, that have more than a passing interest in specific clinic clients. Therefore, although disqualification and imputed disqualification rules\textsuperscript{6} seldom present insurmountable problems, they do present issues that must be addressed. The identification and addressing of these issues is one of the “lessons” that is brought home in a live-client setting that could never be quite replicated in a simulated or traditional doctrinal context.

II. THE SPRING OF 2011

Early in the spring semester of the 2010-2011 academic year, I distributed the conflict of interest questionnaire, included as Appendix A. I also distributed the following instructions regarding completion of the form:

> We will spend several classes on the topic of conflicts of interest and this form will allow me to ensure that no conflicts of interests are presented by your work outside classes or by the clients we accept in the course. The only exception to reporting conflicts is work you may have provided on behalf of clients whose identity was not known to the public. If that is the case, please check with the “ethics attorney” at work to see if identity may be disclosed for the limited purpose of clearing potential conflicts.

Especially in a city like Washington, D.C., clients often retain attorneys for behind-the-scenes negotiations to head-off the filing of criminal charges. When these efforts are successful, the role of the lawyer and the potential criminal justice system involvement of the client are unknown to the public. It is my view that disclosure of the client identity in such a case would require client consent.\textsuperscript{7}

\textsuperscript{6} Model Rules of Prof’l Conduct R. 1.7 (1983); Model Rules of Prof’l Conduct R. 1.10 (1983).

\textsuperscript{7} Prior to the recently-adopted amendment to Rule 1.6(b), there was no exception for the disclosure of confidential client information in order to conduct a conflicts check. Model Rules of Prof’l Conduct R. 1.6 (2002). Prior to the 2012 amendment, the Rule only permitted disclosure when the client gives informed consent, disclosure is impliedly authorized to conduct the representation or the disclosure is permitted by a limited, specific set of exceptions outlined in paragraph (b). Id.
Similarly, there are many government criminal and quasi-criminal investigations that are never visible to the public. Students, in their employment outside law school, may work for the federal agencies conducting the investigations or for private clients seeking to avoid charges or other discipline. In such cases, my view is that disclosure of the investigation targets requires clearance by an ethics official or managing attorney in the student’s work setting. These situations tend to be few and far between and are easily addressed.

The unique event that occurred in this semester was that one student’s former law firm employer refused to permit disclosure of the names of any of the clients for whom the student provided legal research and other assistance. Although the managing attorney was quite vague about the reasons for withholding this information, it appeared that it stemmed from fears that the law student might somehow “steal” clients when he or she entered practice. To add further irony to the situation, the managing attorney, who was an alumnus of the law school at which I teach, was a winner of the “Dean’s Award for Professional Responsibility” at the time of graduation from law school.

Although efforts to “educate” the managing attorney ultimately proved successful and the client names were disclosed for the purpose of checking conflicts of interest, I was left in the interim with a number of difficult questions to answer. First, was a conflict of interest check really required? Second, was client disclosure barred in any way by principles of client confidentiality? Third, if I could not run a conflicts check for this student, was I required to bar this student from enrollment (at a time when we were already a couple of weeks into the semester)? Fourth, if this student could not participate in a conflicts check later on, would (or should) that prevent the student from ever being hired as an attorney? Fifth, was the refusal of this managing attorney to cooperate in a conflicts check somehow sanctionable under the applicable rules of professional conduct in the jurisdiction? This article is the by-product of answering those questions.

III. THE DEVELOPMENT OF THE CONFLICT RULES

A brief history of the development of the conflict of interest rules is necessary to both answer these questions and understand the implications of further amendment. In 1836, David Hoffman published *Fifty Resolutions in Regard to Professional Deportment* as an ethical guide to attorneys in their

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8. Once again, this was not one of the noted exceptions to the strict rules against disclosure of confidential client information. The amendment of Rule 1.9, however, may permit this disclosure without the necessity of informed, written consent if the disclosure is necessary to complete a conflict of interest check. *See supra* note 7 and corresponding text.

9. In this case, the relevant jurisdiction for determining compliance for everyone was the same - the District of Columbia.
dealings with the court, other counsel, and clients. Resolution VIII addressed an attorney’s continuing duty to recognize and avoid conflicts of interest in representation:

VIII. If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause, induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the ghost of the former cause.

This Resolution is clear, concise, and provides no exception permitting the representation of a client if it is adverse to another client.

Shortly thereafter, George Sharswood published a series of lectures as Professional Ethics in an effort to formulate “accurate and intelligible rules” to govern legal professional conduct. Sharswood’s lectures included the following guidance regarding client conflicts of interest, which introduces the idea of informed consent:

[T]he advocate is bound in honor, as well as duty, to disclose to the client at the time of the retainer, every circumstance of his own connection with the parties or prior relation to the controversy, which can or may influence his determination in the selection of him for the office. An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment or endanger his fidelity.

The Resolutions and Professional Ethics lectures went on to be substantial contributors to the American Bar Association’s (“ABA”) Canons of Professional Ethics (the “1908 Canons”), which were a precursor to the Model Rules of Professional Conduct (“the Model Rules”).

10. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 723 (2d ed. 1836).
11. Id. at 753.
12. GEORGE SHARSWOOD, Professional Ethics, in AN ESSAY ON PROFESSIONAL ETHICS 15 (1854).
13. Id. at 23.
14. Preface to MODEL RULES OF PROF’L CONDUCT (2002). The Alabama Bar Association’s Code of Ethics, adopted in 1887, borrowed largely from both Hoffman’s and Sharswood’s texts. Id. When the American Bar Association adopted the original Canons of Professional Ethics, they were
A. The Conflict Rules in the 1908 Canons

In 1905, the ABA commenced a study on the availability of providing a uniform code of professional ethics, and three years later codified the 1908 Canons.15 By 1920, all but thirteen states had adopted the 1908 Canons in some form.16 Of the original forty-seven canons, only Canon 6 specifically addressed conflicts of interest:

\[\text{Adverse Influences and Conflicting Interests}\]

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.17

Canon 37, though targeted at confidentiality, touched briefly on the issue of conflicts of interest as related to client confidentiality: “Confidences of a Client. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.”18

In 1964, however, the ABA House of Delegates created a Special Committee on Evaluation of Ethical Standards (the “Wright Committee”) to assess whether changes should be made in the 1908 Canons.19 The Wright Committee identified numerous deficiencies in the existing canons and concluded that modification was necessary.20

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15. Walter, supra note 14, at 444 (describing the history leading to the development of the Model Rules).
16. See id.
17. CANONS OF PROF’L ETHICS Canon 6 (1908) (amended 1928).
18. CANONS OF PROF’L ETHICS Canon 37 (1908) (amended 1928).
20. The Wright Committee concluded that the Canons needed to be modified for four principal reasons:
B. The Conflict Rules in the Model Code

In response to the deficiencies of the 1908 Canons, the Wright Committee produced the Model Code of Professional Responsibility (the “Model Code”) – adopted by the House of Delegates on August 12, 1969 and subsequently by the vast majority of state and federal jurisdictions. The new Model Code established mandatory requirements through nine canons and 39 Disciplinary Rules (“DRs”) and created “aspirational” provisions through 130 Ethical Considerations (“ECs”).

The Model Code imposed specific requirements on lawyers regarding conflicts of interest, embodied in Canon 5, in seven DRs, and twenty-four ECs. Canon 5 provided, “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client” and included a subsection, Interests of Multiple Clients, with seven guiding ECs specifically concerning the representation of multiple clients with potentially competing interests. Under that subsection, lawyers were encouraged to maintain “the independence of professional judgment,” which prohibited engaging in conflicting representation that might affect the attorney’s loyalty to his client. The potential for conflict was to be evaluated on a case-by-case basis to determine if the lawyer could represent the client “fairly and adequately” without affecting his judgment. Where representation of two or more clients was justified, attorneys were guided to afford each client the opportunity to evaluate the lawyer-client relationship and obtain different counsel if he so chose. Once again the concept of informed consent: 

1. There were important areas involving the conduct of lawyers that were only partially covered by or totally omitted from the Canons;
2. Most Canons that were sound in substance needed editorial revision;
3. Most of the Canons did not lend themselves to practical sanctions for violation; and
4. Changed and changing conditions in our legal system and urbanized society required new statements of professional principles.

See NOBC, supra note 19, at 1; see also Walter, supra note 14, at 445 (explaining that the “Code attempted to bridge the gap between providing persuasive moral authority and legislating minimally acceptable conduct”).

22. See id.; see also Walter, supra note 14, at 445.
24. Id. at EC 5-14 to -20.
25. Id. at EC 5-14. “Conflicting representation” was thought to follow from a lawyer representing two or more clients with “differing interests.” Id.
26. Id. at EC 5-17.
27. Id. at EC 5-16. The EC contains the following text, truly capturing the concept of informed consent:

[B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should
consent was introduced, and was further cemented in one of the two mandatory provisions relevant to representation of multiple clients, DR 5-105(C).\textsuperscript{28} DR 5-105 dealt specifically with conflicts of interest.\textsuperscript{29}

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.\textsuperscript{30}

C. Conflict of Interest in the Model Rules

In 1977, the ABA created the Commission on Evaluation of Professional Standards, chaired by Robert Kutak (the “Kutak Commission”), to conduct a comprehensive review of ethical problems in the legal profession.\textsuperscript{31} Upon evaluating the existing Model Code and determining that mere “patchwork amendment” would not suffice, the Kutak Commission commenced a six-year

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\textsuperscript{28} Id. at DR 5-105.
\textsuperscript{29} Id. The other relevant DR dealt with settlements of claims between multiple clients. Id. at DR 5-106.
\textsuperscript{30} Id. at DR 5-105.
\textsuperscript{31} Preface to MODEL RULES OF PROF’L CONDUCT (2002).
study and drafting process that resulted in the creation of the Model Rules.\textsuperscript{32} The purpose of the redraft was to preserve fundamental values while simultaneously providing realistic and useful professional guidance for lawyers.\textsuperscript{33}

1. Adopted Rule 1.7

At the conclusion of the drafting process, the ABA House of Delegates adopted the Model Rules on August 2, 1983, and nearly all jurisdictions adopted new professional standards based on these guidelines.\textsuperscript{34} The general conflict of interest provision regarding current clients in Rule 1.7 read as follows:

Conflict of Interest: General Rule
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.\textsuperscript{35}

The language of Rule 1.7 consolidated the provisions of DRs 5-101, 105 and 107 into a single standard that applied regardless of whether the potential


\textsuperscript{34} \textit{See Preface to \textit{MODEL RULES OF PROF’L CONDUCT}} (1983). The Kutak Commission released an initial draft of the Model Rules and solicited opinions, comments and proposed amendments from stakeholders in the legal profession. Kutak, \textit{Report of the Commission on Evaluation of Professional Standards}, supra note 33, at 830. In response, the Kutak Commission received official feedback from hundreds of bar associations and individuals, as well as informal comments from many other stakeholders. \textit{Id}. Considering that input, the Kutak Commission later released a Final Draft of the Rules – a precursor to what was finally recommended to the ABA. \textit{Id}.

\textsuperscript{35} \textit{MODEL RULES OF PROF’L CONDUCT R. 1.7} (1983).
conflict of interest stemmed from the personal interests of the lawyer or a commitment by the lawyer to another client or third person. More importantly, however, Rule 1.7 strengthened DR 5-105(A) by adding two requirements. First, when the lawyer’s interest is involved, the client must give consent after disclosure. Second, even with client consent, the representation must reasonably appear to be in the best interests of the client.

After its initial adoption, Rule 1.7 was not significantly amended until August 2002 when the Ethics 2000 Commission substantially rewrote both the model rule and its associated comments. The Rule was completely rewritten, including the title change “Current Clients,” to the following language and has not been amended since:

Conflict Of Interest: Current Clients
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
   (1) the representation of one client will be directly adverse to another client; or
   (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
   (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
   (2) the representation is not prohibited by law;
   (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
   (4) each affected client gives informed consent, confirmed in writing.

Notable changes included: 1) alteration of the Rule’s caption to note its limited scope, applying only to conflicts that arise with respect to current clients; 2) creating a single paragraph (a) to define the concept of “conflict of interest” in an attempt to rectify the fact that attorneys found the prior language (regarding

36. Kutak, Chairman’s Introduction, supra note 32, at 1310.
“directly adverse” conflicts and their “material limitations”) confusing; and 3) creating a single paragraph (b) to guide the principles of “consentability” and informed consent, while also adding a requirement that such consent be established in writing.40

2. Adopted Rule 1.9

Unlike the Model Code, Rule 1.9 of the Kutak Commission’s recommendation included a provision for conflicts of interest regarding former clients.41 Also adopted during the August 1983 ABA Annual Meeting, Rule 1.9 initially read:

**Conflict of Interest: Former Client**

A lawyer who has represented a client in a matter shall not thereafter:

1. represent another client in the same or a substantially related matter in which that client’s interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
2. use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.42

In the following years, the Rule was amended several times, including: 1) replacing two instances of the word “client” with “person” in 1.9(a) to emphasize that a lawyer is prohibited from even entering a lawyer-client relationship without first post-consultation consent;43 2) adding language via 1.9(b) to handle conflicts of interest when a lawyer’s former firm, rather than just the lawyer directly, obtains confidential information;44 and 3) replacing the language “consents after consultation” to introduce the more stringent requirement of “gives informed consent, confirmed in writing.”45 This latter change was recognition of the resulting benefit when both lawyers and former clients are required to secure informed consent, confirmed in writing.46 Presently, Rule 1.9 reads:

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44. *Id.* at 227 (1989 amendment).
45. *Id.* at 229 (2002 amendment). The comments were also substantially amended during this year and notably included guidance for what matters rose to the level of “substantially related.” *Id.* at 230.
46. *Id.* at 232.
Duties To Former Clients
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.47

IV. LAWYER MOBILITY AND THE NEED TO CONDUCT A CONFLICTS CHECK

As lawyer mobility increases, with attorneys moving between the public and private sectors and moving between private firms, the Model Rules have seen substantive changes to try and meet the ethical demands of this movement.

The issues surrounding disclosure of former clients stemmed from the perceived requirement that a new employer conduct a conflicts check before a new employee starts work48 (or, in this case, a clinic or clinic-like program conducts a conflicts check for a new student). This perception is derived from Model Rule 5.1.49 This Rule provides as follows:

Responsibilities of Partners, Managers, and Supervisory Lawyers
(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law

47. MODEL RULES OF PROF’L CONDUCT R. 1.9 (2002).
48. In a recent opinion, the North Carolina Bar Association concluded that this process could begin as part of the hiring process. In upholding this process, the Bar Association ruled that “a hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.” N.C. State Bar Ethics Comm., Formal Op. 12 (2010).
49. Other ethical rules, including Rule 1.9 (see discussion supra regarding Adopted Rule 1.9) also bear on this duty.
firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.\textsuperscript{50}

The relevant requirements of the Model Rules are the rules prohibiting (or limiting) the circumstances in which lawyers may engage in conflicts of interest.\textsuperscript{51}

Few states have explicitly dealt with this issue – perhaps because the obligation under Rule 5.1 is so explicit. No other states beyond North Carolina and New York touch on a hiring law firm’s responsibility to conduct conflict of interest checks for new hires.\textsuperscript{52} Many states discuss the need to conduct such checks with contract or short term lawyers, but do not discuss the same need for permanent positions, again, perhaps, because the duty seems so obvious. The New York opinion is more substantive than the North Carolina opinion, and includes all moving lawyers, not just recent graduates. The opinion rules that when “a lawyer moves from one law firm (Firm A) to another, the new law firm (Firm B) must take steps to identify conflicts of interest that may arise . . . .”\textsuperscript{53}

The ABA issued a formal opinion under the Model Rules in 2009 stating that, “[w]hen a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest.”\textsuperscript{54}

V. AMENDMENT TO MODEL RULE 1.6, CONFIDENTIALITY OF INFORMATION

In February 2012, the ABA Commission on Ethics 20/20 (the “20/20 Commission”) released a series of draft proposals intended to update lawyer conduct standards so as to keep up with both social change and the associated changes on the practice of law.\textsuperscript{55} Included was an amendment for Model Rule 1.6, permitting lawyers to disclose client information in such situations as lateral moves, firm mergers, and law practice sales to determine if conflicts of interest

\begin{itemize}
  \item \textsuperscript{50} Model Rules of Prof’l Conduct R. 5.1 (1983).
  \item \textsuperscript{51} Model Rule 1.7, Conflict Of Interest: Current Clients, introduces the scenarios where a lawyer may not represent a client where a conflict of interest exists, but also provides exceptions; see discussion supra Adopted Rule 1.7. MODEL RULES OF PROF’L CONDUCT R. 1.7 (1983).
  \item \textsuperscript{52} N.C. State Bar Ethics Comm., Formal Op. 12 (2011) (ruling that “a hiring law firm may ask an incoming law school graduate to provide sufficient information as to his prior legal experience so that the hiring law firm can identify potential conflicts of interest.”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 720 (1999).
  \item \textsuperscript{53} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-455 (2009).
  \item \textsuperscript{54} ABA Comm. on Prof’l Conduct, Ethics 20/20 Group Submits Final Proposals For Vote by ABA Delegates at Annual Meeting, 28 LAW. MAN. PROF. CONDUCT 309 (May 23, 2012) [hereinafter ABA, Ethics 20/20 Group Submits Final Proposals].
\end{itemize}
exist. On May 7, 2012, the 20/20 Commission released its final recommendation for updating Rule 1.6, and on August 6, 2012, the ABA’s policy-making House of Delegates voted to approve a slightly revised version. The amendment to Rule 1.6(b) and (c) provides:

**Confidentiality Of Information**

* * * * *

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

(7) to detect and resolve conflicts of interest between lawyers in different firms 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.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The amendment includes two full additional comments for the Rule, aimed to provide limitations for the protection of the client. Specifically, disclosure 1) would not be permitted until substantive discussions about the new attorney relationship have begun, and 2) should only include the identity of the persons or entities involved, a brief summary of the issue, and whether the matter has terminated. Further, disclosure would be prohibited if doing so compromises the attorney-client privilege or harms the client in any other way.

**VI. HOW THE ABA MADE THINGS WORSE**

The problem with the amendment to Model Rule 1.6 is the previously-existing permissive, rather than mandatory, language “A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (7) to detect and resolve conflicts of interest
Lawyers are required to use reasonable efforts to detect and resolve conflicts of interest. Conflicts of interest cannot be detected and resolved without disclosure of client names and the subject matter of the prior representation. But, lawyers are not required to reveal this information since disclosure is only permitted. Therefore, without mandatory disclosure of “information relating to the representation,” the process of checking for conflicts of interest will be a hollow and ineffective charade in many cases.

By adopting the change to Model Rule 1.6, the ABA has effectively said that the duty of loyalty to a client can be compromised so long as the lawyer goes through the appearance of a conflicts check. The conflicts check must be conducted, but it can be based on information that the lawyer knows to be incomplete because of the absence of client information. Form has been elevated over substance, and appearance has been elevated over reality.

VII. FAILURE TO COOPERATE IN A CONFLICTS CHECK SHOULD VIOLATE ETHICAL OBLIGATIONS

When this issue first arose in the spring of 2011, my second step (after conducting some preliminary research) was to email and then conduct a telephone conversation with Saul Jay Singer, Senior Legal Ethics Counsel for the District of Columbia Bar and an adjunct professor teaching ethics at American University Washington College of Law (and other area law schools). In our conversation, we discussed the DC Bar Opinion on the subject and the (currently) unanswered question of whether the failure to cooperate in a conflicts check might violate the prior employer’s ethical obligations. Our conversation reinforced the obligation to conduct a conflict check, but left the punitive issue unresolved.

The only rule that either of us could invoke to penalize the former employer for his refusal to cooperate with a conflicts check was Rule 8.4. Rule 8.4 provides that:

Misconduct (Maintaining The Integrity Of The Profession)
It is professional misconduct for a lawyer to:

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

The question, then, is whether the refusal to provide sufficient client information to conduct a conflicts check should constitute “conduct that is prejudicial to the administration of justice.”

62. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).
There is no definitive answer to this question. As noted previously, some states have explicitly held that the failure to conduct a conflicts check would violate the applicable rules of professional conduct. The issue here, however, is one step removed. Should a former attorney-employer’s refusal to provide the information necessary to conduct a conflict check be treated as a violation of the rules of professional conduct? I believe that it should, and that disclosure of the information is necessary to protect the integrity of the profession.

VIII. HOLDING THE FORMER EMPLOYEE HOSTAGE

One of my initial concerns was whether a former employer could effectively hold a former employee hostage by refusing to provide client information necessary to conduct a conflicts check. If a new law practice setting was required to conduct a conflicts check for new employees and it was prevented from doing so by a prior employer’s refusal to provide necessary information, would the new law practice setting be prevented from hiring the prospective employee?

At least in those jurisdictions in which Model Rule 1.6 governs, “freezing out” of the former employee would not be required since the new law practice setting would have exercised “reasonable efforts.” The problem still is that the “reasonable efforts” would likely be ineffective.

IX. ATTORNEY DISCIPLINE

Perhaps a reason that the conflict of interest rules receive so little regard is the correspondingly-little discipline associated with violating those rules.

States may apply different mitigating and aggravating factors to attorney misconduct to determine the severity of the punishment. Aggravating factors include things such as prior disciplinary offenses, lack of cooperation in the disciplinary process, and failure to make restitution; mitigating factors include the attorney’s character or reputation, a cooperative attitude toward proceedings, and absence of a prior disciplinary record.64 Disciplinary options range from private reprimand, to public reprimands and suspensions, to disbarment.65 When compared to the number of attorney complaints filed in the various states, however, the rate of attorney discipline is proportionately low. An ABA survey reported that, in 2010, state disciplinary agencies received 118,054 attorney

64. See, e.g., Ohio Bd. of Comm’rs on Grievances and Discipline, The Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, app. II (2006).
65. Id.
complaints.66 Despite the high number of complaints, only 3.2% led to formal sanctions, including only .067% resulting in involuntarily or consensual disbarment.67

Looking at sanctions for conflict of interest violations specifically, the Michigan Attorney Discipline Board produces an annual report (see Appendix B), which provides an interesting review of the sanctions imposed corresponding to various types of misconduct.68 Between 2002 and 2011, 1,124 sanctions were imposed on attorneys within the State, only 30 of which were for conflict of interest misconduct.69 Even more staggering is that during that period the majority of sanctions were in the form of reprimand and/or short-term suspension.70 The single sanction resulting in the revocation of the attorney’s license for misconduct relating to a conflict of interest violation during that ten-year period occurred in 2006.71 It is important to note, however, the revocation was also based on violations of eleven other rules of the Michigan Rules of Professional Conduct.72 The nature of the conflict of interest violation lists the attorney as having “entered into a business transaction or knowingly acquired an interest adverse to the client,” violating Rule 1.8(a) of the Michigan Rules of Professional Conduct.73 Following revocation, the next most serious sanction, suspension of the license for three years or more, has only been imposed twice during the discussed period.74 In one of these instances, a panel suspended an attorney’s license for three years for a Michigan Rule 1.7(b) conflict of interest violation when he engaged in a sexual relationship with a client’s spouse.75

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67. Id. at Chart II: Sanctions Imposed 2010. Results showed that 3,791 of complaints led to some sort of formal sanction. Of those, 793 complaints led to disbarment.
69. Id.
70. Id. Short-term suspension is used to describe periods of suspension from 30-179 days.
71. Id. at 2006.
72. Notice of Revocation and Restitution, Brent W. Schindler, Case Nos. 06-69-GA; 06-78-FA, Nov. 22, 2006. Twelve Rules violations were found to have contributed to this revocation. The details of the conflict of interest violation are very briefly mentioned at the end of the discussion, though, numerically, this Rule appears earlier. While it may be reading too much between the lines, the ordering (by some hierarchy other than numerical) suggests that this particular violation was viewed as less important than the other ethical violations.
73. Id.
75. Notice of Revocation and Restitution, Gregory A. Mikat, Case No. 09-56-GA, Oct. 12, 2010. The other case, from 2003, involved a three-plus year suspension but does not specifically mention the conflict of interest rules.
X. HOW THE MODEL RULES SHOULD HAVE BEEN AMENDED

The solution to this problem and the resolution of these two competing policy interests – client confidentiality and client loyalty – is relatively simple. The solution needs to be implemented as soon as possible to ensure that client interests to both confidentiality and loyalty are fully protected.

The text of Model Rule 5.1(a) can continue unchanged. However, a new Model Rule 5.1(d) would need to be added to provide as follows:

(d) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall provide reasonable assistance to permit other lawyers outside the law firm to conform to the Rules of Professional Conduct, including the identification and resolution of potential conflicts of interest.

Model Rule 1.6 would also have to be revised to delete the current Model Rule 1.6(b)(7) and its permissive disclosure of information necessary to identify and resolve conflicts of interest. Instead, a new Model Rule 1.6(d) would have to be added to Model Rules to provide as follows:

(d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary 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. Such information shall be utilized only to detect and resolve conflicts of interest and shall not be disclosed for any other purpose.

Together, these changes in the Model Rules would protect the confidentiality of client information while protecting against the creation of conflicts of interest that could otherwise be detected and avoided. Client loyalty would be advanced while protecting the confidentiality of client information.

XI. CONCLUSION

The Model Rules of Professional Conduct attempt to reconcile many interests relating to the integrity of the profession and the protection of client interests. Among these interests are avoidance of conflicts of interest, loyalty to clients, and confidentiality of client information. However, none of these interests are absolute, and interests like client confidentiality must sometimes be

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76. MODEL RULES OF PROF’L CONDUCT R. 5.1. Rule 5.1 would continue to read: “Responsibilities of Partners, Managers, and Supervisory Lawyers. (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Id.
compromised to advance other interests like the need to protect third parties from death or serious bodily harm. In the case of conflicts of interest, it is possible and necessary to ensure loyalty to clients without unduly compromising client confidentiality. The necessary changes in the Model Rules are long overdue and the recent changes thereto only increase the urgency of making these changes.
APPENDIX A

TO STUDENTS IN THE ______________________________:

Please complete the following questionnaire by the end of the first class. Please use additional pages if necessary.

You have a continuing duty to update the information requested herein throughout your enrollment in the clinical program. The purpose of collecting this information is to allow us to determine whether or not any potential conflicts of interest are presented in connection with the acceptance of new matters by the various WCL clinics or whether safeguards are required on existing matters.

NAME OF STUDENT: ___________________________________________

CURRENT OUTSIDE (Legal-Related) EMPLOYER (including unpaid intern/extern positions) (IF ANY) AND POSITION:

________________________________________________________________

PAST OUTSIDE (Legal-Related) EMPLOYERS (including unpaid intern/extern positions) WITH DATES OF EMPLOYMENT AND POSITION (attach additional sheets if necessary):

________________________________________________________________

________________________________________________________________

MAJOR CLIENTS FOR WHOM LEGAL ASSISTANCE WAS PROVIDED (including unpaid intern/extern positions) (attach additional sheets if necessary):

________________________________________________________________

Signature: __________________________

Date submitted: _____________________
## APPENDIX B

### Summary of Michigan Disciplinary Sanctions

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Sanctions Imposed</th>
<th>Total Sanctions Imposed for Conflict of Interest</th>
<th>Revocation (Disbarment)</th>
<th>Suspension of 3 years or more</th>
<th>Suspension of 180 days or more but less than 3 years</th>
<th>Suspension of 30 days to 179 days</th>
<th>Reprimand</th>
<th>Probation</th>
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<td><strong>1</strong></td>
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<td><strong>10</strong></td>
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| % of Total | 2.67% | 0.09% | 0.18% | 0.44% | 0.89% | 1.07% | 0.00% |
WHEN YOUR CLIENT IS AN ORGANIZATION – SOME OF THE PROBLEMS NOT RESOLVED BY RULE 1.13

Thomas E. Rutledge*

More often than not, transactional attorneys have an organization, rather than a natural person, as their client. Kentucky Supreme Court Rule 1.13\(^1\) sets forth particular ethical rules that apply when the client is an organization. However, the balance of the ethical obligations of an attorney, as set forth in the Kentucky Rules of Professional Conduct (“Rules”), remains applicable.\(^2\) These Rules, as far as they go, can provide guidance. The problem is that the Rules are incomplete and often fail to provide clear guidance for counsel attempting to conscientiously discharge their obligations to that organizational client. A multitude of questions continue to exist including:

- Who is the client when the organization is to be formed?
- Is the non-organization an organizational client?
- To what extent must counsel warn an organization client about the possibility that constituents may inspect attorney-client communications?
- When do the organization’s counsel obligations run to the organization’s constituents? and
- How can counsel limit the effect upon the attorney-client privilege when new management assumes control of an organizational client?

Let me be clear at the outset: this paper will not conclusively answer any of these questions. These issues are going to arise under highly fact-specific circumstances. Accordingly, the issues will require resolution on a highly fact-specific basis. Instead, this paper will highlight the existence of ambiguities in the existing Rules by examining common fact patterns and with the objective of creating sensitivity to the issues that require resolution. It is better to know that you have a problem needing resolution than to be unaware that you have a problem whose resolution is then, of necessity, ignored.\(^3\)

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* Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC resident in the Louisville office. A frequent speaker and writer on business organization law, he has published in journals including The Business Lawyer, the Delaware Journal of Corporate Law, the American Business Law Journal, and the Journal of Taxation. He is also an elected member of the American Law Institute.

1. KY. REV. STAT. ANN. S. CT. R. 3.130(1.13) (West 2009) [hereinafter SCR].
2. See, e.g., SCR 3.130(1.13) cmt. 6 (West 2009).
I. KENTUCKY SUPREME COURT RULE 1.13

For purposes of this review, the primary focus is on subsections (a), (f) and (g) of Rule 1.13. Subsections (b) through (e) of Rule 1.13 focus upon the lawyer’s responsibility when an organization’s constituent violates either the organizational client’s legal obligations or applicable law and how lawyers can remedy those situations. While certainly not meaning to minimize the importance of these Rules, they are not the focus of this article.

Rule 1.13(a) sets forth the rule for organizational clients. It states, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This Rule is drafted against the background of the corporate form. The official comment suggests that the rule applies to unincorporated associations, but it does not give any explanation as to applicable taxonomy. The official comment provides that:

(1) An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons for organizational clients that are not corporations.

Returning to the body of Rule 1.13, a pair of paragraphs address the relationship of the organization’s attorney to its constituents and the lawyer’s ability to maintain a distinct relationship with one of those constituents:

(f) In dealing with an organization’s directors, officer, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know

Now what is the message there? The message is that there are no “knowns.” There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don’t know. But there are also unknown unknowns. There are things we do not know we don’t know. So when we do the best we can and we pull all this information together, and we then say well that’s basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.

Id.

4. SCR 3.130(1.13).
5. SCR 3.130(1.13)(a).
6. See SCR 3.130(1.13) cmt. 1.
7. Id.
that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.\(^8\)

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.\(^9\)

The Rules contemplate that both the organizational client and one of its constituents may be concurrent clients, subject to the other applicable rules.\(^10\)

Also implicated here, Rule 1.6 governs the confidentiality of information related to a client’s representation. It provides in part that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).”\(^11\) This is of particular importance here because subparagraph (b) of Rule 1.6 authorizes an attorney to reveal information relating to the client representation “to comply with other law or a court order.”\(^12\) These provisions, to the extent they allow for “up the ladder” reporting of possible violations, supplement the otherwise generally applicable rules of Rule 1.6.\(^13\)

Official comments (10) and (11) to Rule 1.13 provide that:

(10) There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent.

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8. SCR 3.130(1.13)(f).
9. SCR 3.130(1.13)(g).
10. See generally SCR 3.130(1.7).
11. SCR 3.130(1.6)(a).
12. SCR 3.130(1.6)(b)(4). See also infra notes 46 through 74 and accompanying text.
13. See SCR 3.130(1.13) cmt. 6. It needs to be recognized, however, that these rules are entirely “inward-looking”; they require reporting up within an organization to its ultimate authority in the effort to achieve compliance with the law and do not suggest or sanction reporting outside the organization. See also 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 17.2, 17-6 (3d ed. 2001 & Supp 2012).
individual, and that discussions between the lawyer for the organization and the individual may not be privileged.  

(11) Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.  

Official comment (12) to Rule 1.13 provides:

(12) Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder . . . .

The Rules also provide for several issues dealing with “derivative actions.” These Rules are in part based upon, as is considered below, a flawed understanding of various issues of organizational law. These comments provide:

(13) Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.  

(14) The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer’s client does not alone resolve the issue. Most derivative actions are a normal incident of an organization’s affairs, to be defended by the organization’s lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer’s duty to the organization and the lawyers [sic] relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

II. THE ORGANIZATIONAL CLIENT BEFORE ITS ORGANIZATION

Rule 1.13(a) raises an important question because it provides that a lawyer employed by an organization may represent that organization. Thus, the question becomes, what is the significance of those steps that are required to bring the organization into legal existence? In the case of a corporation, the organization will not exist until the Secretary of State files its Articles of

14. SCR 3.130(1.13) cmt. 10.  
15. SCR 3.130(1.13) cmt. 11.  
16. SCR 3.130(1.13) cmt. 12.  
17. See SCR 3.130(1.13).  
18. SCR 3.130(1.13) cmt. 13.  
Incorporation. Similarly, a limited liability company (LLC) is created when the Secretary of State files its Articles of Organization. In either instance, the Secretary of State’s filing of the document initiates the organization’s legal existence. Before the effective time and date of that filing, neither a corporation nor an LLC exists that is capable of serving as the attorney’s organizational client. How, then, is a lawyer to act when approached by one or more individuals who desire to organize a business entity?

While it is true that most business organizations can now be brought into existence quite promptly, including by electronically-filed documents with the Secretary of State, it is not true that negotiating the organic documents of a venture (for example, the shareholder buy-sell agreement in the case of a corporation or the operating agreement of an LLC) can be quickly resolved. These documents are often complex, resolving zero-sum issues between the constituents, and require negotiation between the parties. Who is the client when the attorney is retained, on behalf of a yet unformed organization, to effect its organization?

Imagine that Laura, Micah, and Charlsey appear at counsel’s office door, asking her to represent them in the formation of a business entity. After an appropriate analysis, the attorney determines that an LLC is the appropriate form of entity. They agree with her assessment and she prepares an operating agreement. With Laura, Micah, and Charlsey’s consent, she files Articles of Organization with the Secretary of State. The LLC is now legally recognized. But is the LLC now the attorney’s client? Recall that it was three individuals, Laura, Micah, and Charlsey, who appeared at her office door seeking legal representation with respect to the formation of a business entity. The LLC did

20. KY. REV. STAT. ANN. § 271B.2-030(1) (West 2009). See also id. § 14A.2-070(1)(a).
21. KY. REV. STAT. ANN. § 275.020(2) (West 2009). See also id. § 14A.2-070(1)(a).
22. See, e.g., KY. REV. STAT. ANN. § 14A.2-070(1) (West 2012) (effective time and date of filing); see id. § 271B.2-030(1) (for corporations); see also id. § 275.020(2) (for LLCs). See also id. § 386A.2-010(1) (statutory trust formed upon filing by the Secretary of State of the certificate of trust); id. § 272A.3-010(2) (limited cooperative association formed upon filing by the Secretary of State of the articles of association).
23. The issue with partnerships can be even more complicated. While the Secretary of State’s filing of the Articles of Incorporation or Articles of Organization clearly indicate the point in time in which the organization comes into existence, no similar state filing is required for the organization of a general partnership, even one that intends to (or even has) filed a Statement of Qualification or Statement of Registration pursuant to which it will be a limited liability partnership. See KY. REV. STAT. ANN. §§ 362.1-202(1), 362.175 (West 2012).
24. See also HAZARD, JR. ET AL., supra note 13, at § 17.2, 17-5 (“Once the client is properly identified as the entity only, and once the lawyer determines as best he can what the interests of the client are, those interests take precedence, as would be the case with respect to any other client.”).
not exist at the time the attorney-client relationship came into existence. With the LLC now in existence, is the attorney’s client: each of Laura, Micah, and Charlsey; the LLC; or each of Laura, Micah, Charlsey, and the LLC?

Some jurisdictions follow the “incorporation rule,” under which, when the organizers consult an attorney regarding the formation of a business entity, the attorney-client relationship shifts upon its formation to the newly formed organization.26 However, in other jurisdictions, the attorney-client relationship does not shift to the organization; a continuing attorney-client relationship exists between the attorney and the individuals who sought to organize the business venture.27 In some states, at least in the context of an unincorporated business organization, counsel to the organization constitutes representation of all members of the association.28 However, the majority of precedent supports the contrary.29

26. See, e.g., Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (providing that with an organization as client, an attorney represents merely the entity and not the entity’s constituents and providing that this rule applies retroactively “where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer’s involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated . . . .”); Manion v. Nagim, No. 02-370-ADM/RLE, 2004 U.S. Dist. LEXIS 1776 (D. Minn. 2004), aff’d, 394 F.3d 1062, 1068-69 (8th Cir. 2005) (confirming the holding in Jesse v. Danforth, that once the entity is formed the attorney’s duties shift to the entity and apply retroactively so that no duties are owed to the incorporator); Hopper v. Frank, 16 F.3d 92, 98 (5th Cir. 1994) (stating that “the formation of Gulf Coast [limited partnership] preempted any prior relationship with Hooper and Sanderson with respect to the delivery of final public offering documents [for the limited partnership]”).

27. See United States v. Edwards, 39 F. Supp. 2d 716, 734 (M.D. La. 1999) (finding an attorney-client relationship with the founder and the corporate entity); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding the attorney represented individual shareholders of the corporation on whose behalf consultation was made).

28. It does not appear the reasoning of these decisions was conditioned upon the participation of the members in the organization. See, e.g., Pucci v. Santi, 711 F. Supp. 916, 927 n.4 (N.D. Ill. 1989) (holding that attorney for partnership also represents each general partner); Schwartz v. Broadcast Music, Inc., 16 F.R.D. 31, 32 (S.D.N.Y. 1954) (holding that each member of unincorporated association is a client of the association’s attorney); Margulies v. Upchurch, 699 P.2d 1195, 1201 (Utah 1985) (holding that facts supported finding that lawyer for partnership also represented individual partners).

29. See, e.g., Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994) (holding that counsel retained to represent limited partnership in sale of assets represented the partnership and not the individual partners); Mursau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259, 263 (W.D. Pa. 1986) (holding that indirect benefit flowing to limited partnership from services performed by attorney for limited partnership and its general partner held not sufficient to create attorney-client relationship between attorney and limited partner), aff’d, 813 F.2d 398 (3d Cir. 1987) (unpublished table decision); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1242 (S.D.N.Y. 1984) (holding that attorney representing either the general partner of a limited partnership or the limited partnership itself is not, in the absence of an affirmative assumption of a duty, the attorney for the limited partners); Johnson v. Superior Court, 45 Cal. Rptr. 2d 312, 320 (Cal. Ct. App. 1995) (holding that on facts presented, lawyer for limited partnership owed no ethical duty to limited partners); Zimmerman v. Dan Kamphausen Co., 971 P.2d 236, 241 (Colo. App. 1998) (“In Colorado, the fact that an attorney represents a partnership does not, standing alone, create an
Let us assume that the attorney has anticipated this quagmire in her engagement letter, and agreed to a joint representation of Laura, Micah, and Charlsey until the organization of the business entity, and thereafter representation of only the entity. An agreement of this nature adds clarity only if the engagement letter addresses both the full implications of joint-representation and the effects of terminating representation of the individuals. For example, as to the first issue, the engagement letter should make clear the attorney’s inability to maintain in confidence information learned from another party to the joint representation. As to the second point, and simply by way of example, may the attorney represent the LLC against a member for an alleged breach of the operating agreement?

Assume the operating agreement provides that six months after the date of organization each member will contribute an additional $10,000 to the LLC. This obligation is spelled out in the operating agreement and in promissory notes each member delivers to the company. Charlsey refuses to perform. If the attorney who assisted Charlsey, Laura, and Micah in the organization of the LLC undertakes the representation, how the court looks at the pre-organization work is crucial. If, even before its formation, the expected LLC was the client, then the representation adverse to Charlsey may be appropriate. However, if before the LLC’s organization there was an attorney-client relationship with each anticipated constituent and a shifting of the relationship to the LLC at the time of its formation, then Charlsey may be a former client of the attorney. As that representation almost certainly included the LLC’s capitalization, our attorney might find herself acting against Charlsey as to the subject matter of the prior representation. However, doing so is not permitted absent informed consent confirmed in writing. Consequently, whether the relationship begins with the attorney-client relationship with each of the partners.

to-be-formed organization or later shifts to it materially impacts the attorney’s obligations.

Therefore, Rule 1.13 should be modified to expressly provide for the rule set forth in *Jesse v. Danforth*. When an attorney is retained to organize an entity, the entity rule should apply retroactively so the pre-organization activities do not give rise to any individual attorney-client relationship with any of the constituents. This modification would provide much-needed clarity.

**III. THE NON-ORGANIZATION AS AN ORGANIZATIONAL CLIENT**

The use of the term “organization,” implying legal separation from its constituents, leads to problems of taxonomy. There are situations that do not have the benefit of creation of a legal entity distinct from its constituents. Therefore, they can present problems of a different nature.

For example, consider the situation in which a group of homeowners jointly approach counsel to represent them in a suit against a homeowners’ association. No organization exists that the attorney can view as being her client; no “partnership” exists among the various homeowners upset with the assessments at issue. In this situation, counsel is compelled to undertake the representation on a joint basis. Before 2009, Rule 2.2 set forth particular parameters and requirements of a joint representation. However, in 2009, Kentucky Supreme Court Rule 2.2 was deleted and replaced with Rule 1.7. Setting aside the structural complexities in providing an effective joint representation, each of the individual homeowners constitutes a client of the

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32. 485 N.W.2d 63, 67 (Wis. 1992).
33. Id.
35. This hypothetical is based upon one set forth in HAZARD, JR. ET AL., *supra* note 13, at § 17.4, 17-12.
36. *See* KY. REV. STAT. ANN. § 362.175(1) (West 2012) (one of the elements of a partnership being that it be “for profit”); *id.* § 362.1-202(10). *See also* THOMAS E. RUTLEDGE & ALLAN W. VESTAL, RUTLEDGE & VESTAL ON KENTUCKY PARTNERSHIPS AND LIMITED PARTNERSHIPS 50-51 (2010).
38. SCR 3.130(2.2).
39. SCR 3.130(1.7).
40. *See*, e.g., Hopper v. Frank, 16 F.3d 92, 98 (5th Cir. 1994) (stating that “the formation of Gulf Coast [limited partnership] preempted any prior relationship with Hooper and Sanderson with respect to the delivery of final public offering documents [for the limited partnership]”); Manion v. Nagim, No. 02-370-ADM/RL, 2004 U.S. Dist. LEXIS 1776 (D. Minn. 2004), *aff’d*, 394 F.3d 1062, 1068-69 (8th Cir. 2005) (confirming the holding in Jesse v. Danforth, that once the entity is formed the attorney’s duties shift to the entity and apply retroactively so that no duties are owed to the incorporator); Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992) (providing that with an
attorney. 41 Without an organization that can be identified as the client, the attorney will not have the benefit of an attorney-client relationship within a legally cognizable organization, even in states allowing the attorney-client relationship to be initiated without creating an attorney-client relationship between the attorney and the anticipated constituents of the venture. 42 This will be true even if the homeowners agree to form a “steering committee” to serve as the point of communications between the attorney and the homeowners. 43

But should that be the rule? Where a collective will is to be represented as a collective that is not a legal entity, Rule 1.13 should permit the treatment of the collective as an organization. 44 While our group of homeowners is not a partnership or other business organization, it nonetheless is an organization of constituents who have come together for a common purpose. Treating representation of that common purpose as a Rule 1.13 “organization” would avoid many of the difficulties and limitations of representing each constituent jointly. At the same time, the uncertainties of a joint representation, such as a falling out between co-clients, can be minimized and perhaps eliminated. 45 In such a circumstance, a constituent may withdraw from the “organization” while the representation is not negatively impacted by counsel’s obligation under the existing rule to treat the withdrawn client as a former client having an interest in the current dispute and from whom confidential information might have been received.

IV. PRIVILEGE VS. ENTITY LAW DOCUMENT INSPECTION RIGHTS

Where the client is an organization, it is the attorney’s obligation to hold in confidence the organization’s confidential information. 46 Those who exercise organization as client, an attorney represents merely the entity and not the entity’s constituents and providing that this rule applies retroactively “where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer’s involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated . . . .”). See also United States v. Edwards, 39 F. Supp. 2d 716, 734 (M.D. La. 1999) (finding an attorney-client relationship with the founder and the corporate entity); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding the attorney represented an individual of the corporation).

41. See Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046, 1050 (D. Colo. 1999) (stating when a group is not a class action or single legal entity, the attorney has an attorney-client relationship with each member of the group).

42. See id.

43. A partnership must be “for profit,” and the steering committee here is not. See KY. REV. STAT. ANN. § 362.175(1) (West 2012).

44. SCR 3.130(1.13).


46. SCR 3.130(1.6)(a).
control over the organization may waive the attorney’s obligation of confidentiality. 47 Waiver can also come about by court order or pursuant to other law. 48 This discussion focuses on that last principle.

Under Rule 1.6(b)(4), an attorney may reveal information related to a client’s representation “to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.” 49 What is too often forgotten is that under many business organization statutes, the constituent owners of the venture are afforded an opportunity to inspect and copy venture records. 50 For example, in Kentucky, a shareholder in a Kentucky corporation is entitled to, upon request, review certain corporate records. 51 Upon showing proper purpose, a shareholder may review additional records. 52 In contrast, Kentucky’s partnership, limited liability company, and nonprofit corporation statutes, do not limit the records that may be inspected by, respectively, a member of the nonprofit corporation, 53 partner 54 or member of a LLC. 55

Under the Kentucky adoption of the Uniform Partnership Act, no provisions indicate whether the partnership agreement may limit a partner’s right to access partnership records. 56 In contrast, the Kentucky Revised Uniform Partnership Act (2006) allows the partnership agreement to impose reasonable limitations on the access and use of the partnership records. 57 In the case of a limited liability company, a written operating agreement may limit the access to and use of company records. 58 Here arises counsel’s quandary. His or her client is an organization, and as its counsel the attorney is obligated to act with diligence and promptness. 59 As a component thereof, the attorney must communicate to the

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47. SCR 3.130(1.2)(a), (1.6)(a).
48. SCR 3.130(1.6)(b)(4).
49. Id.
51. Id.
52. Id. § 271B.16-020(2).
53. Id. § 273.233. The right of a member to inspect and copy the records of a nonprofit corporation is not subject to limitation in either the articles of incorporation or the bylaws. Id. See also Thomas E. Rutledge, The 2010 Amendments to Kentucky’s Business Entity Laws, 38 N. KY. L. REV. 383, 417 (2011).
54. KY. REV. STAT. ANN. § 362.240 (West 2006) (“Every partner shall at all times have access to and may inspect and copy any” partnership book.); id. § 362.1-403(2) (“A partnership shall provide partners and their agents access to its books and records.”).
55. See id. § 275.185(2) (“Upon reasonable written request, a member may, at the member’s own expense, inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location.”).
56. Id. § 362.240 (“The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.”).
59. SCR 3.130(1.3).
client information the client needs to make informed decisions and to direct counsel.60 In doing so, the attorney must avoid inadvertent disclosure and protect against that risk.61

Must counsel condition communications with representatives in light of the possibility that the information will be disclosed to shareholders/partners/members that are not part of the control body? Assume, for example, that ABC, LLC is considering terminating Daniel’s employment; he, a vice-president and a member in the LLC, is working under the terms of a written employment agreement. The LLC wants to terminate his employment “for cause” as defined in the agreement. The LLC contacts its counsel to review the agreement and draft a letter about whether the LLC may terminate Daniel “for cause.” Counsel carefully drafts a letter that comprehensively reviews the contract, the facts, and the applicable law, concluding that while certain issues militate the other way, the LLC may terminate Daniel “for cause.” The LLC then terminates Daniel, and he sues for breach of contract. When Daniel’s discovery request to review counsel’s letter is denied, he responds by requesting to review the LLC’s records, specifically all communications from counsel regarding his employment agreement.62 Daniel might well prevail.

Recall that under Rule 1.6(b)(4) the attorney’s obligation of confidentiality is qualified by other law.63 The General Assembly has frequently afforded the constituent owners of an organization either limited or complete access to company books and records.64 The communications received from counsel are

60. SCR 3.130(1.4).
61. See, e.g., Kathryn A. Thompson, The Worlds of Ethics and Technology Collide – The Ethical Rules for Electronic Communication that Paralegals Need to Know, PARALEGAL TODAY (Sept./Oct. 2005), http://paralegaltoday.com/issue_archive/features/feature1_so05.htm; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (Mar. 10, 1999) (Protecting the Confidentiality of Unencrypted E-Mail), Jennifer Smith, Lawyers Get Vigilant on Cyber Security, WALL STREET JOURNAL (June 25, 2012); Joel A. Osman, Technology and the Challenge of Maintaining Client Confidences, 25 LOS ANGELES CNTY. BAR UPDATE 9 (Oct. 2005), available at http://www.lacba.org/showpage.cfm?pageid=5867 (“Just because it is possible to conduct telephonic business in an airport waiting room or at the deli counter of the local market does not mean that it is a good idea to do so. The question of appropriate mobile phone etiquette is one on which society as a whole needs to work; the necessity of maintaining client confidences makes the issue of immediate concern to lawyers.”). See also United States v. Mathis, 96 F.3d 1577, 1583 (8th Cir. 1989), cert. denied, 110 S. Ct. 723 (1990); Edwards v. Bardwell, 632 F. Supp. 584, 589 (M.D. La. 1986) (no reasonable expectation of privacy in conversation held over radio telephone where the communication could be accessed by anyone using a scanner or radio phone tuned to the same frequency).
62. See KY. REV. STAT. ANN. § 275.185(2) (West 2012) (“Upon reasonable written request, a member may, at the member's own expense, inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location.”).
63. SCR 3.130(1.6)(b)(4).
64. See, e.g., KY. REV. STAT. ANN. § 273.233 (“The member's right of inspection shall not be abolished or limited by the corporation's articles of incorporation or bylaws.”); id. § 275.185(2) (West 2010) (“Upon reasonable written request, a member may, at the member's own expense,
company books and records, and the Kentucky Supreme Court has held that the common-law right of inspection extends to all correspondence that relates to the business affairs of the corporation if the shareholder has a proper purpose. Looking to law outside of Kentucky, in McCain v. Phoenix Resources, Inc., the court concluded “that absent any restriction by statute or the partnership agreement, a limited partner has the right to inspect all documents and papers affecting the partnership, including those held by the partnership’s attorney.” In Burton v. Cravey the court found a non-profit condominium association’s attorney’s files that related to the association were “books and records” available for inspection.

In this hypothetical Daniel is not attempting to reach into the attorney’s file maintained on behalf of the organization, an act that these cases would indicate is permissible, but rather only to what is of record with the LLC. Kentucky’s statutes do not allow an organization to declare that certain records are confidential and exempt them from inspection. Absent a permissible private

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65. “Books and records” have been given a broad construction so as to “extend to all records, contracts, paper, and correspondence to which the common-law right of inspection of a stockholder might properly apply.” 18A AM. JUR. 2D Corporations § 330 (2013). See also Meyer v. Ford Indus., Inc., 538 P.2d 353, 358 (Or. 1975) (holding “books and records of account” was not limited to books and records of account “in any ordinary, literal or otherwise limited sense, but to be the subject of a broad and liberal construction so as to extend to all records, contracts, papers and correspondence to which the common law right of inspection of a stockholder may properly apply.”); State v. Malleable Iron Range Co., 187 N.W. 646, 647-48 (Wis. 1922) (“The right of a stockholder to examine the records and books of account of a corporation extends to all papers, contracts, minute books, or other instruments from which he can derive any information which will enable him to better protect his interest and perform his duties.”).

66. Otis-Hidden Co. v. Scheirich, 219 S.W. 191, 194 (Ky. 1920) (“At common law the right of inspection covers all the books and records of the corporation . . . [b]ut the word ‘record’ is not used in the narrow sense of minutes of official action taken by the board of directors, but has been held to include the documents, contracts, and papers of the corporation . . . We therefore conclude that all of the correspondence in question, which relates to the business affairs of the corporation, is subject to inspection by plaintiff, who has an interest to protect, and whose purpose is not shown to be improper or unlawful . . . .”) (citations omitted).

68. Id
70. But see Milroy v. Hanson, 875 F. Supp. 646, 652 (D. Neb. 1995) (minority shareholder and director denied access to attorney-client communications and records in direct and derivative suit).
agreement to the contrary, an attorney’s communication to an organizational client may be accessed by its constituents.

In light of this possibility, what is counsel to do? Should counsel knowingly under-inform the client? Doing so would likely violate Rule 1.4. Should counsel provide a letter that is limited to the arguments that support the decision-maker’s desired outcome? Doing so would require counsel to state that the advice is limited. Could the attorney satisfy his or her obligations by delivering the limited letter and making an oral presentation setting forth the nature of the letter’s limitations and explaining the counter-arguments to the determination that “for cause” has been satisfied? Perhaps. That assessment is open to debate. At minimum, is counsel to any organization required to warn its management group that communications with the attorney may be subject to Rule 1.6?

V. PRIVILEGE AND REPRESENTATION OF A CLIENT ADVERSE TO A CONSTITUENT THEREOF

As previously noted, when the client is an organization, the attorney does not represent its constituents. Rule 1.3 requires the attorney to represent the interests of the client “diligently.” Rule 1.6 obligates the attorney to protect the client’s confidential information.

The recent Kentucky case of Lach v. Man O’War involved the restructuring of a limited partnership into a LLC. Before the restructuring,
there was a dispute among the incumbent partners as to who would be a successor general partner.\textsuperscript{79} As a result, the partners were unable to achieve the necessary unanimous approval for the designation of a new general partner.\textsuperscript{80} The incumbent general partners, allied with certain of the limited partners, consulted with the partnership’s counsel and investigated various means to restructure the relationship so Lach would not continue to have a blocking position.\textsuperscript{81} The partners ultimately settled upon a contractual sale of assets and interest exchange of the limited partnership into a LLC.\textsuperscript{82}

Further, as part of that reorganization, any partner in the limited partnership who did not sign off on the transaction was precluded from having voting rights in the LLC.\textsuperscript{83} In the prior limited partnership, Lach had held more than a twenty-seven percent interest.\textsuperscript{84} After the transaction’s consummation, Lach sued on a number of bases, most importantly because the reorganization violated the general partner’s fiduciary obligations.\textsuperscript{85}

Under the controlling limited partnership statute, a general partner had no authority to “do any act which would make it impossible to carry on the ordinary business of the partnership.”\textsuperscript{86} Working from the notion that “the doing of an act proscribed by [law] is a breach of [the general partner’s fiduciary] duty,”\textsuperscript{87} and having determined that reorganizing the limited partnership into an LLC made it impossible for the limited partnership to carry on its business, the reorganization was impermissible. The powers afforded the general partners “can be not construed to allow them the power to transform the partnership into a limited liability company, in order to favor a majority of the partners in their selection,

\textsuperscript{79} Id.
\textsuperscript{80} Id. See also Ky. Rev. Stat. Ann. §§ 362.690 (repealed), 362.235(7) (West 2012). This limited partnership, formed in 1986, was governed by Kentucky’s 1970 adoption of the 1916 Uniform Limited Partnership Act and, consequent to linkage, the Kentucky adoption of the Uniform Partnership Act.
\textsuperscript{81} Lach, 256 S.W.3d at 565.
\textsuperscript{82} The merger of the existing limited partnership into a newly-created LLC was not an option in that limited partnership of this milieu did not have the capacity to engage in a merger transaction. A conversion of the limited partnership into an LLC was precluded by the requirement that any such conversion would require the unanimous approval of all of the partners. Ky. Rev. Stat. Ann. § 275.370 (West 2012). An effort by Lach to have the transaction set aside as a de facto conversion for which the required minimum construction was not given was rejected.
\textsuperscript{83} Lach, 256 S.W.3d at 566.
\textsuperscript{84} Id. at 565.
\textsuperscript{85} Id. at 566.
\textsuperscript{86} Ky. Rev. Stat. Ann. § 362.490(2) (West 2012) (repealed). While no longer set forth in KRS, this Act governs limited partnerships organized on or after June 18, 1970 and prior to July 15, 1988 that have not elected to be governed by a subsequent limited partnership act. See also Rutledge & Vestal, supra note 36, at § [3.2]. The 1970 Kentucky adoption of the 1916 Uniform Limited Partnership Act is reproduced therein in appendix 8.
\textsuperscript{87} Lach, 256 S.W.3d at 569 (quoting Gundelach v. Gollehon, 598 P.2d 521, 523 (Colo. App. 1979)).
or substitution of the general partners/managers of the business, without the approval of all the limited partners.\textsuperscript{88}

However, that was not the end of the case.\textsuperscript{89} The plaintiff sought access to the communications between the general partners and the attorneys who structured the reorganization.\textsuperscript{90} Because the general partners’ breach of fiduciary duty, for purposes of privilege analysis, constituted fraud,\textsuperscript{91} and because the attorney-client privilege does not apply with respect to future actions contemplating fraud, the court held that the general partners could not use the attorney-client privilege to protect the requested documents from review and inspection.\textsuperscript{92}

Likewise, in \textit{Steelvest, Inc. v. Scansteel Service Center, Inc.},\textsuperscript{93} the Kentucky Supreme Court famously (a) defined a (nearly insurmountable) standard for granting summary judgment\textsuperscript{94} and (b) classified a breach of fiduciary duty as constituting fraud.\textsuperscript{95} For our purposes, the more important aspect of the decision is that aimed at Tom Scanlon’s legal counsel. While an employee of Steelvest, Scanlon initiated efforts to organize a new and competing venture.\textsuperscript{96} In doing so, Scanlon breached his fiduciary obligations as a director and officer of the corporation.\textsuperscript{97} The Kentucky Supreme Court held that the attorney-client privilege did not protect the communications between Scanlon and his legal counsel from discovery.\textsuperscript{98}

These outcomes present problems to counsel advising a business entity that is considering actions adverse to the interest of a constituent. Even when, by private ordering, the constituent has no right to inspect the company records that include communications with counsel,\textsuperscript{99} those communications may be

\textsuperscript{88} Id. at 571.

\textsuperscript{89} Id.

\textsuperscript{90} Id.

\textsuperscript{91} Id. at 572 (citing Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 487 (Ky. 1991)).

\textsuperscript{92} Id. As already noted, Lach should have prevailed on a request to review those documents based upon his right, as a partner, to review partnership records. See \textit{Ky. Rev. Stat. Ann.} § 362.500(1)(a) (West 2006) (“A limited partner shall have the same rights as a general partner to (a) have the partnership books kept at the principal place of business of the partnership, and at all time to inspect and copy any of them.”).

\textsuperscript{93} 807 S.W.2d 476 (Ky. 1991).

\textsuperscript{94} Id. at 482.

\textsuperscript{95} Id. at 487 (“Accordingly, we determine, as a matter of law, that a breach of fiduciary duty is equivalent to fraud.”).

\textsuperscript{96} Id. at 479.

\textsuperscript{97} Id. at 483-84.

\textsuperscript{98} Id. at 488.

\textsuperscript{99} \textit{See Ky. Rev. Stat. Ann.} § 275.185(5) (West 2012) (permitting a written operating agreement to limit the right to access company records); \textit{id.} § 362.1-403(4) (allowing the partnership agreement to impose reasonable limitations on access to and use of partnership records); \textit{id.} § 362.1-103(2)(b) (cannot unreasonably restrain). In contrast, both the business
ultimately discoverable if those in control of the venture violated a fiduciary duty to a constituent. In light of this possibility, what is counsel to do? Assuming that no attorney would advise a clear violation of a client’s fiduciary duties, it still may be necessary to counsel the client that all communications may be discoverable.

VI. WHEN THE ORGANIZATION’S COUNSEL’S OBLIGATIONS RUN TO THE ORGANIZATION’S CONSTITUENTS

Even when the client is an organization, an attorney’s diligent representation can impose a duty to act on behalf of someone other than the organization or expose the attorney to liability to someone other than the organizational client. Both of these circumstances fly in the face of Rule 1.13 and its definition of the organization as the client. The Restatement (Third) of the Law Governing Lawyers provides that:

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

* * *

(4) to a nonclient when and to the extent that:

(a) the lawyer’s client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to a nonclient, where (i) the breach is a crime or a fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights;

and

(d) such a duty would not significantly impair the performance of the lawyer’s obligations to the client.

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corporation and nonprofit corporation acts preclude limitations in either the articles of incorporation or the bylaws upon the right to access company records. See id. §§ 271B.16-020(4) (business corporations), 273.233 (nonprofit corporations).
100. Steelvest, 807 S.W.2d at 488.
102. See SCR 3.130(1.13) (West 2009).
104. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000) provides in part:

(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.
The application of these rules in the context of an organizational client has not yet been fully explored. That lack of certainty is a basis for concern. While Restatement section 51 and its comments are written in terms of the fiduciary duties that arise in traditional donative trust and probate contexts, the term “fiduciary” applies in the context of organizational clients when particular actors stand in a fiduciary relationship with the organization, its constituents, or both.

In the context of the *Lach v. Man O'War* dispute we could see these rules play out, perhaps to the unappreciated risk of the attorneys. The general partners of the Man O’War limited partnership stood in a fiduciary relationship with each limited partner, including Lach; in consequence, element (4)(a) of Restatement section 51 is satisfied. The reorganization implemented by the attorney constituted a breach of fiduciary duty and therefore a fraud; so, element 4(b) of Restatement section 51 is satisfied. The lawyer can act, without significantly impairing any obligations to the client, by not implementing a plan that constitutes a breach of fiduciary duty by the client; so, element 4(d) of Restatement section 51 is satisfied because an attorney cannot assist a client in

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105. *Restatement (Third) of the Law Governing Lawyers* § 51 (2000). It bears noting that it can be argued that § 51 of the Restatement is not applicable as here described (reliance being made upon comment h) thereto, it providing that:

   The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

106. See, e.g., *Restatement (Third) of the Law Governing Lawyers* § 51, cmt. h (2000). (“The duty recognized under Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries – trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships.”); *id.* (“The scope of a client’s fiduciary duties is limited by the law governing the relationship in question (see, e.g., *Restatement (Second), Trusts* §§ 169-185.’)).

107. See, e.g., *Ky. Rev. Stat. Ann.* §§ 271B.8-300(1)(a)-(c) (West 2006) (stating that fiduciary duties of corporate directors are owed to the corporation); *id.* §§ 273.215(1)(a)-(c) (stating that fiduciary duties of directors are owed to the corporation); *id.* §§ 275.170(1) (stating that duty of care is owed to LLC and the other members; id. §§ 275.170(2) (stating that duty of loyalty is owed to LLC and not to other members; id. § 362.1-404(3) (stating that duty of care owed by each partner to the partnership and other partners); id. § 362.1-404(2) (stating that duty of loyalty owed by each partner to the partnership and the other partners).


effecting a fraud. That leaves element 4(c), whether the non-client beneficiary of the fiduciary obligation is “reasonably able to protect its rights.” Ultimately, Lach was able to do so, but only after a case was appealed to the Kentucky Supreme Court. At what point does the cost of litigation, which may ultimately not be subject to recovery from the disloyal fiduciary, constitute a bar to the beneficiaries’ capacity to protect their rights? Alternatively, are any costs incurred by the beneficiary of a fiduciary acceptable?

It is beyond the scope of this discussion to resolve this issue. However, recognize that attorneys representing organizational clients may have obligations to protect the interests of the organization’s constituents, notwithstanding the limitations of Rule 1.13.

VII. CHANGE OF CONTROL OF AN ORGANIZATIONAL CLIENT

The attorney’s obligation to maintain privilege with respect to client information is a right and asset of the organization. The organization may waive that privilege as it sees fit. However, the attorney has no right to keep information from the client; the attorney does not have any right of privilege. These rules can create troubling situations when control of an organizational client changes because a different group of actors will have the right and capacity to control both the disclosure of confidential information and disclosure back to the organization. Consider the following hypothetical. Holding Co., Inc. is the sole shareholder of ABC, Inc. ABC, Inc. will be sold pursuant to a stock sale to XYZ, LLC. Upon the consummation of the stock purchase agreement, XYZ, LLC is the sole shareholder of ABC, Inc. The LLC’s management, desiring to gain the maximum information possible in connection with the final adjustments to the purchase price, directs ABC, Inc.’s legal counsel to disclose to them all information concerning the negotiation of the stock purchase

111. SCR 3.130(1.2)(d) (West 2009). The author does not in this example mean to suggest that counsel to the Man O’War limited partnership had a conscious appreciation that they were engaged in a breach of fiduciary duty owed to Lach. While the author believes the ultimate ruling in the case to have been normatively correct, the dissent by Justice Abramson is ample proof that reasonable minds can differ on the point.
113. Lach, 256 S.W.2d at 572.
115. It is as well way above the pay grade of this author.
116. SCR 3.130(1.6) (West 2009).
117. Id.
118. See SCR 3.130(1.4) (West 2009).
agreement that might be helpful in their efforts to reduce the ultimate purchase price. 119

Cases of this nature present particular problems, and there is little direction as to the appropriate outcome. Further, the available guidance is troubling. For example, dicta in Commodity Futures Trading Commission v. Weintraub120 stated that “when control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney-client privilege passes as well.”121 Lower courts have interpreted this statement as a substantive rule.122 In re Cap Rock Electric Cooperative, Inc.123 observed, “[t]he attorney-client privilege extends to corporate entities as well as to individuals. When a corporation passes to new management, the authority to assert the privilege passes as well.” Tekni-Plex v. Meyner & Landis125 stated:

Weintraub establishes that, where efforts are made to run the pre-existing business entity and manage its affairs, successor management stands in the shoes of prior management and controls the attorney-client privilege with respect to matters concerning the company’s operations. It follows that, under such circumstances, the prior attorney-client relationship continues with the newly formed entity.126

Applying these principles with respect to the sale of a subsidiary, the court in Medcom Holding Co. v. Baxter Travenol Laboratories, Inc.127 wrote:

It is reasonable then to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its attorney-client privilege. The parties are free to vary this rule by agreement. For example, if the selling parent will have a continuing interest after the sale in contracts, assets or liabilities of the subsidiary the parent can negotiate for special access or control to protect that interest. Similarly, if the attorneys who present a corporate parent also represent its subsidiary in the sale of the subsidiary’s stock they run the resulting risk that after the acquisition subsidiary management will waive the privilege with respect to its communications with those attorneys. A

119. There are, under scenarios such as this, complicated questions of whether there is a joint-representation/client. See SCR 3.130(1.7) (West 2009). Those issues, while of crucial importance, are beyond the scope of this article.
121. Id. at 349.
123. In re Cap Rock Electric, 35 S.W.3d at 222.
124. Id. at 227.
125. Tekni-Plex, 674 N.E.2d at 663.
126. Id. at 668.
seller who wishes to avoid that result can do so by agreement with the purchaser or by employing separate counsel for the subsidiary and limiting to the parent’s own attorneys those communications which the parent wishes to protect.\textsuperscript{128}

Counsel for organizational clients undertaking a negotiated acquisition need to be aware of these rules and plan necessary limitations.

\section*{VIII. Conclusion}

We are admonished by Albert Einstein that “everything should be made as simple as is possible, but not simpler.”\textsuperscript{129} In light of the significant questions and ambiguities that exist in its application, it can be safely concluded that Rule 1.13 violates Einstein’s admonition.

\begin{flushright}
\textsuperscript{128} \textit{Id.} at *4.
\end{flushright}
PREVENTING “MAHAN”- MAYHEM: A CLOSE LOOK AT KENTUCKY’S JUVENILE CRIME PREVENTION INITIATIVES

Aaren E. Meehan

I. INTRODUCTION

In 1929, Kentucky was charged with handling one of the youngest murder defendants in United States history, when the then-six-year-old Paintsville native, Carl Newton Mahan, shot an eight-year-old playmate, Cecil Van Hoose. The two children were fighting over a piece of scrap iron. Carl was only six years old when he shot Cecil with his father’s twelve-gauge shotgun. Kentucky then faced the question of how to handle and punish a six year old who killed another child.

The Commonwealth charged Mahan with murder; however, after a thirty-minute deliberation, a Johnson County jury returned a lesser included conviction for manslaughter. The presiding judge in Johnson County sentenced him to fifteen years in reform school and then released Carl to his parents on bail, pending an appeal of Carl’s sentence. The outcome of Carl’s case was met with support and criticism; some in the community supported the manslaughter conviction, others complained that it was too lenient. While Carl was on bail, a circuit court judge issued a writ of prohibition, preventing the county judge from sending Carl to reform school. After a series of appeals, the decision to continue to appeal the writ of prohibition was in the hands of Kentucky’s Attorney General; however, the Attorney General decided to take no further action against Carl.

The same questions contemplated in Kentucky during 1929 still prove relevant today. Who was supposed to be watching the two boys? Was there any

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2. Id.
3. Id.
4. Id.
5. Id.
7. Id.
8. Id.
way this event could have been prevented? Perhaps. This article offers a potential answer to juvenile crime prevention, and urges drastic changes to the current prevention efforts in Kentucky.

The case illustrated above and Kentucky’s treatment of other juvenile offenders has spurred critics and commentators for decades. Recently, Kentucky has been criticized for leading the country in juvenile incarceration rates, specifically for status offenses. The recent outcry by youth advocates to abolish the practice of incarcerating status offenders has brought Kentucky’s juvenile justice system to the forefront of the public eye and garnered immense media attention. During the 2012 legislative sessions, the Kentucky legislature established a task force to study the Commonwealth’s Unified Juvenile Code and recommend changes.

This article serves as a blueprint, urging Kentucky lawmakers to amend the governing laws of Kentucky’s Department of Juvenile Justice. Specifically, this article proposes that Kentucky implement programs aimed at creating “capable guardians.” Part II discusses the history of Kentucky’s Department of Juvenile Justice and the Commonwealth’s Unified Juvenile Code, details child classification within the system, and provides information on the Court Designated Workers in Kentucky.

Part III examines the wealth of information concerning criminology, juvenile crime prevention, and best practices. The Routine Activities Theory, a well-

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9. The Annie E. Casey Foundation & The Public Welfare Foundation, Blueprint for Kentucky’s Children: Reducing the Use of Incarceration for Status Offenses in Kentucky 2 (Nov. 2010), available at http://www.njjn.org/uploads/digital-library/Reducing%20the%20Use%20of%20Incarceration%20for%20Status%20Offenders%20in%20KY,%202011.10.pdf (“Youth charged with status offenses in Kentucky are detained at the second highest rate in the nation.”) [hereinafter Blueprint]. The cited publication is put forth by youth advocacy groups in Kentucky, which are calling for abolishing the incarceration of status offenders in that state. As the article notes, “Kentucky, Washington, and Texas combined to account for nearly sixty percent of all detained youths convicted of status offenses.” Id.; see also Janet E. Ainsworth, Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition, 36 B.C.L. REV. 927 (1995) (responding to critics of the push to abolition juvenile court, illustrating another idea presented in the effort to revamp the American juvenile justice system).

10. Jason Riley & Deborah Yetter, Status Offenders: Kentucky Among Nation’s Leaders in Jailing Children, COURIER JOURNAL, Dec. 11, 2011, available at http://www.courierjournal.com/article/20111211/NEWS01/312110023/status-offenders-I (noting that Kentucky pays $210 a day for each child incarcerated (for a total of nearly $2 million), and Kentucky ranks second only to the state of Washington in the percentage of incarcerated youth status offenders).


13. The discipline of criminology is dedicated to the study of crime. A few notable articles for further reading include: Chie Noyori-Corbett & Sung Seek Moon, Multifaceted Reality of Juvenile
established theory in criminology, provides understanding and guidance to the issue of juvenile delinquency prevention.\textsuperscript{14} The Routine Activities Theory also establishes the concept of the “capable guardian” and provides insight into a juvenile crime prevention mechanism.\textsuperscript{15} Part IV discusses two current juvenile crime prevention programs in Kentucky: the Drug Abuse Resistance Education (D.A.R.E.) and the Nurse-Family Partnership Program, applying the concept of the “capable guardian” to each program’s results. Finally, Part V proposes amending the Kentucky statutes governing the Department of Juvenile Justice and implementing a statewide prevention program that incorporates a “capable guardian.” Kentucky legislators and department heads should keep the concept of the “capable guardian” in mind when analyzing proposals of reform to the Commonwealth’s current juvenile system and its supporting agencies. Creating a “capable guardian” aids the effort to prevent juveniles from entering the system altogether.

II. KENTUCKY’S DEPARTMENT OF JUVENILE JUSTICE AND UNIFIED JUVENILE CODE

The Kentucky Department of Juvenile Justice (DJJ) was established in 1996.\textsuperscript{16} Since its inception, Kentucky’s DJJ has provided services and care to Kentucky’s youth.\textsuperscript{17} The department’s initiatives range from prevention programs to aftercare.\textsuperscript{18} While Kentucky is recognized for its efforts in the rehabilitation of delinquent youth, a review of the Commonwealth’s juvenile crime prevention efforts and Unified Juvenile Code is overdue.\textsuperscript{19} However,
before a discussion concerning prevention programs is warranted, a basic understanding of the current structure of Kentucky’s Juvenile Justice System and governing laws is needed.

A. Status Offenders

Children entering Kentucky’s juvenile justice system are classified as either status, public, or youthful offenders. Once status offense charges are filed, a status offense hearing is conducted. A status offense hearing is, “any action brought in the interest of a child who is accused of committing acts, which if committed by an adult, would not be a crime.” Status offenses include charges for a minor: (1) being beyond the control of parents; (2) being a habitual runaway; (3) being a habitual truant; (4) using tobacco; and (5) using alcohol. Status offenses are non-violent offenses. If adjudicated, a juvenile status offender can be detained up to a forty-eight hour period after the initial detention hearing. However, a judge has the ability to detain a juvenile for contempt of court if he or she violates a court order. Detaining status offenders has gained the scrutiny and attention of youth advocate groups in recent years.

In 2009, 172 out of 10,000 youth ages ten to nineteen were charged with a status offense in Kentucky. Truancy charges comprised the majority of status offenses, totaling eighty-seven percent. Kentucky leads the nation, along with Texas and Washington, for detention of status offenders. Those three states comprise nearly sixty percent of all detained status offenders in the United States. While the average reported detainment of a Kentucky status offender is

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20. KY. REV. STAT. ANN. § 630.010 (West 2012) (requiring separate guidelines for juveniles deemed status offenders). See also id. § 600.020(60) (defining particular status offenses).
21. See id. § 600.020(48) (providing definition of a public offense action in the State of Kentucky).
22. See id. § 600.020(67) (providing definition of youthful offender).
23. Id. § 600.020(20)-(2159)(a).
24. Id. § 600.020(60)(a).
25. KY. REV. STAT. ANN. § 600.020(60)(a)-(5) (West 2012).
26. Id. § 600.020(60)(a).
27. Id. § 610.265(1) (providing specified time frames for detained status offenders not to exceed forty-eight hours).
28. Id. § 630.070 (prohibiting the detainment of status offenders in secure detention facilities as a form of punishment unless the child violates a court order).
29. See, e.g., Riley & Yetter, supra note 10.
31. Id.
32. Id.
33. Id.
five to six days, the sheer volume of juveniles being detained is concerning. Some critics are calling for the ban of the practice altogether. If these critics are correct, the question remains how Kentucky can continue to reduce incarceration statistics. One view is that the legislature should shift to addressing prevention of crimes, in contrast to the current system, which primarily reacts to juvenile offenders after the criminal offense has occurred.

B. Public Offenses & Youthful Offenders

The majority of detained juveniles commit a public offense rather than a status offense. A public offense hearing, resulting from a public offense charge, is “an action, excluding contempt, brought in the interest of a child who is accused of committing an offense under [the Kentucky Revised States] Chapter 527 or a public offense which, if committed by an adult, would be a crime, whether the same is a felony, misdemeanor, or violation.” Public offense guidelines are housed under the Kentucky Penal Code and typically identified by the crimes of burglary, assault, battery and sex offenses. Public offenses also include any firearm offenses listed under the Kentucky Revised States (KRS) Chapter 527. Public offenses differ from status offenses because the child’s age no longer makes an act illegal.

The last category of juvenile offenders in Kentucky is youthful offenders. A youthful offender is defined by the KRS as “any person regardless of age, transferred to Circuit Court under the provisions of KRS Chapter 635 or 640 and who is subsequently convicted in Circuit Court.” Currently, Kentucky law permits both public and youthful offenders to be transferred and tried as adults. Once transferred to Circuit Court, a juvenile can be placed in an adult facility operated by the Kentucky Department of Corrections. This transfer occurs upon the meeting of certain criteria laid out in the KRS and the filing of a motion

34. Id.
35. See id. at 2 (critics noting the expense of incarceration, over $200 dollars a day, and the adverse effects of detainment on young people, including increased anti-social behavior).
36. See id. at 6.
37. Blueprint, supra note 9.
38. KY. REV. STAT. ANN. § 600.020(48) (West 2012).
39. Id.
40. Id.
41. For example, consuming alcohol is not an illegal act, but when a child consumes alcohol that act is considered a status offense because based on the child’s age the consumption is illegal. When the same act of consuming alcohol is conducted by an adult over the age of twenty one, it is not illegal.
42. KY. REV. STAT. ANN. § 600.020(67) (West 2012).
43. Id. § 635.020 (outlining procedure for transferring public offenders); see also id. § 640.010(2) (outlining procedure for transferring youthful offenders).
44. Id. § 635.025(1).
to transfer.\textsuperscript{45} Though transfers are not common, they are available to judges in cases with youth defendants.\textsuperscript{46}

\textbf{C. Court Designated Workers & Recent Legislation}

Juvenile justice and delinquency experts recognize that incarcerating children is not the best option, especially upon the first offense.\textsuperscript{47} The often-quoted saying “boys will be boys” still rings true for many today.\textsuperscript{48} Children, particularly boys, are sometimes impulsive, irrational, and often lack cognitive skills to make the best choices.\textsuperscript{49} Delinquent youth exercising anti-social behavior demonstrates a potential link between society’s failure to protect and educate children and delinquency.\textsuperscript{50}

Regardless of the failures associated with the juvenile justice system, programs exist in Kentucky which attempt to minimize a child’s exposure to the criminal justice system while simultaneously promoting education and accountability.\textsuperscript{51} One such program in Kentucky is the Court Designated Worker’s Program (CDW).\textsuperscript{52} In 1986, the Kentucky legislature enacted laws to implement the Court Designated Worker Program.\textsuperscript{53} This statewide program is a division of the Administrative Office of the Courts and provides each of Kentucky’s 120 counties with an available CDW twenty-four hours a day, seven days a week.\textsuperscript{54}

\textsuperscript{45} Id.
\textsuperscript{46} Id. § 600.020(64).
\textsuperscript{47} Blueprint, supra note 9; see also Barry Goldson, Children, Crime, Policy and Practice: Neither Welfare nor Justice, 11 CHILD. & SOC’y 77, 82 (1997) (discussing the negative effect of a child’s removal and placement in a facility on his or her “maturational growth and development”).
\textsuperscript{48} See also Barbara Kantrowitz & Claudia Kalb, Boys will be Boys: Developmental Research has been focused on girls; now it’s their brothers’ turn. Boys need help, too, but first they need to be understood, NEWSWEEK, May 11, 1998, at 54 (explaining boys’ development and gravitation towards impulsive behavior).
\textsuperscript{49} See id. (speculating that differences in testosterone and serotonin levels between boys and girls explain why boys tend to have higher rates of attention deficit disorder and impulsive behavior); see also David P. Farrington, Predictors, Causes, and Correlates of Male Youth Violence, 24 CRIME & JUST. 421, 443 (1998) (“Among the most important personality dimensions that predict youth violence are hyperactivity, impulsiveness, poor behavioral control, and attention problems.”).
\textsuperscript{50} Id. at 460 (explaining that potential risk factors for developing violent offenders include: family factors (such as a lack of supervision and the presence of overly harsh or abuse discipline); peer delinquency, low socioeconomic status; and living in high-crime or urban environments).
\textsuperscript{52} Id.
\textsuperscript{53} See KY. REV. STAT. ANN. § 605.010; 1987 Ky. Acts Ch. 423 § 4 (legislative act establishing the Court Designated Workers program in the state of Kentucky).
\textsuperscript{54} Court Designated Worker Program Brochure, supra note 51.
The CDW’s office may investigate complaints concerning status and public offenses, and after investigation, file a petition that initiates a formal court action in the interest of a child offender. Upon receiving a complaint, the CDW will use the KRS in deciding to either file a petition initiating formal court proceedings or recommend the child to a diversion program. The diversion programs are specifically tailored to each child. The child and CDW draft a diversion agreement. A diversion agreement is “an agreement entered into between a court-designated worker and a child charged with the commission of offenses set forth in KRS Chapter 630 and 635, the purpose of which is to serve the best interest of the child and to provide redress for those offenses without court action and without the creation of a formal court record.” Diversion agreements often require the juvenile to complete restitution, community service, abide by a curfew, obtain counseling, and complete a drug or alcohol assessment. Upon successful completion of the diversion agreement, the case can be dismissed.

If the diversion program is not successful, there are several courses of action. The CDW could forward the complaint and initiate formal court proceedings. This option likely results in the child being exposed to the courtroom. Although some diversion programs are not successful, the CDW’s office successfully directed over 10,000 Kentucky youth through diversion programs in the year 2010 alone, helping those youth avoid formal charges. The diversion program works to keep Kentucky’s youth away from the courtroom. If current law is amended to provide more power to a CDW, the Commonwealth’s prevention efforts will be expanded to fulfill its mandated duty to implement preventative programs.
In 1986, the Kentucky legislature established the Unified Juvenile Code, which took effect in July of 1987. The early 2000s brought various changes and adoptions, yet the code has undergone no major revamping since its inception. In the 2012 regular legislative session, House Concurrent Resolution 129 established a task force enlisted to study the Unified Juvenile Code. Additionally, the legislature asked the task force to submit a report to the Legislative Research Commission by January 7, 2013. The legislature suggested that the Commission report should also analyze many different areas of concern with enforcement, including the possible elimination of status offenses, alternatives to detention, and community-based treatment programs. The creation of the task force provides Kentucky with an opportunity and forum to discuss changes to the current child welfare system, DJJ, and Kentucky’s delinquency prevention programs.

III. ROUTINE ACTIVITIES THEORY

There are successful juvenile crime prevention programs in states around the country. Model programs have been studied and adopted at varying rates, although prevention programs are particularly popular among federal funds grantees. Many of these model prevention programs, intentionally or not, have created what criminologists call a “capable guardian.” Understanding the concept of a “capable guardian” and using evidence-based criminological theories, can bring about real results from prevention programs. Before the

68. See id. § 600.010, created by 1986 Ky. Acts 423, § 1 (creating the Unified Juvenile Code).
69. See, e.g., 2012 Ky. Acts 37 (explaining that although there have been “significant amendments” to the Unified Juvenile Code, the code needed review and revision to “remove . . . ambiguities and inconsistencies” which had arisen from piecemeal amendment since 1994).
70. See generally 2012 Ky. Acts 37, § 3 (establishing the Task Force to study Kentucky’s Unified Juvenile Code)
71. Id. at § 4.
72. Id. at § 3.
73. Id.
74. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, TITLE V COMMUNITY PREVENTION GRANTS PROGRAM 2009 REPORT TO CONGRESS 1-3 (April 2011) (discussing 371 programs awarded Community Prevention Grants by the Office of Juvenile Justice and Delinquency Prevention, its performance data, and the varying program grant areas ranging from child abuse and neglect programs to delinquency prevention programs).
75. Id. at 5 (displaying a graph of the number of subgrants per program area and showing that a great majority of subgrants were given to delinquency prevention as opposed to substance abuse or gun programs).
76. See id. at 6-7 (describing an Oklahoma program which refers truancy officers to meet with truant students, parents, and school staff to help students make structural changes in their lives; see also id. at 7-8 (describing a Vermont program which funds a mentoring program where children receiving mentor services experienced improved school performance by nearly 60%).
77. See infra notes 78-109 and accompanying text.
applicability of the “capable guardian” to the prevention of juvenile crime can be analyzed, a basic understanding of the overarching theory should be established. The recent outcry by youth advocates mainly concerns the incarceration of status offenders and turns silent on the issue of juvenile crime prevention and statewide programs.78

Cohen and Felson’s criminological theory provides the framework and concept of the “capable guardian.”79 In their groundbreaking article, Cohen and Felson analyzed crime rate trends through their theory of “routine activities.”80 Cohen and Felson argued that structural changes in everyday “routine activities” influenced the opportunity for crime and affected crime rates for direct contact predatory violations.81 Direct contact predatory violations are illegal acts during which “someone definitely and intentionally takes or damages the person or property of another.”82 Direct contact predatory violations include rape, murder, and the non-violent crimes of burglary and vandalism.83

Cohen and Felson contend that for a direct-contact predatory violation or crime to occur three elements must be present: (1) a motivated offender, (2) a suitable target, and (3) the absence of a capable guardian, who could guard against a violation.84 Importantly, the absence of one of these elements prevents or reduces the likelihood that the direct contact predatory violation will occur.85 The crux of Cohen and Felson’s theory is that modern social structural changes have drastically altered “routine activities,” creating more criminal opportunities.86 The routine activities theory is based on the three elements of a crime and their convergence in time and space.87 As complex as the routine activities theory might appear, it has real value when developing preventative programs.88 Juvenile crime prevention development by the current legislature

78. See, e.g., Riley & Yetter, supra note 10.
80. Id.
81. Id. at 589.
82. Daniel Glaser, Social Deviance 4 (Robert W. Hodge et al. eds., 1st ed. 1971); see also Cohen & Felson, supra note 12, at 589 (discussing “those predatory violations involving direct physical contact between at least one offender and at least one person or object which that offender attempts to take or damage”).
83. Id. at 4-5.
84. Cohen & Felson, supra note 12, at 590.
85. Id. (“We emphasize that the lack of any one of these [three] elements normally is sufficient to prevent such violations from occurring.”).
86. Id. at 591 (“For example, daily work activities separate many people from those they trust and the property they value. Routine activities also bring together at various times of day or night persons of different background, sometimes in the presence of facilities, tools or weapons which influence the commission or avoidance of illegal acts. Hence, the timing of work, schooling and leisure may be of central importance for explaining crime rates.”).
87. Id. at 590.
88. See infra notes 92-98 and accompanying text.
should play an integral role when analyzing Kentucky’s current Unified Juvenile Code and supporting agencies.

Under a routine activities approach, a motivated offender must have both “criminal inclinations and the ability to carry out those inclinations.” 89 A suitable target may be either a person or an object perceived to have value by the motivated offender, thus target suitability often equates to value or monetary worth.90 Additionally, a target’s suitability can increase for reasons such as accessibility, visibility, or ability to transport the object.91 For instance, an iPod worth approximately three-hundred dollars, though valuable, might not be seen by a motivated offender if it is kept in the drawer of your desk in your bedroom.92 However, the same iPod, when lying in the passenger seat of an unattended car, becomes increasingly suitable as a target because it is more accessible to the motivated offender.93 And through the convergence of time and space, the suitable target (iPod) and the motivated offender (juvenile), coupled with the absence of a capable guardian (unattended car), equates to a criminal opportunity.94 What the routine activities approach attempts to do is explain the correlation between criminal opportunity and the modern changes to people’s everyday “routine activities” by drawing a connection between increased time spent away from the home and the resulting increase in offending opportunities.95

The presence or creation of a capable guardian has the potential to eliminate criminal opportunity.96 Taking the previous iPod scenario, what if the driver of the vehicle stays behind while the passenger runs into the store? While the iPod might still be lying in the passenger seat and the juvenile still walks by the car with the iPod in sight, there is no opportunity for crime because the driver, who was not present before, now fills the role of the capable guardian and eliminates, or at the very least decreases the likelihood for the iPod to be stolen. If the presence of a capable guardian can decrease criminal opportunity, then juvenile crime prevention programs should create capable guardians as a crime prevention mechanism.

Although all three elements are essential to Cohen and Felson’s theory - motivated offender, suitable target, and absence of capable guardian97 - the

89. Cohen & Felson, supra note 12, at 590.
90. Id. at 591.
91. Id.
92. The proposed iPod scenario is simply an example.
93. Cohen & Felson, supra note 12, at 591 (explaining that “[d]aily activities may affect the location of property and personal targets in visible and accessible places at particular times.”).
94. See id.
95. Id. at 594-604 (explaining the relationship of household activity to crime rates in the United States from 1947 to 1974).
96. Id. at 590.
97. Id.
absence of a capable guardian proves most useful when analyzing juvenile crime prevention programs. This article does not address the other two elements to potential juvenile crime prevention programs for several reasons. First, target suitability is difficult to decrease or increase by the development of a program or laws.\textsuperscript{98} Furthermore, the opportunities for direct contact offenses have increased due to people traveling away from home for work and leisure, leaving suitable targets unattended.\textsuperscript{99}

Similarly, the existence of a motivated offender would also be difficult to address; for instance, an individual can become a motivated offender for several reasons, and some criminological theories attribute criminal behavior to biosocial factors.\textsuperscript{100} Other factors relating to the motivated offender include environmental and attachment theories, which would likewise be difficult to influence through legislative initiatives.\textsuperscript{101}

The present objective, in hopes of preventing juvenile crime, is to create capable guardians. Cohen and Felson indicated that the concept of guardianship is usually "marked by the absence of violations."\textsuperscript{102} Cohen and Felson went on to recognize that the police provide guardianship, but indicated that ordinary citizens are extremely capable of providing guardianship.\textsuperscript{103} The authors even went as far as to explain that social roles and relationships play a part in the occurrence or non-occurrence of criminal acts.\textsuperscript{104} Modern theorists have determined that the element of the absence of a capable guardian simply means that there was no one present who could prevent the occurrence of the crime.\textsuperscript{105} Working off of this notion, it appears possible that developing capable guardians could prevent illegal acts.\textsuperscript{106} Therefore, this article focuses on the creation and implementation of capable guardians, through state-run prevention programs, that have the potential to eradicate the criminal opportunity.

\textsuperscript{98} Cohen & Felson, supra note 12, at 591 (explaining target suitability reflects objects of value but that value is influenced by physical visibility, access, and desirability of target by the motivated offender, meaning a program would likely have little effect on target suitability because of the abundant other factors that influence and individualize target suitability).

\textsuperscript{99} Id.

\textsuperscript{100} See David P. Farrington, Predictors, Causes, and Correlates of Male Youth Violence, 24 CRIME & JUST. 421, 441-42 (1998) (discussing biological factors such as low resting heart rate and its mark on antisocial and violent youth).

\textsuperscript{101} MARILYN D. MCSHANE & FRANK P. WILLIAMS III, CRIMINOLOGICAL THEORY 239 (4th ed. 2004) (explaining that unstructured and unsupervised socializing among young adults, as a routine activity, can increase the rates of deviant behavior).

\textsuperscript{102} Cohen & Felson, supra note 12, at 590.

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} MCSHANE & WILLIAMS III, supra note 101, at 238 (explaining the Routine Activity Approach to crime and the element of lack of capable guardian).

\textsuperscript{106} See Cohen & Felson, supra note 12, at 590.
IV. CURRENT CRIME PREVENTION PROGRAMS IN KENTUCKY AND THE “CAPABLE GUARDIAN”

“Insanity [is] doing the same thing over and over and expecting a different result.”

This saying applies to the way the government, legislature, judges, teachers, and parents should approach issues surrounding the child welfare and justice system. There are enough existing studies that actually address which prevention programs work and which programs are ineffective.

Some states have made juvenile justice and juvenile crime prevention top priority. By gearing efforts towards finding solutions, acknowledging the successes, and then growing them exponentially, states like Florida, Washington, and Pennsylvania have begun to aggressively implement evidence-based programs in hopes of bringing change to their current systems. Kentucky, with the formation of the task force, presently has a golden opportunity to improve the current system by implementing proven evidence-based prevention programs.

In the period between the Vietnam War and the 1990s, juvenile crime rates soared. This increase was similar to the crime wave experienced more generally in post World War II America, spurring Marcus Felson and Lawrence Cohen’s initial work. Juveniles were being arrested at staggering rates in the early 90’s. The U.S. law enforcement’s mantra was to get “tough on

110. Id. at 186.
113. Clarke, supra note 111, at 674 (noting that the arrest rate among juveniles charged with violent offenses, such as murder, rape, robbery and assault, grew at double the rate of similar adult arrests during the period from 1987-1991).
crime." This “tough on crime” approach trickled down to the juvenile justice system.

### A. Drug Abuse Resistance Education

One popular program across the country and in Kentucky classrooms is the Drug Abuse Resistance Education program, commonly known as D.A.R.E. As of 2009, D.A.R.E was reportedly taught in nearly seventy-two percent of the school districts in the United States. While leaders of the D.A.R.E program say that the empirical evidence is not telling of the real results, many leaders in the United States have warned against the use of D.A.R.E. The U.S. Surgeon General has published material warning of the ineffectiveness and at times counter-productiveness of the D.A.R.E. program.

One potential reason for claims of D.A.R.E.’s ineffectiveness is the program’s failure to utilize or create capable guardians to provide guardianship during non-school hours. D.A.R.E.’s curriculum includes placing peace officers “in classrooms to deliver sophisticated, science and evidence-based curricula, teaching students good decision-making skills to help them lead safe and healthy lives.” The D.A.R.E. program does not provide guardianship outside of the classroom, and therefore it is plausible that its lackluster results are due in part to the program’s failure to create a capable guardian who can prevent the criminal opportunity. Although D.A.R.E. does not incorporate the concept of a capable guardian in its program model, there are successful programs that have, and are currently in place in Kentucky.

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114. *Id.* at 674-76 (describing the increasingly punitive juvenile philosophy which developed in the 1990s in response to rising juvenile crime rates).

115. *Id.* at 677-84 (discussing the juvenile justice system reflecting the American culture “tough on crime” approach, spurred by the 1990 outbreak of school violence, juveniles began to be tried as adults at unprecedented rates, “between 1988 and 1994, the rate of transfer for person crimes rose steadily from 1.8 to 2.6 percent of all petitioned cases”).


117. *Id.* at 3.

118. David Satcher, M.D., Ph.D., Youth Violence: A Report of the Surgeon General Ch. 5 (2001) (stating “One school-based universal prevention program meets the criteria for Does Not Work: Drug Abuse Resistance Education, or DARE . . . [evidence] shows that children who participate are as likely to use drugs as those who do not participate”); see also Cheryl L. Perry et al., A Randomized Controlled Trial of the Middle and Junior High School D.A.R.E. and D.A.R.E. Plus Programs, 157 ARCH. PEDIATR. ADOLESC. MED. 178-84 (2003).

119. See generally *id.*


121. *Id.* (the D.A.R.E. program’s curriculum does not establish a guardian or component for outside of the classroom, all of D.A.R.E.’s lessons are taught during school hours).
B. Nurse-Family Partnership

Although recent attention has been paid to the reaction and handling of juvenile offenders, this article focuses on the current Department of Juvenile Justice in Kentucky and its governing laws. Regardless of recent criticism concerning Kentucky’s status offender incarcerations and the Commonwealth’s use of ineffective prevention programs, there are some highly effective prevention initiatives. These effective programs are given exemplary ratings and labeled model programs for prevention. One program is the Nurse-Family Partnership (NFP). The NFP program pairs a public health nurse with a low-income first-time mother. Based on the integration of human ecology, self-efficacy, and attachment theories, the NFP program incorporates home visits by nurses throughout a woman’s pregnancy until the child reaches twenty-four months of age.

The home visiting nurse assists the first-time mother with the arrival of the child through prenatal care, diet improvements, and emotional preparation for the arrival of the baby. Although the first-time mother is the primary client, the extended family, friends, and child’s father become a support system and reap the benefits of the home visiting nurse’s aid. One of NFP’s theories concerns human ecology and the impact that an individual’s social context has in his or her development. The effectiveness of the NFP is extensively documented, and evidence indicates that it has the ability to produce a fifty percent decrease in crime. Other data reveals that the NFP has the greatest effect on girls. One reason for the NFP’s exemplary model status is that a

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124. See id. Human ecology theory “emphasizes the impact of the social context on human development. Self-efficacy theory suggests that people will engage in desirable behaviors if they believe that they will lead to desirable outcomes. Attachment theory suggests that children who receive “sensitive and responsive” parenting are likely to exhibit those same personal characteristics themselves.” Id.
125. See Program Guide, supra note 123.
126. Id.
127. Id.
128. Id.
thirty-year study of the program indicated that mothers in every test site who were visited by home nurses had fewer subsequent births than the control group. Furthermore, the test groups reported lower mortality rates and a decrease of reported anti-social behavior as the children reached adolescence. Moreover, the NFP, on average, equated to roughly a $17,000 savings per family, due to the impact that the Partnership had on family factors with economic consequences, such as crime, substance abuse, educational achievement, teen pregnancy, and domestic violence.

In terms of juvenile crime prevention for juvenile offenders, the data speaks volumes. One of NFP’s main goals is to improve “child health and development by helping parents provide responsible and sensible care[.]” Thus, the Kentucky NFP aims to create a capable guardian through improved parenting skills. The Elmira results reveal a connection between the NFP program and the prevention of delinquency. The control group and test group were evaluated when the children reached the age of fifteen. The children visited by home nurses had fewer arrests, needed less supervision, and reported fewer convictions. This data suggests that a component of the NFP also provides a crime prevention technique through the program’s creation of capable guardians.

Providing a more competent parent with improved parenting skills is just one objective of the NFP. Inadvertently, by creating a more involved and engaged parent, the NFP has created a capable guardian, thereby eliminating one of the three elements of a crime. The success of NFP could be explained in part by the program’s creation of parents who served as capable guardians for children

the girls in the nurse-visited group born to high-risk mothers experienced positive effects of NFP, while data revealed the NFP program had minimum effect on boys).

132. Id. at 6.
133. Id. at 4. As the author notes, the decrease in early onset antisocial behavior was important, because it “leads to more serious and violent offending that is different from normative acting out in mid-adolescence.” Id.
134. Olds, supra note 131, at 10.
135. See Program Guide, supra note 123.
136. See id.
137. Olds, supra note 131, at 7.
138. Id.
139. Id. at 7 (stating that “the 15-year-old children of study participants, those visited by nurses, had fewer arrests and adjudications as persons in need of supervision”).
140. See Program Guide, supra note 123.
141. Cohen & Felson, supra note 12, at 590 (referring to one of the three elements necessary for a criminal activity to take place, the capable guardian is an individual or entity that provides guardianship over the suitable target).
throughout their lifetime at a frequency much higher than the control group.\textsuperscript{142} The presence of a capable guardian affected the rate of criminal opportunities for potential juvenile offenders.\textsuperscript{143} The routine activities theory correlates with the evidence produced for the thirty-year synopsis of the program.\textsuperscript{144} This data provides significant support for the development and funding of statewide programs aimed at creating capable guardians.\textsuperscript{145} Interactions between young adults (routine activity) without appropriate supervision can lead to increased deviance.\textsuperscript{146} The NFP, by creating capable guardians, is successful because the program decreases the amount of unsupervised time young adults experience in a single day.\textsuperscript{147}

The NFP began as a non-profit in Kentucky in 1999.\textsuperscript{148} Additionally, the NFP has led to a $2.88-$5.70 return for every dollar invested in the program.\textsuperscript{149} Unfortunately, the program has only been implemented in three counties in Kentucky,\textsuperscript{150} and has yet to reach many of Kentucky’s neediest.\textsuperscript{151} The NFP is a model program that prevents juvenile offending by producing capable guardians and yields favorable long-term results.\textsuperscript{152}

\section*{V. The Prevention Proposal} 

The NFP is a program worthy of further investment. If Kentucky is committed to preventing juvenile crime and delinquency, a statewide prevention program and prevention department might be the most appropriate route to

\begin{enumerate}
\item[142.] \textit{See id.}
\item[143.] \textit{See Cohen & Felson, supra note 12, at 590.} I suggest that the NFP created more capable guardians who were present and working under the Routine Activities approach, eliminating one of the elements of a crime, thus preventing criminal activity.
\item[144.] \textit{Olds, supra note 131, at 9} (noting that nurse-visited mothers tended to have longer relationships with their partners, and were more likely than the control to register their children in out-of-home care between the age of two and four-and-a-half years).
\item[145.] \textit{See id.; see also Aos, supra note 129, at 9} (indicating that NFP programs have a dramatic effect in reducing crime outcomes for both mothers and children; for example, a -56.2\% decrease or mothers, and -16.4\% decrease for children).
\item[146.] \textit{McShane \& Williams III, supra note 101, at 239} (“[C]rime occurs because of the absence of authority figures, a reduction in social control responses, available unsupervised time, and an increase in the probability of reward for deviant behavior.”).
\item[147.] \textit{See id.; see also Cohen \& Felson, supra note 12, at 590.}
\item[149.] \textit{Id.}
\item[150.] \textit{Id.} (listing the program sites in Boone, Kenton, and Campbell County).
\item[151.] \textit{See Dean Praetorius, 2010 Census: Poorest Counties In America, Huffington Post (Dec. 21, 2010, 11:11 AM),} \textit{http://www.huffingtonpost.com/2010/12/21/2010-census-the-poorest-counties-in-america_n_799526.html#s212802&title=10_Allendale_County_799526.html#s212810&title=1_Owsley_County (stating that Kentucky is home to four of the ten poorest counties in the United States, including Owsley, Lee, Breathitt, and Magoffin).}
\item[152.] \textit{See supra notes 137-38 and accompanying text.}
explore. The Kentucky Department of Juvenile Justice (DJJ) was created by House Bill 117 in 1996.153 Kentucky’s DJJ falls under the Justice and Safety Cabinet and is one of five departments in that cabinet.154 In addition to being housed within the Justice and Public Safety Cabinet, Kentucky’s DJJ is made up of ten separate divisions, also codified under Kentucky law.155

Since the DJJ’s inception, Kentucky law has governed and provided regulations pertaining to the Department’s duties and powers.156 One particularly relevant statute, Kentucky Revised Statute (KRS) 15A.065(1)(a), requires Kentucky’s DJJ to develop and administer programs for the prevention of juvenile crime.157 Kentucky law requires the DJJ to conduct research and comparative experiments to find the most effective means of: (1) preventing delinquent behavior; (2) identify pre-delinquent behavior; (3) prevent pre-delinquent youth from becoming delinquent; and (4) assess the needs of pre-delinquent and delinquent youth.158 Unfortunately, there is not a juvenile crime prevention component to the DJJ’s structure and goals as codified in state law.159

Although there might not be an express mandate to the DJJ to address juvenile crime prevention, the language of the KRS still provides flexibility for the DJJ to address prevention.160 Without the responsibility of overseeing a statewide prevention program, the DJJ is able to assist various programs throughout the state and research the most effective means of reaching their prevention goals.161 Furthermore, the versatility of the law, specifically the statutes speaking to the DJJ’s powers and duties, permits the Department to develop and implement programs in a timely manner because the Department does not have to adhere to rigid codified guidelines.162 Without deadlines and other constraints laid out in Kentucky statutory law, the DJJ is free to work on its

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155. Id.
156. Id. § 15A.065.
157. Id. § 15A.065(1)(a).
158. Id. § 15A.065(1)(g)(1-4).
159. See id.
161. See id. § 15A.065(1)(g)(6) (conferring on the DJJ the general power and duty to “[assess] the success of all programs of the department and those operated on behalf of the department and making recommendations for new programs, improvements in existing programs, or the modification, combination, or elimination of programs as indicated by the assessment and the research.”).
162. See generally Ky. Rev. Stat. Ann. § 15A.065(1)(g)(6) (West 2012) (charging Kentucky’s DJJ with its duties and powers, but omitting any timeline of events, evaluation periods, and deadlines). The omission of such restraints has the potential to create an efficient branch of government, because DJJ does not have to wait for another department’s approval or legislative session when implementing prevention programs.
own timeline rather than the Kentucky Legislature’s. Essentially, it permits the DJJ to cut through red tape. In the same vein, the statute gives the DJJ the power to “[eliminate] programs as indicated by the assessment and the research.” This specific language enables the DJJ to act promptly, and it also empowers the DJJ to prevent funding, support, and valuable state resources from being funneled into prevention efforts that have been deemed ineffective. The capability to cut off ineffective programming is vital to the success of effective programming and indicates that Kentucky law accommodates the research and implementation of outcome based programs.

The positive impact on the assessment and decision making process gained from the flexible language contained in KRS Chapter 15A.065 has proven to be a double-edged sword. Presently, the statute governing the powers and duties of Kentucky’s Department of Juvenile Justice has several inconsistencies. The DJJ has a duty to develop and administer programs aimed at preventing juvenile crime as well as to research and assess the most effective means of preventing delinquent behavior. The DJJ has an additional duty to prevent pre-delinquent youth from becoming delinquent. Unfortunately, as the law currently sits, the DJJ does not have the power to require pre-delinquent youth or delinquent youth to participate in prevention programs, “except for adjudicated youth, participation in prevention programs shall be voluntary.” Furthermore, the KRS does not empower other agencies like the Court Designated Workers to require youths participating in diversion to attend or participate in a prevention program. Unless a youth is adjudicated, meaning already tried in court, prevention programs are entirely voluntary and no one can mandate that a child participate.

Questions arise concerning the vagueness and apparent internal inconsistencies of the statute. For instance, does the duty to develop and administer programs for the prevention of juvenile crime mean just future

163. Id. If the Department of Juvenile Justice and had to wait on approval from the legislature for every prevention program funding decision then significant delay would mark Kentucky prevention programs. Instead, as this author has previously indicated, the current statutes governing DJJ are flexibly and lacking detailed organization of the Department which in theory would permit the Department to work in a timely manner. See id.
164. Id.
165. Id.
166. See id.
167. See id.
169. KY. REV. STAT. ANN. § 15A.065(1).
170. Id.
171. See id. § 15A.065(1)(b).
172. See generally id.
173. Id.
juvenile crime from youths who have already offended? Or, does it mean to prevent offenses by individuals labeled “pre-delinquent” youth? If a pre-delinquent youth cannot be required to participate in a prevention program, then where is the law’s teeth? What powers does the Department of Juvenile Justice have in the effort to prevent juvenile crime?

One answer might be to amend KRS 15A.065 to empower the DJJ to require a youth to attend a prevention program before the child commits a crime or is formally charged. One concern might be the possibility for violating an individual’s Constitutional rights. However, by not empowering the DJJ or another state agency (think school or CDW’s office) to require pre-delinquent youths to participate in prevention programs, the DJJ’s duty turns into an uphill battle. If Chapter 15A of the KRS is left untouched, the DJJ is up against a statutory barrier in fulfilling its mandated duties.

The Kentucky legislature should expand the law governing the structure and organization of the Justice and Public Safety Cabinet to create a Division of Prevention, located under the Department of Juvenile Justice. Creation of a Division of Prevention is a natural extension of the existing law charging the DJJ with the duty to administer programs for the prevention of juvenile crime. Kentucky’s current law prescribing the infrastructure of the DJJ does not detail the implementation and operation of successful prevention initiatives. If the law is altered to include a separate prevention division, the implications for its impact on juvenile crime prevention and even reduction are potentially endless.

The KRS should be revised and expanded to include a prevention division administered by the Department of Juvenile Justice. This proposal would provide the attention, funding, and successful implementation tools necessary to make a positive impact on the Department’s efforts in preventing Kentucky’s youth from committing crimes. The duty to institute outcome-based prevention programs in Kentucky hinges on expansion of the current law. This proposal’s creation of a prevention division, as well as a statewide prevention program, would take the law a step further. The laws that govern the DJJ’s structure would also govern the statewide prevention program. Rather than relying on

174. See U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). The line appears to stop, however, when a juvenile is charged with a crime. See, e.g., Schall v. Martin, 467 U.S. 253, 281 (1984) (concluding that pre-trial juvenile detention without the right to bail did not violate the Due Process Clause, because the juvenile was likely to commit a crime before his next appearance).

175. KY. REV. STAT. ANN. § 15A.020 (West 2012).

176. See id. § 15A.065(1)(a) (statute omits any specifics or guidelines pertaining to prevention programs from the powers and duties of the Department of Juvenile Justice).
community networks and advisory councils, the Commonwealth of Kentucky needs to create and implement a statewide prevention program with corresponding laws to ensure state support.

Dozens and potentially hundreds of different prevention programs exist; however, Kentucky has never adopted a statewide program. The DJJ prevention plans lack statewide support because there is no codified Division of Prevention within the DJJ. Currently, the DJJ has established delinquency prevention councils, existing in eleven Kentucky counties, which is not mandated, but permitted by statute. These prevention councils are comprised of individuals who “identify community programs that can provide services for these problems and award grants for programs, including community education, community ministries, schools and boys and girls clubs.” The prevention councils report to an advisory board appointed by the Governor. The prevention councils submit grant applications from participating cities or counties to the advisory board. Again, the flexibility attained by the drafting language and corresponding structure of the DJJ allows for pilot programs to meet the needs of different regions within the state. Still, there remains a need for a more encompassing law to address juvenile crime prevention because the grants given out by the Governor’s advisory board rely on community partners and lack the backing of Kentucky law. The proposed prevention division within the DJJ would be responsible for overseeing Kentucky’s prevention efforts. Such a division automatically establishes the DJJ as a stake-holder in

177. See id. § 15A.065(5)(a) (requiring the DJJ to have an advisory board who “shall review grant applications from local juvenile delinquency prevention councils and include in its annual report the activities of the councils”).
178. See, e.g., Aos, supra note 129, at 9 (listing dozens of different evidence-based approaches to reducing criminal outcomes).
183. See generally Kelly & Settle, supra note 181, at 60 (discussing Kentucky’s Delinquency Prevention Councils and their impact on Kentucky’s juvenile justice system).
185. Id. § 15A.300(3)(d).
186. See id. § 15A300(1).
Kentucky’s goal to prevent juvenile delinquency, because it no longer solely relies on third party community partners to produce solutions.\footnote{187}

Another potential benefit of forming a prevention division within the DJJ is the opportunity to establish a statewide prevention program. The difficult task is determining what kind of prevention program is worthy of monetary support, state funding, and state laws to aid in its success. The current juvenile delinquency prevention councils and many legislatures alike are certainly aware of prevention programs and even support after-school programs such as the Boys & Girls Club.\footnote{188} Organizations solely dedicated to promoting children’s access to after-school programs can be found in Kentucky.\footnote{189} The importance of quality after-school programs and their lasting positive effect on children is widely recognized and well documented,\footnote{190} yet there is no correlating Kentucky law that specifically mandates establishment of this proven type of prevention program.\footnote{191}

While Kentucky’s Department of Juvenile Justice is a supporter of after-school organizations, its capacity varies and its duty to implement prevention programs would be satisfied if it adopted a statewide after-school program. The DJJ should adopt a model after-school program and be required by Kentucky law to run it under the proposed “Division of Prevention.” After-school programs are effective and considered one of the model programs for the prevention of juvenile crime and delinquency.\footnote{192} Most notably, after-school programs create “capable guardians” that will have a positive impact on the effort to decrease juvenile delinquency.

This article’s proposal charges the Kentucky Legislature with forming new laws pertaining to the structure of the DJJ, creating a new prevention division, and developing a statewide after-school program. Ideally, the prevention division would dedicate a portion of its resources to developing what Cohen and Felson have labeled “capable guardians.” If the proposed statewide after-school program is viewed as a juvenile crime prevention program, it is reasonably a responsibility of the DJJ. Again, the success of such a prevention program relies heavily on the governing Kentucky laws. Lax drafting language may inhibit the DJJ from fulfilling its mandated prevention duties.\footnote{193} However, it is a tough line

\begin{itemize}
  \item \footnote{188} See generally Kelly & Settle, supra note 181, at 60.
  \item \footnote{189} See, e.g., Kentucky Out-of-School Alliance, http://www.kyoutofschoolalliance.org/ (last visited Mar. 25, 2013).
\end{itemize}
to draw between empowering the DJJ to allocate its resources as it wishes and at the same time ensuring Kentucky is committed to prevention efforts which have big payoffs for the state’s future.

This proposal for a Division of Prevention and statewide after school program has its fair share of challenges. The biggest issue the prevention proposal is likely to face is the idea of prevention itself. Currently, it is possible to prevent recidivism, but the DJJ’s duty to prevent pre-delinquent youth from committing crimes seems virtually impossible because all prevention programs are voluntary. The statute’s drafters most likely wanted to avoid forcing individuals who had not been convicted of crimes to participate in programs against their will, which could possibly have violated the United States Constitution. However, unless Kentucky’s state representatives empowering entities like Court Designated Workers to require an after-school program for juveniles participating in diversion, the DJJ will not achieve prevention for “pre-delinquent” youths.

If “the proposal” is not considered by legislators, then the next step is to eliminate any prevention mandated duties or modify the KRS to read “prevent juvenile delinquency recidivism.” Without amendments to the current statutory language, prevention programs will never be able to produce their intended results, reduction and prevention of juvenile offenders. If the DJJ can require only adjudicated juveniles to participate in prevention programs, it will never achieve true prevention. Adjudication indicates that an offense has already occurred and therefore the program intended for prevention is essentially reacting to the juvenile’s offense.

VI. CONCLUSION

Prevention of, rather than reaction to, juvenile offending should be the DJJ’s responsibility and should not rest solely on schools, teachers, counselors, and agencies that lack adequate resources. With historic budget cuts in Kentucky, the legislature should reexamine funding ineffective programs. Accordingly, programs aimed at preventing delinquency should be properly implemented. Funding should not be distributed to programs deemed ineffective by research. The accessibility of reports providing evidence based support for prevention programs should be readily available to legislators and policy makers. Kentucky should not only expand the currently small Nurse-Family Partnership, but it should also amend its current laws and create a Division of Prevention.

194. Id. § 15A.065(1)(b).
195. U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
This prevention division would be charged with implementing a statewide after school program that could be mandated by CDW as terms of juvenile’s diversion agreements.

Society needs to be reminded that juvenile offenders are different than adult offenders. While the structure of the current juvenile justice system in Kentucky could take much more time to alter, or to even welcome real change, a starting place is the prevention programs that the state chooses to fund. When those equipped with the decision making power are evaluating programs, specifically those seeking to be funded, the concept of creating a “capable guardian” should be kept close in mind. By eliminating the likelihood that a crime can occur, you eliminate the possibility to offend. As a result, a young person is prevented from becoming a juvenile offender.
SPOUSAL COMPANIONSHIP AND CONSORTIUM CLAIMS
UNDER 42 U.S.C. § 1983

Robert Grise*

I. INTRODUCTION

Many aspects of marital relationships receive constitutional protection under the Fourteenth Amendment Due Process Clause.¹ For instance, the right to intimate association with one’s spouse receives constitutional protection, as does one’s fundamental liberty interest in marrying and raising children.² However, whether the Constitution protects the right to enjoy the companionship of one’s spouse is unclear. Plaintiffs asserting claims under 42 U.S.C. §1983 that assert such a right frequently frame their claims as seeking redress for loss of consortium.³

Part II of this article will discuss the important substantive components of the Fourteenth Amendment’s protection of family autonomy and intimate association, actions under 42 U.S.C. §1983 seeking redress for governmental interference with that autonomy, and state law actions for loss of spousal consortium. Part III will examine and contrast the approaches of three different federal circuits concerning whether the Fourteenth Amendment concept of liberty encompasses the right to the companionship of one’s spouse. Part IV will recommend that the appropriate approach is one contrary to that recently enunciated by the U.S. District Court for the District of Idaho in Bach v. Idaho State Board of Medicine.⁴ This article concludes that although there is some uncertainty regarding the scope of the personal familial rights protected by the Fourteenth Amendment, it is clearly established that the Fourteenth Amendment

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¹ See generally U.S. Const. amend. XIV, §1 (“[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).


³ See generally 42 U.S.C. §1983 (2012). “Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity . . . .” Id.

protects numerous aspects of the marital relationship; therefore, state actors
should not be entitled to qualified immunity for interference with the marital
relationship.

II. BACKGROUND LAW

There are several important substantive and procedural components of the
multiple areas of law relevant to an analysis of the constitutional protection of
the marital relationship. The first section that follows traces protections
traditionally available under the Fourteenth Amendment for family autonomy,
including the Supreme Court’s recognition of citizens’ constitutional rights to
marry, divorce, procreate, cohabitate with family, and control the upbringing of
their children. Similarly, the second section defines each citizen’s constitutional
right to associate with members his or her family. The third section outlines
procedural requirements for enforcing a citizen’s constitutional right through 42
U.S.C. §1983, including what is required to pierce a government actor’s
qualified immunity. The final section explains the common law loss of
consortium claim and the types of physical and psychological injuries that it
redresses.

A. Fourteenth Amendment Protection of Family Autonomy

The Fourteenth Amendment guarantees that “[n]o State shall . . . deprive any
person of life, liberty, or property, without due process of law . . . .” 5
Encapsulated within the Fourteenth Amendment’s guarantee of liberty are a
person’s most intimate and personal choices, such as those concerning “one’s
own concept of existence.” 6 The constitutional concept of liberty presupposes
an individual autonomy that includes the freedom to engage in certain intimate
conduct. 7 The rights to marry, 8 procreate, 9 enjoy custody of one’s children, 10 and

5. U.S. CONST. amend. XIV, §1.
invoking the most intimate and personal choices a person may make in a lifetime, choices central
to personal dignity and autonomy, are central to the liberty protected by the Fourteenth
Amendment. At the heart of liberty is the right to define one’s own concept of existence, of
meaning, of the universe, and of the mystery of human life.”). See also Lawrence v. Texas, 539
7. Lawrence, 539 U.S. at 562 (“Liberty presumes an autonomy of self that includes freedom
of thought, belief, expression, and certain intimate conduct.”).
the right to use contraceptives). The Court in Griswold discussed the right to marry as stemming
from a right of privacy that is older than the Bill of Rights. Id. at 486. See also Zablocki v.
Redhail, 434 U.S. 374, 386-87 (1978) (reaffirming right to marry).
cohabitate with one’s family members are among the components of family life that the Supreme Court has declared fundamental constitutional rights, inherent in the concept of ordered liberty. In addition to the right to procreate, the Constitution protects other elements of sexual privacy, including one’s right to purchase and use contraceptives.

The Supreme Court has long recognized the importance of marriage. Specifically, the Court described marriage as a basic civil right, which is “fundamental to the very existence and survival of the race.” As early as the nineteenth century, the Supreme Court recognized “marriage, as creating the most important relation in life . . . .” Additionally, the Court touted the social importance of marriage in its declaration that without marriage, “there would be neither civilization nor progress.” The Court has described the marital relationship as:

a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

9. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (overturning Oklahoma’s three strikes law that used sterilization as a punishment for criminals). “Marriage and procreation are fundamental to the very existence and survival of the race.” Id.
12. See generally Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (“[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.”).
15. Skinner, 316 U.S. at 541. See also Loving v. Virginia, 388 U.S. 1, 12 (1967) (creating a right to interracial marriage).
16. Maynard v. Hill, 125 U.S. 190, 205 (1888) (“Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”).
17. Id. at 211. Marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.” Id.
18. Griswold, 381 U.S. at 486.
The Supreme Court later affirmed that the marital relationship is “the foundation of the family in our society.” In *Zablocki v. Redhail*, the Court reviewed a Wisconsin statute that prevented Wisconsin residents with outstanding child support obligations from marrying without first receiving a court order granting permission to marry. Relying primarily on *Loving v. Virginia*, the Court invalidated the Wisconsin statute, noting that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.” The Court additionally emphasized that the freedom to marry is “essential to the orderly pursuit of happiness by free men.”

The right to marry is so fundamental that it also extends to prisoners, whose constitutional rights are generally more restricted during incarceration. Although the right to marry, like many other rights, may be subject to substantial restrictions because of an individual’s incarceration, an inmate retains those constitutional rights that are consistent with the inmate’s “status as a prisoner or with the legitimate penological objectives of the corrections system.” Additionally, the Supreme Court has preserved the right of inmates to marry, because many important attributes of marriage remain, even in the prison setting, despite the pragmatic difficulties and limitations of prison life. The remaining attributes of these relationships are sufficient to allow inmates to form a protected marital relationship even in the prison context. Among these remaining attributes are expressions of emotional support, expressions of public commitment, spiritual significance, expectation of consummation, and the formation of a legal relationship that will affect entitlements such as the receipt of government benefits or property rights.

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20. *Id.* at 375.
23. *Id.* at 375.
24. *Id.* at 383 (citing *Loving*, 388 U.S. at 12) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).
25. *Turner v. Safley*, 482 U.S. 78, 99-100 (1987) (overturning a Missouri regulation requiring prison superintendent approval for a prison inmate to marry). A state may not ban a prisoner’s decision to marry; however, a state may regulate the time and circumstances under which the ceremony takes place. *Id.* at 99.
26. *Id.* at 95.
27. *Id.*
28. *Id.* at 96.
29. *Id.* at 95-96.
The fundamental right to marry is of such importance that the Supreme Court also protects a citizen’s right to divorce. Because state court may be the only available method for citizens to dissolve their marriage, a state may not deny an indigent citizen’s ability to seek a divorce solely on inability to pay court fees and other costs, because such requirements limit an indigent citizen’s access to the courts. Additionally, restricting court access to only solvent petitioners might interfere with the fundamental right of indigent persons to remarry.

In Boddie v. Connecticut, the Supreme Court invalidated a Connecticut statute as applied to indigent individuals that required payment of litigation costs before litigants could pursue a dissolution of marriage. The Court reasoned that unencumbered access to pursue divorce was necessary because, unlike commercial contracts that may be freely made or rescinded, both the creation and dissolution of marriage requires the invocation of the state’s judicial machinery. The Court further noted that, generally, access to a state’s court system is not an absolute or inalienable right. However, access to a state’s court system to pursue a divorce is unique because it represents “the exclusive precondition to the adjustment of a fundamental human relationship.”

Similarly, the government lacks the power to determine whether a citizen may procreate. The Supreme Court has reaffirmed this protection on multiple occasions. Most famously, the Court held in Griswold v. Connecticut that a

31. Id. at 376.
32. Id. at 374. (“[D]ue process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”).
33. Id. at 376.
34. Id. at 372-73. The overwhelming litigation cost that burdened the fundamental rights of indigent Connecticut citizens was, on average, sixty dollars.
35. Id. at 376.
36. Boddie, 401 U.S. at 382. “We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual . . . .”
37. Id. at 383.
state statute which forbade the use of contraceptive drugs, medicines, or instruments unconstitutionally intruded upon one’s right to marital privacy.40

Additionally, in Skinner v. Oklahoma, the Court struck down a state statute that had allowed punitive sterilization of habitual criminals.41 The Court noted that, even in the prison context, operation of the habitual criminal sterilization statute would inflict irreparable injury upon a most basic civil right that is necessary for the very existence and survival of the human race.42 Further, the Court held that a strict scrutiny standard of review applies to any classification used by a state passing sterilization laws, which further demonstrates the fundamental nature of this right.43 The Court noted that affording the government the power to control procreation might leave citizens vulnerable to evil or reckless abuses of that power, leading to deliberate extinguishment of certain races or types inimical to the dominant group.44 Outside the prison context, the government may not burden or intrude upon matters that affect a person as fundamentally as deciding whether to have a child.45 The right to procreate is a basic civil right of humankind that is vital to constitutional liberty.46

The Fourteenth Amendment not only protects the creation of a family by protecting citizens’ rights to marry and to procreate, but it also protects citizens’ rights to maintain and to raise a family by protecting cohabitation47 and child-rearing.48 The Court addressed a family’s right to cohabit in Moore v. City of

40. Griswold, 381 U.S. at 485. See also Carey, 431 U.S. at 702; Eisenstadt, 405 U.S. at 453.
41. Skinner, 316 U.S. at 541. Although the Oklahoma statute in Skinner was struck down as a violation of the Fourteenth Amendment’s Equal Protection Clause due to the statute’s differentiation in punishment between larceny and embezzlement, the Court’s holding in Skinner has been interpreted as recognizing procreation as a constitutionally-protected, fundamental right.
42. Id. (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.”).
43. Id. (“[S]trict scrutiny of the classification which a State makes a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”).
44. Id. (“In evil or reckless hands [the power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear.”).
45. Eisenstadt, 405 U.S. at 453 (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). See also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 640 (1974).
46. Skinner, 316 U.S. at 541. See also LaFleur, 414 U.S. at 640.
48. Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923) (holding parents have the right to control the education of their children).
East Cleveland. In Moore, an East Cleveland housing ordinance limited occupancy of a dwelling unit to members of a single family, but defined “single family” narrowly so as to prevent a grandmother from legally living with her two grandsons. The Court, in distinguishing factually the case at bar from contradictory precedent, emphasized that the East Cleveland ordinance sought to control the occupancy of related individuals “by slicing deeply into the family itself.” The Court invalidated the housing ordinance and emphasized that this nation’s history and tradition compelled constitutional protection for a broader concept of “family” than that drawn by the ordinance—one which included the extended rather than just the nuclear family.

In addition to protecting the right to cohabitate, the Court acknowledged parents’ right to control the upbringing of their children in Meyer v. Nebraska. In Meyer, the Court invalidated a Nebraska law that forbade the teaching of any subject in any language other than English. In deciding the constitutionality of the law, the Court concluded that the state legislature “attempted materially to interfere with . . . the power of parents to control the education of their own,” thereby depriving them of due process of law.

The Supreme Court again addressed a parent’s right to control the upbringing of his or her child two years later in Pierce v. Society of Sisters. In Pierce, the Court invalidated an Oregon statute that required every person in custody of a child between eight and sixteen years old to send the child to a public school. Relying primarily on Meyer v. Nebraska, the Court noted that it

49. Moore, 431 U.S. at 495-96.
50. Id. at 496. The two grandsons were cousins, not brothers.
51. Village of Belle Terre v. Boraas, 416 U.S. 1, 8-9 (1964) (upholding a zoning ordinance that defined a single family as inclusive of up to two unrelated individuals and an unlimited number of related individuals related by blood, adoption, or marriage).
52. Moore, 431 U.S. at 498. (The Court noted that the ordinance in Belle Terre was upheld, in part, because it contained an exception for all who were related by “blood, adoption, or marriage,” thereby promoting “family needs” and “family values.”) (contrasting Boraas, 416 U.S. at 9).
53. Moore, 431 U.S. at 506 (“The Constitution prevents East Cleveland from standardizing its children - and its adults - by forcing all to live in certain narrowly defined family patterns.”).
54. Id. at 505 (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).
56. Id. at 396 (overturning the conviction of a teacher who unlawfully taught German language to a child).
57. Id. at 401 (“Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.”).
59. Id. at 535 (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”).
was entirely plain that the compulsory attendance statute unreasonably interfered with parents’ and guardians’ liberty to control the upbringing and education of their children.60

B. First Amendment Protection of Intimate Association

Though not expressly presented in its text, the First Amendment protects an individual’s freedom to associate with other individuals.61 Judicial recognition of such peripheral rights serves to make those rights that are specifically enumerated in the Constitution’s text more secure.62

In Roberts v. United States Jaycees, the Supreme Court confirmed that the Constitution shields the right to intimate relationships from governmental intrusion, because of the role that such relationships play in safeguarding the individual freedom that is central to the American constitutional scheme.63 The Court held that the Jaycees program was clearly distinguishable from the type of group that would warrant this kind of constitutional protection, finding that the relationships between its members were more attenuated than intimate.64 Additionally, the Supreme Court clarified that the types of intimate relationships protected by the First Amendment freedom of intimate association are those attendant to the creation and maintenance of a family.65 The Court noted that

60. Id. at 534-35 (“Under the doctrine of Meyer v. Nebraska, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”).
61. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (“We have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”).
62. Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (“The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach -- indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.”).
63. Roberts, 468 U.S. at 617-18 (“In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”).
64. Id. at 621 (“The local chapters of the Jaycees are neither small nor selective. Moreover, much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship. Accordingly, we conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.”).
65. Id. at 619 (“The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend to the creation and sustenance of a family -- marriage, education of children, and cohabitation with one’s relatives.”).
intrinsically personal liberty exemplified by intimate family relationships was attributable to the attachments, thoughts, experiences, beliefs, and personal aspects of one’s life that family members shared with one another.66

C. 42 U.S.C. § 1983

Congress enacted the Civil Rights Act of 1871, from which 42 U.S.C. §1983 is derived, for the express purpose of enforcing the provisions of the Fourteenth Amendment.67 In particular, Congress enacted §1983 in response to the overwhelming concern that “state courts had been deficient in protecting federal rights.”68 Therefore, §1983 protects those injured by persons acting under color of state law.69 Section 1983 confers no substantive rights.70 It merely provides a mechanism for the enforcement of an individual’s federal rights secured by the Constitution or by federal statute.71 Additionally, §1983 does not provide an avenue by which one may derivatively sue for the deprivation of another’s civil rights—the rights asserted must belong to the plaintiff.72

To succeed in bringing a claim under §1983, a plaintiff must prove that: (1) the plaintiff was “deprived of a right secured by the Constitution or laws of the United States;” and, (2) in the deprivation of this right, the defendant acted under color of state law.73 Therefore, whether a plaintiff has successfully stated a

66. Id. at 619-20 (“Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively person aspects of one’s life.”).
67. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 934 (1982) (“[The Civil Rights Act of 1871] was passed for the express purpose of ‘enforc[ing] the Provisions of the Fourteenth Amendment.’ The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual.”) (emphasis added) (citing Lynch v. Household Fin. Corp., 405 U.S. 538, 545 (1972)).
68. Allen v. McCurry, 449 U.S. 90, 98 (1980) (“[T]he debates show that one strong motive behind [the Fourteenth Amendment’s] enactment was grave congressional concern that the state courts had been deficient in protecting federal rights.”)
69. 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”)
70. 13D CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §3573.2 (3d ed. 2008). “Section 1983 is not a source of substantive rights; it provides only a remedy.” Id.
71. Id. (“[Section 1983] allows a remedy for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .”)
73. Mirbeau of Geneva Lake, LLC v. City of Lake Geneva, 746 F. Supp. 2d 1000, 1007 (E.D. Wis. 2010) (“To recover under Section 1983, a plaintiff must show that: (1) they were deprived of a
claim under §1983 often raises a question of substantive constitutional law.\textsuperscript{74} The substantive elements of a successful claim can vary according to the specific constitutional violation alleged.\textsuperscript{75} For instance, if a plaintiff wishes to challenge executive action under §1983, the plaintiff must prove that the state executive official’s conduct was shocking to the conscience, in a constitutional sense, to allege a violation of the plaintiff’s Fourteenth Amendment substantive due process rights.\textsuperscript{76} Harm negligently inflicted by government officials does not violate citizens’ substantive due process rights and, therefore, plaintiffs may not assert such claims under §1983.\textsuperscript{77}

In addition to the substantive pleading requirements, plaintiffs can face other difficulties in bringing successful claims under §1983. For example, defendants in §1983 actions might be entitled to an affirmative defense of qualified immunity if they acted within their discretionary authority.\textsuperscript{78} Qualified immunity shields a state actor from personal liability, even for violations of constitutional rights, if the state actor reasonably misjudged the law governing the circumstances that gave rise to the violation.\textsuperscript{79} This inquiry focuses on the state actor’s notice of the unlawfulness of the actor’s conduct, therefore, courts right secured by the Constitution of laws of the United States; and (2) the deprivation was visited upon them by a person or persons acting under color of state law.”) (emphasis added).

\textsuperscript{74} WRIGHT, supra note 70, § 3573.2 (“But whether the plaintiff in a particular case has stated a claim under such a constitutional provision raises a question of substantive constitutional law.”).

\textsuperscript{75} Id.

\textsuperscript{76} Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); see also Peterson v. Baker, 504 F.3d 1331, 1338 (11th Cir. 2007) (applying the shock the conscience standard to school discipline); Pagan v. Calderon, 448 F.3d 16, 32 (1st Cir. 2006) (“[P]laintiff must show both that the acts were so egregious as to shock the conscience and that they deprived him of a protected interest in life, liberty, or property.”).

\textsuperscript{77} Daniels v. Williams, 474 U.S. 327, 335-36 (1986) (declining to extend § 1983 claims to negligence when a prisoner was injured as the result of negligence). “Where a government official’s act causing injury to life, liberty, or property is merely negligent, no procedure for compensation is constitutionally required.” Id. at 333 (internal quotation marks omitted). See also Lewis, 523 U.S. at 848-49 (“[T]he Supreme Court has] accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”).

\textsuperscript{78} Bates v. Harvey, 518 F.3d 1233, 1242 (11th Cir. 2008) (“Qualified immunity protects law enforcement officials from § 1983 suits for civil damages arising from the discharge of their discretionary functions, ‘as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.’”) (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

\textsuperscript{79} Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (The court noted, “Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”) (referencing Saucier v. Katz, 533 U.S. 194, 206 (2001)).
judge the reasonableness of the behavior against the backdrop of the law at the time of the conduct.

A state actor’s affirmative defense of qualified immunity defense requires a three-part analysis. First, a court must decide a question of substantive constitutional law to determine whether the plaintiff alleged a constitutional violation. This is a threshold determination in which the court interprets the facts in the light most favorable to the plaintiff. Second, the court must determine whether the right was “clearly established” at the time of the alleged violation. A qualified immunity defense is available only if the right was not clearly established at the time of the alleged violation. Third, the court must determine “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” A state actor might be entitled to immunity for the violation of a plaintiff’s constitutional rights if a reasonable person in the defendant’s position could have failed to appreciate that the defendant’s behavior would violate those rights.

D. Loss of Spousal Consortium

A loss of spousal consortium claim recognizes that a plaintiff’s physical or psychological injury might affect the quality of the plaintiff’s marriage. The
purpose of a cause of action for loss of consortium is to recover damages for the
harm that the injury caused to the marital relationship of the injured party and
the injured party’s spouse.\textsuperscript{89} Loss of consortium generally includes both
pecuniary and non-pecuniary components.\textsuperscript{90} The modern, emotionally based
cause of action developed significantly from one that originally recognized only
a husband’s property-based economic interest in the services of his wife.\textsuperscript{91}

To assert a successful cause of action for loss of consortium, a plaintiff must
establish: (1) the plaintiff’s “marriage to the injured person at the time of the
person’s injury; (2) a tortious act by the defendant that resulted in the injury to
the plaintiff’s spouse; and (3) the loss of some benefit of the marital relationship
as a result of the spouse’s injury.”\textsuperscript{92} Although a consortium claim is necessarily
derivative of a preceding injury,\textsuperscript{93} it is a separate cause of action, not an item of
damages.\textsuperscript{94} Because a consortium claim is a mechanism for compensating the
injured party’s spouse for a wounded interest in “the continuance of a healthy
and happy marital life,”\textsuperscript{95} a plaintiff may seek compensation for the loss or

\textsuperscript{89} E.g., Planned Parenthood of Nw. Ind., Inc. v. Vines, 543 N.E. 2d 654, 657 (Ind. 1989)
(holding loss of consortium applies to spouses even when temporarily separated).

\textsuperscript{90} Daigle v. Legendre, 619 So. 2d 836, 842 (La. Ct. App. 1993) (“Loss of consortium
includes such pecuniary elements as loss of services and such non-pecuniary components as love,
companionship, affection, society, sexual relations, comfort, and solace.”).

\textsuperscript{91} Michelle N. Ferreri, Which Comes First in Federal Court, the Chicken or the Baby
Chicks?: The Unavailability of Federal Remedies for Spousal Consortium Claims Under 42 U.S.C.
§ 1983, 52 VILL. L. REV. 569, 571 (2007). See also Hitaffer v. Argonne Co., Inc., 183 F.2d 811,
812, 820 (D.C. Cir. 1950) (allowing wife to pursue a loss of consortium claim despite earlier
precedent limiting consortium claims to husbands and despite the federal Workmen’s
Compensation statute providing the exclusive remedy for employers); Vines, 543 N.E. at 657.

\textsuperscript{92} Carolyn Kelly MacWilliam, Cause of Action for Loss of Marital Consortium, in 24 CAUSES

\textsuperscript{93} Ind. Patient’s Comp. Fund v. Winkle, 863 N.E. 2d 1, 6 (Ind. Ct. App. 2007) (“Loss of
consortium, loss of services, loss of love and affection, and other such claims, are purely relacional.
That is, they inure to the claimant only because of the relationship that exists between the claimant
and the injured, be it husband and wife or parent and child. They do not require that the claimant
have been involved in or even present during the incident that caused the injury. They are basically
an additional element of the damage caused by the incident; hence, they are considered
derivative.”).

\textsuperscript{94} Id. (“A cause of action is derivative if it may be brought only where a separate, related
claim is actionable. There derivative claimant must prove all of the elements of the related tort in
order to recover.”) (citing Durham v. U-Haul Int’l, 745 N.E. 2d 755, 764 (Ind. 2001) and Mayhue
v. Sparkman, 653 N.E. 2d 1384, 1386 (Ind. 1995)).

\textsuperscript{95} Millington v. Se. Elevator Co., 239 N.E. 2d 897, 900 (1968). See also Goldstein v. United
diminution of intangible considerations such as love, companionship, affection, society, sexual relations, and solace.97

The intangible benefits of marriage, such as companionship and affection, are difficult to quantify to calculate a damage award.98 Therefore, a successful claim for loss of consortium generally requires evidence that the injured party and the party’s spouse are no longer capable of engaging in activities they previously enjoyed together, thereby demonstrating an injury to their companionship.99 This type of harm might continue to accrue, in situations of serious bodily injury, for the entirety of the time in which the injured party is hospitalized, bedridden, or confined to a wheelchair.100 Additionally, a loss of companionship may be demonstrated by evidence that the plaintiff’s injury effectuated a change in the plaintiff’s personality that negatively affected his or her marriage.101 In some jurisdictions, it is even possible to recover damages resulting from the inability to engage in planned activities in which the couple has not yet engaged.102

III. CIRCUIT SPLITS REGARDING CONSTITUTIONAL CONSORTIUM CLAIMS

This part discusses the differing analyses of three federal circuits regarding whether the Fourteenth Amendment recognizes a constitutional “liberty” interest in the consortium of one’s spouse. The Third Circuit’s approach recognizes the marital relationship between spouses as being comparable to the protected liberty interest in the parent-child relationship. The Seventh Circuit’s approach refuses to equate marriage with consortium for fear of allowing all married

97. Millington, 239 N.E. 2d at 899. See also Goldstein, 9 F. Supp. 2d at 193.
98. Spaur v. Owens-Corning Fiberglas Corp., 510 N.W.2d 854, 870 (Iowa 1994) (stating that it is difficult to measure the value of a spouse’s companionship, affection, and aid).
99. See Oliver v. Alexander, 737 So. 2d 772, 777 (La. Ct. App. 1999) (Affirming a damages award for loss of consortium and noting that “[the injured party could] no longer support his family, participate in sports, travel, or assist with household chores. His disability made him more irritable and adversely affected his intimate marital relationship.”).
100. Daigle, 619 So. 2d at 842 (awarding $5,000 to a spouse for loss of consortium for the time when her husband was hospitalized, bedridden, and in a wheelchair).
101. Burden, 636 F. Supp. at 1044-45 (awarding $4,000 in damages to a spouse when her injured husband’s personality changed and he became withdrawn, moody, and depressed partially due to an increased intake of alcohol and medication).
102. Bennett v. Lembo, 761 A.2d 494, 496, 499 (N.H. 2000) (upholding an award of $25,000 in damages to a spouse when her injured husband could no longer engage in many activities they had planned to enjoy together throughout his retirement, such as taking long drives with their children and grandchildren).
victims of state abuse to become constitutional plaintiffs. The district courts in the Ninth Circuit, in contrast, have taken several different approaches.

A. The Third Circuit: Pahle v. Colebrookdale Township

The United States District Court for the Eastern District of Pennsylvania addressed the conflict between consortium claims and §1983 actions in Pahle v. Colebrookdale Township. In Pahle, a motorist’s wife sued the township in which she lived seeking redress for the allegedly improper actions of a police officer during a drunken driving arrest. Colebrookdale Township Police Officer Katherine Fryer, after receiving a tip from two off-duty police officers, pulled over Mr. Ted Pahle, a motorist rehabilitating from an earlier, unrelated injury, on suspicion of drunken driving. Because Pahle’s brain injury impaired his capacity for communication, he was unable to inform Fryer that he was disabled. According to Pahle, after Fryer became impatient with his refusal to submit to roadside sobriety tests, she had him place his body over the trunk of his vehicle and proceeded to arrest him. Pahle contended that he experienced excruciating pain when Fryer pulled his arms behind his back; as a result, he reflexively pulled away from her. Fryer interpreted Pahle’s response as resisting arrest and forced him to the ground, injuring his face and head and

103. Pahle v. Colebrookdale Twp., 227 F. Supp. 2d 361, 384 (E.D. Pa. 2002) (denying summary judgment on an injured spouse’s state claims for assault, battery, and false imprisonment, on his §1983 claim, and on his spouse’s loss of consortium claim). The parties disputed the underlying facts of this case and no factual determination was made in this opinion. Id.
104. Id. at 364.
105. Id. at 365. Mr. Pahle fell down a flight of stairs four years earlier and suffered brain damage and other serious injuries. “He spent years trying to regain functionality, and still has great difficulty with memory, other mental functions and many physical activities.” Id.
106. Id. at 365. Two off-duty police officers contacted Officer Fryer after seeing Mr. Pahle in a parking lot and believed he was drunk.
107. Id. (“Mr. Pahle was very nervous and began fumbling with his wallet to find disability identity cards, attempting to explain to Officer Fryer that his communication capacity was impaired by his brain injury.”).
108. Id. (“Officer Fryer grew impatient with Mr. Pahle’s failure to produce the requested documents, and asked that he step out of his vehicle to undergo several sobriety tests. Mr. Pahle refused to take the tests, on account of his disabilities, but said he would consent to a blood test. Thereupon, Officer Fryer asked Mr. Pahle to lie over the trunk of his vehicle and began to arrest Mr. Pahle, pulling his arms behind his back to place him in handcuffs.”).
109. Pahle, 227 F. Supp. 2d at 365 (“Because of Mr. Pahle’s injuries, he experienced excruciating pain when Officer Fryer forced his right arm behind him, and he reflexively spun away from her and into the roadway.”).
reinjuring his shoulder and arm. Additionally, Pahle alleged that Officer Fryer kicked him several times while he was on the ground.

Pahle complained that this encounter adversely affected his physical rehabilitation and his marriage. According to Mrs. Pahle, because of this incident, her husband discontinued his previous efforts to return to work. He also became paranoid, causing him to board up the doors to his home and to keep the shades drawn. He became irritable, threatening, and suicidal. Because her husband’s state had deteriorated so, Mrs. Pahle committed him to a mental institution to protect his welfare and that of others. Though they were not separated before the incident, Mr. and Mrs. Pahle subsequently divorced.

The District Court for the Eastern District of Pennsylvania allowed Mrs. Pahle to assert a loss of consortium claim against Officer Fryer, in her individual capacity, for loss of the services, society, and companionship of her husband. Mr. Pahle’s most significant injuries from the incident were emotional. Although Pennsylvania case law was unclear on whether purely “emotional injuries can be the basis of a loss of consortium claim,” the court held that Mrs. Pahle should be able to pursue recovery for loss of consortium under state law. The court allowed Mrs. Pahle’s claims to proceed because Officer Fryer’s behavior negatively affected the endurance, intimacy, and peacefulness of the Pahles’ marriage.

Although the court granted summary judgment against Mrs. Pahle’s § 1983 claim due to an inadequately pled complaint, the court still analyzed the issue “that the government improperly interfered with her personal right to the

110.  Id. at 365 (“Officer Fryer perceived Mr. Pahle’s actions as an attempt to resist arrest, and she forced him to the ground and placed him in handcuffs. In the process, Mr. Pahle re-injured the shoulder and arm he had been rehabilitating.”).
111.  Id. (“While Mr. Pahle was on the ground, Officer Fryer kicked him several times.”).
112.  Id. at 366. Mr. Pahle and his spouse were subsequently divorced.  Id.
113.  Id.
114.  Id. After the incident, Mrs. Pahle stated that Mr. Pahle became paranoid, keeping the shades drawn and the doors secured at home with extra boards.  Id.
115.  Pahle, 227 F. Supp. 2d at 366. According to Mrs. Pahle, Mr. Pahle became upset very easily, turned suicidal, and even threatened to hit her.
116.  Id. (“Mrs. Pahle believed her husband’s mental state had deteriorated so much since the incident that she felt he was a danger to himself and others and that she could not safely return to her own home until she had him committed to a mental institution.”).
117.  Id.
118.  Id. at 375 (“Because Mr. Pahle’s underlying claims concerning probable cause, excessive force, assault and battery and false imprisonment will overcome summary judgment, Mrs. Pahle’s loss of consortium claim stemming from his injuries may also survive.”).
119.  Id. at 376.
120.  Id.
121.  Pahle, 227 F. Supp. 2d at 380.
122.  Id.
services, society and companionship of her husband." 123 Specifically, the court stated its belief “that spouses possess a liberty interest under the Due Process Clause which entitles them to pursue happy, intimate association free from unlawful government intrusion.” 124 Despite never being directly confronted on the issue in case law, the court mentioned that parents in the Third Circuit could assert violations of their own constitutional rights when a state interfered with the parent-child relationship. 125 Because parent-child relationships create cognizable liberty interests capable of supporting derivative claims under § 1983, the court reasoned that the same interests were created by spousal relationships. 126

The court then addressed Officer Fryer’s affirmative defense of qualified immunity, although it was directed at Mr. Pahle’s claims against the officer, rather than Mrs. Pahle’s loss of consortium claim. 127 The court denied Fryer summary judgment on qualified immunity, because she acted unreasonably according to settled constitutional standards at the time. 128 Officer Fryer’s conduct was constitutionally unreasonable because, taking Mr. Pahle’s testimony as true, Officer Fryer detained, arrested, pushed him to the ground, and kicked him repeatedly despite the fact that he was not drinking, driving erratically, threatening her, or resisting arrest. 129

B. The Seventh Circuit: Niehus v. Liberio

On similar facts to Pahle, the United States Court of Appeals for the Seventh Circuit analyzed constitutional consortium claims brought as §1983 actions very differently than the Eastern District of Pennsylvania. 130 In Niehus v. Liberio, just as in Pahle, a motorist’s wife sought redress from her husband’s arresting officers for the loss of consortium that resulted from the officers’ alleged use of excessive force. 131 The police arrested Mr. Niehus, on suspicion of drunk driving, just like Pahle. 132 After the officers arrested him, they took him to a Chicago police station; at the station, a fight ensued during which two officers

123. Id. at 380, 384.
124. Id. at 383.
125. Id. at 381 (citing Estate of Bailey v. Cnty. of York, 768 F. 2d 503, 509 FN7 (3d Cir. 1985), where the court indicated that a father could sue under § 1983 for the violation of his constitutional rights for his child’s death).
126. Id. (“We believe that the same rights existing in the Third Circuit between parents and children logically extend to spouses”).
127. Id. at 373.
128. Id.
129. Pahle, 227 F. Supp. 2d at 373.
130. See id. at 384; Niehus v. Liberio, 973 F.2d 526, 534 (7th Cir. 1992).
131. Niehus, 973 F.2d at 527; Pahle, 227 F. Supp. 2d at 364.
132. Niehus, 973 F.2d at 527; Pahle, 227 F. Supp. 2d at 364.
kicked Niehus in the face. As a result of the altercation, Niehus suffered a broken left cheekbone. His broken cheekbone caused brain damage which resulted in significant mental and emotional injury. Mrs. Niehus sued the officers, claiming that her husband’s injury ruined their marriage and caused the couple’s divorce, thereby depriving her of spousal consortium right without due process of law.

The court noted that while the sexual component of marriage has been traditionally compensated by consortium claims and singled out for constitutional protection, “[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct.” The court was deliberately careful to prevent §1983 from overshadowing states’ public-officer torts. The court reasoned that because constitutional liberty had been restricted to protect only the core of personhood, and because marriage is not synonymous with consortium, and deprivation of consortium includes a wide range of deprivations, the court declined to interpret consortium as constitutionally protected liberty.

The court’s vocabulary lesson might have been intended to be interpreted literally, emphasizing only that consortium claims could compensate for

133. Niehus, 973 F.2d at 527 (“James Niehus was arrested on suspicion of drunk driving and brought to a police station in Berkeley, Illinois, a suburb of Chicago. He got into an argument with the police, and a fight ensued in the course of which – he testified – officers Liberro and Vittorio kicked him in the face . . . .”).
134. Id. (“[A]s a consequence of [his broken cheekbone] he suffered brain damage that has caused significant although not totally disabling mental and emotional injury.”).
135. Id.
136. Id. Mrs. Niehus argued “that the psychological injury inflicted by defendants on her husband ruined her marriage and caused her to obtain a divorce from him.” Id.
137. See Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (overturning a law that banned the sale of contraceptives to married persons based on the constitutional notion of privacy surrounding the marriage relationship).
138. Niehus, 973 F.2d at 533 (quoting Harpole v. Ark. Dept. of Human Servs., 820 F.2d 923, 928 (8th Cir. 1987)).
139. Niehus, 973 F.2d at 533 (“Concerned to keep section 1983 from swallowing the whole of the states’ law of public-officer torts, the courts have confined “liberty” to the core of personhood. Even bodily integrity is not protected completely; minor assaults and batteries are not actionable as deprivations of constitutional liberty.”).
140. Id. The court stated that the constitution did not absolutely protect bodily integrity, peace of mind, or harm to reputation.
141. Id. (“[C]onsortium is not a synonym for marriage.”).
142. Id. at 534 (“Deprivations of the lesser services comprehended in the portmanteau term ‘consortium’ are not deprivations of liberty within the restricted meaning that the term bears in the Constitution. The right to a husband’s assistance in raking leaves is not a liberty protected by the Fourteenth Amendment. But Mrs. Niehus does not ask us to confine the constitutional right of consortium to the greater deprivations. She wants us to rule that consortium is liberty, period. We decline the invitation.”) (emphasis added).
insignificant injuries—such as a wife’s right to her husband’s assistance in household chores—and that such injuries fall outside the protection of the Fourteenth Amendment. However, the court made special mention of the way in which Mrs. Niehus framed her claim. The court declined Mrs. Niehus’s invitation to “rule that consortium is liberty,” while leaving open the question whether greater deprivations of spousal consortium (potentially including the type suffered by Mrs. Niehus) may qualify as deprivations of due process. The court’s phrasing demonstrates that it might have been willing to recognize more serious deprivations of spousal consortium as unconstitutional (that is, more serious than the menial examples offered by the court) had Mrs. Niehus framed her complaint that way.

C. The Ninth Circuit: Bach, Engebretson, and Trevino

The United States District Court for the District of Idaho addressed the permissibility of spousal consortium claims under §1983 in Bach v. Idaho State Board of Medicine. In Bach, the plaintiff, John Bach, sued forty-two defendants associated with the Teton Valley Hospital, Teton County Coroner’s Office, medical team, and local media following the death of his wife. Mrs. Bach was admitted to the Teton Valley Hospital where she was diagnosed with and treated for community acquired pneumonia. On the morning of her scheduled release, Mrs. Bach was found unresponsive in her bed and attempts to resuscitate her were unsuccessful. Mr. Bach subsequently brought §1983

143. Id. (“A loss of consortium can therefore be as minor and transient as a wife’s losing a month’s help from her husband in mowing the lawn and washing the dishes and grooming the cat, and as major as the loss of all spousal services consequent upon an injury that renders the injured spouse a human vegetable.”).
144. Id. (“But Mrs. Niehus does not ask us to confine the constitutional right of consortium to the greater deprivations.”).
145. Niehus, 973 F 2d at 534.
146. Id. The court said, “The right to a husband’s assistance in raking leaves is not a liberty protected by the Fourteenth Amendment. But Mrs. Niehus does not ask us to confine the constitutional right of consortium to the greater deprivations. She wants us to rule that consortium is liberty, period. We decline the invitation. Nor are we eager on our own to fix a point on the scale from the smallest to the largest loss of consortium and say that above that point the Constitution provides a remedy but below it not.” Id.
147. See id.
149. Id. at *3–4, 6.
150. Id. at *4 (“Bach’s wife checked into the hospital on November 5, 2008. Defendant Dr. Chad Horrocks ‘diagnosed [her] with community acquired pneumonia.’”)
151. Id. at *5 (“[A]t 5 a.m. on November 8, Ms. Bach ‘was found unresponsive in her bed.’ Defendant Dr. Wolfe’s efforts to resuscitate her failed.”).
claims on his wife’s behalf, as well as his own, alleging that the hospital had deprived him of his constitutional right to the companionship of his late wife without due process of law.152

The Idaho District Court noted that there was judicial ambiguity between the circuits regarding the existence of a constitutional right to spousal companionship and it resolved this ambiguity in favor of the state-actor defendants.153 The court emphasized that Mr. Bach failed to cite any binding precedent from either the Ninth Circuit or the Supreme Court.154 The court reasoned that because of the three differing approaches taken by courts, there was not a clearly established constitutional right to spousal companionship at the time of the alleged violation.155 Because the court found that the constitutional right was not clearly established, the defendants were entitled to qualified immunity.156

Another court within the Ninth Circuit also denied recovery to a spouse seeking compensation under § 1983 for governmental interference with her marriage.157 Jesse and Catherine Engebretson, husband and wife, sued Montana State Prison’s warden and others, alleging that Mr. Engebretson’s incarceration was illegal under its original terms.158 His sentence was imposed following his conviction on four counts of sexual assault.159 After his release from prison, Engebretson successfully challenged the legality of his probationary term.160 After the illegality of his original sentence was determined and subsequently

152. Id. at *16 (“Bach alleges a claim under § 1983 for both himself and his wife. To state a claim under § 1983 Bach must show that the defendants, through conduct sanctioned under the color of state law, deprived him of a federal constitutional or statutory right.”).
153. Id. at *19 (“[C]ourts have at least three different approaches to the issue, and the parties have not cited any binding precedent from the Ninth Circuit or the Supreme Court. Given this disarray in the law over the constitutional issue, there was no “clearly established” constitutional right to the companionship of a spouse at the time Cindy Bach passed away. Accordingly, the defendants have qualified immunity and Bach’s § 1983 claim must be dismissed.”).
155. Id.
156. Id.
158. Id. at *2 (“The Engebretsons’ Complaint alleges that, in light of the amended sentence imposed against Jesse on September 6, 2007, he was ‘illegally incarcerated’ under the terms of his original sentence.”).
159. Id. at *1-2.
160. Id. at *2 (“After completing the 10-year period of incarceration, Jesse successfully challenged the legality of the 30-year probationary term before the Montana Supreme Court. On September 6, 2007, the Montana Fourth Judicial District Court issued an amended judgment which sentenced Jesse to a term of 20 years of incarceration on each of the four counts to be served concurrently. The amended judgment gave Jesse credit for his time served, and it suspended his sentences on each of the four counts.”).
amended, he sued, claiming that he was incarcerated more than fifteen-hundred days longer than he should have been. In tandem with her husband’s claim, Mrs. Engebretson sued the defendants for allegedly interfering with her marital relationship by imposing incarceration on her husband. After receiving a motion to dismiss from defendants on her §1983 claim, Mrs. Engebretson amended her complaint to allege that the defendants interfered with her marital relationship by imposing improper probation terms on her husband.

The court, while it rejected Mrs. Engebretson’s claim, noted that unnecessary extensions of liberty interests protected by the Fourteenth Amendment unjustifiably remove issues from the arena of public debate and legislative action. While referring to Mrs. Engebretson’s claim as an unwarranted extension of liberty, the court refused to acknowledge a “liberty interest for a spouse affected by the conditions imposed on the probation of the other spouse.”

Another Ninth Circuit court, the U.S. District Court for the Eastern District of California, allowed constitutional consortium claims to proceed as cognizable under §1983. The court in Trevino v. Lassen Municipal Utility District characterized the Ninth Circuit’s treatment of constitutional consortium claims far differently than the court in Engebretson. The court in Trevino characterized the liberty interest present in the marital relationship as the same that resounds in the parent-child relationship. The court in Trevino evaluated the two relationships as equally intimate and therefore equally deserving of protection from government interference. Additionally, in Trevino the court (two years before Engebretson) interpreted the weight of Ninth Circuit precedent

161. Id.
162. Id. at *8.
164. Id. at *16 (“Unwarranted extensions of the liberty interests that are to be protected as a matter of substantive due process would improperly “place the matter outside the arena of public debate and legislative action.”) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997).
167. Id. at *11. (“The Ninth Circuit has recognized that family members have a liberty interest in their companionship with one another such that a state actor’s interference with it may constitute a violation of procedural or substantive due process rights.”) (citing Smith v. City of Fontana, 818 F. 2d 1411, 1419-20 (9th Cir. 1987)). But see Engebretson, 2010 WL 1490362, at *16.
169. Id. at *13-14 (“The Supreme Court has long recognized that both of these relationships as among the most intimate of an individual’s life and, consequently, most deserving of protection from state interference.”).
very differently than did the Engebretson court.\footnote{170} In Trevino, the court asserted that “[Ninth Circuit] cases, as well as those of the Supreme Court, suggest that there is nothing inconsistent with permitting a spouse to pursue a claim for interference with her liberty interest in the companionship of her spouse.”\footnote{171}

IV. ANALYSIS

A court’s refusal to allow spousal consortium claims under §1983 might result in the mischaracterization of unreasonable behavior in certain circumstances, leading to the denial of a federal remedy to victims of unreasonable behavior. For example, imagine that a uniformed police officer walks up to a citizen walking alone on the street. Suppose the two had never seen each other before and neither knew anything about the other. Now, imagine that the police officer beats the citizen mercilessly, causing serious physical, psychological, and emotional injury. The officer should have known that this unreasonable conduct violated the victim’s clearly established constitutional rights, for which the officer could be liable. Further, the officer may be liable for all of the direct consequences of the unreasonable conduct upon the citizen’s body, including compensating the victim for activities or household chores that the victim is no longer capable of performing.

However, if the citizen is married, then the characterization of the officer’s conduct undergoes a startling transformation. Under the Seventh Circuit’s approach, the citizen’s spouse will not be able to state a claim for loss of consortium despite the fact that the spouse’s life has been directly and negatively affected by the officer’s unreasonable conduct. The spouse will not be able to recover for the damage to the marital relationship because the officer’s conduct, as to the spouse, did not violate a clearly established, constitutional right. Therefore, the officer will be entitled to qualified immunity, likely resulting in the dismissal of the spouse’s claim.

While this distinction might initially seem underwhelming, its importance is twofold. Initially, the courts’ refusal to recognize one spouse’s right to the other’s companionship as cognizable under §1983 deprives the marital relationship of the intimacy responsible for its other related constitutional protections.\footnote{172} Further, by failing to punish direct and substantial governmental
interference with intangible facets of the marital relationship, courts transform a lauded, fundamental companionship into an ordinary social association.173

Additionally, refusing to acknowledge a spouse’s right to the other’s companionship as cognizable under §1983 can sometimes work to deny a federal remedy to those widowed by unreasonable state conduct. Even though plaintiffs may ordinarily bring state-law claims for loss of spousal consortium under a federal court’s supplemental jurisdiction,174 whether a decedent’s claim survives under §1983 is governed by 42 U.S.C. §1988.175 Section 1988 defers to the law of the forum state.176 Therefore, if the forum state does not allow a deceased spouse’s claim to survive, then a bereaved spouse will be denied access to the expertise and resources of the federal court system.177

This result is improper for a number of reasons. First, the origins of §1983 make it clear that Congress intended the law to compensate for not only spousal consortium claims but also parental consortium claims.178 Congressional statements concerning section 1 of the Ku Klux Klan Act of 1871, from which §1983 is derived, described it as offering a federal remedy “to a man whose house has been burned . . . to a woman whose husband has been murdered . . . [and] to the children whose father has been killed.”179 Because this description

173. See City of Dallas v. Stanglin, 490 U.S. 19, 24-26 (1989) (holding that the Constitution does not protect a citizen’s simple right to social association, while it does protect a citizen’s right to “intimate” and “expressive” association). See supra notes 63-66 and accompanying text.

174. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (“[S]upplemental or [p]endent jurisdiction, in the sense of judicial power, exists whenever there is a claim ‘arising’ under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case. . . . The state and federal claims must derive from a common nucleus of operative fact.”).

175. Robertson v. Wegmann, 436 U.S. 584, 587 (1978) (“This statute provides that, when federal law is ‘deficient’ with regard to ‘suitable’ remedies in federal civil rights actions, federal courts are governed by ‘the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States.’”). See also id. at 588 (noting that Section 1988 “recognizes that in certain areas federal law is unsuited or insufficient to furnish suitable remedies; federal law simply does not ‘cover every issue that may arise in the context of a federal civil rights action’”) (internal quotations omitted) (citing Moor v. Cnty. of Alameda, 411 U.S. 693, 702-03 (1973)).

176. Id. at 588 (“When federal law is thus ‘deficient,’ §1988 instructs us to turn to ‘the common law, as modified and changed by the constitution and statutes of the [forum] State,’ as long as these are ‘not inconsistent with the Constitution and laws of the United States.’”).

177. Ferreri, supra note 91, at 605 (“If a federal remedy is not provided for loss of spousal consortium claims under Section 1983, victims are forced to choose between consolidating and bringing all claims in state court, or splitting up claims between state and federal court, which inevitably increases the cost, time and labor devoted to be made whole.”).


179. Bell, 746 F.2d at 1244. “Representative Butler’s descri[ption] of the [Ku Klux Klan]Act: ‘This then is what we offer to the people of the United States as a remedy for wrongs, arsons and
characterizes the act as a remedy afforded to wives for the loss of their husbands, the description suggests that wives possess rights in the companionship of their husbands. Further, the fact that the list of beneficiaries includes both spouses and children indicates that those familial relationships are deserving of federal protection.

Second, if spousal companionship is not protected under the liberty interests guaranteed by the Fourteenth Amendment, then a most anomalous result occurs. For example, all citizens have a fundamental constitutional right to marry, associate with family members, and seek dissolution of marriage without significant governmental intrusion. However, after citizens exercise their fundamental constitutional right to marry, they suddenly lose their ability to seek redress for substantial governmental interference with the relationship established by the exercise of that fundamental constitutional right. This is so despite the Supreme Court’s describing the marital relationship as the sacrosanct bedrock of western society, necessary to the creation and maintenance of a family. Further, because the establishment of a marital relationship is not a biological prerequisite to procreation (which is a protected liberty interest), it is clear that it is the intimate relationship itself that is fundamental to our very existence and survival, not the process of selecting a mate or the offspring it might eventually bring about.

Finally, the requirement that a constitutional right must be “clearly established” in order to defeat a government official’s qualified immunity is misplaced regarding claims under §1983 for loss of spousal consortium. The doctrine of qualified immunity is designed to balance two important interests: (1) the need to hold state actors accountable for irresponsible exercises of power; and (2) the refusal to hold state actors liable for responsible or reasonable performance of their duties. Therefore, conduct for which state actors would

murders done. This is what we offer to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy.” Id. See also Pahle, 227 F. Supp. 2d at 382 (citing Bell, 746 F.2d at 1244). 180. Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (reaffirming constitutional right to marry). 181. Roberts v. United States Jaycees, 468 U.S. 619-20 (1984) (“Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one’s life.”). See also id. at 620 (“[O]nly relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.”). 182. Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (holding the State cannot prevent citizen’s from dissolving their marriages by denying them access to the only means of dissolution). 183. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). 184. Id. See also Loving v. Virginia, 388 U.S. 12 (1967). 185. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (“Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power
be liable should be characterized only as irresponsible exercises of power, while conduct for which state actors would not be liable should be characterized only as responsible performances of duty.\textsuperscript{186} Asserting that injuring the relationship between spouses is a responsible performance of duty while at the same time injuring the body of a married individual is an irresponsible exercise of power is preposterous, because the same conduct causes simultaneous injury to each. It appears to be a useless distinction to treat the primary injury to a victim’s body differently than the resulting direct injury to a victim’s married life.

All consortium claims are necessarily derivative of a preceding injury.\textsuperscript{187} If the preceding injury results from an unreasonable act for which the defendant may be held liable, then it is inappropriate to assert that the defendant was unaware of the illegality of the injuring conduct for purposes of precluding spousal consortium claims. Further, treating the dual effects of a single wrongful act so differently might actually prevent rights that are currently unrecognized from becoming clearly established because the illogical differentiation might make it more difficult for government actors to evaluate the legality of their conduct. This differentiation remains despite the fact that unreasonable conduct that injures an unmarried victim will be as illegal as the same unreasonable conduct that injures a married victim, though the latter might have more extensive consequences. The injuring conduct could be blatantly unreasonable. Yet, when a victim’s spouse seeks compensation under §1983 for the unreasonable conduct’s injurious effect upon the victim’s marital relationship, the conduct is transformed into a reasonable performance of duty.

Even if a victim’s marital status did hinder a government actor’s ability to gauge the wrongfulness of his conduct, it is still reasonable to hold government actors responsible for the unforeseeable consequences of their wrongful conduct. Constitutional tortfeasors, like common law tortfeasors, may be fully liable for the unforeseeable consequences caused by their wrongful conduct upon plaintiffs’ unforeseeable particular sensitivities.\textsuperscript{188} The common law “eggshell skull” rule applies to constitutional tortfeasors and holds them fully liable for all damages caused by their aggravation of victims’ preexisting conditions.\textsuperscript{189} Therefore, although a government actor might not be able to discern that a

\textsuperscript{186.} Id.

\textsuperscript{187.} Ind. Patient’s Comp. Fund v. Winkle, 863 N.E. 2d 1, 6 (Ind. Ct. App. 2007).

\textsuperscript{188.} Cobige v. City of Chicago, 651 F.3d 780, 782 (7th Cir. 2011) (“A tortfeasor takes his victim as he finds him, and if a special vulnerability . . . leads to an unusually large loss, the wrong doer is fully liable.”).

\textsuperscript{189.} See Pieczynski v. Duffy, 875 F.2d 1331, 1336 (7th Cir. 1989) (“The tortfeasor takes his victim as he finds him . . . so if the victim has a preexisting condition which the tort aggravates, the tortfeasor is liable for the full consequences.”).
citizen has a preexisting condition, if the government actor violates the citizen’s constitutional rights and thereby aggravates the underlying condition, then the government actor will be fully liable under §1983 for the entirety of the damages caused. In such a case, the government actor will be liable because of the direct causal link between the government actor’s conduct and the harm even if the particular degree of harm that the conduct would cause is unforeseeable. Therefore, analogously, if a government actor violates a married victim’s constitutional rights, the government actor should be held liable for the resulting injury to the victim’s marriage regardless of the government actor’s inability to foresee the degree of harm potentially caused.

V. CONCLUSION

The current status of the law surrounding whether §1983 recognizes a constitutionally cognizable liberty interest to receive spousal consortium is chaotic. However, courts should allow spousal consortium claims under §1983 for three reasons. First, §1983’s history indicates that it was intended to enforce substantive provisions of the Fourteenth Amendment and to compensate for consortium-type losses. The Ku Klux Klan Act of 1871, a predecessor to §1983, was designed and originally understood to provide a remedy for victims of losses similar to those compensated by consortium claims. Additionally, the Civil Rights Act of 1871, another predecessor to §1983, was designed to enforce substantive provisions of the Fourteenth Amendment. The right to seek a federal remedy that compensates for unreasonable injury to familial relationships was established as early as 1871. Therefore, the right to do so has long been clearly established.

Second, the maintenance of a marital relationship represents the ongoing exercise of other constitutionally protected fundamental rights. The array of fundamental rights surrounding family privacy and autonomy represents a judicially protected sphere of activity of which government actors should be aware.

Third, refusal to allow spousal consortium claims under §1983 might result in the gross mischaracterization of blatantly unreasonable conduct as responsible and dutiful behavior, leading to the denial of a federal remedy to victims of such unreasonable behavior. Such a mischaracterization is counterproductive to encouraging government actors to accurately assess their official conduct and conform to standards of constitutional reasonableness. The “eggshell skull” rule already holds government actors liable for any degree of harm caused by their

190. See supra notes 174-75 and accompanying text.
191. See supra notes 67-68 and accompanying text.
192. See supra notes 176-79 and accompanying text.
unreasonable conduct. Therefore, allowing spousal consortium claims under §1983 could allow government actors to more accurately assess the risk of engaging in potentially injurious conduct because a wedding band is easier to see than an exceptionally thin skull.