ORIGINAL

No. AF 09-0688

IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN RE PETITION OF THE
STATE BAR OF MONTANA
FOR REVISION OF THE MONTANA
RULES OF PROFESSIONAL CONDUCT

Petition in Support of Revision of the Montana Rules of Professional Conduct

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An Original Proceeding

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COMES NOW, the State Bar of Montana together with its Ethics Committee, and respectfully petitions this Court to revise eighteen rules and a portion of the preamble of the Montana Rules of Professional Conduct.

MEMORANDUM IN SUPPORT OF PETITION

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1. The Court has the exclusive authority to establish rules governing the professional conduct of attorneys.

Article VII, section 2(3) of the 1972 Montana Constitution grants the Supreme Court the authority to make rules governing the conduct of the members of the State Bar. The Montana Supreme Court has construed this provision to give the Court "exclusive authority to promulgate such rules." *Matter of Petitions of*

McCabe and Zemen, 168 Mont. 334, 339, 544 P.2d 825, 827-828 (1975). The Court acknowledged the importance of this responsibility in *In the Matter of the Application of Kimberly A. Kradolfer v. Ed Smith,* 246 Mont. 210, 805 P.2d 1266 (1990) stating "Even before the adoption of Article VII, Section 2, Clause 3, we had held that the admission and regulation of attorneys in Montana is a matter peculiarly within the inherent power of this Court."

The Montana Supreme Court has reaffirmed its Constitutional duty to govern and control the practice of law and the members of the Bar in *In re the Petition of the State Bar of Montana for a Dues Increase,* 2001 MT 108, 53 P.3d 854, 305 Mont. 279 (2001); *In re: Revising the Montana Rules of Professional Conduct,* (Feb. 12, 2004) No. 03-264; *Cross v. Van Dyke,* 2014 MT 193, 332 P.3d 215 (2014); *In re the Rules of Professional Conduct* (Sept. 22, 2016) No. 09-0688; and most recently in *In re the Dues of the State Bar of Montana* (Feb. 20, 2018) No. 00-329.

2. Twenty-first Century Developments Mandate Amendment of Montana's Current Rules of Professional Conduct.

The explosive dynamics of modern law practice and anticipated developments in the future of the legal profession mandate the proposed updates. In addition to technological advances beyond the internet and e-mail, many state-line barriers to practice have been removed. Some attorneys consider themselves "national" practitioners. Montana's rules require adjustment to absorb these and other developments.

Montana's Rules of Professional Conduct were last comprehensively amended in 2004, using the ABA Model Rules as their guide. While several rules

have been amended in the intervening period to address technological advances[1], eighteen rules do not adequately address the current state of practice and should be updated.

The State Bar is recommending that ten unique Montana rules remain as currently adopted, eleven rules be amended to directly (or with minimal adjustment) correspond to the ABA Model Rules, seven unique Montana rules be amended slightly to absorb ABA language, rejection of one ABA rule in its entirety, and one unique addition to the Preamble.[2] A summary page of the recommendations is attached as A. If a rule is not included in this Petition, it means that Montana's rule is identical to the Model Rule. Attached as B is a side-by-side comparisons of the ABA Model Rules and the Montana Rules.

The Ethics Committee began reviewing the 29 Montana rules that are not identical to the ABA's Model Rules in April 2017. The ABA initiated its comprehensive review, titled Ethics 20/20, in 2009. The ABA's House of Delegates in 2018 completed its review and has adopted the Model Rules referenced in this Petition.

The ABA's decade-long 20/20 effort, and in turn Montana's Ethics

[1] Rule 1.0(p), Terminology, defining "writing," Rule 1.4 on Communication, Rule 1.6 on Confidentiality and Rule 4.4 on Respect for Rights of Third Persons by Order AF 09-0688 filed 9/22/2016.

[2] Two rules are not included in this review, having earlier been the subject of Court attention: Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4(g) (Misconduct). Montana's Rule 4.4 is identical to the ABA Rule, and the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g).

Committee, respond to the needs of clients, their attorneys and firms, to address twenty-first century developments, including:

- Legal advice and information about legal services are increasingly communicated through electronic media – includes e-mail, texts, podcasts, blogs, tweets, and websites – reaching easily across jurisdictional lines, both domestically and globally;
- Client confidences are no longer kept just in file cabinets, but on laptops, smart-phones, tablets, and in the cloud; connections with potential clients are sought not just through print advertisements but via social networks, lead-generation services, "pay-per-click" ads, and "deal of the day" coupon sites;
- Legal and non-legal services are increasingly outsourced and "unbundled," both domestically and internationally, raising questions for lawyers working with other people and entities about who is responsible for the work that is being outsourced;
- Lawyers in all practice settings increasingly need to cross state and national borders – virtually and physically – in order to serve their clients. They need to know what rules apply to them;
- Non-U.S. lawyers increasingly seek to practice in the United States, and U.S. lawyers increasingly need to practice internationally in order to

meet their clients' needs;

- Lawyers change jobs regularly, triggering potential conflicts of interest and other ethics issues that need to be addressed.

The State Bar's Ethics Committee was not in a position to duplicate the ABA efforts; however, it reviewed all the departures between the two sets of rules. The proposed rules retain a distinctly "Montana flavor." Of the 29 departures from the Model Rules, eighteen of the ABA Model Rules were absorbed in whole or part.

The State Bar's Board of Trustees unanimously approved the Ethics Committee's recommendations, having had the opportunity to review the Committee's progress at their quarterly meetings.

3. Rules Revised to Correspond to the ABA Model Rules

A. Rule 1.6 Confidentiality

The State Bar recommends that Montana adopt the ABA's Model Rule on Confidentiality, with a slight modification--adding commas in the ABA's 1.6(3) ("reasonably certain to result, or has resulted, from the client's commission of a crime....").

The time has come to adopt the ABA's additional exceptions to the client confidentiality rule permitting (but not requiring) disclosure of information where necessary to "prevent, mitigate, or rectify substantial injury to the financial interests or property of another" reasonably certain to result from client crimes or fraud "in

furtherance of which the client has used the lawyer's services....". The additional exceptions are necessary to protect Montana's citizens from unlawful client behavior. Fidelity to the legal system must trump fidelity to the client.

Montana's current rule is more restrictive than those of the majority of states, a source of confusion for the nearly 800 active bar members admitted here but practicing from out-of-state. While most states have not adopted the ABA's Model Rule verbatim, it is because many permit more disclosures and qualify the disclosures differently than provided in the Model Rule[3].

The ABA Model Rule's 2002 amendments included the disclosure exceptions for crime or fraud when the State Bar and the Court considered the confidentiality rule in the 2002-2004 review. At that time in Montana there was considerable disagreement over whether to relax the tighter Montana confidentiality restrictions. Ultimately, the State Bar (by the narrowest of margins) recommended that Montana continue with its more restrictive rule.

Times have changed, and the State Bar now endorses the need to permit the disclosures set out in the rule proposed below. Developments on the national stage, particularly the corporate malfeasance leading to the recession of 2008, showcase the damage that might have been prevented or mitigated had the Rules afforded lawyers an applicable exception to the duty of confidentiality. An additional exception in (7)

[3] https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/

simply recognizes that lawyers change jobs regularly and provides structure for identifying and resolving conflicts that arise from that practical reality.

The proposed rule, with new language underlined, reads:

Rule 1.6: Confidentiality of Information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result, or has resulted, from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

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

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(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.

(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.

B. Rule 1.13 Organization as a Client

The Committee unanimously recommends adopting the ABA's Model Rule 1.13. The ABA language provides more flexibility for attorneys and eliminates the Hobson's choice[4] of Montana's current rule requiring resignation in the face of inappropriate client or organization behavior. Further, given current regional and national practice demands on Montana attorneys, alignment with national resources and jurisprudence is appropriate and necessary.

The proposed rule, with proposed new language underlined, reads:

> Rule 1.13 Organization as Client
>
> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain

[4] In other words, one may "take it or leave it". The phrase is said to have originated with Thomas Hobson (1544-1631), a livery stable owner in Cambridge, England, who offered customers the choice of either taking the horse in his stall nearest to the door or taking none at all.

to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(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.

C. Rule 1.20 Duties to Prospective Clients (ABA Rule 1.18)

The ABA amended its rule in 2012 to include useful detail in (d). The proposed rule, with new language underlined, reads:

Rule 1.20 Duties to Prospective Client

(a) 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.

(b) 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.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

D. Rule 3.8 Special Responsibilities of a Prosecutor

The State Bar recommends adoption of Model Rule 3.8 (with Montana's earlier modification, "consistent with the Confidential Criminal Justice Information Act").

The ABA added subsections (g) and (h) to Rule 3.8 in 2008. These provisions were added "to identify prosecutors' obligations when they know of new evidence establishing a reasonable likelihood that a convicted defendant did not commit the offense of which he was convicted."

Dissent is anticipated from some prosecutors concerned that the language in (g) is "cloudy and problematic" and precludes the finality of a conviction.

The State Bar believes the ABA considered the issues raised by the prosecutors and feel that those concerns are addressed in the Model Rule. Further, the Model Rule sets responsibility on the prosecutor to act in a manner intended to complement criminal and civil law. The State Bar believes that the proposed rule prescribes a standard of conduct to which all good prosecutors already subscribe.

The proposed rule, with new language underlined, reads:

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel,

employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

E. Rule 5.7 Responsibilities Regarding Law-Related Services

The State Bar unanimously agreed to adopt ABA Rule 5.7, a rule that Montana has not previously had. Real estate, probate and transactional lawyers will benefit from the ABA's model rule on ancillary businesses. The ABA adopted its Model Rule on ancillary businesses in February 1994, amending it to this form in 2002:

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services

are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

F. Rules on Limited Scope Representation: Rule 1.2, 4.2 and 4.3

The State Bar unanimously recommends adoption of the Model Rules on Rule 1.2 Scope of Representation, Rule 4.2 Communication with Person Represented by Counsel and Rule 4.3 Dealing with Unrepresented Person.

The Committee and the State Bar believe that the ABA rules are simpler, that the ABA and most states construe them to authorize limited-scope representation, that most states have adopted them, and that the details of Montana's limited scope rules are now unnecessary and potentially create disciplinary traps for failure to comply with the details of the Montana rules. As to the writing requirements of the limited scope rules, it was noted that Rule 1.5 already requires a writing for most fee agreements, to include any limitations to the scope of representation as described below.

Montana's Supreme Court was ahead of the curve in encouraging access to justice. District Court Judge Russell Fagg worked with his law clerk to develop Montana's unique modification of these rules in 2011. Fast forward to 2018, where now the ABA fully embraces limited scope and teaches best practices that absorb the requirements of Montana's rules. The Committee believes that Montana's specific

rule components can be removed without harming Montana's clients.

The proposed rules are simply an elimination of the extra Montana language tacked on to the Model Rules, and read:

> Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
>
> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> Rule 4.2 Communication with Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.
>
> Rule 4.3 Dealing with Unrepresented Person
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure

counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Please see Attachment B for the stricken language.

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

Rules 5.5 and 8.5 were referred to a special subcommittee that included Ethics Committee chair Peter Habein, committee member and former Disciplinary Counsel Tim Strauch, Deputy Disciplinary Counsel Jon Moog, Board of Bar Examiners Chair Gary Bjelland, and Office of Consumer Protection counsel Anne Yates. This special subcommittee agreed that the ABA's Model Rule 5.5 was an improvement from Montana's current rule. The Ethics Committee and Board of Trustees unanimously voted to confirm the subcommittee's recommendations. The special subcommittee deferred to the Ethics Committee's recommendations for Rule 8.5, addressed later in this memo.

Model Rule 5.5 addresses many of the "where's the line?" issues. It accommodates pro hac vice, administrative law, arbitration, mediation, contract work and other lawyer services. It also addresses the foreign lawyer boundaries.

The proposed Rule 5.5 reads:

> Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
>
> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall

not:

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

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

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

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

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

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

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

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are

admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, the Montana Supreme Court.

H. Rule 7.2, Advertising

The State Bar recommends adoption of the ABA's Model Rule, with the exception of eliminating the reference to "qualified" lawyer referral service in (b)(2) because the State Bar does not have the capacity to qualify lawyer referral service providers.

The ABA in 2018 folded several components of its Model Rules 7.4 and 7.5 (both of which they eliminated) into its new 7.2 and 7.3 and Comments. The Montana Ethics Committee unanimously chose to stay with Montana's Rule 7.3, but that does not undermine the structure of the set of rules titled "Information About Legal Services (Rules 7.1 to 7.5).

The proposed Rule 7.2, with new language underlined, reads:

Rule 7.2 ~~Advertising~~ Communications Concerning a Lawyer's Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit ~~or qualified~~ lawyer referral service.

(3) pay for a law practice in accordance with Rule 1.19 [*ABA Rule*

1.17];

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

i. the reciprocal referral agreement is not exclusive; and

ii. the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

I. Rule 7.4, Communication of Fields of Practice and Specialization

The State Bar recommends eliminating this rule, as did the ABA with their Model Rule, because the State Bar recommends accepting the ABA's Model Rule 7.2 and keeping the current Montana Rule 7.1, which together absorb the critical requirements of 7.4.

Recommended to be eliminated is:

Rule 7.4 - Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his/her practice is limited to or concentrated in a particular field of law, if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

4. Unique Montana Rules Requiring Modification

A. Rule 1.0 Terminology

The State Bar unanimously agreed to adopt the ABA's language adding as "signed" writings, "the electronic equivalent of a signature, such as" with the pre-existing examples. In Rule 1.0(p).

The Committee further agreed that Montana's unique language defining "Bona fide" and "Consult" and "Consultation" remain as earlier adopted in 1.0 (b) and (c).

B. Rule 1.5 Fees

The State Bar unanimously recommends adding new language to Montana's (b) ", any changes in the scope" to address the limited scope representation component of written fee agreements. As a result, the modification would read: "(b) The scope of representation, any changes in the scope, and the basis or rate of the fee and expenses for which the client will be responsible..."

It is further recommended that the remainder of Montana's unique language also be retained.

C. Rule 1.8 Conflicts: Specific Rules

The State Bar confirms the Montana specific portion of this rule, and recommends including the ABA's language in (c) "or individual with whom the lawyer or the client maintains a close, familial relationship."

D. Rule 1.10 Imputation of Conflicts

Montana's Rule 1.10 includes language to create safe harbors, permitting representation in light of Montana's small-town potential for conflict of interest. The Committee in 2004 emphasized the importance of Montana's (c)(2) requirement of written notice.

The State Bar recommends adding the ABA's 2009 screening provisions to Montana's current language.

The proposed rule, with new language underlined and unique Montana language in italics, reads:

> Rule 1.10 - Imputation of Conflicts of Interest: General Rule
> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless
> (1) the prohibition is based on a personal interest of the ~~prohibited~~ disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
> (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
> (i) the disqualified lawyer is timely screened from any participation in

the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.1.

E. Rule 1.15 Safekeeping Property

The State Bar unanimously recommends adopting the ABA's 1.15 (a),(b),(c) and (d) as written, but keeping Montana's current (c), which corresponds with the ABA's (e); calling Montana's (c) the new (e), adding only the last line of the ABA's

(e) to Montana's new (e). As a result, Montana's proposed rule would be identical to the ABA's, but the new (e) would read as set forth below:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
>
> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (e) When in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

F. IOLTA-- Rule 1.18, Montana's Interest on Lawyer Trust Accounts (IOLTA) Program) and Rule 1.15 on Safekeeping Property

The State Bar unanimously recommends adopting Retired Justice Pat Cotter's proposals to distribute unclaimed property in lawyers' trust accounts to the Montana

Justice Foundation, rather than to the State of Montana's unclaimed property division, to maintain the confidential nature of the attorney/client relationship.

The State Bar recommends the following addition to Rule 1.15:

> (f) Unclaimed or unidentifiable Trust Account Funds.
>
> (1) When a lawyer, law firm, or estate of a decease lawyer cannot, using reasonable efforts, identify or locate the owner of funds in its Montana IOLTA or non-IOLTA trust account for a period of at least two (2) years, it may pay the funds to the Montana Justice Foundation (MJF). At the time such funds are remitted, the lawyer may submit to MJF the name and last known address of each person appearing from the lawyer's or law firm's records to be entitled to the funds, if known; a description of the efforts undertaken to identify or locate the owner; and the amount of any unclaimed or unidentified funds.
>
> (2) If, within two (2) years of making a payment of unclaimed or unidentified funds to MJF, the lawyer, law firm, or deceased lawyer's estate identifies and locates the owner of funds paid, MJF shall refund the funds it received to the lawyer, law firm, or deceased lawyer's estate. The lawyer, law firm, or deceased lawyer's estate shall submit to MJF a verification attesting that the funds have been returned to the owner. MJF shall maintain sufficient reserves to pay all claims for such funds.

The State Bar wanted the above to preclude the payment of interest upon return of unclaimed funds, hence "shall refund the funds it received" in (2).

The State Bar also proposes to add to Rule 1.18:

> (e) Unclaimed or unidentifiable trust account funds. Disposition of unclaimed or unidentifiable IOLTA or non-IOLTA trust account funds shall be handled in accordance with Rule 1.15(d).

G. Rule 8.5 Jurisdiction and Certification

Referenced earlier as the subject of the special subcommittee including ODC, the Board of Bar Examiners and Office of Consumer Protection, the State Bar

recommends retaining Montana's rule while folding in key components of the ABA rule.

The ABA's rule is titled "Disciplinary Authority; Choice of Law." Montana's rule is titled "Jurisdiction and Certification." The State Bar proposes the Court include ABA's Choice of Law language in Montana's rule. Also, as a result of litigation Tim Strauch experienced when he was Disciplinary Counsel, the State Bar recommends including the word "state" where the ABA uses the word "jurisdiction." In the Choice of Law segment, the State Bar believes it appropriate to use both "state" and "jurisdiction."

Language in bold is the ABA language. Underlined are the departures from the ABA's rule. *Italics* are used to explain paragraph placement.

> Rule 8.5 - Jurisdiction and Certification
>
> (a) **Disciplinary Authority. A lawyer admitted to practice in this <u>State</u> is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.**
>
> A lawyer not admitted to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer; (2) involves that lawyer holding himself or herself out as practicing law in this State; (3) advertises, solicits, or offers legal services in this State; or (4) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control.
>
> [*This is Montana's Rule's 2nd paragraph.*]
>
> <u>(b) Certification.</u> A lawyer who is not an active member in good standing of the State Bar of Montana and who seeks to practice in any state or federal court located in this State pro hac vice, by motion, or before being otherwise admitted to the practice of law in this State, shall, prior to engaging in the practice of law in this State, certify in writing and under oath to this Court that, except as to Rules 6.1 through 6.4, he or she will be bound by

these Rules of Professional Conduct in his or her practice of law in this State and will be subject to the disciplinary authority of this State. A copy of said certification shall be mailed, contemporaneously, to the business offices of the State Bar of Montana in Helena, Montana.
[*This is the Montana's Rule's 1st paragraph.*]

(c) Choice of Law. In any exercise of the disciplinary authority of this state and jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the state and jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the state and jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different state and jurisdiction, the rules of that state and jurisdiction shall be applied to the conduct.

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.
[*This paragraph is the existing language in both the ABA and Montana Rules.*]

5. Unique Montana Rules Requiring No Additional Modification

Please see the accompanying Attachment B for the following rules, which the Committee agreed should stand as written.

A. Rule 1.16 Declining or Terminating Representation

The State Bar recommends no changes, preferring Montana's language that elaborates retention and conveyance language.

B. Rule 1.17 Government Employment

There is no parallel ABA rule for this Montana rule. After discussion addressing the "full time" restriction within the rule, the State Bar recommends that the rule remain unchanged.

C. Rule 1.19 Sale of Practice (ABA Rule 1.17)

In spite of the current passive voice within the rule's language, the State Bar unanimously agreed that Montana's rule is preferred over the ABA's rule. Montana's rule avoids the commoditization of clients.

D. Rule 3.1 Meritorious Claims and Contentions

The State Bar recommends no changes, preferring Montana's rule to the ABA's. Montana's rule is unique because of choices made in the 2002-2004 re-write. At that time, the Ethics Committee was disturbed at the disparity between what the rule purports to represent and what actually happens in practice. All acknowledged the subjectivity of the topic. The Supreme Court agreed with the Committee's (and Board's) goal to address the disparity between rule and practice, and that Montana's language gave the rule teeth.

E. Rule 3.5 Impartiality and Decorum of Tribunal

The State Bar recommends no changes, adding that the ABA's language is unnecessary given Montana's Rules of Civil Procedure.

F. Rule 5.1 Responsibilities of Partners, Managers

The State Bar recommends keeping Montana's unique language, as Montana's standard is higher.

G. Rule 6.1 Voluntary Pro Bono

The State Bar recommends keeping Montana's unique aspirational language.

H. Rule 7.1 Communications Concerning a Lawyer's Services

The State Bar recommends keeping Montana's enumeration of misleading communications. The ABA's Comments to this rule generally track the enumerated examples.

Montana's unique rule stems from a 2008-2009 effort to clarify Montana disciplinary jurisdiction over attorney advertising, identify types of misleading lawyer communications, and recognize that Montana does not have a procedure to "qualify" a lawyer referral service.

The Supreme Court adopted the State Bar's recommendations on Rules 7.1, 7.2 and 8.5 in 2010. (Supreme Court Order No. 09-0688, July 20, 2010.)

The Ethics Committee adds that much of the national advertising is crass and unprofessional and that to the extent Montana's language addresses that, it is welcome.

I. Rule 7.3 Direct Contact with Prospective Clients

The State Bar recommends keeping Montana's rule without amendment. The ABA's rule includes a definition for "solicitation," which the State Bar rejected as unnecessarily creating an opportunity to look for loopholes. The ABA also eliminates the requirement that solicitations be labeled "Advertising Material," a requirement in Montana's rule.

The ABA's language in (b) about solicitation, though couched in "shall not"

terms, permits more solicitation than currently allowed in Montana's rule. For example, Montana's rule prohibits solicitation if the lawyer reasonably should know that the person is already represented by another lawyer. The ABA's amended rule would permit that contact.

J. Rule 7.5, Firm Names and Letterheads

The ABA eliminated its Rule 7.5, folding it into portions of its Rules 7.2 and 7.3 and its Comments. The State Bar recommends adoption of the ABA's Rule 7.2, but not its 7.3. There's nothing really wrong with Rule 7.5, and the ABA didn't really think so either–the ABA just folded most of what it did into its Comments. Since Montana does not have Comments, and the Committee prefers Montana's 7.3, it is most efficient to communicate the boundaries by leaving Montana's Rule 7.5 as written.

6. Preamble

A bar member, aware of the Committee's comprehensive review of the Rules of Professional Conduct, submitted a request that Rule 1.2(d) be amended to allow representation of clients engaged in Montana's emerging cannabis industry, explaining:

"Most Montana attorneys are reluctant to assist or engage individuals and businesses involved in the Cannabis Industry not only because of possible exposure to federal criminal laws, but also because they could face prosecution from

Montana's Office of Disciplinary Counsel."

The member's concern is that Montana's current Rule 1.2(d) appears to disallow Montana attorneys from representing clients engaged in the emerging cannabis industry because of the uncertainty resulting from the conflict between state and federal law.

The State Bar unanimously agreed to recommend creation of a safe harbor and chose to put the language in the Preamble rather than within Rule 1.2 until the state and federal law disparities are more aligned. To that end, the State Bar agreed to recommend amendment of paragraph 6 of the Preamble to read:

> (6) A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the lawyer's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. <u>For example, a lawyer may counsel and assist a client regarding Montana's cannabis-related laws. In the event Montana law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.</u>"

The underlined language parallels Oregon's Rule 1.2(d). The State Bar chose not to follow Illinois 1.2(d)(3), which states "...may...counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences" as too broad. The goal is to help lawyers

representing cannabis clients, not create a whole ring of exceptions for other state/federal law disparities.

7. ABA Rule Specifically Rejected

A. Rule 7.6 Political Contributions

The State Bar recommends rejection of the ABA's Model Rule, believing it is unnecessary in Montana given statutory and Rules of Judicial Conduct restraints. It further rejects the rule as poorly written.

CONCLUSION

The State Bar of Montana believes that the amended rules are key to adapting the regulation of our profession to the rapidly changing technological, social, legal, and business context in which its members practice. The amended rules ensure that the guidance they offer to lawyers is germane to the actual circumstances encountered by those lawyers practicing in Montana. The Board of Trustees of the State Bar of Montana and the Ethics Committee respectfully request the following from the Montana Supreme Court:

1. The Court direct publication of this Petition in *The Montana Lawyer* and provide for comments and a response from the Bar before considering the request for amendment; and

2. The Court adopt the proposed changes to the Rules of Professional Conduct.

Respectfully submitted this 1st day of March, 2019.

STATE BAR OF MONTANA

BY: _____
Eric Edward Nord, President

ATTACHMENT A

Summary Page

Recommend Adopting ABA Model Rule
Rule 1.2 Scope and Allocation of Authority
Rule 1.6, Confidentiality, with two additional commas;
Rule 1.13, Organization as a Client
Rule 1.20, Duties to Prospective Clients
Rule 4.2 Communication with Person Represented by Counsel
Rule 4.3 Dealing with Unrepresented Person
Rule 3.8, Special Responsibilities of a Prosecutor
Rule 5.5, Unauthorized Practice of Law; Multi-jurisdictional Practice of Law
Rule 5.7, Responsibilities Regarding Law-Related Services
Rule 7.2, Advertising, with slight modification
Rule 7.4, Communication of Fields of Practice and Specialization --eliminated, per ABA

Retain Montana Rule with Amendment
Rule 1.0, Terminology
Rule 1.5, Fees
Rule 1.8, Conflicts: Specific Rules
Rule 1.10, Imputation of Conflicts
Rule 1.15, Safekeeping Property
Rule 1.18 Montana's Interest on Lawyer Trust Accounts (IOLTA) Program
Rule 8.5, Jurisdiction and Certification

Retain Montana Rule with No Amendment
Rule 1.16, Declining or Terminating Representation
Rule 1.17, Government Employment
Rule 1.19, Sale of Practice (the ABA's Rule is 1.17)
Rule 3.1, Meritorious Claims and Contentions
Rule 3.5, Impartiality and Decorum of Tribunal
Rule 5.1 Responsibilities of Partners, Managers
Rule 6.1, Voluntary Pro Bono
Rule 7.1, Communications Concerning a Lawyer's Services
Rule 7.3, Direct Contact with Prospective Clients
Rule 7.5, Firm Names and Letterheads

Rejected ABA Rule
Rule 7.6, Political Contributions

Unique Montana Proposal
Preamble, paragraph 6 in lieu of requested amendment to Rule 1.2(d), addressing Cannabis