



# MALPRACTICE ALERT!

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This issue of **Malpractice Alert!** provides an in-depth look at the amendments to the Ohio Rules of Professional Conduct effective April 1, 2015, with our loss prevention tips highlighted in **yellow**.

These amendments are based largely on amendments made by the ABA to the Model Rules of Professional Conduct in 2012 and 2013, with a few changes as the result of comments from the bar in Ohio. The comment(s) accompanying each rule explain and illustrate the meaning and purpose of the rule and are intended as guides to interpretation. The text of each rule is authoritative.

OBLIC has reprinted the Rules of Professional Conduct in booklet form with these amendments, identified as the Eighth Printing. If you would like a copy of this publication, please contact OBLIC at [gmote@oblic.com](mailto:gmote@oblic.com).

The Ohio Rules of Professional Conduct are available on the Ohio Supreme Court website [www.sconet.state.oh.us](http://www.sconet.state.oh.us). If you have questions about the Rules as they relate to your practice, please feel free to call the OBLIC Loss Prevention Hotline at 614-572-0620. We are here for you!

Gretchen K. Mote, Editor  
**Malpractice Alert!**



## AMENDMENTS TO OHIO RULES OF PROFESSIONAL CONDUCT EFFECTIVE APRIL 1, 2015

The Supreme Court of Ohio issued the initial publication for comment of proposed amendments to Rules 1.0, 1.1, 1.4, 1.6, 1.12, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, 7.3, and 8.5 of the Ohio Rules of Professional Conduct on September 15, 2014.

Public comments were accepted by the Court until October 15, 2014. An additional amendment to Rule 5.5 was published for public comment on December 22, 2014. Final adoption of the amendments took place February 24, 2015, with the effective date of April 1, 2015.

These amendments address significant issues for the legal profession in:

- Technology
- Confidentiality
- Client development
- Client solicitation
- Corporate Counsel *pro bono*

The highlights of the amendments are:

**RULE 1.1: COMPETENCE** requiring a lawyer to maintain competency including the benefits and risks associated with relevant technology.

**RULE 1.6: CONFIDENTIALITY OF INFORMATION** requiring a lawyer to make *reasonable* efforts to prevent inadvertent or unauthorized disclosure of or access to confidential client information, and amending the Rule to allow a limited disclosure of confidential information to detect and resolve conflict involved with a change in employment or in the ownership or composition of a law firm.

**RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS** to include electronically stored information in the scope of the Rule and expand the duties of the lawyer who receives, inadvertently, information sent electronically.

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW** allowing corporate counsel to provide *pro bono* legal services, adopting the change proposed by the Ohio State Bar Association to make Rule 5.5 consistent with the amendments to Rule VI of the Rules for the Government of the Bar.

**RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES, RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT, and RULE 7.3: SOLICITATION OF CLIENTS** to provide that advertisements and solicitations may be made using the Internet and electronic format.

**RULE 7.3: SOLICITATION OF CLIENTS** to correspond to references in Board of Professional Conduct Opinion 2013-2 on text message solicitations, and to prohibit the solicitation of minors or those unable to make informed decisions regarding representation, based upon the twenty-plus states that have similar provisions in their rules.

The following is a rule by rule summary of the amendments. The full text of the amendments is available on the OBLIC website at [www.oblic.com](http://www.oblic.com).

**RULE 1.0 TERMINOLOGY** (p) "Writing" or "written" was amended to include electronic communication.

Comment [9] under the heading **Screened** was amended to add "information, including information in electronic form."

**RULE 1.1 COMPETENCE** had no changes to the black-letter rule. The Comments to Rule 1.1 were amended under **Retaining or Contracting with Other Lawyers** to add:

- Comment [6], requiring that before a lawyer retains or contracts with another lawyer outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client, and
- Comment [7] to provide that when lawyers from more than one law firm are providing legal services to the client, they should ordinarily consult with each other and the client about scope of respective representations and allocation of responsibility between them. (See Rule 1.2).

**Maintaining Competence** was amended making former Comment [6] new Comment [8], and "including the benefits and risks associated with relevant technology" to the changes in the law and its practice with which lawyers should stay current to maintain competence.

**RULE 1.4: COMMUNICATION** had no amendments to the black-letter rule. A Comment to Rule 1.4 was amended at Comment [4] to provide that "a lawyer should promptly respond to or acknowledge client communications." This changed the previous language that required "client telephone calls should be promptly returned or acknowledged."

- This change is a further recognition of the requirement that lawyers need to respond to electronic communications.



**RULE 1.6: CONFIDENTIALITY OF INFORMATION** was amended to add paragraph (7) at division (b), allowing a lawyer to reveal information relating to the representation of a client, including information protected by the attorney-client privilege, to the extent the lawyer *reasonably believes* necessary.

(7) 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.

Comments [13] and [14] were added under **Detection of Conflicts of Interest** to further discuss disclosure pursuant to division (b)(7). Comment [13] references Rule 1.17, Comment [7] in noting that any such disclosure should ordinarily include:

- no more than the identity of the persons and entities involved in a matter
- a brief summary of the general issues involved, and
- information about whether the matter has terminated.

Amendments also added new language in division (c) of Rule 1.6, requiring that "a lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to representation of a client." Note: Former paragraph (c) was designated paragraph (d).

Comment [16] was renumbered as Comment [18], with the addition of language discussing division (c). Comment [18] states that "the unauthorized access to or inadvertent or unauthorized disclosure of information related to representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure."

Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to:

- the sensitivity of the information
- the likelihood of disclosure if additional safeguards are not employed

- the cost of employing additional safeguards
- the difficulty of implementing the safeguards
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*eg.*, by making a device or important piece of software excessively difficult to use)

Comment [18] further notes that a client may

- require the lawyer to implement special security measures not required by this rule or
- may give informed consent to forego security measures that would otherwise be required by this rule.

Comment [19] added language to previously numbered Comment [17], stating that "whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules."

➤ OBLIC provides data breach coverage without additional cost to OBLIC policyholders. The OBLIC website has extensive resources to assist policyholders with cybersecurity issues. Please visit [www.oblic.com](http://www.oblic.com) to view the Data Breach/Cyber Risk Management Information.

**RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL** had no amendments to the black-letter rule. Comment [1] was amended to change the reference to the Ohio Code of Judicial Conduct to Part III of the Application section and to remove "judge pro tempore" from the sentence that a part time judge shall not "act as a lawyer in any proceeding in which the judge served as a judge or in any other related proceeding."

**RULE 1.17: SALE OF LAW PRACTICE** was amended at division (h) to remove the requirement that the *written notice* to clients required by division (e) and (f) of the rule shall be provided by certified mail, return receipt requested and instead require that the *written notice* to clients shall be provided by regular mail

with a certificate of mailing or other comparable proof of mailing.

Reference to Rule 1.6(b)(7), *supra*, was added to Comment [7] in the section **Client Confidences, Consent, and Notice**.

**RULE 1.18: DUTIES TO PROSPECTIVE CLIENT** was amended at division (a) to remove the word “discusses” and add “consults about,” to provide that “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.”

Division (b) was amended to remove the phrase “had discussions with” and add “has learned information from” to state that “even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

Likewise, Comment [1] removed the word “discussions” and refers to “consultations.”

➤ The rule has replaced the word “discussions” with “consultations” regarding interactions with a prospective client. While these terms are not defined in the Rules, Black’s Law Dictionary defines *discussion* as “the act of exchanging views on something,” while *consultation* is defined as “the act of asking the advice or opinion of someone (such as a lawyer).”

Comment [2] of Rule 1.18 was amended to add new language describing how a person becomes a prospective client. The added language states that “a person becomes a prospective by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”

Comment [2] continues that “whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances.”

Comment [2] states:

- 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.

- 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
  - contact information or
  - provides legal information of general interest

➤ Lawyers should consider the guidance that Rule 1.18 gives regarding the manner in which lawyers communicate about their services, especially via electronic means such as websites.

**RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS** was amended to add “or electronically stored information” to division (b), to now require that “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.”

Comments [2] and [3] of Rule 4.4 were also amended to include electronically stored information.

Comment [2] also added 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.”

Comment [2] further indicates that for purposes of Rule 4.4, “document or electronically stored information” includes:

- paper and electronic documents
- e-mail

- other forms of electronically stored information, including embedded data (commonly referred to as “metadata”)

Comment [2] also states that “metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know the metadata was sent inadvertently to the receiving lawyer.”

➤ This rule and its comments highlight the importance of establishing and following good client communication procedures that address both paper and electronic documents.

### **RULE 5.3: RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS**

had no amendments to the black-letter rule. The Comments to Rule 5.3 were amended, switching former Comment [1] to Comment [2] and former Comment [2] to Comment [1]. Comment [1] was amended to require that lawyers with managerial authority “ensure that the firm has in effect measures giving reasonable assurance that non-lawyers in the firm or government agency, and non-lawyers outside the firm or agency who work on firm or agency matters, will act in a way compatible with the professional obligations of the lawyer.”

➤ This language also reflects the addition of “non-lawyers outside the firm or agency who work on firm or agency matters” to those within the purview of the lawyer with managerial authority.

Comments [3] and [4] were added under **Non-lawyers Outside the Firm or Agency**.

Comment [3] provides examples of such non-lawyers outside the firm or government agency that may be used to assist the lawyer in rendering legal services to the client.

These include:

- 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
- using an Internet-based service to store client information

Comment [3] further requires that “when using such services outside the firm or agency, the lawyer must make reasonable efforts to ensure that the services are provided in a manner compatible with the lawyer’s professional obligations.”

Comment [3] indicates that “the extent of the obligation to make reasonable efforts will depend on the circumstances, including:

- the education, experience, and reputation of the non-lawyer
- the nature of the services involved
- the terms of any arrangements concerning the protection of client information
- the legal and ethical environments of the jurisdictions in which services will be performed, particularly with regard to confidentiality.”

Comment [4] notes that “when the client directs the selection of a particular non-lawyer service provider outside the firm or agency, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring between the client and the lawyer.”

➤ Lawyers should use this rule for guidance on hiring outside service providers with procedures to remain in compliance with their professional obligations.

### **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

was amended to add (3) to division (d), providing that a lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction if (3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 3. Corporate Counsel Attorney Registration.



The next amendments are found in **VII. INFORMATION ABOUT LEGAL SERVICES:**

**RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES** had no amendments to the black-letter rule. The Comments to Rule 7.1 were amended at Comment [3] to change the phrase "a prospective client" to "the public." The last sentence of Comment [3] now states that "the inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public."

**RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT** had no amendments to the black-letter rule. The Comments to Rule 7.2 were amended at Comment [1] to add "learning about" legal services in addition to obtaining legal services.

Comment [2] was amended to include a lawyer's email address and website in the information the rule permits the lawyer to advertise.

Comment [3] was amended to include the "Internet, or other forms of electronic communication" as permitted advertising methods.

Comment [5] under **Paying Others to Recommend a Lawyer** was amended to add "recommending the lawyer's services" to the requirement that except as provided by these rules, lawyers are not permitted to give anything of value to another. Comment [5] further notes that "a communication contains a recommendation if it endorses or vouches for a lawyer's

- credentials
- abilities
- competence
- character
- other professional qualities

Comment [5A] was amended to add "Internet-based advertisements." It also provides that "a lawyer may pay others for generating client leads, including Internet-based client leads, provided

- the lead generator does not recommend the lawyer
- any payment to the lead generator is consistent with Rules 1.5 and 5.4
- the lead generator's communications are consistent with Rule 7.1."

To comply with Rule 7.1, a lawyer shall 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
- has analyzed a person's legal problems when determining which lawyer should receive the referral.

Comments [6] and [7] were amended to change "prospective clients" to "people who seek" to secure legal representation and to change "laypersons" and "prospective clients" to "the public."

**RULE 7.3: SOLICITATION OF CLIENTS** was changed to that title from the former title "DIRECT CONTACT WITH PROSPECTIVE CLIENTS." The phrase "from a prospective client" was removed from division (a). In division (b)(1) "prospective client" was changed to "person being solicited."

Division (b)(3) was added to require that a lawyer shall not solicit professional employment by *written*, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if either of the following applies:

(3) the lawyer *knows or reasonably should know* that the person to whom the communication is addressed is a minor or incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

The phrases regarding "prospective client" are deleted from (c), (d) and (e) and in (d) and (e) are replaced with the word "anyone."

New language was provided for Comment [1] with language defining that "a solicitation is

- a communication initiated by the lawyer that is directed to a specific person
- that offers to provide or
- can reasonably be understood as offering to provide

legal services."

Comment [1] further states, "in contrast, a lawyer's communication typically does not constitute a solicitation if it is

- (a) directed to the general public, such as through
  - a billboard
  - an Internet-based advertisement
  - a web site
  - a commercial
- (b) in response to a request for information
- (c) automatically generated in response to Internet searches."

Former Comment [1] became Comment [2] and was amended to change "inherent in" to "when a solicitation involves" in the indication that there is a potential for abuse when a solicitation involves direct, in-person, live telephone, or real-time

electronic contact by a lawyer.

Former Comment [2] became Comment [3], which was amended to add that "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."

References to "prospective client" were also changed to "someone" or "person" or removed in Comments [2], [3], [4], [6], [7], [8], and [8A].

➤ These amendments indicate important considerations for lawyers using various forms of electronic communications in advertising, soliciting and communicating with clients. Lawyers should have procedures and policies in place and follow them to avoid problems using this technology.

**RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW** had no amendments to the black-letter rule. A Comment to Rule 8.5 was amended under **Choice of Law** at Comment [5] to add "with respect to conflicts of interest and determining a lawyer's reasonable belief pursuant to division (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that division may be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement."

➤ As Comment [5] indicates, this could be important when a lawyer's conduct involves significant contacts with more than one jurisdiction in determining which disciplinary authority would apply.

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