PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____TERM, 2022

Order Promulgating Amendments to Rules 1.2(c), 1.6, 1.15A, 3.1, 4.4, 5.3, 5.5, 8.3, and 8.4 of the Vermont Rules of Professional Conduct

Pursuant to the Vermont Constitution, Chapter II, § 30, it is hereby ordered:

1. That Rule 1.2(c) and the Comments to Rule 1.2 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, and the client gives informed consent, confirmed in writing. A lawyer who has not entered a limited appearance but who provides assistance in drafting pleadings shall advise the client to comply with any rules of the tribunal regarding participation by a lawyer in support of a pro se litigant.

Comment

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[5] It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, to avoid the use of offensive or dilatory tactics, or to treat opposing counsel or an opposing party with civility.

Independence from Client's Views or Activities

[~~5~~ 6] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

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[~~14~~ 15] With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 7, chapters 31 through 39 of the Vermont Statutes Annotated and Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

Board's Note—2022 Amendment

The first sentence of subdivision (c) is amended to require that a client's consent to a limited scope representation be confirmed in writing. Lawyers and their clients benefit and are protected when consent to a limited scope representation is confirmed in writing. The new requirement is consistent with what is required by the waiver provisions of Rules 1.7(b)(4) and 1.9(a).

The second sentence of subdivision (c) is new. Ghostwriting is a permissible form of a limited representation and one that can increase access to legal services. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 446 (2007). Ordinarily, a person who receives legal assistance from a lawyer who does not enter a limited appearance need not disclose the assistance. The new language, however, serves to remind lawyers that some tribunals require such disclosure. See, e.g., 2d Cir. R. 32.2. Competent representation includes advising the client as to the rules of the tribunal in which the client's matter is pending.

New Comment [5] is rooted in the fact that professionalism and civility are important aspects of professional responsibility. The new comment clarifies that, while the client controls the objectives of a representation, a lawyer does not violate any professional duty to the client by agreeing, for instance, to extensions of time or by affording professional courtesy to opposing counsel, parties, and witnesses while pursuing a client's objectives.

Old Comments [5] thru [14] are renumbered [6] to [15] to reflect the addition of new Comment [5].

Comment [14] is renumbered Comment [15] and is amended substantively to reflect statutory changes. The Comment was originally added in 2016. Since then, Vermont's regulatory scheme related to cannabis, cannabis products, and marijuana has changed significantly. Among other things, chapters 31 through 39 of Title 7 regulate cannabis, establish the Cannabis Control Board, and vest it with authority over cannabis establishments, licenses to engage in specified cannabis-related activities, the medical cannabis registry, medical cannabis dispensaries, and cannabis social equity programs. Title 7 creates a regulatory scheme that will require participants in cannabis-related activities to secure valuable legal advice. This amendment clarifies that a lawyer may counsel a client regarding the validity, scope, and meaning of Title 7, chapters 31 thru 39 so long as the lawyer abides by the existing requirement of advising the client regarding the potential consequences of the client's conduct under related federal law and policy.

2. That Rule 1.6 and the Comments to Rule 1.6 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 1.6. CONFIDENTIALITY OF INFORMATION

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(c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

(1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act;

(2) to secure legal advice about the lawyer's compliance with these rules; ~~or~~

(3) to secure guidance from bar counsel;

(~~3~~ 4) 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~~.~~; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change or potential 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.

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

Comment

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[11] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice and guidance from bar counsel about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraphs (c)(2) and (c)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(~~3~~ 4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[13] A lawyer entitled to a fee is permitted by paragraph (c)(~~3~~ 4) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

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[15] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(~~3~~ 5). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this rule. Disclosure may be required, however, by other rules and thus by paragraph (b). See Rules 1.2(d), 3.3(b), 4.1(b), 8.1 and 8.3.

Detection of Conflicts of Interest

[16] Paragraph (c)(5) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, cmt. [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. 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. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[17] Any information disclosed pursuant to paragraph (c)(5) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (c)(5) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (c)(5). Paragraph (c)(5) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Acting Competently to Preserve Confidentiality

[~~16~~ 18] Paragraph (d) makes clear that a ~~A~~ lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a

lawyer may be required to take additional steps to safeguard a client's information 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].

[~~17~~ 19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Former Client

[~~18~~ 20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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Board's Note—2022 Amendment

New paragraph (c)(3) is added to clarify that a lawyer does not violate Rule 1.6 by disclosing information relating to the representation of a client by making a confidential inquiry of bar counsel on matters related to that representation. Proactive regulation includes providing lawyers with assistance in achieving and maintain high standards of professional responsibility. Lawyers, therefore, are encouraged to seek guidance and assistance from bar counsel on matters related to compliance with the Rules of Professional Conduct.

Comment [11] is amended to conform to the addition of new paragraph (c).

Old paragraph (c)(3) is renumbered as paragraph (c)(4). Comments [12] and [13] are amended to reflect the renumbering of the paragraphs in subdivision (c).

Paragraph (c)(5) is added to track the ABA Model Rule and to allow lawyers to conduct limited conflict checks prior to and in the process of changing employment. The practice of law is becoming

increasingly mobile. Once discovered, a lawyer's conflict of interest often may be imputed to others in the lawyer's new firm or office. See V.R.Pr.C. 1.10. Prohibiting lawyers from making reasonable efforts to detect conflicts of interest prior to and while transitioning jobs inhibits mobility.

New Comments 16 and 17 address paragraph (c)(5).

Subdivision (d) is added to reflect that the modern practice of law includes possession of information related to the representation of client in many forms, including information that is stored electronically or digitally. A lawyer is under a duty to act competently to safeguard client information, no matter its format. See V.R.Pr.C. 1.1. Paragraph (d) tracks the ABA Model Rule, clarifies that V.R.Pr.C. 1.6 applies to the electronic transmission and storage of information relating to a representation, and makes explicit that the duty under Rule 1.6 is broader than avoiding affirmative disclosures of information relating to the representation of a client.

Old Comment [16] is renumbered as Comment [18] and is amended to reflect the addition of paragraph (d).

Old Comments [17] and [18] are renumbered as Comments [19] and [20].

3. That Rule 1.15A and the Comments to Rule 1.15A of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 1.15A. TRUST ACCOUNTING SYSTEM

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(b) With respect to pooled interest-bearing trust accounts required by paragraph (a):

(1) only a lawyer admitted to practice law in Vermont, or a person under the direct supervision of the lawyer, shall be an authorized signatory on the account or be authorized to make transfers from the account;

(2) records of deposits shall be sufficiently detailed to identify each item;

(3) withdrawals shall be made only by authorized electronic transfer or by check payable to a named payee and not to cash.

(~~b~~ c) A lawyer or law firm shall submit to a confidential compliance review of financial records, including pooled interest-bearing trust accounts, trust accounts, and fiduciary accounts, by the Professional Responsibility Program's Disciplinary Counsel. The information derived from such compliance reviews shall not be disclosed by anyone in such a way as to violate the evidentiary, statutory, or constitutional privileges of a lawyer, law firm, client, or other person, or

any obligation of confidentiality imposed by these rules, except in accordance with Administrative Order No. 9. A copy of any final report shall be provided to the lawyer or law firm.

(~~c~~ d) The Supreme Court may at any time order an audit of financial records, including pooled interest-bearing trust accounts, trust accounts, and fiduciary accounts, of a lawyer or law firm and take such other action as it deems necessary to protect the public.

(~~d~~ e) For purposes of this rule and Rule 1.15B, "financial institution" includes banks, savings and loans associations, credit unions, savings banks and any other businesses or persons that accept and hold funds held by lawyers or law firms as required in this rule.

Comment

[1] Paragraphs (a) and (b) enumerate minimal accounting controls for client trust accounts.

[2] Paragraph (b)(1) enunciates the requirement that only a lawyer admitted to the practice of law in Vermont or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a pooled interest-bearing trust account, an account more commonly referred to as an "IOLTA account" or a "client trust account." While it is permissible to grant nonlawyer access to such accounts, the access should be limited and closely monitored by the lawyer. The lawyer has a nondelegable duty to protect and preserve the funds in pooled interest-bearing trust accounts and can be disciplined for failure to supervise subordinates who misappropriate client funds. See V.R.Pr.C. 5.1 and 5.3.

[3] Paragraph (b)(3) delineates the only approved methods of withdrawing or transferring funds from a pooled interest-bearing trust account. By the plain terms, withdrawals by debit card are not approved. Authorized electronic transfers are limited to (1) money required for payment to a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation; (3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.

Board's Note—2022 Amendment

Subdivision (b) is new. It is intended to provide additional protection to clients and third persons for whom lawyers hold funds in trust.

Subdivisions (c), (d), and (e) are re-lettered to conform to the addition of paragraph (b).

The amendments to new paragraphs (c) and (d) are intended to clarify that it is not solely a lawyer or law firm's pooled interest-bearing trust accounts, more commonly referred to as "IOLTA

accounts" or "client trust accounts," that are subject to compliance reviews and audits.

New comments [1] to [3] are added to explain the limited appropriate uses of client trust accounts.

4. That Rule 3.1 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined):

RULE 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or hospitalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

Board's Note—2022 Amendment

The amendment makes clear that a lawyer who is representing a client in a matter that could result in the client being placed on an order of hospitalization does not violate the rule by holding the State to its proof. The change conforms to the ABA Model Rule.

5. That Rule 4.4(b) and the Comments to Rule 4.4 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

(b) A lawyer who receives ~~a document~~ information relating to the representation of the lawyer's client and knows or reasonably should know that the ~~document~~ information was inadvertently sent shall promptly notify the sender.

Comment

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[2] Paragraph (b) recognizes that lawyers sometimes receive ~~documents~~ information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a such ~~a document~~ information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the information or original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of ~~a document~~ information has been waived. Similarly, this rule does not address the legal duties of a lawyer who receives ~~a document~~ information that

the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, ~~"document"~~ "information" includes tangible documents and e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return ~~a document~~ information that was inadvertently sent unread, for example, when the lawyer learns prior to receipt that the ~~document~~ information ~~it~~ was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such ~~a document~~ information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

[4] Lawyers should be aware that this rule does not alter, modify, or change duties imposed by applicable rules of procedure upon the receipt of information that may or may not constitute work product or a privilege waiver. Whether information is work product or privileged is beyond the scope of these rules, as is whether a privilege has been waived.

Board's Note—2022 Amendment

Prior to this amendment, paragraph (b) referred only to the inadvertent production of "documents." Comment [2] defined "document" to include "e-mail and other electronic modes of transmission subject to being read or put into readable form." The amendment replaces "document" with "information" and at the same time moves what was stated in comment [2] into the body of the rule, thereby clarifying a lawyer's duties. See Preamble & Scope, Paragraph [15] ("Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.") The change reflects the reality of the practice of law in the 21st century: information exchanged while representing clients is not limited to paper documents. There is no reason to exclude electronically stored information from the duty imposed by paragraph (b).

Comment [4] is added to clarify that Rule 4.4(b) is limited to a lawyer's ethical obligation. The rules of procedure might impose additional obligations or duties related to the receipt of documents or electronically stored information that were inadvertently produced.

6. That the Comment to Rule 5.3 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter added):

RULE 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

Comment

Nonlawyers Outside the Firm

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[3] 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 regarding confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Board's Note—2022 Amendment

Comments 3 and 4 are new and are taken from the ABA Model Rules of Professional Conduct. The new comments address the fact that it has become increasingly common for lawyers to contract for services with persons and entities who are not employed by the lawyer or the lawyer's firm, including vendors who store information related to the representation of a lawyer's client. Lawyers must be mindful of the duty to ensure that nonlawyer assistants act in a way that comports with a lawyer's professional obligations and responsibilities.

7. That Comment [22] to Rule 5.5 of the Vermont Rules of Professional Conduct be added to read as follows:

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

Comment

[22] Lawyers who are not admitted to the bar of the Vermont Supreme Court may remotely practice the law of the jurisdictions in which they are licensed while physically present in

Vermont if they do not hold themselves out as being admitted to the bar of the Vermont Supreme Court or licensed to practice in Vermont, do not advertise or otherwise hold themselves out as having an office in Vermont, and do not provide, offer to provide, or hold themselves out as authorized to provide legal services in Vermont, unless otherwise authorized. Remote practice that satisfies these requirements does not constitute the unauthorized practice of law in Vermont.

Board's Note—2022 Amendment

In December 2020, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 495: Lawyers Working Remotely. The opinion begins with:

> Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice.

The COVD-19 pandemic brought remote practice into clearer view. The Committee concluded:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction while physically located in a jurisdiction

where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Earlier in 2020, the District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law had reached a similar conclusion in Opinion 24-20.

ABA Formal Opinion 495 drew from the conclusions reached in Maine Ethics Opinion 189 (2005) and Utah Ethics Opinion 19-03 (2019). Since Formal Opinion 495 was issued, several jurisdictions have cited it to conclude that lawyers who, while physically present in a jurisdiction in which they are not licensed or admitted, work remotely on matters in another jurisdiction in which they are licensed or admitted do not engage in the unauthorized practice of law so long as they satisfy several conditions. Such lawyers must not hold themselves out as being admitted or licensed in the jurisdiction in which physical present, must not advertise or otherwise hold themselves out as having an office in the jurisdiction in which physical present, and must not provide, offer to provide, or hold themselves out as authorized to provide legal services in the jurisdiction in which physically present, unless otherwise authorized. See New Jersey Committee on the Unauthorized Practice of Law and New Jersey Advisory Committee on Professional Ethics, Joint Formal Opinion 59-742, (October 6, 2021); Bar Association of San Francisco, Opinion 2021-1 (August 2021); Florida Bar Re: Advisory Opinion, Out-of State-Attorney Working Remotely From Home, Florida Supreme Court, SC20-1220 (May 20, 2021); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee, Joint Formal Opinion 2021-100 (March 2, 2021).

Similar principles apply in Vermont. Rule 5.5 is intended to protect consumers of Vermont legal services from the unauthorized practice of law. It is not intended to keep lawyers who are not licensed in Vermont from providing remote legal services to clients in jurisdictions in which they are licensed. Consumers of Vermont legal services are protected by the conditions that prohibit non-Vermont lawyers who are working remotely from Vermont from holding themselves as admitted or licensed here, advertising or opening an office here, and providing, offering to provide, or

holding themselves as authorized to provide legal services here. Vermont has no interest in regulating the practice of lawyers who, for all intents and purposes, are providing legal services that have no impact on Vermont, Vermonters, the Vermont Judiciary, or Vermont's legal profession.

The modifier "unless otherwise authorized" in new comment [22] refers to lawyers who are not admitted to the bar of the Vermont Supreme Court but who are authorized to provide legal services here pursuant to paragraphs (c) or (d) of Rule 5.5.

8. That Comment [4] to Rule 8.3 of the Vermont Rules of Professional Conduct is amended to read as follows: (new matter underlined):

RULE 8.3. REPORTING PROFESSIONAL MISCONDUCT

Comment

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question or to a lawyer who has volunteered to help such lawyers through approved Vermont Bar Association committees. Such a situation is governed by the rules applicable to the client-lawyer relationship. A confidential inquiry to bar counsel does not satisfy the duty set out in subdivision (a) or (b).

Board's Note—2022 Amendment

Inquiries of bar counsel are confidential. Moreover, bar counsel is exempt from the reporting requirement of Rule 8.3 and must keep confidential all information related to inquiries and requests for guidance. See Administrative Order 9, Rules 7 and 8. While contacting bar counsel is encouraged, a lawyer who is obligated to report the professional misconduct of a judge or another lawyer does not satisfy that duty by seeking guidance from bar counsel as to whether the duty exists.

9. That Rule 8.4 of the Vermont Rules of Professional Conduct be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

* * * * * *

(b) engage in a ''serious crime,'' defined as any illegal conduct involving any felony or lesser crime that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or involving any ~~lesser~~ crime a necessary element of which involves interference

with the administration of justice, false swearing, intentional misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a ‘‘serious crime’’;

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Board's Note—2022 Amendment

The amendment conforms with the ABA Model Rule. In addition, the new language harmonizes Rule 8.4(b)'s definition of "serious crime" with the definition of "serious crime" that appears in Administrative Order 9, Rule 21(c).

Prior to this amendment, A.O. 9 Rule 21 authorized the immediate interim suspension of any lawyer who had been convicted of a serious crime, as defined by A.O. 9, Rule 21(C). The rule defined "serious crime" more broadly than Rule 8.4(b), including in its definition any "lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." The language was not part of Rule 8.4(b), thus leaving possible the perverse situation in which a lawyer could be placed on an immediate interim suspension for certain conduct, but not finally disciplined for the same conduct.

10. That these rules and comments, as amended, are prescribed and promulgated effective _____. The Board's Notes are advisory.

11. That the Chief Justice is authorized to report these amendments to the General Assembly inaccordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2022.

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice

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Nancy J. Waples, Associate Justice