Lawyer Ethics Reform in Perspective: A Look at the Louisiana Rules of Professional Conduct Before and After Ethics 2000

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I. INTRODUCTION

The last several years have been introspective and eventful ones for the American legal profession. During the late 1980s, the American Law Institute undertook the ambitious project of restating the law of lawyering. Heralded upon completion as an “event of major significance,” the Restatement of the Law Governing Lawyers is a “major piece of legal scholarship” that now stands as a milestone “contribution to the norms of the legal profession.” In 1997, the American Bar Association (ABA) created its Commission on Evaluation of the Rules of Professional Conduct—later known as the Ethics 2000 Commission—to re-evaluate the Model Rules of Professional Conduct from the ground up. After considering a myriad of “issues and questions” presented by the “explosive dynamics of modern law practice,” the Commission completed its work in early 2002 when the ABA House of Delegates adopted comprehensive revisions to the Model Rules. Later in 2002, the ABA adopted additional changes to the Model Rules proposed by its Commission on Multijurisdictional Practice.
These national efforts to reform the ethical standards governing the legal profession have hit home. In 1990, the Louisiana Supreme Court completed a major overhaul of the disciplinary process in Louisiana by creating the Louisiana Attorney Disciplinary Board and the Office of Disciplinary Counsel to police lawyer misconduct. Since then, the Court has established committees to address various issues affecting the legal profession in Louisiana, including the creation of a Committee for the Prevention of Lawyer Misconduct and a Committee on Financial Assistance to Clients. Likewise, in 1993 and 1997, the Court adopted the recommendations of the Louisiana State Bar Association (LSBA) designed to regulate lawyer advertising and solicitation. More recently, the LSBA, through its Ethics 2000 and Multijurisdictional Practice committees, proposed extensive revisions to all major sections of the Louisiana Rules of Professional Conduct, many of which the Court adopted in 2004.

This Article surveys and critiques the 2004 revisions to the law governing lawyers in Louisiana. After considering the history of lawyer regulation in Louisiana, it evaluates the recent amendments to the Louisiana Rules of Professional Conduct adopted by the Louisiana Supreme Court during the Ethics 2000 revision process. In so doing, it discusses the substance of each amended rule, and contrasts the rule as revised with both its Louisiana predecessor and its Model Rule counterpart. Concluding that the revised rules are a.

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8. See LSBA Committees, Chairs and 2003–04 Projects, 51 La. Bar J. 192, 204 (2003) ("The mission of the Multijurisdictional Practice Committee is to monitor the work of the ABA Commission on Multijurisdictional Practice and to research, study and report on the application of current ethics and bar admission rules in Louisiana to the multijurisdictional practice of law.").
marked improvement over what came before, the Article nonetheless calls for the on-going reconsideration of the principles, norms, and rules of lawyering in Louisiana.

II. THE CODIFICATION OF LEGAL ETHICS IN LOUISIANA: A RETROSPECTIVE

Although Louisiana courts have long exercised their inherent power to regulate the lawyers practicing before them, the use of uniform standards to evaluate lawyer conduct is a relatively modern development. In the earliest reported case of lawyer discipline in Louisiana, the Superior Court of the Territory of Orleans in 1810 struck the name of Pierre Dormenon from the roll of attorneys. After hearing testimony from “men of veracity,” the court found that disbarment was warranted because Mr. Dormenon, “wearing a scarf . . . marched at the head of the brigands” during a 1793 slave revolt in Santo Domingo. Similarly, the Louisiana Supreme Court imposed a twelve-month suspension on Michel De Armas for using “arrogant and indecorous language” in a brief, which the Court held, “the law forbids us to suffer.” In disciplining these lawyers for apparently self-evident wrongdoing, the Court did not labor to find whether either lawyer violated any applicable standard of conduct governing members of the bar. Given that no such standards existed, this should come as no surprise.

In 1899, the LSBA undertook the first effort to codify the principles governing lawyering in Louisiana. In so doing, Louisiana diverged from the lawyer codes then in place in most other states, and instead, based its new code on a seventeenth century oath for advocates from the Swiss Canton of Geneva. Although

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10. Dormenon’s Case, 1 Mart. (o.s.) 129 (La. 1810).
11. See id. at 130, 131. Two years later, the court readmitted Dormenon after he was elected to the Louisiana House of Representatives and cleared by that body of wrongdoing in connection with the slave revolt. See Dormenon’s Case, 2 Mart. (o.s.) 305, 306 (La. 1812).
12. See Michel De Armas’ Case, 10 Mart. (o.s.) 123 (La. 1821).
13. See Report of the Comm. on Code of Prof’l Ethics, 31 ABA Rep. 678 (1907) (“With the exception of the Louisiana Code, all the State Bar Associations Codes are formulated, almost totidem verbis, upon that of Alabama . . . .”).
14. See Henry S. Drinker, Legal Ethics 23 (1954); see also Ellen S. Podgor, Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession, 61 Temple L.R. 1323, 1325 n.17 (1988); Peter A. Joy, Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers’ Conduct, 15 Geo. J. Legal Ethics 313, 322 n.30 (2002). Three other states, namely California, Oregon and Washington, had also based their lawyer ethics codes on the Swiss advocate’s oath. See Drinker, supra note 14, at 23. Moreover, the oath had previously been translated and reprinted in New York’s 1850 Field Code of
denominated by the LSBA as a “Code of Ethics,” this enumeration of broad principles read more like a pledge than a disciplinary code.\(^5\) For example, the Code declared that it was the “duty” of a Louisiana lawyer to “maintain the respect due to courts of justice and judicial officers,” to “employ . . . such means only as are consistent with truth,” to “maintain inviolate the confidence, and at every peril to ourselves, to preserve the secrets of our clients,” and to “abstain from all offensive personalities,” among other things.\(^6\)

Shortly after the LSBA adopted this code, the ABA formed a committee in 1905 to consider the “advisability and practicability” of creating its own.\(^7\) In short order, the committee decided that an ethics code was in fact advisable and practicable, and then set out to collect all of the existing codes, including the LSBA 1899 Code of Ethics.\(^8\) Ultimately, the committee concluded its work and the ABA adopted its 1908 Canons of Ethics.\(^9\) Although history has given the Canons mixed reviews,\(^10\) they mark the beginning of the ABA’s preeminence in the field of lawyer regulation.\(^11\)

After the ABA enacted the 1908 Canons, Louisiana became one of the first states to adopt them. At its 1910 meeting in Baton Rouge, the LSBA adopted all thirty-two canons without revision.\(^12\)


15. See Altman, supra note 14, at 2422 n.171.

16. See La. State Bar Ass'n, Report of the Louisiana State Bar Association 1898–1899, Charter of 1899, art. II, at 20 (1899). In adopting the Swiss advocates’ oath, the LSBA added an eighth canon not found in the Swiss source, namely, the duty to “live uprightly; and in our persons, to justify before men the dignity, honor and integrity of a great and noble profession.” See id. ¶ 8.

17. See Drinker, supra note 14, at 24.

18. The LSBA Code of Ethics was attached as Appendix C to the ABA committee’s report. See ABA, Report of the Thirtieth Annual Meeting at 714 (1907); Altman, supra note 14, at 2422, n.171; see also Carol Rice Andrews, *The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct*, 24 J. Legal Prof. 13, 20 n.23 (2000) (discussing ABA committee’s consideration of the Swiss lawyers’ oath).


20. One prominent commentator has noted that the Canons attracted little professional, public, or scholarly attention in their day. See Wolfram, supra note 19, at 54. For a discussion of the Canons and its critics, see generally Altman, supra note 14.

21. See, e.g., Wolfram, supra note 19, § 2.6.2, at 56 (“The significance of the Canons, aside from their historical importance as an episode in bar regulation, is that they served as the forerunner to the 1969 Code and the 1983 Model Rules.”).

Thereafter, Louisiana courts and lawyers slowly began to cite to the Canons as authoritative statements of the principles of lawyering.\textsuperscript{23} Such citations, however, were infrequent. Moreover, confusion remained among members of the Louisiana bar as to the standards governing their conduct. For example, during an LSBA meeting in 1926, a well-intentioned delegate from New Orleans offered a resolution calling for "a revision and restatement of the present code of ethics of this Association, to the end that the same may be made more comprehensive and specific."\textsuperscript{24} The president of the LSBA responded by asking the delegate if he was aware "that the present code of ethics is the canon of ethics of the American Bar Association.” The delegate responded as follows:

Mr. F.B. Freeland (Orleans): No, I was not cognizant of that fact; but I looked at the charter of the Association and found there what appears to be the code of ethics for the Association, and I was not cognizant of the fact that the canons of the American Bar Association were our code of ethics. In fact, that is the main idea I had in mind. If that is the fact, then I most cheerfully withdraw my motion.

President Herold: I am so informed by the Secretary.\textsuperscript{25}

In the years following adoption of the Canons, the ABA continually revised and supplemented them. For example, the ABA revised the Canons in 1928, 1933, 1937, 1940, 1942, 1943, and 1951.\textsuperscript{26} The LSBA kept pace with these changes, first by simply adopting verbatim the ABA’s revisions, and later, by selectively picking, choosing, and amending the ABA’s standards. For example, in 1929, the LSBA Charter formally adopted the “Canons of Ethics of The American Bar Association in effect January 1, 1929” as “the Code of Ethics of the Association.”\textsuperscript{27} However, the charter also opened the door for more selective adoption by providing that “[t]he Association shall have the right at any general meeting, by resolution, to alter or amend said Code and to adopt additional canons of ethics,


\textsuperscript{24} See La. State Bar Ass’n, Report of the Louisiana State Bar Association for 1926 at 199 (1926) (resolution of Mr. F.B. Freeland (Orleans)).

\textsuperscript{25} Id.

\textsuperscript{26} See, e.g., Drinker, \textit{supra} note 14, at 25–26.

\textsuperscript{27} La. State Bar Ass’n, Report of the Louisiana State Bar Association for 1929 at 219 (1929) (reprinting Article III of Charter of the Louisiana State Bar Association).
without the necessity of amending the charter.” Indeed, by the early 1940s, the LSBA was liberally diverging from the ABA Canons on matters of form and substance. Louisiana’s increasing divergence from the aging ABA Canons reflected a more widespread dissatisfaction with the Canons’ vague and imprecise standards. Such discontent led the ABA to appoint a committee in 1964 to reevaluate the Canons. After working for more than four years, the committee proposed, and the ABA adopted, its Model Code of Professional Responsibility in 1969.

Unlike the 1908 Canons that preceded it, the 1969 Model Code consisted of “three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules.” The Canons were “statements of axiomatic norms” expected of a lawyer. The Ethical Considerations were “aspirational in character” and represented “the objectives toward which every member of the profession should strive.” Finally, the Disciplinary Rules were “mandatory in character” and set forth the “minimum level of conduct below which no lawyer [could] fall without being subject to disciplinary action.”

The 1969 Code was quickly and widely accepted around the nation, with Louisiana at the forefront of the wave of adoptions. During its April 1970 meeting, the LSBA passed a resolution to submit the issue of adoption of the ABA Code to its general membership. That summer, the referendum passed, and the Code was adopted.

Despite the Model Code’s widespread acceptance by the states, enthusiasm for it quickly waned. Critics assailed it as unconstitutional, unresponsive to the realities of modern practice, unhelpful to solo and transactional lawyers, and internally

30. See Wolfram, supra note 19, § 2.6.3, at 56.
32. Id.
33. Id.
34. Id.
35. See Wolfram, supra note 19, § 2.6.3, at 56 (“[t]he 1969 Code was an impressive and quick success . . . ”); Monroe H. Freedman & Abbe Smith, Understanding Lawyers’ Ethics § 1.03, at 5 (2d ed. 2002) (noting that “[t]he Model Code was quickly adopted, with some variations of substance, by virtually all jurisdictions.”).
As a result of this mounting criticism, deconstruction of the Model Code began just eight years after its adoption when the ABA formed the "Kutak Commission" in 1977. After re-evaluating the Model Code, the Kutak Commission eventually jettisoned its hortatory Canons and Ethical Considerations and replaced them with a single set of black-letter "Rules" setting forth minimally-acceptable standards of conduct. In adopting these proposals in 1983 as the "Model Rules of Professional Conduct," the ABA "completed the transformation from the vague and largely inspirational Canons to an expressly legalistic rule-based ethics regime."

In 1984, Louisiana set out to consider adopting the ABA's newly-minted Model Rules. At the request of Louisiana Supreme Court Chief Justice John A. Dixon, Jr., the LSBA formed a "Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct." Although some apparently believed there was no need to replace the then-existing Louisiana Code of Professional Responsibility, the five members of the Task Force eventually undertook to do just that, perhaps as a result of "pressure from the American Bar Association" and the persuasiveness of the "suggestion" from the Louisiana Supreme Court that it do so. Ultimately, the Task Force tweaked and modified the ABA Model Rules in a number of respects and then issued a decidedly lukewarm report giving the LSBA House of Delegates the option of either adopting and recommending the Model Rules "in the form and content proposed in this report and not as originally adopted by the American Bar Association," or retaining the "present Code of Professional Responsibility." In November 1985, the House chose the first option and approved the Task Force's modified version of the ABA Model Rules. After considering the Task Force's recommendations and reconciling several issues of form and substance, the Louisiana Supreme Court enacted the Louisiana Rules of Professional Conduct and made them effective on January 1, 1987.

37. See, e.g., Wolfram, supra note 19, § 2.6.4, at 60; Freedman & Smith, supra note 35, § 1.03, at 5 (characterizing the Code as "incoherent, inconsistent and unconstitutional").
40. See id. at 8-9 (citing Report and Recommendation of the Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct at 42 (Nov. 1985); Letter from John A. Dixon to Louis D. Smith (Sep. 27, 1983)).
41. See id. at 10.
42. See id. at 14 (citing Letter, Thomas O. Collins, Jr., to Louisiana Supreme Court (Nov. 25, 1986)).
The years following the adoption the Rules of Professional Responsibility brought much change to the practice of law. Throughout the nation, the proliferation of lawyer advertising, mass tort lawsuits, lawyer referral services, alternative dispute resolution, interstate practice, and Internet advice called into question the adequacy of the ABA’s model standards, despite nearly thirty amendments in the years following 1983. As a result, in 1997 the American Bar Association determined yet again that the time had come to reconsider its model standards. In that year, ABA president Jerome J. Shestack formed the Commission on Evaluation of the Rules of Professional Conduct and charged it to reevaluate the 1983 Model Rules. Many commentators hoped that the Commission, later known as the “ABA Ethics 2000 Commission,” would “not just examine [the Model Rules] of conduct but help bring us to a higher moral ground.”

The Commission’s early work plan, published in 1998, ambitiously organized its work into three “tracks” of different priorities. Despite these ambitious plans, the Commission’s actual

46. The Commission was comprised of thirteen members chaired by E. Norman Veasey (Chief Justice, Delaware Supreme Court), and was served by two reporters, Professors Nancy J. Moore and Carl A. Pierce.
49. In track one, the commission targeted a number of rules for immediate reconsideration, including Rules 1.1, 1.6, 1.7, 1.8, 1.9–1.12, 2.2, 4.2 and 8.4. In track two, the Commission identified the following rules and issues as “most in need of fixing”: Rules 1.2, 3.3, 1.14, 1.15, 3.4, 1.5, 1.13, 3.5, 3.8, and the Preamble and Scope. Furthermore, the Commission placed on track two the consideration of the following potential new rules: a “new rule on duties to prospective clients”; a “new rule covering systems for law practice (accounting, conflict checks, docket-management)”; a “new rule on discipline for law firms”; and, a “new rule on lawyers representing fiduciaries.” Finally, in track three the Commission grouped for consideration the following “subject areas that are increasingly important in the future of law practice and implicate multiple rules”: lawyers acting as dispute resolution neutrals; lawyers representing clients in ADR; lawyers handling class actions; aggregate settlements; lawyer referrals; client-law firm networking; internet
work was more measured. Rather than charting an entirely new course, the Commission decided that "it would follow a presumptive rule of making no change to the ABA Model Rules] unless it is substantively necessary."50 When the Commission released its initial report, denominated Report 401, in late November 2000, it proposed significant but not sweeping revisions.51 The Report was first considered by the ABA House of Delegates during its annual meeting in Chicago during the summer of 2001, and later was adopted by the House, with revisions, during its mid-year meeting in 2002.52

In addition to the changes in lawyering that prompted the ABA's Ethics 2000 initiative at the national level, developments closer to home drove reform initiatives in Louisiana as well. For example, the increasingly vigilant enforcement of ethical norms by the Louisiana Office of Disciplinary Counsel—facilitated in large part by a 1990 restructuring of the disciplinary process and a significant increase in enforcement funding through controversial lawyer assessments—accentuated the call for reform in Louisiana. As a result, in late 1999 the Louisiana State Bar Association created the LSBA Ethics 2000 Committee53 and appointed members drawn from diverse geographic areas and practice settings, including two judges, three previous LSBA presidents, a law professor, two chairpersons of the Louisiana Attorney Disciplinary Board, the Chief Disciplinary Counsel, respondents' counsel, and a liaison to the Louisiana Supreme Court.54 The Committee's charge was threefold: (1) to

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51. The Commission's report was revised and resubmitted to the House in March 2001. In addition to the commission Report, a "Minority Report" was submitted to the House of Delegates. The principal author of this report was commission member Lawrence J. Fox of Philadelphia. Lawrence J. Fox, Minority Report, available at http://www.abanet.org/cpr/e2k-dissent.html.


53. See Letter from Robert E. Guillory, Jr., President, LSBA (Dec. 9, 1999).

54. The Committee was comprised of the following LSBA members: Harry S. Hardin, III, Chair; Christine Lipsey, Vice-Chair; Professor Dane S. Ciolino, Reporter; Kim M. Boyle; Connor B. Eglin; Orlando N. Hamilton, Jr.; Judge Carolyn W. Gill-Jefferson; Harvey J. Lewis; Charles B. Plattsmier; Judge Harry Randow; Michael H. Rubin; Marta-Ann Schnabel; Joseph L. Shea, Jr.; Richard C. Stanley; Timothy F. Averill, Supreme Court Liaison; E. Phelps Gay, Board Liaison.
monitor and study the ongoing work of the American Bar Association Ethics 2000 Commission; (2) to conduct a comprehensive review of the Louisiana Rules of Professional Conduct; and (3) to recommend rule changes to the LSBA House of Delegates and, ultimately, the Louisiana Supreme Court. 55

The Committee’s work began in 1999. To define the nature and scope of its efforts, the Committee made a number of preliminary determinations that shaped its deliberations. First, the Committee decided that it would not propose adoption of the “Comments” to the ABA Model Rules. Although the Comments provide very useful guidance to courts and practitioners, the ABA has never intended them to serve as black-letter standards. 56 Indeed, they are replete with hortatory provisions that would engender issues of notice and due process if employed as standards for discipline. 57 In addition, debate on the Comments to each Model Rule would have consumed a prohibitive amount of Committee time. Moreover, although some Committee members argued for adoption of the Comments simply to make them available to Louisiana judges and lawyers, Louisiana courts already use the Comments to interpret black-letter provisions

56. The ABA Model Rules specifically provide that “[t]he Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.” See Model Rules of Prof’l Conduct Scope ¶ 21. In addition, some of the Comments are intended merely “to alert lawyers to their responsibilities under . . . other law.” See id. ¶ 15. Such informal “alerts” would be out of place in a disciplinary code.
57. As Professor Smith put it:
There are statements in the comments . . . that are more than guides to interpretation. They amount to hidden substantive rules. This is not exactly an ideal state of affairs. In some circumstances, a lawyer might be faced with discipline based upon an obligation that is unexpectedly articulated in a comment instead of in the text of the rules.
See Smith, supra note 39, at 68. Because Louisiana has not adopted the Comments, he notes that this “risk would be remote in Louisiana.” See id.
of the Louisiana Rules. Finally, because the LSBA and the ABA have made the Comments readily accessible on the Internet, Westlaw, and in hard-copy publications, the issue of access was less compelling than it perhaps had been in the past.

Second, the Committee decided that it would not deviate from the language of the ABA Model Rules unless there was a compelling reason for doing so. The Committee believed that greater consistency with the ABA’s model standards would provide more resources to Louisiana lawyers and judges interpreting the Louisiana counterparts. For example, consistency would allow Louisiana practitioners to utilize legal ethics case law developed in other jurisdictions. Furthermore, consistency would make the commentary on the Model Rules published in law reviews, treatises, the ABA’s Comments, and the working papers of the ABA Ethics 2000 Commission relevant and useful here. Finally, many members of the Committee believed that greater consistency with the ABA Model Rules would ease the burden of justifying the Committee’s proposals to the Court and thus increase the chances of adoption.

Third, the Committee decided that it would not propose revisions to rules upon which the Louisiana Supreme Court had acted recently. For example, in the not-so-distant past, the Court considered and revised the rules on lawyer advertising and solicitation, as well as on the sale of a law practice. The Committee believed that it would be premature to revise such recently-considered provisions.

58. See, e.g., In re Grevemberg, 2002-2721 (La. 2003), 838 So. 2d 1283, 1287-88 (citing ABA Comments to Model Rule 1.8(c)); Walker v. DOTD, 2001-2078 (La. 2002), 817 So. 2d 57, 63 (citing ABA Comments to Model Rule 1.11); In re Watley, 2001-1775 (La. 2001), 802 So. 2d 593, 597 (citing ABA Comments to Model Rule 5.4); see also Smith, supra note 39, at 33 (noting that Louisiana courts “have implicitly and explicitly acknowledged” the value of the ABA Comments).

59. Many of these same considerations led the 1984 Louisiana Task Force to Evaluate the American Bar Association’s Model Rules of Professional Conduct to reach the same conclusion. Professor Smith notes that the Task Force declined to adopt the Comments to the 1983 Model Rules (1) because it did not want to get “bogged down in disputes over language or concepts” in the Comments; (2) because it wanted to avoid conflicts between modified black-letter rules and unmodified Comments; and, (3) because adoption of the ABA Comments was not necessary in order to make them available to Louisiana practitioners. See Smith, supra note 39, at 12–13.

60. Moreover, greater consistency with the law governing lawyers in Louisiana’s sister states furthers the presumably important goal of facilitating interstate commerce. See Voltaire, 7 Oeuvres de Voltaire, Dialogues 5 (1838) (complaining that the law in pre-revolutionary France required “change legal systems as often as you change horses”) (quoted in Shael Herman, The Louisiana Civil Code: A European Legacy for the United States 12 (1993)).

61. See Smith, supra note 7.
The Committee labored diligently from 1999 until 2003. It held twenty-four Committee meetings. It disseminated its meeting minutes, work product, and preliminary drafts through the LSBA’s Internet web site, and it actively sought and received suggestions from local bar associations, specialty bar associations, lawyers, judges and lay persons throughout the state by conducting CLE seminars, symposia, and nine public hearings. After completing its work, the Committee submitted a final report to the LSBA House of Delegates in December 2002. On January 25, 2003, the LSBA House of Delegates debated the Committee’s report and unanimously approved it after modifying a handful of rules. LSBA president Larry Feldman thereafter forwarded the resolution to the Louisiana Supreme Court. Following a meeting with members of the Committee in May 2003, the Court requested additional clarification as to a few proposals. Ultimately, the Court enacted the revised Louisiana Rules of

62. Many of these hearings were well attended by lawyers as a result of the availability of free continuing legal education attendance credit. Only a few members of the general public attended the hearings. One demanded to know why the Pope was not included in the revision process.


64. See Minutes of the House of Delegates of the Louisiana State Bar Association at 8–12 (Jan. 25, 2003); id. at 12 (“The resolution as amended was unanimously approved.”); see generally Marta-Ann Schnabel, House of Delegates Passes New Rules of Professional Conduct, 50 La. Bar J. 437, 437 (2003). For example, the House of Delegates adopted floor amendments (1) deleting language from Rule 6.1 encouraging a lawyer to make economic contributions to pro bono organizations, (2) adding “religious . . . views” to the list of client views that a lawyer does not endorse by representation, and most importantly, (3) replacing the expansive lawyer misconduct reporting rule proposed by the LSBA Ethics 2000 Committee with Model Rule 8.3. See id.

65. See Letter from Larry Feldman, Jr., to Pascal F. Calogero, Jr. (Feb. 18, 2003) (enclosing “[a]pproval of resolution (as amended) from LSBA Ethics 2000 Committee proposing amendment to the Louisiana Rules of Professional Conduct”).

66. See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III (Oct. 29, 2003). More particularly, the Court sought additional information regarding proposed Rules 1.5(e) (division of fees), 1.7 (concurrent conflicts), 1.8(g) aggregate settlements, 1.8(j) (sexual relations with clients), 1.13 (organizational clients), 4.2(b) (contact with represented persons), 5.4 (sharing of legal fees with nonprofit organizations), 5.5 (unauthorized practice of law), 6.1 (pro bono service), 7.4 (specialization), 7.6 (pay-to-play), 8.3 (reporting professional misconduct), 8.4(g) (threatening criminal or disciplinary charges), and 8.5 (jurisdiction and choice of law). The LSBA Ethics 2000 Committee responded to the Court’s requests on November 20, 2003. See Letter from Harry S. Hardin, III, to Pascal F. Calogero, Jr. (Nov. 20, 2003) (attaching “Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court’s October 29, 2003 Letter”).
Professional Conduct on January 21, 2004 and made them effective on March 1, 2004.67

III. THE 2004 REVISIONS TO LOUISIANA RULES OF PROFESSIONAL CONDUCT: A CONTEMPORARY PERSPECTIVE

The Louisiana Supreme Court's 2004 revisions to the Louisiana Rules of Professional Conduct range from minor semantic changes that will have virtually no effect on the day-to-day practice of law, to fundamental substantive rewrites that should dramatically alter the manner in which Louisiana lawyers handle their clients' matters. This section addresses these revisions. In so doing, it discusses the extent to which each rule diverges from its Louisiana predecessor and its Model Rule counterpart.

A. Preamble, Scope, and Terminology

1. Preamble

The Preamble to the Model Rules sets forth important, but sometimes forgotten, ideals of the legal profession. For example, it encourages a lawyer to aid the poor and powerless by ensuring "equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." Likewise, it encourages professionalism and civility by admonishing a lawyer to be zealous while "maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system."69

The LSBA Ethics 2000 Committee did not discuss or recommend adoption of the Preamble.70 Although the Preamble sets forth admirable goals, adoption as an integral part of a disciplinary

67. See Order of January 21, 2004 (La. Jan. 21, 2004) ("Article XVI of the Articles of Incorporation of the Louisiana State Bar Association be and is hereby repealed and re-enacted to read as follows . . . "). Note that since June 2003, the Louisiana Supreme Court has had under advisement additional revisions to Louisiana Rules of Professional Conduct proposed by the LSBA Multijurisdictional Practice Committee. See Letter from Wayne J. Lee to Pascal F. Calogero, Jr. (Jun. 17, 2003) (enclosing "[r]esolution from the Multijurisdictional Practice Committee which proposes amendments" to Rules 5.5 and 8.5). Although there has been continuing dialogue between the Court and the LSBA regarding these proposals, the Court has not yet taken definitive action.
68. See Model Rules of Prof'l Conduct Preamble ¶ 6.
69. See id. ¶ 9.
70. Similarly, these provisions were not recommended by the 1984 Task Force that evaluated the 1983 Model Rules. See Smith, supra note 39, at 3.
code would have sent conflicting signals about the nature of a lawyer's obligations. For example, in declaring that "a lawyer should be competent, prompt, and diligent," the Preamble would have been inconsistent with black-letter Rules providing that a lawyer "shall" be competent and diligent. While some may argue that the Court missed a valuable opportunity by not adopting the Preamble, its hortatory and doctrinal statements would have been an uneasy fit.

2. Scope

Like the Preamble, the Scope section of the Model Rules was not intended to state authoritatively the standards governing lawyering. Rather, the ABA intended it to "provide general orientation" for the black-letter Rules that follow.

The LSBA Ethics 2000 Committee did not consider adopting the Scope section of the Model Rules. Doing so would have blurred the line demarcating the Court's role as regulator of lawyers and its role as interpreter of legislation. In addition, adoption of the Scope by the Court might have been viewed as judicial usurpation of the legislature's constitutional responsibility for tort and procedural lawmaking. For example, the Scope provides that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Likewise, it provides that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation" or "civil liability." When "causes of action" arise, "presumptions" exist, and "civil liability" is warranted are issues more properly addressed by the legislature or by the Court acting in an adjudicative rather than regulatory capacity.

3. Rule 1.0—Terminology

Unlike the Preamble and Scope, the Terminology section of the Model Rules was adopted verbatim in 2004 as an entirely new
section of the Louisiana Rules. This section, titled Rule 1.0, defines the following terms: "belief," "confirmed in writing," "firm," "fraud," "informed consent," "knowingly," "partner," "reasonable," "reasonable belief," "reasonably should know," "screened," "substantial," "tribunal," and "writing." 77

It is odd that it took more than fifteen years for Louisiana to adopt the section of the Model Rules that defines critical terms employed throughout the black-letter provisions. Louisiana was not alone in this regard, however. Because the Terminology section had no rule number, it was often left behind when states adopted the enumerated provisions that follow. For this reason, the ABA Ethics 2000 Commission redesignated the Terminology section as Rule 1.0. 78 The following defined terms in new Rule 1.0 are of particular note.

a. "Informed Consent"

The term "informed consent" in Rule 1.0 supplants the pre-2004 term "consent after consultation." 79 The ABA Ethics 2000 Commission believed that the familiar term "informed consent" better articulated that adequate information and explanation were required before a client could make an important decision. 80

b. "Fraud"

Rule 1.0 defines the term "fraud" to clarify that for conduct to be "fraudulent" under the Rules, it not only must be committed with the "purpose to deceive," but also must be fraudulent under applicable substantive or procedural law. 81 The ABA redefined this term due to concern that courts had applied the prior definition to brand conduct "fraudulent" even though the conduct did not run afoul of any other law. 82

78. The Reporter to the ABA Ethics 2000 Commission stated that the purpose of enumerating the section as Rule 1.0 was "to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions." See ABA Ethics 2000 Commission, Model Rule 1.0: Reporter's Explanation of Changes (2002).
79. Compare La. Rules of Prof'l Conduct R. 1.0(e), 1.6(a), 1.7(b) (2004) with La. Rules of Prof'l Conduct R. 1.6(a), 1.7(b) (1987) (repealed 2004).
81. La. Rules of Prof'l Conduct R. 1.0(d) (2004).
c. "Writing"

Finally, Rule 1.0 defines the term "signed" to include methods intended as the equivalent of a traditional signature. The ABA modeled this electronic signature provision on the Uniform Electronic Transactions Act.

B. The Lawyer-Client Professional and Financial Relationship

Rules 1.1 through 1.18 define the fundamentals of the lawyer-client relationship and set forth a lawyer's basic fiduciary obligations, including the duties of competence, confidentiality, and loyalty. The LSBA Ethics 2000 Committee spent the vast majority of its time debating these particular provisions.


a. Rule 1.1—Competence

Rule 1.1 provides that a lawyer "shall provide competent representation to a client" by possessing the knowledge and skill required, and by exercising the "thoroughness and preparation reasonably necessary for the representation." Furthermore, it obligates a Louisiana lawyer to comply with minimum continuing legal education requirements.

This rule was not modified during the Ethics 2000 process. It now differs from the corresponding Model Rule only by requiring compliance with mandatory continuing legal education requirements.

b. Rule 1.2—Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2 empowers a lawyer to act as an agent (or mandatary) for the client. It then allocates decision making authority vis-a-vis

86. See id. R. 1.1(b).
88. See La. Rules of Prof'l Conduct R. 1.2 (2004). The ABA clarified this agency relationship through the addition of a sentence to paragraph (a) of the corresponding Model Rule providing that "[a] lawyer may take such action on
lawyer and client to ensure that the client retains control over the fundamental objectives of the representation and other critical decisions.\footnote{La. Rules of Prof'l Conduct R. 1.2(a) (2004).} It permits a lawyer to limit the scope of his representation—for example, by handling some but not all of a client's claims—if the client provides "informed consent."\footnote{Id. R. 1.2(c).} Finally, it prohibits a lawyer from knowingly assisting a client with the commission of a crime or fraud.\footnote{Id. R. 1.2(d).}

This provision differs from the former Louisiana rule in a few substantive respects.\footnote{See La. Rules of Prof'l Conduct R. 1.2 (1987) (repealed 2004).} Unlike the former rule, it bestows upon the lawyer the power to act on behalf of his client as a mandatary, although that undoubtedly was true under the general law of mandate prior to the revision. Furthermore, unlike the former rule, it specifies certain decisions on which the client has ultimate authority, including "whether to settle a matter," and in a criminal case, the "plea to be entered, whether to waive jury trial and whether the client will testify."\footnote{Id. R. 1.2(b).} It provides that a lawyer's representation of a client "does not constitute an endorsement of the client's political, religious, economic, social or moral views or activities," while curiously, the Task Force that drafted the former rule removed similar language.\footnote{Compare La. Rules of Prof'l Conduct R. 1.2 (1987) (repealed 2004), with Model Rules of Prof'l Conduct R. 1.2(b) (1983) (amended 2002).}

Although this provision differs significantly from the former Louisiana rule, it is identical in substance to current Model Rule 1.2 but for two minor differences. First, this rule qualifies the lawyer's obligation to abide by his client's decisions by making this obligation "[s]ubject to the provisions of Rule 1.16."\footnote{La. Rules of Prof'l Conduct R. 1.2(a) (2004).} The Model Rule contains no such qualification.\footnote{See Model Rules of Prof'l Conduct R. 1.2 (2002).} The LSBA Ethics 2000 Committee proposed this revision to clarify that a lawyer who disagrees with a client's decisions concerning the objectives of representation may withdraw, must withdraw, or may be required to continue the representation, as permitted or required by Rule 1.16. Therefore, the lawyer need not comply with a "decision" that he refrain from withdrawing if Rule 1.16 would otherwise permit him to do so.

Second, the LSBA recommended, and the Court adopted, a divergence from the corresponding Model Rule by including a
client's "religious . . . views" among the things that a lawyer does not endorse by representation. This insertion was made through a floor amendment during the LSBA House of Delegates meeting in January 2003.

c. Rule 1.3—Diligence

Rule 1.3 requires a lawyer to act with "reasonable diligence and promptness" in representing a client. This rule, which goes hand in hand with the lawyer's obligation to provide competent representation, is identical to the former Louisiana rule and to current Model Rule 1.3.

d. Rule 1.4—Communication

Rule 1.4 embodies the lawyer's obligation to keep his client reasonably informed about significant matters related to the representation. Although the former Louisiana provision stated the obligation in these general terms, the revised rule provides more detailed guidance, obligating the lawyer to "promptly inform the client of any decision or circumstance" with respect to which the client's informed consent is required; to "reasonably consult with the client about the means by which the client's objectives are to be accomplished"; to keep the client "reasonably informed about the status" of the matter; to "promptly comply with reasonable requests for information"; and to "consult with the client about any relevant limitation on the lawyer's conduct" when the lawyer knows that the client expects impermissible assistance.

In adopting Rule 1.4, the Court diverged from the language of the corresponding Model Rule upon recommendation of the LSBA Ethics 2000 Committee. Paragraph (b) of the Louisiana provision provides that the lawyer shall give the client "sufficient information to participate intelligently" in decisions concerning the objectives of

103. See id. R. 1.4(a).
104. Prior to the 2004 revision of this rule, paragraph (b) of the former Louisiana rule provided that a lawyer was required to communicate with his client
the representation and the means by which they are to be pursued," while the ABA counterpart provides that the lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Committee recommended divergence from the ABA rule simply to clarify that both lawyer and client have a role to play in making decisions concerning the representation. Nevertheless, the Committee intended no substantive change from the corresponding Model Rule.

e. Rule 1.13—Organization as Client

Rule 1.13 addresses issues of client identity, confidentiality, and loyalty that arise when a lawyer represents an organizational client, such as a limited liability company, partnership, corporation, or other juridical person. It clarifies that a lawyer representing such an organization represents the organization rather than its constituents. Moreover, it requires a lawyer who learns of a constituent’s serious wrongdoing to report it up the organizational ladder, and if no higher-ups take appropriate action, it permits—but does not require—disclosure of confidential information if reasonably necessary to protect the organization. Finally, it addresses a lawyer’s obligations when dealing with or concurrently representing constituents of the organization in an effort to avoid confusion as to the lawyer’s role and loyalties, and to prevent conflicting-interest representations.

This rule markedly diverges from the language and substance of former Rule 1.13. In so doing, the revision reflects the more widespread reevaluation of the law of lawyering that followed Enron’s collapse and other recent corporate fiascos. The original

only “to the extent the client is willing and able to do so.” See La. Rules of Professional Conduct Rule 1.4 (1987) (repealed 2004). The LSBA Ethics 2000 Committee recommended deleting the language because it could be misinterpreted to suggest that a lawyer need not communicate with a client who is either “unwilling” or “unable” to speak with the lawyer. As to the “unwilling” client, the lawyer and client presumably would have serious issues that must be resolved under Rules 1.2 and 1.16 rather than by this rule. As to the “unable” client, the lawyer should consult Rule 1.14 rather than simply proceed without communication. LSBA Ethics 2000 Committee Minutes; Discussion of Rule 1.4; December 6.

106. LSBA Committee Minutes; Discussion of Rule 1.4; Dec. 6.
108. Id. R. 1.13(b)-(c).
109. Id. R. 1.13(f)-(g).
LSBA Ethics 2000 Committee proposal sent to the Louisiana Supreme Court in early 2003 contained no substantive revisions to this rule.\textsuperscript{112} While the Committee's proposal was under advisement with the Court, however, the ABA made sweeping changes to Model Rule 1.13 during the summer of 2003 to require more vigilant up-the-ladder reporting of constituent wrongdoing, and to permit extra-enterprise disclosures of otherwise confidential information for the good of the organization.\textsuperscript{113} The Court thereafter directed the Committee to comment on the ABA's revision, noting that most members of the Court "appeared to favor" the new version because it "strengthen[ed] the organizational lawyer's authority to address organizational wrongdoing."\textsuperscript{114} The Committee concurred,\textsuperscript{115} and the Court then adopted Model Rule 1.13 verbatim.

\textit{f. Rule 1.14—Client with Diminished Capacity}

Rule 1.14 addresses the intractable problems associated with the representation of an impaired client. Identical in substance to Model Rule 1.14,\textsuperscript{116} this rule admonishes the lawyer to strive to maintain a "normal client-lawyer relationship," but permits him to disclose confidences and to take "protective action"—including interdiction—if "reasonably necessary" to protect his client's interests.\textsuperscript{117}

Revised Rule 1.14 differs from the former Louisiana rule in a few minor respects. Most significantly, this rule provides more detailed

\footnotesize{(codified in various sections of 11, 15, 18, 28, and 29 U.S.C.); see also Securities and Exchange Commission Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003). See generally Duane Windsor, \textit{Business Ethics at "The Crooked E,"} in Enron: Corporate Fiascos and Their Legal Implications (Nancy B. Rapoport & Bala G. Dharan eds., 2004).\textsuperscript{112} \textsuperscript{113} See Model Rules of Prof'l Conduct R. 1.13 (2003). \textsuperscript{114} See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 4 (Oct. 29, 2003). \textsuperscript{115} See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 2 (Nov. 20, 2003) ("As a policy matter, the Committee unanimously believes that the Court should adopt ABA Model Rule 1.13. Indeed, these proposals are consistent in spirit with the Committee's proposed revisions to Rule 1.6."). \textsuperscript{116} The only differences between this rule and the corresponding Model Rule are the deletion of the terms "guardian ad litem, conservator or guardian," and the insertion of analogous Louisiana terms from the civil law of tutorship and interdiction. Compare La. Rules of Prof'l Conduct R. 1.14 (2004), with Model Rules of Prof'l Conduct R. 1.14 (2002). \textsuperscript{117} La. Rules of Prof'l Conduct R. 1.14 (2004).}
guidance to a lawyer dealing with an impaired client, albeit without breaking new substantive ground. Furthermore, it omits language providing that when a lawyer answers to a tutor or curator, "the client remains the subject of the representation for purposes of determining whose best interest should be protected." 118 This undoubtedly remains true in the wake of the revision, given that a tutor or curator is also a fiduciary with a duty of loyalty to protect the interests of the client. 119 Finally, this rule expressly permits a lawyer forced to take "protective action" to reveal confidential information to the extent reasonably necessary to protect the client's interests. 120 Although the former rule contained no language relating to confidential information, Louisiana lawyers routinely disclosed such information in this context to protect their clients' interests.

\[ g. \text{ Rule 1.16—Declining or Terminating Representation} \]

Rule 1.16 addresses the circumstances under which a lawyer must decline or terminate his representation of a client; namely, when the representation would violate the law, or if the lawyer is impaired or discharged. 121 In addition, this rule addresses the circumstances under which a lawyer may withdraw after commencement of a representation. Among other circumstances, a lawyer may withdraw at any time if withdrawal will not materially prejudice the client, if the client has or is using the lawyer to further criminal or fraudulent conduct, or if the client refuses to pay the lawyer's invoices or engages in repugnant conduct. 122 Finally, this rule sets forth a lawyer's obligations to the client upon termination of the representation, including his obligation to return the client's file materials. 123

This rule is substantively identical to the former Louisiana rule. 124 It does, however, vary from the corresponding Model Rule. 125 Paragraph (d) contains additional language requiring the lawyer to "promptly release to the client or the client's new lawyer the entire

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121. Id. R. 1.16.
122. Id. R. 1.16(b).
123. Id. R. 1.16(d).
125. See Model Rules of Prof'l Conduct R. 1.16 (2002).
file relating to the matter. This provision, initially adopted by the Louisiana Supreme Court in 2001, clarifies that client files belong to clients, and that a lawyer must promptly and unconditionally return any files upon request.

h. Model Rule 1.17—Sale of a Law Practice

The LSBA Ethics 2000 Committee did not propose Model Rule 1.17 for adoption. The Committee took this action because the Louisiana Supreme Court had, in the relatively recent past, declined to adopt this rule.

2. Fees and Client Funds

a. Rule 1.5—Fees

Rule 1.5 regulates legal fees and costs. Among other things, it requires all agreements regarding fees and costs to be “reasonable” and to be communicated to the client. As to contingent fees, it requires memorialization in a signed writing and forbids such fees in criminal and certain domestic relations matters. Furthermore, this rule closely regulates the sharing of fees between lawyers in different firms, permitting fee division only if the client agrees to representation by each lawyer, is advised in writing of the fee-sharing terms, and each participating lawyer performs “meaningful” work on the matter. The final paragraph of this rule sets forth detailed instructions for the handling of various types of payments received by

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127. LSBA Committee comments & suggestions; Nov. 4 and 5, 2002.
128. Reasonableness is determined through an analysis of the following factors: “(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent.” See La. Rules of Prof'l Conduct R. 1.5(a) (2004).
129. Id. R. 1.5(a)-(b).
130. Id. R. 1.5(c)-(d).
131. Id. R. 1.5(e).
a lawyer, such as fixed fee payments, advance deposits, and minimum fee payments.\textsuperscript{132}

The LSBA Ethics 2000 Committee’s debate regarding the bulk of Rule 1.5 was unremarkable, with the Committee proposing and the Court adopting provisions that are identical in substance to the corresponding paragraphs of the Model Rule.\textsuperscript{133} Nevertheless, there are some changes from the former Louisiana rule. For example, the revised rule subjects a lawyer’s “expenses” to a reasonableness analysis, while the former rule expressly mentioned only “fees” in this regard.\textsuperscript{134} Likewise, the revised rule requires a lawyer to communicate not only the fee arrangement (as did the former rule), but also the scope of his representation and the expenses for which the client is responsible. As to contingent fee agreements, the former rule required only that the terms be reduced to a writing, while the revised rule requires “a writing signed by the client.” Finally, Rule 1.5(e) reflects a significant and controversial departure from the former rule on fee sharing among lawyers in different firms.\textsuperscript{135}

Rule 1.5(e) consumed a disproportionate amount of the Committee’s meeting time and engendered far more complaints and suggestions from members of the bar than any other rule. On the one hand, some members of the Committee and the bar believed that the practice of “case brokering” needed to be curbed by prohibiting a lawyer from “signing up” a client and then passing the client off to another lawyer for handling. On the other hand, others believed that “case brokering” was not necessarily problematic, particularly when the client’s total fee is reasonable and the participating lawyers provide competent representation.\textsuperscript{136} In the end, the Committee

\textsuperscript{132} Id. R. 1.5(f).
\textsuperscript{133} See Model Rules of Prof'l Conduct R. 1.5 (2002). The debate as to paragraph (f) was likewise unremarkable. This paragraph, which does not appear in the Model Rule, sets forth detailed guidelines addressing how a lawyer must hold and account for monies received from, or on behalf of, a client during the course of representation. These provisions provide much-needed guidance to a Louisiana lawyer handling advance deposits, general retainers, fixed fees, and the like. For example, paragraph (f)(5) clarifies how a lawyer must handle disputes arising over a fixed fee, minimum fee, or a fee drawn from an advanced deposit. When a reasonable dispute arises over one of these types of fees, the lawyer must deposit the disputed portion in a trust account until the dispute is resolved. See La. Rules of Prof'l Cond. R. 1.5(f)(5) (2004).
\textsuperscript{136} Those in this camp believed that liberal fee sharing under these circumstances would encourage a lawyer marginally equipped to handle a matter to refer a client to a more competent lawyer. Likewise, those in this camp believed that lawyers in large law firms routinely share legal fees—albeit within the context
proposed and the Court adopted a rule that tightly regulates the division of fees among lawyers. To effect this regulatory goal, paragraph (e) differs in a number of respects from the corresponding Model Rule.137

First, unlike Model Rule 1.5(e), paragraph (e)(1) of this rule makes no distinction between fees divided "in proportion to the services performed" and fees divided otherwise. In all cases, the client must agree in writing to the "representation" by all of the lawyers involved.138

Second, paragraph (e)(1) provides that the client must agree "in writing" to the "share of the fee each lawyer will receive."139 Although the corresponding Model Rule contains a similar requirement in paragraph (e)(2),140 the Committee proposed this language to permit a lawyer to inform his client at any time, rather than only at the commencement of the representation as the Model Rule suggests (but does not expressly provide).141 The Committee made this recommendation after extensive consultation with representatives of the Louisiana Trial Lawyers' Association.142

of a common business enterprise—and that small-firm and solo practitioners should not be precluded from doing the same thing. Finally, those in this camp believed that it is none of the client's business what a lawyer does with a fee that is paid, provided that the fee is reasonable and the client was competently represented.

138. La. Rules of Prof'l Conduct R. 1.5(e) (2004). The LSBA Ethics 2000 Committee believed that the corresponding Model Rule incorrectly suggested that a lawyer paid "in proportion to services performed" did not "assume responsibility" for the client's matter. See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 2 (Nov. 20, 2003) (attached to Letter from Harry S. Hardin, III, to Pascal F. Calogero, Jr. (Nov. 20, 2003)).
140. See Model Rules of Prof'l Conduct R. 1.5(e)(2) (2002).
141. The Court asked the LSBA Ethics 2000 Committee to clarify this resolution. See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 2 (Oct. 29, 2003) ("why does the LSBA prefer allowing the client to be informed at or near the conclusion of the representation, rather than 'in advance,' as the ABA appears to suggest?").
142. See Minutes of the House of Delegates of the Louisiana State Bar Association at 9 (Jan. 25, 2003) (noting that "the LTLA has reached a compromise with the Ethics 2000 Committee"). More particularly, the LSBA Ethics 2000 Committee agreed with the LTLA that it is "not uncommon for lawyers to revise their preliminary agreement regarding fee division to address the amount of work actually performed by each participating lawyer." For this reason, the proposal adopted by the Court allows lawyers to determine fee-division percentages at the end of the representation and to so notify the client at that time. Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to
Third, paragraph (e)(3) requires each lawyer to render "meaningful legal services for the client in the matter." The Committee proposed this departure from the corresponding Model Rule to curb "case brokering" by requiring that any lawyer who seeks to share a fee must not only "represent" the client in the matter, but also perform some "meaningful" role. It is unlikely, however, that this rule will have any significant impact, given that a lawyer’s work can be "meaningful" even if it involves only client-relations activities.

b. Rule 1.15—Safekeeping Property

Rule 1.15 regulates the handling of funds in which the lawyer’s client or a third party has an ownership or security interest. Like the former rule, it requires a lawyer to segregate the property of his clients and third persons in a pooled IOLTA trust account, and it requires the lawyer to keep "[c]omplete records" of such property for at least five years after terminating his representation. Unlike the former rule, however, the revised rule permits the lawyer to maintain a small personal balance in his trust account to cover bank service charges.

Although most of its provisions are identical in substance to the corresponding Model Rule, paragraph (d) contains an additional sentence added by the Court early in the revision process to clarify and limit when a lawyer must recognize a nonclient’s interest in funds held by the lawyer. More particularly, when a lawyer knows that a third person has an identifiable and proprietary interest in specific funds that he holds—in other words, when the lawyer knows that a third person has a "real right" in the funds—then, and only then, must the lawyer respect the interest.

the Court’s October 29, 2003 Letter at 2 (Nov. 20, 2003).
144. LSBA Committee Minutes; Nov. 4, 2002.
147. Compare La. Rules of Prof’l Conduct R. 1.15 (2004), with Model Rules of Prof’l Conduct R. 1.15 (2002). Paragraph (a) is identical to ABA Model Rule of Professional Conduct 1.15(a), with the additional requirement that the lawyer’s trust account must be maintained in “a bank or similar institution.” This requirement assures that a lawyer does not attempt to set up a trust account using a shoe box at his office. Paragraph (b) is identical to Model Rule 1.15(b). Paragraph (c) is identical to Model Rule 1.15(c), with the addition of the last sentence: “The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).” Paragraph (e) is identical to Model Rule 1.15(e). Finally, paragraph (f) contains provisions necessary to implement Louisiana’s Interest on Lawyers’ Trust Accounts (“IOLTA”) program.
3. Confidentiality

a. Rule 1.6—Confidentiality of Information

Rule 1.6 sets forth a lawyer's confidentiality obligation. Broadly defining as "confidential" all information "relating to the representation," this rule then enumerates several circumstances under which a lawyer may reveal a client's confidences.\(^1\) For example, a lawyer may reveal information: when the client expressly or impliedly authorizes disclosure; when disclosure is necessary to prevent death or substantial bodily harm; when disclosure is necessary to prevent financial harm resulting from the client's misuse of the lawyer's services; when the lawyer seeks legal advice or needs to defend himself in a legal proceeding or investigation; and, when disclosure is compelled by law or court order.\(^2\)

The revision to this rule substantially expanded the grounds for permissive disclosure of confidential client information. In revising Model Rule 1.6, the ABA Ethics 2000 Commission attempted to strike a balance between preserving the core value of confidentiality and preserving human life and the integrity of the lawyer's role within the legal system.\(^3\) The end result of this effort was a model rule—and an identical Louisiana rule—that permits a lawyer to disclose confidential information under several new circumstances.

First, this rule expands permissive disclosure as to conduct threatening death or substantial bodily harm. It substitutes the prerequisite of "imminent" harm with harm that is "reasonably certain" to occur anytime in the future.\(^4\) Likewise, the rule removes the requirement that the harm flow from a "criminal" act of the "client."\(^5\)

Second, this rule adds new disclosure provisions relating to certain client financial crimes and frauds.\(^6\) Before the public outcry over the role of lawyers in Enron and other corporate scandals, the ABA had rejected identical provisions. In the post-Enron environment of August 2003, however, the ABA adopted provisions

\(^1\) Id. R. 1.6.
\(^2\) Id. R. 1.6(b).
that permit a lawyer to reveal client confidences to prevent the commission of a serious crime or fraud that the lawyer unwittingly assisted. Although somewhat controversial, this rule is premised on the notion that the injurious misuse of a lawyer’s services is an abuse of the client-lawyer relationship that justifies sacrificing confidentiality in pursuit of loss avoidance.

Third, this rule permits a lawyer to reveal confidential information in order to secure legal advice regarding his own obligations. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, this rule clarifies that such disclosures are appropriate even without prior express or implied authorization.

Finally, this rule now expressly permits, but does not require, the disclosure of confidences in order for a lawyer to comply with law or a court order. Although the rules previously did not address the permissibility of legally-compelled disclosures, no Louisiana lawyer had been disciplined for making such a disclosure.

4. Loyalty and Conflicts of Interest

a. Rule 1.7—Conflict of Interest: Current Clients

Rule 1.7 addresses concurrent conflicts of interest. It defines “concurrent conflict” of interest to include both direct-adversity conflicts that arise when a lawyer’s representation of one client is directly opposed to another, and material-limitation conflicts that arise when a lawyer’s representation of a client is limited by competing concerns for himself or others. This rule provides that each affected client can waive a concurrent conflict if the waiver is informed, reasonable, lawful, and confirmed in writing.

This rule is identical to Model Rule 1.7. As revised in 2004, it diverges in a few notable respects from the former Louisiana rule. First, the prefatory language contained in the former rule—“[l]oyalty is an essential element in the lawyer’s relationship to a client”—has been removed. Second, the scope of material-limitation conflicts

157. Id. R. 1.6(b)(6).
160. Id. R. 1.7(b).
is now limited to situations in which there is "a significant risk" that the representation will be impaired, rather than to situations in which it "may" be impaired. 163 Third, the revised rule reaffirms that some conflicts are simply not consentable, including those that would impair the lawyer's post-waiver ability to provide competent representation. 164 Moreover, while lawyers previously could obtain conflict waivers orally, the revised rule requires written confirmation. 165 Under the prior rules, a lawyer could obtain a conflict waiver only through "consent[] after consultation." 166 The revised rule substitutes the more familiar term "informed consent," which is defined in Rule 1.0(e). 167

b. Rule 1.8—Conflict of Interest: Current Clients—Specific Rules

Rule 1.8 addresses an eclectic collection of circumstances under which the loyalty of a lawyer is threatened by other competing interests. 168 Loosely bundled together by the title "Conflict of Interest: Current Clients—Specific Rules," these provisions reflect significant differences from the former Louisiana rule and from the current Model Rule. 169

for Louisiana lawyers. Other members, however, believed that it was anomalous to single out "loyalty" for such treatment without making similar statements about "competence" in Rule 1.1, "diligence" in Rule 1.3, and "confidentiality" in Rule 1.6, among others. Ultimately, the Committee reached a consensus to omit the statement from Rule 1.7 rather than to insert similar statements elsewhere. LSBA Ethics 2000 Committee: Summary of comments and suggestions; Nov. 4 and 5, 2002.


164. See La. Rules of Prof'L Conduct R. 1.7 (2004). Under the former rule, consentability turned on whether the representation would be "adversely affected" as a result of the waived conflict. See La. Rules of Prof'L Conduct R. 1.7(b) (1987) (repealed 2004). This standard was problematic because its relationship to the "material limitation" standard was uncertain. See ABA Ethics 2000 Commission, Model Rule 1.7: Reporter's Explanation of Changes (2002).

165. Compare La. Rules of Prof'L Conduct R. 1.7(b)(4) (2004), with La. Rules of Prof'L Conduct R. 1.7(a)(2) & (b)(2) (1987) (repealed 2004) (requiring only "consent[] after consultation"). Although many believed that this written-confirmation requirement would be controversial, it raised little stir within the ABA House of Delegates, the LSBA, or the Louisiana Supreme Court.


167. See id. R. 1.8.


Paragraph (a) regulates business transactions with clients. It is identical to Model Rule 1.8(a) and incorporates new provisions mandating that the lawyer advise the client of the “desirability” of seeking independent counsel, and requiring that the terms of the deal be “fair,” “reasonable,” and “fully disclosed” to the client. In addition, it requires that the client’s “informed consent” be provided in a “signed writing.”

Paragraph (b) prohibits a lawyer from using confidential information to the “detriment” of the client. It is identical to Model Rule 1.8(b). Although the rule does not expressly permit it, a lawyer’s profitable personal use of confidential information would appear to be permissible under the plain language of this rule—at least if the client is not harmed.

Paragraph (c) regulates client-lawyer gifts. Like the previous version of this rule, it prohibits a lawyer from preparing a will or act of donation giving the lawyer (or one of his relatives) a substantial gift unless the lawyer is closely related to the client. However, the revised rule contains language prohibiting a lawyer from “soliciting” such a gift from a client. The ABA added this anti-solicitation language to avoid the danger of overreaching and to address criticism that the predecessor Model Rule regulated only formal gifts made by instrument, but not those made informally.

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2004), and Model Rules of Prof’l Conduct R. 1.8 (2002).
170. See Model Rules of Prof’l Conduct R. 1.8(a) (2002).
172. Id. In addition, the lawyer must disclose his “role in the transaction” to the client. See La. Rules of Professional Conduct Rule 1.8(a)(3) (2004). The ABA added these provisions, among other reasons, to protect clients from lawyer overreaching and to bring the rules into conformity with common-law decisions providing for the voidability of improper lawyer-client transactions. See ABA Ethics 2000 Commission, Model Rule 1.8: Reporter’s Explanation of Changes (2002).
174. See Model Rule of Prof’l Conduct R. 1.8(b) (2002).
175. In contrast, under general Louisiana mandate law, a mandatary must account to his or her principal for all profits or advantages obtained in the course of the mandate. See La. Civ. Code art. 3004; id. art. 3005 cmt. b (“In the absence of contrary agreement, the mandatary is not entitled to apply to his own use the money or other property of the principal.”); Noe v. Roussel, 310 So.2d 806, 818–19 (La. 1975); Neal v. Daniels, 47 So.2d 44 (La. 1950); Foreman v. Pelican Stores, 21 So. 2d 64 (La. App. 2d Cir. 1944); see also Restatement (Third) of the Law Governing Lawyers § 60(2) (2000) (lawyer must account to client for profits made through the use of confidential information).
The new Louisiana rule is nearly identical to Model Rule 1.8(c), but excludes language found in the Model Rule permitting a lawyer to accept gifts from "other" individuals "with whom the lawyer or the client maintains a close, familial relationship." The LSBA Ethics 2000 Committee recommended against adoption of this language out of concern that it was too indeterminate to give lawyers fair notice regarding who would be included within its scope.

Paragraph (d) prohibits a lawyer from negotiating literary or media rights with his client during the representation. It is identical to the corresponding Model Rule.

Paragraph (e) prohibits a lawyer from providing "financial assistance" to clients other than advancing litigation-related expenses. Although this rule—and its 1987 predecessor—forbid a lawyer from advancing living expenses to a client, doing so is a well-established practice in Louisiana as a result of a 1976 decision of the Louisiana Supreme Court giving clients a right to such assistance under the Louisiana Constitution. The Court is currently reevaluating this controversial issue.

Paragraph (f) regulates fee payments by a nonclient to assure that the lawyer remains loyal to the client rather than to the fee payor. It requires that the lawyer obtain his client’s "informed consent" to the payment, that the payment not interfere with the lawyer's professional independence, and that the lawyer protect the client’s confidential

180. LSBA Committee Minutes; March 21, 2000.
182. See Model Rules of Prof’l Conduct R. 1.8(d) (2002).
184. See id.; La. Rules of Prof’l Conduct R. 1.8(e) (1987) (repealed 2004). But see In re Maxwell, 2000-3527 (La. 2001), 783 So. 2d 1244, 1249 ("Arguably, a plain reading of Rule 1.8 would indicate that any advance to a client, other than one for costs and litigation expenses, would constitute a violation of this rule."); see also Restatement (Third) of the Law Governing Lawyers § 36(2) (2000). However, in *Louisiana State Bar Association v. Edwins*, 329 So. 2d 437, 445 (La. 1976), the Louisiana Supreme Court held that a lawyer may advance "minimal living expenses" to a client if the advances were reasonably necessary, the client remained responsible for repayment irrespective of the outcome of the litigation, and the lawyer did not initially make the advances in order to obtain the representation. According to the Court, such advances are permissible to prevent the client from being forced into accepting an unfavorable early settlement. *Id.; see also Maxwell*, 783 So. 2d at 1249.
185. In 2000, the Louisiana Supreme Court formed a committee to evaluate the continued propriety of permitting a lawyer to advance living expenses to a client. See, e.g., *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 2000-0414 (La. 2000), 763 So. 2d 610; see also *Maxwell*, 783 So. 2d at 1249. Since doing so, however, the Court has taken no dispositive action on this controversial issue.
information. 186 This rule is identical to Model Rule 1.8(f), except that the Louisiana version relieves the lawyer of securing informed consent when the client has already consented to—and indeed contracted for—third party payment in an insurance contract or a prepaid legal service plan. 187

Paragraph (g) requires a lawyer negotiating an aggregate settlement to obtain his clients' “informed consent” in a “signed” writing 188 after fully disclosing the “nature of all the claims . . . involved and of the participation 189 of each person in the settlement.” 190 This rule is identical to Model Rule 1.8(g), except that the Louisiana version exempts a lawyer from compliance in the limited context of settling “certified class action[s].” 191 The LSBA Ethics 2000 Committee proposed this variation to relieve a class-action lawyer of the obligation of obtaining signed writings from all members of a certified class in order to settle a class-action matter. 192 The Committee believed that this requirement was unnecessary to protect class members’ interests, given that the court presiding over a class action is duty bound to police the fairness of the settlement. 193

188. The ABA added this signed-writing requirement to the corresponding Model Rule because it believed that aggregate settlements often entail offers posing potentially serious conflicts of interest between the clients. See “ABA Ethics 2000 Commission, Model Rule 1.8: Reporter’s Explanation of Changes (2002). 189. In essence, this paragraph requires that the lawyer disclose to each client “what the other clients will receive or pay if the settlement . . . offer is accepted.” See Model Rules of Prof'l Conduct R. 1.8, cmt. 13 (2002).
190. La. Rules of Prof'l Conduct R. 1.8(g) (2004). The Court asked the LSBA Ethics 2000 Committee to clarify how this writing requirement would “work in practice, especially in criminal cases . . . when the plea is subject to Court supervision.” See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 3 (Oct. 29, 2003). The Committee responded by noting that “a lawyer representing more than one client would simply be required to write a letter to all of his clients explaining the details of the proposed agreement that he has made on behalf of each one. Each client would then sign an acknowledgment at the bottom of the letter accepting the proposed agreement. In a criminal case, the lawyer would be required to do the same thing . . . .” See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court’s October 29, 2003 Letter at 7 (Nov. 20, 2003) (attached to Letter from Harry S. Hardin, III, to Pascal F. Calogero, Jr. (Nov. 20, 2003)). The Court thereafter adopted the Committee’s recommendation.
192. LSBA Committee Minutes; Nov. 4, 2002.
193. LSBA Committee Minutes; Nov. 4, 2002. Although no Louisiana court has squarely addressed the issue, a risk exists that any aggregate settlement agreement that fails to comply with this rule may be subject to later nullification by adversely affected clients. See Burrow v. Arce, 997 S.W.2d 229, 246 (Tex. 1999).
Paragraph (h) regulates both prospective and retrospective attempts by a lawyer to limit liability for "malpractice." As to prospective limitations, the client must be "independently represented." As to retrospective settlements with unrepresented clients, the lawyer must advise the client of the "desirability" of seeking "independent legal representation," and must give the client a reasonable opportunity to do so. This rule is identical to Model Rule 1.8(h).

Paragraph (i) prohibits a lawyer from acquiring a "proprietary interest" in litigation other than a "lien authorized by law" or a contingent fee. This rule is identical to Model Rule 1.8(i). Note that this rule differs from its Louisiana and Model predecessors in that the term "authorized by law" replaces the term "granted by law." This revision clarifies that the exemption applies to all liens authorized by substantive law—including those that arise by operation of law and those that arise conventionally by contract.

Paragraph (j) is "Reserved." The corresponding Model Rule, in contrast, places significant limitations on client-lawyer sexual relationships. In 2002, the ABA adopted a per se rule prohibiting a lawyer from commencing a sexual relationship with an existing client. Although recognizing that most egregious behavior can be addressed through other Rules, the ABA believed that a specific rule better alerted lawyers to the dangers of sexual relationships with clients, and better informed clients that such conduct is questionable. Furthermore, the ABA opted for a complete, rather than a partial, ban on client-lawyer relationships, except those predating the formation of the client-lawyer relationship. The ABA believed that a partial ban—such as one prohibiting relationships involving coercion or incompetence—would not effectively address the potential for conflicts of interest, particularly given the difficulty of obtaining an adequately informed consent from the client.

195. Id.
196. See Model Rules of Prof'l Conduct R. 1.8(h) (2002).
204. Id.
By a five-to-five vote, the LSBA Ethics 2000 Committee chose not to recommend the adoption of ABA Model Rule 1.8(j).\textsuperscript{205} Those members of the Committee who voted against adopting Rule 1.8(j) did so for several reasons. First, they felt that the Court's existing case law adequately addressed the complex and variable issues associated with "unethical" sexual conduct.\textsuperscript{206} Next, they felt that a bright-line rule could serve as an unjustified safe harbor sheltering a lawyer engaged in sexual conduct that is improper, but that happens to comport with the letter of Rule 1.8(j).\textsuperscript{207} Finally, they felt that there may be situations in which sexual conduct should not be sanctionable.\textsuperscript{208}

On the other hand, those Committee members who voted for adopting the model rule did so for a number of reasons. They felt that a refusal to adopt Rule 1.8(j) could be misconstrued as an indication that Louisiana opted for a more permissive attitude with respect to client sex when that is not so, and they believed that the proposed rule was not inconsistent with existing Louisiana case law.\textsuperscript{209} Finally, they felt that even if a sexual relationship predated the representation, the lawyer nonetheless would be constrained by other rules, including Rule 1.7(b), which the Louisiana Supreme Court has interpreted to prohibit sexual misconduct adversely affecting the client.\textsuperscript{210}

Ultimately, the Louisiana Supreme Court agreed with those members of the Committee who disfavored the per se prohibition.\textsuperscript{211} For this reason, Rule 1.8(j) is now labeled "Reserved."

Paragraph (k) is unique to Louisiana and is not contained in Model Rule 1.8.\textsuperscript{212} This paragraph prohibits a lawyer from seeking a power of attorney to settle a matter without obtaining the client's

\begin{itemize}
  \item 205. LSBA Committee Minutes; Nov. 4–5, 2002.
  \item 206. \textit{Id}.
  \item 207. \textit{Id}.
  \item 208. \textit{Id}.
  \item 209. \textit{Id}.
  \item 210. \textit{Id}.
  \item 211. Before the Court did so, it asked the LSBA Ethics 2000 Committee for additional clarification on its recommendation. \textit{See} Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 2 (Oct. 29, 2003) ("we would ask for a brief explanation of why not having a rule like ABA Model ROPC 1.8(j) is the better way of proceeding"). The Committee responded by explaining the background of the Committee's deliberations and the policies counseling in favor of and against the proposal. \textit{See} Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 8–9 (Nov. 20, 2003) (attached to Letter from Harry S. Hardin, III, to Pascal F. Calogero, Jr. (Nov. 20, 2003)).
  \item 212. \textit{See} Model Rules of Prof'l Conduct R. 1.8 (2002).
\end{itemize}
informed consent to the settlement.\footnote{La. Rules of Prof'l Conduct R. 1.8(k) (2004).} The LSBA Ethics 2000 Committee recommended that the Court retain this provision in order to clarify that a lawyer must have the consent of his client prior to settling a matter, but thereafter, he may obtain a specific mandate from the client to endorse or negotiate an instrument given in settlement of the claim.

Finally, paragraph (l) imputes all of the conflicts set forth in this rule to other members of a lawyer's firm.\footnote{La. Rules of Prof'l Conduct R. 1.8(l) (2004).} This revision dramatically expands the scope of imputation of Rule 1.8 conflicts. Indeed, under the 1987 version of the Louisiana Rules and the 1983 version of the Model Rules, only conflicts arising under paragraph (c) (gifts to a lawyer) were imputed to other members of the conflicted lawyer's firm.\footnote{See La. Rules of Prof'l Conduct R. 1.8(c) & 1.10(a) (1987) (repealed 2004); Model Rules of Prof'l Conduct R. 1.8(c) & 1.10(a) (1983) (amended 2004); see also ABA Ethics 2000 Commission, Model Rule 1.8: Reporter's Explanation of Changes (2002).}

c. Rule 1.9—Duties to Former Clients

Rule 1.9 prohibits a lawyer from being adverse to a former client in the "same or a substantially related matter" unless the client "gives informed consent, confirmed in writing."\footnote{La. Rules of Prof'l Conduct R. 1.9 (2004).} This requirement of a writing differs from the former Louisiana rule, which did not require a writing to waive a former-client conflict.\footnote{See La. Rules of Prof'l Conduct R. 1.9 (1987) (repealed 2004).} In addition, this rule continues to prohibit a lawyer from being adverse to a client of his former firm in the "same or a substantially related matter" if he possesses confidential information "material to the matter," unless the affected persons waive the conflict.\footnote{La. Rules of Prof'l Conduct R. 1.9 (2004).}

This rule is identical to Model Rule 1.9.\footnote{See Model Rules of Prof'l Conduct R. 1.9 (2002).} As revised, however, it gives a lawyer greater leeway than did the former Louisiana rule to "use" confidential information to the disadvantage of his former client. More specifically, the revision permits a lawyer to use confidential information against his former client if it has "become generally known," but he still may not "reveal" such information.\footnote{La. Rules of Prof'l Conduct R. 1.9 (2004).}

\begin{thebibliography}{9}
\bibitem{1} La. Rules of Prof'l Conduct R. 1.8(k) (2004).
\bibitem{3} See La. Rules of Prof'l Conduct R. 1.8(c) & 1.10(a) (1987) (repealed 2004); Model Rules of Prof'l Conduct R. 1.8(c) & 1.10(a) (1983) (amended 2004); see also ABA Ethics 2000 Commission, Model Rule 1.8: Reporter's Explanation of Changes (2002).
\bibitem{7} See Model Rules of Prof'l Conduct R. 1.9 (2002).
\bibitem{8} La. Rules of Prof'l Conduct R. 1.9 (2004).
\end{thebibliography}
d. Rule 1.10—Imputation of Conflicts of Interest: General Rule

Rule 1.10 imputes any conflicts arising under "Rules 1.7 or 1.9" to all members of the lawyer's "firm," unless the prohibition is based on a "personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Moreover, it permits a firm to be adverse to a client represented by a lawyer who has left the firm, unless a lawyer remaining at the firm possesses confidential information "material to the matter." Finally, it clarifies that a client can waive an imputed conflict through informed consent, confirmed in writing.

This rule, which is identical to Model Rule 1.10, implements one significant substantive change to Louisiana law. More particularly, Rule 1.10 no longer imputes most "personal interest" conflicts to other members of a lawyer's firm. Thus, for example, if one lawyer at a firm would be "materially limited" in his representation of a client due to personal disdain for the client's cause, that lawyer's conflict generally will not be imputed to other members of his firm.

e. Rule 1.11—Special Conflicts of Interest for Former and Current Government Officers and Employees

Rule 1.11 addresses the "special conflicts of interest" issues that arise in the context of government employment. It applies to existing government lawyers, to those who have passed through the "revolving door" into private practice, and to those who have transferred between agencies.

Identical to Model Rule 1.11, this rule incorporates the significant changes wrought by the ABA in the Ethics 2000 revision process. It now provides that a lawyer who has formerly served as a public officer or employee of the government is subject to the confidentiality provisions of Rule 1.9(c), and is also prohibited from

221. Id. R. 1.10.
222. Id.
223. Id.
representing a client in a matter in which the lawyer participated "personally and substantially," unless the appropriate government agency gives its informed consent, confirmed in writing. While the rules impute such a conflict to other members of the lawyer's firm, imputation can be resolved through nonconsensual screening. Furthermore, to prevent a former government official from taking advantage of the citizens he once served, the lawyer may not be adverse to a citizen if he learned "confidential government information" about them that "could be used to the material disadvantage of that person." Finally, the rule provides that a current government lawyer is subject to Rules 1.7 and 1.9, and may be adverse to a former private client only under limited circumstances.

f. Rule 1.12—Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Rule 1.12 addresses the conflicts issues that arise as to a former judge, law clerk, arbitrator, or third-party neutral. This rule is identical to Model Rule 1.12 which was revised by the ABA to address, among other things, a lawyer participating in ADR proceedings. It prohibits such a lawyer from representing anyone in a matter in which he previously participated "personally and substantially," unless all parties provide informed consent, confirmed in writing. Furthermore, this rule prohibits such a lawyer from seeking employment with any participant in a matter in which the lawyer is currently participating personally and substantially. Finally, the rule imputes these conflicts to others in the lawyer's firm unless the disqualified lawyer is properly screened.

229. Id.
230. Id.
233. La. Rules of Prof'l Conduct R. 1.12 (2004). This rule makes a limited exception for a lawyer who previously served as a partisan arbitrator. Id. R. 1.12(d).
234. Id. R. 1.12(b). This rule makes a limited exception for judicial law clerks: "A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer." Id.
235. Id. R. 1.12(c). The ABA Ethics 2000 Commission recommended screening in this context because it was concerned that failure to permit screening
g. Rule 1.18—Duties to Prospective Client

Rule 1.18 is an entirely new addition to the Louisiana Rules of Professional Conduct. It addresses a lawyer's obligations to prospective clients with whom he forms no attorney-client relationship. Although the LSBA Ethics 2000 Committee recommended that the Court vary somewhat from Model Rule 1.18 to permit more representations adverse to prospective clients, the Court declined to do so. As a result, this rule is identical to Model Rule 1.18. It prohibits a lawyer from using or revealing confidential information learned from a former client "except as Rule 1.9 would permit" as to a former client. It prohibits a lawyer from being adverse to a prospective client if he received information that "could be significantly harmful to that person in the matter," and imputes this conflict to other members of the firm. Nevertheless, this rule permits adverse representation by the lawyer if "both the affected client and the prospective client have given informed consent, confirmed in writing," or by his firm, if the lawyer who received the information is screened and took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client."
C. Lawyer as Counselor

a. Rule 2.1—Advisor

Rule 2.1 requires a lawyer to "exercise independent professional judgment and render candid advice." In rendering advice, a lawyer may refer not only to law, but also to other considerations that may be relevant. This rule was not revised in 2004 and is identical to Model Rule 2.1.

b. Rule 2.2—Deleted

Former Rule 2.2—as well as former Model Rule 2.2—addressed a lawyer's obligations when functioning as an "Intermediary." In 2002, the ABA deleted Model Rule 2.2 on recommendation of the ABA Ethics 2000 Commission because the concept of "intermediation" (as distinct from either "representation" or "mediation") was not well understood. For this reason, the Louisiana Supreme Court deleted this provision from the Louisiana Rules.

c. Rule 2.3—Evaluation for Use by Third Parties

Rule 2.3 permits a lawyer to evaluate a client-related matter for a third person, but only if doing so "is compatible with other aspects of the lawyer's relationship with the client." Moreover, if the evaluation likely will be adverse to the lawyer's client, the lawyer must obtain his client's informed consent in advance. Finally, the lawyer conducting an evaluation must disclose no more confidential information than is authorized in connection with the evaluation.

This rule differs from the former Louisiana rule by dispensing with the requirement of client preauthorization when the lawyer's evaluation will not be unfavorable to the client and the evaluation is

242. Id. R. 2.1.
243. Id.
247. La. Supreme Court Order—Jan. 27, 2004
249. Id. R. 2.3(b).
250. Id. R. 2.3(c).
otherwise compatible with the lawyer-client relationship.\textsuperscript{251} It is identical to Model Rule 2.3.\textsuperscript{252}

d. Rule 2.4—Lawyer Serving as Third-Party Neutral

Rule 2.4 requires a lawyer serving as a third-party neutral\textsuperscript{253} to inform any unrepresented parties that he does not represent them.\textsuperscript{254} Moreover, when the lawyer knows or should know that a party does not understand his role, he must correct the misunderstanding.\textsuperscript{255}

This is an entirely new addition to the Louisiana Rules. It is identical to Model Rule 2.4, which the ABA adopted to avoid confusion among ADR parties as to the lawyer's role.\textsuperscript{256}

D. Lawyer as Advocate

a. Rule 3.1—Meritorious Claims and Contentions

Rule 3.1 prohibits a lawyer from pursuing claims, defenses, or positions in litigation 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."\textsuperscript{257} Nevertheless, it permits a criminal defense lawyer to demand that a prosecutor establish every element of a case.\textsuperscript{258}

This provision reflects a change in approach, if not in substance, from the former Louisiana rule. In 1986, the Louisiana Task Force substituted the term "in good faith" for the model rule term "not frivolous" because it believed that the notion of "frivolousness" was vague.\textsuperscript{259} In contrast, the Task Force believed—perhaps

\begin{footnotesize}
\begin{enumerate}
\item See Model Rules of Prof'l Conduct R. 2.3 (2002).
\item A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter."
\item Id. R. 2.4(a).
\item Id. R. 2.4(b).
\item Id.
\item See Model Rules of Prof'l Conduct R. 2.4 (2002); see also ABA Ethics 2000 Commission, Model Rule 2.4: Reporter's Explanation of Changes (2002).
\item Id.
\end{enumerate}
\end{footnotesize}
optimistically—that there was "relatively little question among the Bench and Bar about the meaning of good faith." As a matter of substance, the difference between a standard that employs the indeterminate term "not frivolous" and one that uses the similarly indeterminate term "in good faith" is evanescent—although one certainly could argue that the later term connotes a more subjective standard. As a matter of process, the LSBA Ethics 2000 Committee tended to err on the side of conformity with the corresponding Model Rule rather than on the side of marginally-useful incongruity. For this reason, Rule 3.1 is identical to Model Rule 3.1.

b. Rule 3.2—Expediting Litigation

Rule 3.2 requires a lawyer to make "reasonable efforts" to expedite litigation consistent with the interests of the client. It was not revised in 2004 and is identical to Model Rule 3.2.

c. Rule 3.3—Candor Toward the Tribunal

Rule 3.3 addresses a lawyer's obligation to refrain from misleading a tribunal. Paragraph (a)(1) prohibits a lawyer from "knowingly" making a false statement of fact or law to the tribunal and requires him to correct a false statement he made previously. This reflects a significant revision from the former rule, which prohibited only false statements that were "material." This paragraph is identical to Model Rule 3.3(a).

Paragraph (a)(2) forbids a lawyer from failing to disclose controlling legal authority that the lawyer knows is directly adverse

260. Id. (quoting the Task Force's report to the Louisiana Supreme Court). On the merits, this rationale is questionable, given that the terms "in good faith" and "not frivolous" are equally vague.
266. Id. R. 3.3(a)(1).
to his position. This is identical in substance to the former rule and tracks Model Rule 3.3(a)(2) verbatim.

Paragraph (a)(3) prohibits a lawyer from knowingly offering false evidence and requires him to undertake reasonable efforts to correct any "material" falsities his side has offered into evidence. Moreover, as to evidence that a lawyer "reasonably believes"—but does not "know"—is false, the lawyer must refuse to offer the evidence, unless it is the "testimony of a defendant in a criminal matter." In so doing, it gives a lawyer more discretion to decline to offer suspicious evidence than existed under the former rule. This paragraph is identical to Model Rule 3.3(a)(3).

Paragraph (b) requires that a lawyer who comes to know that someone has or will commit a crime or fraud related to a proceeding in which the lawyer is a participant must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This paragraph expands a lawyer's obligation to include an obligation to report wrongdoing by any person associated with the proceeding—not just by the lawyer's client or witnesses, as was the case under the former rule. This paragraph is identical to the corresponding Model Rule.

Paragraph (c) provides that the foregoing candor-related obligations "continue to the conclusion of the proceeding" and apply "even if compliance requires disclosure of information otherwise protected by Rule 1.6." This reflects two significant changes from

272. Id. The ABA Ethics 2000 Commission revised the comments to Model Rule 3.3 to note that a lawyer should not be held accountable under if a court insists that he permit a criminal defendant to offer false testimony. See ABA Ethics 2000 Commission, Model Rule 3.3: Reporter's Explanation of Changes (2002).
277. See Model Rules of Prof'l Conduct R. 3.3(b) (2002). In drafting this paragraph, the ABA Ethics 2000 Committee incorporated the substance of former Model Rule 3.3(a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G) ("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge"). See ABA Ethics 2000 Commission, Model Rule 3.3: Reporter's Explanation of Changes (2002).
278. La. Rules of Prof'l Conduct R. 3.3(c) (2004).
the former Louisiana rule. First, while the Model Rules have always required disclosure of confidential client information to assure compliance with this rule, the Louisiana Task Force in 1986 inexplicably chose a different course. It recommended, and the Louisiana Supreme Court adopted, a version of former Rule 3.3 that prohibited a lawyer from making certain disclosures if doing so would have revealed information protected by Rule 1.6.\textsuperscript{279} Second, while the former Model Rule provided that all of the "duties stated in paragraph (a) continue until the conclusion of the proceeding," former Louisiana Rule 3.3(b) made a lawyer’s obligation to comply with some of the disclosure items "unlimited in time."\textsuperscript{280} As revised, the new rule is now consistent with the Model Rule in all respects.\textsuperscript{281}

Finally, paragraph (d) requires a lawyer in an ex parte proceeding to inform the tribunal of "all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."\textsuperscript{282} The substance of this rule is unchanged from the former Louisiana rule and is identical to Model Rule 3.3(d).\textsuperscript{283}

d. Rule 3.4—Fairness to Opposing Party and Counsel

Rule 3.4 sets forth a series of paragraphs regulating a lawyer’s obligations to his opponents in litigation. Among other things, it prohibits a lawyer from destroying, falsifying, or obstructing access to evidence.\textsuperscript{284} It prohibits the payment of prohibited inducements to witnesses, requires a lawyer to obey the rules of a tribunal, and prohibits a lawyer from making frivolous discovery requests and from unreasonably refusing to comply with an opponent’s discovery

\textsuperscript{279} Former ABA Model Rule 3.3(b) provided that \textit{all} of the obligations set forth in ABA Model Rule 3.3(a) applied "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Model Rules of Prof’l Conduct R. 3.3(b) (1983) (amended 2002). In contrast, under the 1987 Louisiana version of Rule 3.3(b), only the disclosure obligations set forth in paragraphs 3.3(a)(2) and (4) were exempted from the confidentiality requirement of Rule 1.6. \textit{See} La. Rules of Prof’l Conduct R. 3.3 (1987) (repealed 2004). Thus, former Rule 1.6 trumped a Louisiana lawyer’s disclosure obligations set forth in former Rules 3.3(a)(1) and (3).


\textsuperscript{281} \textit{See} Model Rules of Prof’l Conduct R. 3.3(c) (2002).

\textsuperscript{282} La. Rules of Prof’l Conduct R. 3.3(d) (2004).


\textsuperscript{284} La. Rules of Prof’l Conduct R. 3.4(a)–(b) (2004).
requests.\textsuperscript{285} In trial, it precludes a lawyer from alluding to irrelevant and unsupported facts, and from asserting personal knowledge or personal opinion regarding facts and issues in dispute.\textsuperscript{286} Finally, it prohibits a lawyer from requesting that a nonclient withhold information from another party unless the nonclient is a relative or agent of his client.\textsuperscript{287}

This rule was not revised in 2004. It is identical to Model Rule 3.4.\textsuperscript{288}

e. Rule 3.5—Impartiality and Decorum of the Tribunal

Rule 3.5 prohibits a lawyer from disrupting a tribunal or from seeking to influence improperly a judge or juror.\textsuperscript{289} During a proceeding, it forbids unauthorized ex parte communication with such persons.\textsuperscript{290} Thereafter, it permits communication with former jurors unless the communication is otherwise prohibited by law, is unwelcome, or involves misrepresentation or coercion.\textsuperscript{291}

This rule was revised to permit more post-verdict communication with jurors than the prior rule and to provide more guidance to a lawyer seeking to contact former jurors.\textsuperscript{292} It is identical to Model Rule 3.5.\textsuperscript{293}

f. Rule 3.6—Trial Publicity

Rule 3.6 prohibits a lawyer from making an extrajudicial statement to the media that the lawyer should know will likely prejudice an adjudicative proceeding in which he is participating.\textsuperscript{294} The rule enumerates a host of statements that the lawyer may permissibly make notwithstanding the general prohibition, including

\begin{itemize}
  \item \textsuperscript{285} \textit{Id.} R. 3.4(b)–(d).
  \item \textsuperscript{286} \textit{Id.} R. 3.4(e).
  \item \textsuperscript{287} \textit{Id.} R. 3.4(f).
  \item \textsuperscript{288} \textit{See} Model Rules of Prof’l Conduct R. 3.4 (2002).
  \item \textsuperscript{289} \textit{La.} Rules of Prof’l Conduct R. 3.5(a) (2004).
  \item \textsuperscript{290} \textit{Id.} R. 3.5(b).
  \item \textsuperscript{291} \textit{Id.} R. 3.5(c).
  \item \textsuperscript{292} The ABA Ethics 2000 Commission noted that the revised Model Rule, although permitting more post-verdict contact, affords more protection for jurors than did ABA Model Code of Professional Responsibility DR 7-108(D), which provided as follows: “After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.” \textit{See} ABA Ethics 2000 Commission, Model Rule 3.5: Reporter’s Explanation of Changes (2002).
  \item \textsuperscript{293} \textit{See} Model Rules of Prof’l Conduct R. 3.5 (2002).
  \item \textsuperscript{294} \textit{La.} Rules of Prof’l Conduct R. 3.6(a) (2004).
\end{itemize}
a statement of the claim or defense involved, a statement providing information in the public record, a statement regarding the scheduling of the proceeding, and statements dealing with similar matters. In addition, the rule permits a lawyer to respond to “recent publicity” by making a limited statement that he reasonably believes is “required” to protect his client from “substantial undue prejudicial effect.”

This rule was not revised in 2004. It is identical to Model Rule 3.6.

**g. Rule 3.7—Lawyer as Witness**

Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which he is likely to be a “necessary” witness—unless his disqualification would cause “substantial hardship” to the client, or his testimony relates to an uncontested issue or to the nature of his legal services. A lawyer’s disqualification under this rule is not generally imputed to other members of his firm.

Rule 3.7 differs from its predecessor in that former paragraph (c)—a paragraph included in neither the 1983 or 2002 versions of the Model Rules—has been deleted. This rule is now identical to Model Rule 3.7.

**h. Rule 3.8—Special Responsibilities of a Prosecutor**

Rule 3.8 prohibits a prosecutor from pursuing a case that he knows lacks probable cause. Furthermore, it requires a prosecutor to facilitate access to counsel for the accused and to refrain from seeking waivers of important pretrial rights until counsel is obtained. It incorporates the Brady obligation to disclose evidence...
favorable to the accused.\textsuperscript{305} It restricts a prosecutor's right to subpoena a lawyer for information about a client, unless the prosecutor reasonably believes that the information is not privileged, is "essential" to complete an investigation, and is unobtainable elsewhere.\textsuperscript{306} Finally, it contains a provision on pretrial publicity that is similar to the provisions of Rule 3.6.\textsuperscript{307}

This rule contains no substantive revisions. It is identical to Model Rule 3.8.\textsuperscript{308}

\textit{i. Rule 3.9—Advocate in Nonadjudicative Proceedings}

Rule 3.9 requires a lawyer representing a client before a legislative body or administrative agency in a non-adjudicative proceeding to disclose that the appearance is in a representative capacity.\textsuperscript{309} Moreover, it requires that the lawyer's conduct conform to the provisions of Rule 3.3(a) through (c), 3.4(a) through (c), and 3.5.\textsuperscript{310}

The substance of this rule was not revised.\textsuperscript{311} It is identical to Model Rule 3.9.\textsuperscript{312}

\textsuperscript{305} Id. R. 3.8(d). See also Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963).
\textsuperscript{306} Id. R. 3.8(e).
\textsuperscript{307} Id. R. 3.8(f).
\textsuperscript{308} See Model Rules of Prof'1 Conduct R. 3.8 (2002).
\textsuperscript{309} La. Rules of Prof'1 Conduct R. 3.9 (2004).
\textsuperscript{310} Id.
\textsuperscript{311} Note that the 1983 Model Rule and 1987 version of this rule formerly referenced "legislative or administrative tribunal." See Model Rules of Prof'1 Conduct R. 3.9 (1983) (amended 2002); La. Rules of Prof'1 Conduct R. 3.9 (1987) (repealed 2004). The ABA replaced this term in the Model Rule with "legislative body or administrative agency." Model Rules of Prof'1 Conduct R. 3.9 (2002). The Model Rules define the term "tribunal" in Model Rule 1.0(m) to denote courts and other agencies when those agencies are acting in an adjudicative capacity. Model Rules of Prof'1 Conduct R. 1.0(m) (2002). The ABA believed that this change was necessary to clarify that Rule 3.9 applies only when the lawyer is representing a client in a nonadjudicative proceeding of a legislative body or administrative agency. See ABA Ethics 2000 Commission, Model Rule 3.9: Reporter's Explanation of Changes (2002). These changes are included in the revised Louisiana rule.
\textsuperscript{312} See Model Rules of Prof'1 Conduct R. 3.9 (2002).
E. Transactions with Nonclients

a. Rule 4.1—Truthfulness in Statements to Others

Rule 4.1 prohibits a lawyer from knowingly making a false statement of material fact or law in the course of a representation. Moreover, it forbids knowing nondisclosure of a material fact if disclosure is necessary to avoid assisting a client crime or fraud. This obligation to disclose, however, is trumped by the lawyer’s confidentiality obligation to the client as set forth in Rule 1.6.

This rule was not revised in 2004. It is identical to Model Rule 4.1.

b. Rule 4.2—Communication with Person Represented by Counsel

Rule 4.2 prohibits a lawyer from communicating with a “person” the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of that person’s lawyer, or the communication is authorized by law or court order. As to contacting constituents of a represented organization, a lawyer is free to communicate with any former employee who is not independently represented. In addition, a lawyer may communicate with any other constituent who does not regularly consult with the organization’s lawyer, who can not bind the organization with respect to the matter, or whose act or omission may not be imputed to the organization for liability purposes.

This rule differs from its predecessor in three respects. First, it extends the no-contact rule to any “person” represented by a lawyer in a matter and not merely to any “party.” Second, it permits a lawyer to obtain a “court order” to circumvent the no-contact principle. This change was prompted at the ABA level by an request from the United States Department of Justice to amend the Model Rules to permit more liberal contact with represented

314. Id. R. 4.1(b).
315. Id.
318. Id. R. 4.2(b).
witnesses and subjects.\textsuperscript{321} Finally, the Court added an entirely new paragraph addressing contacts with constituents of a represented organization. Paragraph (b), which deviates from the black letter of Model Rule 4.2, contains language extracted from Comment 7 to that rule.\textsuperscript{322} The LSBA Ethics 2000 Committee recommended adoption of this paragraph\textsuperscript{323} to provide guidance to Louisiana lawyers regarding which constituents of a represented organization may be contacted directly without going through the organization's lawyer.\textsuperscript{324} The Committee believed that guidance was necessary,\textsuperscript{325} particularly considering the importance of providing direction to a lawyer who must interview witnesses and otherwise investigate a matter to comply with his obligations under Rule 1.1 (competence) and Rule 3.1 (meritorious claims and contentions), among others.

\textsuperscript{321} Although a communication with a represented person pursuant to a court order will ordinarily fall within the "authorized by law" exception, the ABA Ethics 2000 Commission intended the specific reference to a "court order" to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment 4. See Model Rules of Prof'l Conduct R. 4.2, cmt. 4; see also ABA Ethics 2000 Commission, Model Rule 4.2: Reporter's Explanation of Changes (2002). Note that the Commission decided against recommending more specialized rules regarding a government lawyer engaged in law enforcement because it concluded that Rule 4.2 struck the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system. See id.

\textsuperscript{322} Compare La. Rules of Prof'l Conduct R. 4.2(b) (2004), with Model Rules of Prof'l Conduct R. 4.2 & cmt. 7 (2004).

\textsuperscript{323} The LSBA Ethics 2000 Committee believed that it was not proposing a change in the law regarding contact with constituents of represented organizations, but rather, that it was restating the law as it existed at that time. LSBA Committee Minutes; Nov. 5, 2002.

\textsuperscript{324} Concerned that this rule would prohibit a lawyer from "communicating with an insurance adjuster," the Court wrote to the LSBA Ethics 2000 Committee and requested "a brief explanation of the types of persons intended to be included in this prohibition, as well as explanation of those who would not be included in the prohibition . . . ." See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 4 (Oct. 29, 2003). The Committee responded by explaining that an insurance adjuster or claims manager "should be 'off-limits' to an opposing lawyer unless the insurance company has not assigned or retained a lawyer to handle that matter, or the insurance company's lawyer has authorized the contact in advance." See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 13 (Nov. 20, 2003) (attached to Letter from Harry S. Hardin, III, to Pascal F. Calogero, Jr. (Nov. 20, 2003)).

\textsuperscript{325} Prior to the adoption of this paragraph, many lawyers struggled with the issue of contacting current employees of a corporate adversary because Louisiana courts had not articulated a bright-line rule. See, e.g., Jenkins v. Wal-Mart Stores, Inc., 956 F. Supp. 695 (W.D. La. 1997); In re Shell Oil Refinery, 143 F.R.D. 105 (E.D. La. 1992); see also Model Rules of Prof'l Conduct Rule 4.2 cmt. 4 (2002); Restatement (Third) of the Law Governing Lawyers § 100(2) (2000).
c. Rule 4.3—Dealing with Unrepresented Person

Rule 4.3 prohibits a lawyer dealing with an unrepresented person from suggesting that he is disinterested. Moreover, it requires such a lawyer to clarify his role if he reasonably should know that the unrepresented person is confused in this regard. Finally, this rule prohibits a lawyer from giving any legal advice to an unrepresented person other than the advice to secure counsel if the lawyer reasonably should know that the person’s interests possibly conflict with those of his client.

This rule, which is identical to Model Rule 4.3, is not a significant change from the former Louisiana rule. In fact, the 2002 amendment to the Model Rule 4.3 brought the model rule in line with the corresponding Louisiana rule. The no-legal-advice principle now set forth in the model rule had been part of the Louisiana Rules since the Task Force imported the principle from former ABA Model Code of Professional Responsibility DR 7-104(A)(2). In recommending adoption of this provision, the ABA Ethics 2000 Commission was motivated by reports that it was not uncommon for lawyers to engage in the disfavored practice of providing legal advice in negotiations with an unrepresented party.

d. Rule 4.4—Respect for Rights of Third Persons

Rule 4.4 prohibits a lawyer from engaging in conduct that has no substantial purpose other than to embarrass, delay, or burden a third person, or that violates the legal rights of a third person. Moreover, it provides that a lawyer who accidentally receives a clearly

327. Id.
330. The reason for the initial decision to delete the Model Code prohibition from the text was the difficulty of determining what constitutes impermissible advice-giving. The Commission recommended that language be included in the Comment to address the application of the textual prohibition in some common situations. Although the line may be difficult to draw, the Commission believed that it is important to discourage a lawyer from overreaching in negotiations with unrepresented persons. See ABA Ethics 2000 Commission, Model Rule 4.3: Reporter's Explanation of Changes (2002).
331. See id.
confidential or privileged writing must refrain from examining the document and return it to the sender.

The latter provision addressing inadvertent communications departs significantly from the substance of the former rule and from Model Rule 4.4(b). The former rule did not address the issue of inadvertently sent documents. While Model Rule 4.4 does address the issue, it imposes a less onerous burden on the receiving lawyer, requiring only that the lawyer notify the sender of receipt. Based on an ethics opinion from the ABA Standing Committee on Ethics and Professional Responsibility reaching the same conclusion, the new Louisiana rule places an unrealistic obligation on a lawyer and, at the very least, will be difficult to enforce.

F. Law Firms

a. Rule 5.1—Responsibilities of Partners, Managers, and Supervisory Lawyers

Rule 5.1 requires a lawyer engaged in the management of a firm or in the supervision of a subordinate lawyer to make "reasonable efforts" to ensure that his underlings comply with the Louisiana Rules

333. This rule's reference to the "attorney-client privilege" was unfortunate. The term is superfluous, given that any information that is "confidential" under Rule 1.6 is within the scope of the attorney-client privilege. Moreover, the use of an evidence-law term—presumably with its jurisprudential baggage—when elsewhere the term "confidential information" is used, could lead to confusion. Perhaps for the reason, the ABA Ethics 2000 Commission purposely removed the few remaining vestiges of the law of privilege from the Model Rules. See ABA Ethics 2000 Commission, Model Rule 8.3: Reporter's Explanation of Changes (2002).


338. In 2002, the ABA Ethics 2000 Commission noted that numerous inquiries have been directed to ethics committees regarding the proper course of conduct for a lawyer who receives a fax or other document from opposing counsel that was not intended for the receiving lawyer. The Commission noted, however, that Opinion 92-368 had been criticized, in part because there is no provision of the Model Rules directly on point. The Commission decided that this Rule should require only that the lawyer notify the sender when the lawyer knows or reasonably should know that material was inadvertently sent, thus permitting the sending lawyer to take whatever steps might be necessary or available to protect the interests of the sending lawyer's client. See ABA Ethics 2000 Commission, Model Rule 4.4: Reporter's Explanation of Changes (2002). The Louisiana Supreme Court, on recommendation of the LSBA Ethics 2000 Committee, took a different approach in paragraph (b) of this rule.
of Professional Conduct. Moreover, it holds a lawyer responsible for another lawyer’s professional misconduct if the lawyer either orders or knowingly ratifies the other’s conduct, or if the lawyer fails to exercise his managerial or supervisory power in an effort to mitigate the consequences of an underling’s misconduct.

This rule is similar to the former rule and is identical to Model Rule 5.1. In 2002, the ABA revised the corresponding model rule to clarify that it applies to a managing lawyer in a corporate, government, or legal-services organization, as well as to a partner in a private law firm. The ABA intended no change in substance.

b. Rule 5.2—Responsibilities of Subordinate Lawyer

Rule 5.2 provides that a subordinate lawyer is bound by the Louisiana Rules of Professional Conduct even if he commits misconduct at the direction of another person. However, such a lawyer’s conduct is excused if he follows a supervisor’s reasonable advice on “an arguable question of professional duty.” This rule is unchanged and is identical to Model Rule 5.2.

c. Rule 5.3—Responsibilities Regarding Nonlawyer Assistants

Rule 5.3 provides that a lawyer engaged in the management of a firm or in the supervision of nonlawyer support personnel must make “reasonable efforts” to ensure that the conduct of nonlawyers at the firm is “compatible with the professional obligations of the lawyer.” Moreover, it holds a lawyer responsible for a nonlawyer’s conduct if he either orders or knowingly ratifies the conduct, or fails to exercise managerial or supervisory power in an effort to mitigate the consequences of an underling’s misconduct.

This rule is identical in substance to the former rule. It tracks verbatim Model Rule 5.3.

340. Id. R. 5.1(c).
344. Id. R. 5.2(b).
347. Id. R. 5.3(c).
d. Rule 5.4.—Professional Independence of a Lawyer

Rule 5.4 prohibits a lawyer from sharing legal fees with a nonlawyer except under limited circumstances.\(^349\) For example, a lawyer in a firm may make payments over time to a deceased lawyer’s heirs or estate. Similarly, a lawyer who winds-up the business of a deceased lawyer may pay his heirs or estate a fair share of the fee to account for work done by the deceased prior to death. Also, a lawyer may include nonlawyer employees in a compensation or retirement plan, even though the plan is based on a profit-sharing arrangement, and may share fees with a nonprofit lawyer referral program in accordance with Rule 7.2(b).\(^350\) Finally, the rule prohibits a lawyer from engaging in business with a nonlawyer if “any” of the activities of the enterprise constitute the practice of law.\(^351\)

This rule is identical to former Rule 5.4, with the addition of a provision permitting the sharing of legal fees with nonprofit lawyer referral services.\(^352\) It differs from Model Rule 5.4 in two respects. First, it omits any reference to Model Rule 1.17 (sale of a law practice), which was not adopted in Louisiana.\(^353\) Second, paragraph (a)(4) is “Reserved.”\(^354\) The corresponding paragraph of Model Rule 5.4, provides that “a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.”\(^355\) The ABA included this language in the corresponding Model Rule largely because such fee-sharing arrangements were upheld in Formal Opinion 93-374 of the ABA Standing Committee on Ethics and Professional Responsibility.\(^356\) Although the LSBA recommended adoption of Model Rule 5.4(a)(4), the Louisiana Supreme Court declined to adopt this paragraph. The Court’s decision in this regard should have no effect on fee-sharing arrangements with nonprofit lawyer-referral services, although it will affect the sharing of fees with public-interest groups such as the ACLU.\(^357\)

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350. Id.
351. Id. R. 5.4(b)–(d).
357. See La. Rules of Prof’l Conduct Rule 7.2(b) (2004); see also Model Rules of Prof’l Conduct Rule 7.2(b)(2) (2002). An organization such as the ACLU that
Rule 5.5 prohibits a Louisiana lawyer from practicing law in another jurisdiction if doing so is prohibited under that jurisdiction’s law.\textsuperscript{358} Within Louisiana, this rule prohibits a lawyer from assisting a nonlawyer with the unauthorized practice of law.\textsuperscript{359} Moreover, it prohibits any practice-related association with a disbarred lawyer\textsuperscript{360} and permits associations with a suspended lawyer only if the lawyer submits a detailed registration statement to the Office of Disciplinary Counsel.\textsuperscript{361} Finally, this rule defines the practice of law as: holding one’s self out as a lawyer; giving legal advice; appearing for a client at a legal proceeding or related discovery proceeding; negotiating or transacting any matter on behalf of a client with third parties; and otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.\textsuperscript{362}

This rule was not modified by the Court during the Ethics 2000 process. However, the Court subsequently amended the rule to adopt the revisions to the 2002 Model Rules of Professional Conduct proposed by the ABA’s Commission on Multijurisdictional Practice\textsuperscript{363}. As a result of these amendments, it parallels Model Rule 5.5 in large measure.\textsuperscript{364} For example, Rule 5.5(b) now prohibits a lawyer from establishing an office or other systematic and continuous presence in a jurisdiction, unless permitted to do so by law, or by another provision of Rule 5.5.\textsuperscript{365} Likewise, Rule 5.5(c) now expressly permits a lawyer in good standing to practice law on a temporary basis in another jurisdiction under the following circumstances: when the lawyer’s services are performed in active association with a lawyer admitted to practice law in the jurisdiction; when his services are ancillary to pending or prospective litigation or administrative

\textsuperscript{358} La. Rules of Prof'l Conduct R. 5.5(a) (2005).
\textsuperscript{359} Id. R. 5.5(a).
\textsuperscript{360} Id. R. 5.5(e)(1).
\textsuperscript{361} Id.
\textsuperscript{362} Id. R. 5.5(e)(3).
\textsuperscript{363} See Order, Supreme Court of Louisiana (effective April 1, 2005). www.aba.net.org/epm/emp-home.html
\textsuperscript{364} See La. Rules of Prof'l Conduct 5.5 (2005).
\textsuperscript{365} Id. R. 5.5(b).
agency proceedings in a state where the lawyer is admitted or expects to be admitted pro hac vice or is otherwise authorized to appear; when his services are performed in an alternative dispute resolution ("ADR") setting, such as arbitration or mediation; and when his services involve non-litigation work that are related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Also, revised Rule 5.5(d) identifies multijurisdictional practice standards relating to (i) legal services by a lawyer who is an employee of a client, and (ii) legal services that the lawyer is authorized by federal or other law to render in a jurisdiction in which the lawyer is not licensed to practice.

Paragraph (e) of the Louisiana rule is not found in the Model Rules. The Louisiana Supreme Court first adopted the substance of this paragraph's provisions in 2002 to preclude disbarred and suspended lawyers from skirting court-imposed disciplinary sanctions by participating in the practice of law in a purportedly paraprofessional capacity.

f. Rule 5.6—Restrictions on Right to Practice

Rule 5.6 prohibits a lawyer from making any employment agreement restricting a lawyer's right to practice after termination of the agreement (except an agreement concerning retirement benefits). Likewise, it prohibits a lawyer from entering into any agreement restricting a lawyer's right to practice as part of a settlement. The rule is identical in substance to former Rule 5.6. It is also identical to Model Rule 5.6.

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366. *Id.* R. 5.5(c).
367. *Id.* R. 5.5(d). *See also* ABA Multijurisdictional Practice Committee, Client Representation in the 21st Century, Final Report (adopted August 12, 2002).
369. La. Rules of Prof'l Conduct R. 5.6(a) (2004).
370. *Id.* R. 5.6(b).
372. *See* Model Rules of Prof'l Conduct R. 5.6 (2002). *Note* that the ABA amended the corresponding Model Rule to clarify that it applies to settlements not only between purely private parties, but also between a private party and the government. *See* ABA Ethics 2000 Commission, Model Rule 5.6: Reporter's Explanation of Changes (2002) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 394). This amendment is now incorporated into Rule 5.6.
g. Model Rule 5.7—Responsibilities Regarding Law-Related Services

Model Rule 5.7 was not adopted by the Louisiana Supreme Court. This rule provides that a lawyer "shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services." In 2004, the LSBA Ethics 2000 Committee recommended against adoption of this rule because it was concerned that adoption might lead Louisiana lawyers to believe that they are not subject to discipline for engaging in misconduct unrelated to the practice of law. On the contrary, Rule 8.4 makes it clear that a Louisiana lawyer is in fact subject to discipline for committing unlawful acts wholly unrelated to the practice of law. Thus, a Louisiana lawyer can be disciplined under the Louisiana Rules of Professional Conduct regardless of whether he engages in "misconduct" while providing law-related services.

G. Public Service

a. Rule 6.1—Voluntary Pro Bono Publico Service

Rule 6.1 suggests—though does not require—that a lawyer "should aspire to provide" fifty hours of pro bono legal services each year. It goes on to suggest that a "substantial majority" of the lawyer's time should be performed for "persons of limited means" and for organizations addressing their needs. The remainder of a lawyer's time should be spent providing pro bono or reduced-rate services to other civic and charitable organizations.

373. Model Rules of Prof'l Conduct R. 5.7(a) (2002).
374. LSBA Committee Minutes; Nov. 5, 2002.
376. Id. R. 6.1.
377. Id. R. 6.1(a).
378. Id. R. 6.1(b).
This rule differs from the former rule by targeting a particular hourly goal and by prioritizing service to the poor over other civic, charitable, and law-reform activities.\textsuperscript{379}

This rule is identical in substance to Model Rule 6.1,\textsuperscript{380} except for the omission of the final sentence of the Model Rule. That sentence provides as follows: "In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means."\textsuperscript{381} The Court deleted this language on recommendation of the LSBA House of Delegates,\textsuperscript{382} which believed that a lawyer should be permitted to make his own decisions regarding the types of charitable organizations to which to contribute.\textsuperscript{383}

\textit{b. Rule 6.2—Accepting Appointments}

Rule 6.2 prohibits a lawyer from avoiding a tribunal appointment to represent a person unless good cause exists.\textsuperscript{384} As to what "good cause" might include, the rule lists the following: that the representation will likely violate the Rules or the law; that the representation will place an unreasonable financial burden on the lawyer; or, that the client is so repugnant to the lawyer that it would impair the lawyer-client relationship.\textsuperscript{385}


\textsuperscript{380} The corresponding Model Rule characterizes the lawyer's "obligation" under this rule as a "professional responsibility" to provide legal services to the poor. \textit{See} Model Rules of Prof'l Conduct R. 6.1 (2002). In contrast, the Louisiana rule emphasizes that the "obligation" imposed is more of an "aspirational goal" than it is a "professional responsibility." \textit{See} La. Rules of Prof'l Conduct R. 6.1 (2004). Notwithstanding this semantic difference, neither the Model Rule nor this rule imposes an obligation enforceable through the disciplinary process (or otherwise).

\textsuperscript{381} \textit{See} Model Rules of Prof'l Conduct Rule 6.1 (2002).

\textsuperscript{382} \textit{See} Minutes of the House of Delegates of the Louisiana State Bar Association at 10 (Jan. 25, 2003).

\textsuperscript{383} The Court wrote to the LSBA Ethics 2000 Committee with two concerns about Rule 6.1. First, the Court was concerned that the rule "may be somewhat confusing regarding the government lawyer who is prohibited from practicing law." \textit{See} Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 5 (Oct. 29, 2003). Second, the Court was concerned that the proposed rule did not permit lawyers to "discharge their pro bono obligation through financial support" in lieu of providing legal services. \textit{See id.} at 6. The Committee responded with alternative language to address both of these concerns. \textit{See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 17 (Nov. 20, 2003). In the end, however, the Court adopted the original language proposed by the Committee, presumably, realizing that this rule is purely aspirational and imposes no enforceable obligations.


\textsuperscript{385} \textit{Id.}
This rule is not amended in 2004. It is identical to Model Rule 6.2. 386

c. Rule 6.3—Membership in Legal Services Organizations

Rule 6.3 permits a lawyer to serve a legal-services organization even though the organization may represent someone with interests adverse to a client of the lawyer. 387 Nevertheless, the lawyer is prohibited from participating in a particular "decision or action" of the organization if doing so would be incompatible with his obligations to a client under Rule 1.7, or if doing so would adversely affect the representation of a client of the organization. 388

This rule was not substantively revised in 2004. It is identical to Model Rule 6.3. 389

d. Rule 6.4—Law Reform Activities Affecting Client Interests

Rule 6.4 permits a lawyer to serve a law-reform organization—such as the Louisiana State Law Institute or the LSBA—even though the organization’s reform activities may affect the interests of a client. 390 When the lawyer knows that a client may benefit from a decision in which the lawyer participates, he must disclose that fact but he need not identify the client. 391

This rule was not revised in 2004. It is identical to Model Rule 6.4. 392

e. Rule 6.5—Nonprofit and Court-Annexed Legal Limited Legal Services Programs

Rule 6.5 provides that a lawyer who gives limited advice to a short-term client under the auspices of a program sponsored by a court or nonprofit organization is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the short-term representation involves a conflict. 393 Moreover, such a representation is subject to the

388. Id.
391. Id.
imputation principles of Rule 1.10 only if the lawyer "knows" that another lawyer with his firm would be disqualified from undertaking the short-term representation. 394

This rule is new. It is identical to Model Rule 6.5, 395 which the ABA adopted in response to the ABA Ethics 2000 Commission’s concern that a strict application of the conflict-of-interest rules could deter a lawyer from volunteering in a program in which clients are provided limited but useful short-term legal services. Such programs include legal-advice hotlines and pro se clinics providing one-time assistance to persons of limited means. 396

H. Advertising and Solicitation

The LSBA Ethics 2000 Committee recommended no substantive changes to the vast majority of the 7-series rules relating to "information about legal services." The Committee declined to recommend major substantive revisions to these rules for two reasons. First, the Louisiana Supreme Court revised these rules in 1993 after the LSBA Advertising Committee conducted an exhaustive advertising study and engaged in months of deliberations. Second, and more importantly, the Committee felt that the ABA had moved in the wrong direction as to its work in this area. The sense of the Committee was that the ABA’s revisions tended toward deregulation at a time when questionable lawyer advertising and solicitation seemed to be on the rise. Rather than providing more determinate conduct guidelines in this area, the ABA had opted instead to

394. Id. R. 6.5(a)(1) & (2).
396. See ABA Ethics 2000 Commission, Model Rule 6.5: Reporter’s Explanation of Changes (2002). Paragraph (a)(1) of this Rule provides that the lawyer is subject to Rules 1.7 and 1.9(a) only if he “knows” that the representation involves a conflict of interest. See id. This provision makes it unnecessary for the lawyer to conduct a comprehensive conflicts check in a practice setting in which it normally is not feasible to do so. When the lawyer knows of a conflict of interest, however, he must comply with Rules 1.7 and 1.9(a). See id. Paragraph (a)(2) provides that a lawyer participating in a short-term legal services program must comply with Rule 1.10 if the lawyer knows that a lawyer with whom he is associated in a firm would be disqualified from handling the matter by Rule 1.7 or Rule 1.9(a). See id. As explained in Comment 4 to the Model Rule, a lawyer’s participation in a short-term limited legal services program does not preclude his firm from providing representation to a regular client adverse to a short-term client being represented under the program’s auspices. Nor is the personal disqualification of a lawyer participating in the program imputed to other lawyers participating in the program. Given the limited nature of the representation provided in nonprofit short-term limited legal services programs, the ABA Ethics 2000 Commission believed that the protections afforded clients by Rule 1.10 are not necessary except in the circumstances specified in paragraph (a)(2). See id.
articulate increasingly vague statements of general principles. Therefore, the Committee believed that there was no compelling reason to substantively revise these rules. Nevertheless, to make the numbering scheme of the Louisiana Rules of Professional Conduct consistent with the ABA Model Rules of Professional Conduct, the LSBA recommended that the 7-series rules be renumbered and that the rule titles be conformed to the corresponding Model Rules. The Court agreed with the Committee’s recommendations.

a. Rule 7.1—Communications Concerning a Lawyer’s Services

Rule 7.1 regulates the information a lawyer provides to clients and to potential clients about his services. Most fundamentally, it prohibits “false, misleading, or deceptive” communications. The rule also provides numerous examples of impermissible communications, including those that imply that the outcome of any particular legal matter was not or will not be related to its facts or merits, those that imply that a lawyer can influence unlawfully a decision maker, those that include unsubstantiated comparisons with other lawyers, and those that use an actor portraying a lawyer or client without disclosure that the depiction is a dramatization, among others. Finally, the rule prohibits the acceptance of a referral from anyone who has violated or would have violated this rule if they were a lawyer.

This rule is unchanged. It is based on Model Rules 7.1 and 7.2. However, it differs from the corresponding Model Rules in several respects. First, the Model Rules enumerate only two types of communications that are per se misleading, namely, those that contain material misrepresentations of fact or law, and those that omit a fact necessary to make a statement not materially misleading. In sharp contrast, Rule 7.1 sets forth eight types of communications that are “false, misleading, or deceptive,” in a nonexhaustive, illustrative list.

Second, Rule 7.1 sets forth additional requirements for communications that contain information about the lawyer’s fee, including that the lawyer must communicate the extent to which the client will be liable for expenses in contingent fee matters, and that

398. Id. R. 7.1(a)(i)-(viii).
399. Id. R. 7.1(c).
401. See id. R. 7.1.
the lawyer must honor any advertised fee for a specified period of time after the advertisement.\textsuperscript{403} No similar requirements are set forth in the Model Rules.\textsuperscript{404}

Finally, Rule 7.1 prohibits a lawyer from accepting a referral from anyone whom the lawyer "knows has engaged in any communication or solicitation relating to the referred matter that would violate these rules."\textsuperscript{405} No such prohibition is set forth in the Model Rules, although the Model Rules do prohibit a lawyer from assisting or inducing another to engage in misleading communications.\textsuperscript{406}

\textit{b. Rule 7.2—Advertising}

Although Rule 7.2 is entitled "Advertising," it actually has little to do with that subject. This rule prohibits a lawyer from paying another person to recommend his services.\textsuperscript{407} Nevertheless, it does permit a lawyer to pay the "reasonable and customary" costs of advertisements and other communications, and to pay the customary charges of nonprofit lawyer referral services, which typically are operated by local bar associations.\textsuperscript{408}

The substance of Rule 7.2 was formerly set forth in Rule 7.2(d).\textsuperscript{409} The remainder of former Rule 7.2 was renumbered "Rule 7.3." Therefore, this rule reflects no substantive revisions to the Louisiana Rules of Professional Conduct.

Rule 7.2 differs from Model Rule 7.2(b) in a few respects. First, this rule does not permit payments in conjunction with the sale of a law practice (because Louisiana has not adopted Model Rule 1.17). Second, this rule does not permit the bartering of nonexclusive client referrals as does Model Rule 7.2(b)(4).\textsuperscript{410} Finally, this rule contains more detailed provisions regulating payments to lawyer referral services than does Model Rule 7.2(b)(2).\textsuperscript{411}

\begin{thebibliography}{99}
\bibitem{403} Id. Rule 7.1(a)(viii)(A)–(B).
\bibitem{404} See Model Rules of Prof'l Conduct R. 7.1–7.2 (2002).
\bibitem{405} See La. Rules of Prof'l Conduct R. 7.1(c) (2004).
\bibitem{406} See Model Rules of Prof'l Conduct R. 8.4(a) (2002) (prohibiting assisting or inducing another to violate any other rule).
\bibitem{408} Id. For a lawyer referral service to qualify under this rule, it must refers all who request help to a participating lawyer, prohibit a participating lawyer from increasing his fee to compensate for the referral service charges, and randomly distribute referral cases among the participating lawyers. Id. R. 7.2(b).
\bibitem{411} Compare La. Rules of Prof'l Conduct Rule 7.2(b) (2004), with Model Rules of Prof'l Conduct Rule 7.2(b)(2) (2002).
\end{thebibliography}
c. Rule 7.3—Direct Contact with Prospective Clients

Rule 7.3 contains detailed provisions addressing lawyer solicitation. First, it prohibits profit-seeking personal contacts with a prospective client—unless there exists a preexisting family or professional relationship. Second, this rule prohibits profit-seeking targeted communications with a prospective client unless the lawyer marks the communication as an “advertisement,” preserves a copy for three years, and discloses his name and how he came to learn that the client needed representation. Furthermore, a lawyer is prohibited from soliciting employment if the client has expressed a desire not to be contacted, or the solicitation involves “coercion, duress, harassment, fraud, overreaching, intimidation or undue influence.” The substance of this rule was previously set forth in former Rule 7.2. Thus, no change in substance was effected in 2004.

This rule differs from the Model Rule in a few respects. First, Model Rule 7.3(a)(1) expressly permits a lawyer to solicit legal business from another lawyer. Second, paragraph (b) of Louisiana’s rule—which relates only to targeted written and recorded communications and not to in-person communications—is similar to Model Rule 7.3(c), with several additional requirements. Unlike the Model Rules, this rule requires retention of a copy of a targeted communication (although not an advertisement) for three years. This rule requires that a targeted communication (although not an advertisement) identify at least one Louisiana lawyer responsible for its content. It requires that a written communication not resemble a legal document and not be sent via restricted delivery. Furthermore, this rule sets forth detailed specifications relating to the

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412. Personal contacts include communications “in person, by person to person verbal telephone contact or through others acting at [a lawyer’s] request or on his behalf.” See La. Rules of Prof’l Conduct Rule 7.3(a) (2004).
413. Id.
414. Targeted communications include written and recorded solicitations targeted at a particular person known to need legal services (as distinguished from advertisements disseminated to the public at large).
415. Id. R. 7.3(b).
416. Id. R. 7.3(c).
421. Id. R. 7.2(b)(ii).
422. Id. R. 7.2(b)(iii)(A).
required notice that the communication is an “advertisement.”\textsuperscript{423} It imposes a thirty-day waiting period for written (although not recorded) communications relating to “accidents and disasters.”\textsuperscript{424} Finally, this rule requires that a lawyer disclose how the lawyer “obtained the information prompting the communication” if it was made in a response to a “specific occurrence involving or affecting the intended recipient.”\textsuperscript{425}

Third, paragraph (c), which prohibits unwanted solicitations and improper solicitations, is substantively similar to Model Rule 7.3(b).\textsuperscript{426} However, Rule 7.3(c)(ii) additionally prohibits a Louisiana lawyer from engaging in solicitations involving “fraud, overreaching, intimidation, or undue influence.”\textsuperscript{427}

Finally, Model Rule 7.3(d) contains a paragraph not found in the Louisiana Rules. Namely, Model Rule 7.3(d) permits a lawyer to participate in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer even though that plan may solicit clients not known to need legal services for a particular matter.\textsuperscript{428}

\textit{d. Rule 7.4—Communication of Fields of Practice}

Rule 7.4 prohibits a lawyer from claiming certification, specialization, or expertise in a particular area unless he has been recognized as such in the area in accordance with the rules and procedures established by the Louisiana Board of Legal

\textsuperscript{423} \textit{Id.} R. 7.2(b)(iii)(B), (b)(iv).
\textsuperscript{424} \textit{Id.} R. 7.2(b)(iii)(C).
\textsuperscript{425} \textit{Id.} R. 7.2(b)(v).
\textsuperscript{426} Compare \textit{id.} R. 7.3(c), with Model Rules of Prof’l Conduct R. 7.3(b) (2002).
\textsuperscript{427} \textit{La.} Rules of Prof’l Conduct R. 7.2(c)(ii) (2004).
\textsuperscript{428} \textit{See} Model Rule of Prof’l Conduct 7.3(d) (2002); \textit{see also} Allison \textit{v.} Louisiana State Bar Association, 362 So. 2d 489 (La. 1978).
This rule was not revised in 2004. It is based on Model Rule 7.4, but contains several significant differences.

First, unlike this rule, Model Rule 7.4 explicitly permits a lawyer to communicate the fields in which he "does or does not practice." Although the Louisiana Supreme Court deleted similar language from the Louisiana Rules in 1993, the widespread practice of communicating this information likely remains proper.

Second, Model Rule 7.4 gives a lawyer more latitude to communicate expertise in a particular area of the law than does Rule 7.4. For example, the Model Rule permits a lawyer to designate himself or herself as an expert in patent law and admiralty. The Louisiana rule, however, does not permit such self-designation.

Finally, Model Rule 7.4 permits a wider range of organizations to certify a lawyer's expertise in a field of practice. The Louisiana rule, in contrast, permits a lawyer to communicate expertise only in accord with "the rules and procedures established by the Louisiana Board of Legal Specialization."

e. Rule 7.5—Firm Names and Letterheads

Rule 7.5 prohibits a lawyer from using a service mark that violates the Louisiana Rules of Professional Conduct. Thus, a lawyer's service mark or trade name cannot imply a connection with a public or charitable enterprise. Moreover, if a lawyer uses a trade name, it must appear on all of his public documents, office signs, and fee

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430. The LSBA Ethics 2000 Committee recommended that the Court adopt Model Rule 7.4. After receiving that recommendation, the Court wrote to the Committee, noting that "in 1995 the LSBA passed a Resolution which placed a moratorium on adding new specialties," and requesting that the Committee to "author a short briefing paper which addresses the constitutionality of proposed Rule 7.4(d)." See Letter from Pascal F. Calogero, Jr., to Harry S. Hardin, III, at 6 (Oct. 29, 2003). In response, the Committee defended the proposal to adopt the Model Rule and opined that the LSBA moratorium and Plan of Legal Specialization should be reconsidered. See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 20 (Nov. 20, 2003). After considering the Committee's proposal and response, the Court opted to make no changes to Rule 7.4.
432. Id. R. 7.4(b)–(c).
436. Id. R. 7.5(a).
437. Id.
contracts.\textsuperscript{438} A firm may list a lawyer on its letterhead who is not licensed to practice in Louisiana, but must set forth his “jurisdictional limitations.”\textsuperscript{439} A firm may not use the name of a lawyer who is not “actively and regularly practicing” in any communication, although a firm may continue to use the name of a firm member who has died or retired.\textsuperscript{440} Finally, a lawyer may not imply that he is practicing with others in a common enterprise unless he is actually doing so.\textsuperscript{441}

The substance of this rule was previously set forth in Rule 7.3.\textsuperscript{442} No change in substance was effected in 2004. This rule is based on Model Rule 7.5, but contains several differences.

First, Rule 7.5(a) itemizes more types of professional designations that must conform with the Rules than does Model Rule 7.5.\textsuperscript{443} Second, this rule, unlike the corresponding Model Rule, prohibits a lawyer from using a trade name that implies a connection not only to a government agency, public services organization, or charity, but also to any “other professional association.”\textsuperscript{444} Third, this rule, unlike the corresponding Model Rule, prohibits a lawyer from using a “trade or fictitious name” unless the lawyer also uses that name on all other documents such as letterheads, fee contracts, and pleadings.\textsuperscript{445} Fourth, this rule, unlike Model Rule 7.5, prohibits a firm from using the name of a “formerly associated” lawyer who has neither died nor retired.\textsuperscript{446} Finally paragraph (e) of this rule, unlike Model Rule 7.5, expressly permits a firm to use the name of a deceased or retired former firm member.\textsuperscript{447}

\textit{f: Model Rule 7.6—Political Contributions to Obtain Government Legal Engagements or Appointments by Judges}

Model Rule 7.6, which prohibits a lawyer from accepting legal work from a judge or government official if the lawyer made a political contribution “for the purpose of obtaining” such work,\textsuperscript{448} was not recommended for adoption by the LSBA Ethics 2000 Committee. The

\begin{thebibliography}{99}
\bibitem{438} Id.
\bibitem{439} \textit{Id.} R. 7.5(b).
\bibitem{440} \textit{Id.} R. 7.5(c), (e).
\bibitem{441} \textit{Id.} R. 7.5(d).
\bibitem{443} \textit{Compare} La. Rules of Prof'l Conduct R. 7.5(a) (2004) (“firm name, logo, letterhead, professional designation, trade name or trademark”), \textit{with} Model Rules of Prof'l Conduct R. 7.5(a) (2002) (“firm name, letterhead or other professional designation”).
\bibitem{444} La. Rules of Prof'l Conduct R. 7.5(a) (2004).
\bibitem{445} \textit{Id.}
\bibitem{446} \textit{Id.} R. 7.5(c).
\bibitem{447} \textit{Id.} R. 7.5(e); \textit{see also} ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1511 (1985) (so interpreting ABA rules).
\bibitem{448} Model Rules of Prof'l Conduct R. 7.6 (2002).
\end{thebibliography}
Committee decided not to propose this rule because it feared that the lightning-rod issue of lawyer political contributions might have threatened adoption of the larger package of revisions.449

I. Bar Admissions, Reporting Misconduct, and Jurisdiction

a. Rule 8.1—Bar Admission and Disciplinary Matters

Rule 8.1 prohibits a bar applicant or a lawyer from knowingly making a false statement of material fact, failing to correct a known factual misunderstanding, or failing to respond to a lawful information request in connection with an admissions or disciplinary matter.450 However, this rule does not require disclosure of information otherwise protected by Rule 1.6.451 Furthermore, this rule requires a lawyer to cooperate with investigations conducted by the Office of Disciplinary Counsel, except for an openly expressed claim of constitutional privilege.452

This rule was not amended in 2004. While most of this rule is identical to Model Rule 8.1,453 it contains a provision not found in the Model Rule, namely, paragraph (c), which sets forth a duty to cooperate with ODC.454 In 1985, the Louisiana Task Force on Adoption of the Model Rules recommended adoption of this paragraph "in order to facilitate the Committee on Professional Responsibility in its investigation and, most importantly, to expedite those investigations to the extent possible."

449. After receiving this recommendation from the Committee, the Court directed the Committee to "discuss its reasons for rejecting this rule." See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 7 (Oct. 29, 2003). The Committee responded by quoting Comment 1 to Model 7.6, which states as follows:

[When lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit.]

Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 21 (Nov. 20, 2003) (quoting Model Rules of Prof'l Conduct Rule 7.6, cmt. 1 (2002)).

451. Id. R. 8.1(b).
452. Id. R. 8.1(c).
b. Rule 8.2—Judicial and Legal Officials

Rule 8.2 prohibits a lawyer from making a false statement which knowingly or recklessly maligns the qualifications or integrity of a judge, adjudicatory officer, or other public legal officer (or a candidate for such office).\(^{456}\) Moreover, it requires a lawyer who is a candidate for judicial office to comply with the applicable provisions of the Code of Judicial Conduct.\(^{457}\) This rule was not revised in 2004 and is identical to Model Rule 8.2.\(^{458}\)

c. Rule 8.3—Reporting Professional Misconduct

Rule 8.3 addresses a lawyer's obligation to report the misconduct of judges and other lawyers to the appropriate authorities. A lawyer must report misconduct that "raises a question" as to a lawyer's or judge's "honesty, trustworthiness or fitness."\(^{459}\) However, this rule imposes no obligation to report misconduct if doing so would involve the disclosure of confidential client information or the disclosure of information learned through participation in a lawyers' assistance program or the LSBA Ethics Advisory Service Committee.\(^{460}\)

This rule marks a significant departure from the 1987 Louisiana Rules. As to judicial misconduct, the 1987 version contained a more restrictive reporting requirement, requiring a lawyer merely to "reveal fully" his or her knowledge of judicial misconduct "upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."\(^{461}\) As to lawyer misconduct, the 1987 version of this rule imposed a more expansive reporting requirement, requiring a lawyer to report "unprivileged knowledge or evidence" of any ethical violation by a lawyer—no matter how trivial.\(^{462}\) In 1985, the Task Force concluded that it was inappropriate to put a lawyer "in the position of making a subjective judgment" regarding the significance of a violation\(^{463}\) and decided that it was "preferable to put the burden on every lawyer to report all violations, regardless of their nature or kind, whether or not they raised a substantial question as to honesty, trustworthiness, or fitness."\(^{464}\)

\(^{457}\) Id. R. 8.2(b).
\(^{458}\) See Model Rules of Prof'l Conduct R. 8.2 (2002).
\(^{459}\) La. Rules of Prof'l Conduct R. 8.3(a)--(b) (2004).
\(^{460}\) Id. R. 8.3(c).
\(^{462}\) See id.
\(^{463}\) See Report and Recommendation of the Task Force to Evaluate the American Bar Association’s Model Rules of Professional Conduct at 24 (Nov. 23, 1985).
\(^{464}\) Id. at 24–25.
During the Ethics 2000 revision process, the LSBA Ethics 2000 Committee proposed retention of the all-violations reporting requirement as to lawyer misconduct. The LSBA House of Delegates, however, rejected the Committee's proposal and forwarded to the Louisiana Supreme Court a recommendation that it adopt Model Rule 8.3, which provides for the reporting of a narrower class of misconduct (namely, misconduct that raises a "substantial question" as to the lawyer's "honesty, trustworthiness or fitness" in other respects). The LSBA House of Delegates made this recommendation because the former requirement was believed to be "unenforceable" and unnecessary, given that reporting is necessary only as to "those offenses that a self-regulating profession must vigorously endeavor to prevent." The LSBA House of Delegates made this recommendation because the former requirement was believed to be "unenforceable" and unnecessary, given that reporting is necessary only as to "those offenses that a self-regulating profession must vigorously endeavor to prevent." Ultimately, the Court adopted a middle-ground position in revised Rule 8.3." This rule now requires lawyer to report judicial or lawyer misconduct that raises "a question"—although not a "substantial question"—as to the person's "honesty, trustworthiness or fitness." In so doing, the Court diverged from the corresponding Model Rule.

d. Rule 8.4—Misconduct

Rule 8.4 contains a series of provisions that implement and supplement the many that come before. This rule implements the Louisiana Rules of Professional Conduct by declaring that a violation, attempted violation, or contributory violation of the Rules is sanctionable "professional misconduct." It supplements the Rules by branding as "misconduct" the following misdeeds that are not within the

466. See Memorandum from the LSBA Ethics 2000 Committee to the Louisiana Supreme Court in Response to the Court's October 29, 2003 Letter at 22 (Nov. 20, 2003) (quoting Model Rules of Prof'l Conduct R. 8.3, cmt. 3 (2002)).
467. Before doing so, the Court wrote to the LSBA Ethics 2000 Committee, noting that the former rule "has not been viewed as unenforceable," and accurately observing that the LSBA's recommendations "represent major policy changes." See Letter from Pascal F. Calogero, Jr. to Harry S. Hardin, III, at 7 (Oct. 29, 2003).
468. La. Rules of Prof'l Conduct R. 8.3(a), (b) (2004).
469. See Model Rules of Prof'l Conduct R. 8.3 (2002). Rule 8.3 also deviates from the corresponding Model Rule in two minor respects. First, paragraphs (a) and (b) of the Louisiana rule designate the "Office of Disciplinary Counsel" and the "Judiciary Commission" as the appropriate professional authorities to whom lawyers must report violations of the relevant standards of professional conduct. Second, paragraph (c) identifies the "Ethics Advisory Service Committee" in addition to the "approved lawyers assistance program" mentioned in Model Rule 8.3(c). Compare La. Rules of Prof'l Conduct R. 8.3 (2004), with Model Rules of Prof'l Conduct R. 8.3 (2002).
scope of other rules: engaging in criminal conduct, "especially" conduct reflecting adversely on the lawyer's honesty, trustworthiness or fitness; engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation"; engaging in conduct that is "prejudicial to the administration of justice"; implying an ability to improperly influence a judge or official or "to achieve results by means that violate the Rules of Professional Conduct or other law"; assisting a judge in conduct that violates the Rules of Judicial Conduct or other law; or threatening "to present criminal or disciplinary charges solely to obtain an advantage in a civil matter."471

This rule is virtually identical to the former Louisiana rule and the current Model Rule with a few substantive differences. First, Rule 8.4(b) differs from the Model Rule by branding as "misconduct" any criminal act by a lawyer—regardless of whether the act casts doubt on the lawyer's honesty, trustworthiness, or fitness to practice."472

Second, paragraph (g) of this rule, which prohibits a Louisiana lawyer from threatening to present criminal or disciplinary charges "solely to obtain an advantage in a civil matter," is not found in the Model Rules. Although no similar provision exists in Model Rule 8.4, the ABA has issued a formal ethics opinion condemning the practice.473

e. Rule 8.5—Jurisdiction

Rule 8.5, revised by the Court in 2005, now provides that a Louisiana lawyer is subject to the Louisiana Supreme Court's disciplinary authority although he is engaged in practice elsewhere.474 As a result of the Court's 2005 revision, this rule is now identical to Model Rule 8.5.

Rule 8.5(a) now provides that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this

471. Id. R. 8.4(b)–(g).
472. Id. R. 8.4(b). The rule has this effect as a result of the inclusion of the language "especially one that" between "criminal act" and "that reflects." Compare id., with Model Rules of Prof'l Conduct R. 8.4(b) (2002). The Louisiana Supreme Court retained this language from the 1987 version of this rule. However, it is unclear whether the Court or the Task Force intended the result in 1987, given that the Task Force's commentary fails even to mention this significant difference in language. See Report and Recommendation of the Task Force to Evaluate the American Bar Association's Model Rules of Professional Conduct at 25 (Nov. 23, 1985).
jurisdiction." No similar provision was previously found in the Louisiana Rules.

Second, revised Rule 8.5(a) provides that "[a] lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct." Although the Louisiana Rules previously did not so provide, this undoubtedly was the state of the law in Louisiana prior to the revision.

Finally, Rule 8.5(b) now contains fairly detailed choice-of-law provisions addressing which jurisdiction's disciplinary standards apply in the case of a conflict between the rules of professional conduct and other potentially-applicable ethical standards.

IV. CONCLUSION: A LOOK AHEAD

The 2004 revisions to the Louisiana Rules of Professional Conduct are an improvement over what came before. It would be short-sighted to assume, however, that these revisions mark the end of the road for ethics reform. On the contrary, the profession and its regulators must continually review the principles, norms, and rules of lawyering in Louisiana. This Article concludes with a prospective look at some of the issues that remain.

More can be done to enhance client protection. Many Louisiana lawyers do not carry malpractice insurance. As a result, clients are often left holding the bag for their lawyer's negligence. In August 2004, the ABA Standing Committee on Client protection recommended adoption of a rule requiring a lawyer to inform the highest court in his jurisdiction whether he maintains malpractice insurance. While leaving the "ultimate decision whether or not to maintain professional liability insurance" with the lawyer, such a rule would "reduce potential public harm by giving consumers of legal services an opportunity to decline to hire" an uninsured lawyer. Louisiana should consider the adoption of such a rule.

More can be done to reduce lawyer-client disputes relating to legal fees and litigation costs. To reduce misunderstandings as to fees and costs, Louisiana should require that all retention agreements with new clients be reduced to writing. At present, the Louisiana Rules impose a writing requirement only as to contingent-fee agreements. Moreover,
to resolve fee disputes after they arise, Louisiana should consider mandatory arbitration. Lawyers sometimes take advantage of their clients in fee disputes by filing heavy-handed preemptive lawsuits. On the other hand, clients sometimes seek jury trials in routine fee collection suits hoping to take advantage of lawyers by tapping into public disdain for the profession. Worse still, straightforward fee disputes often degrade into frivolous retaliatory malpractice actions. Much of this gamesmanship could be curbed through mandatory ADR or related reforms.

Finally, more can be done to preserve the integrity of the profession. The literature is replete with complaints about the decline in professionalism among lawyers. While much of this debate falls within the normative rubric of "professionalism," the Court and the bar should consider a new positive rulemaking to regulate more extensively dealings among lawyers as well as lawyer advertising.

**House of Delegates, however, declined to follow the recommendation. Ultimately, the LSBA Ethics 2000 Committee declined to propose a rule deviating from the Model Rule.**

480. William N. King, Lawyer Fee Dispute Resolution Program, 51 La. Bar J. 32, 32 (2003) ("Rarely is the attorney-client relationship salvageable after an attorney takes his client to court over legal fees. More often than not, the attorney is met with a legal malpractice claim as a defense to a claim for legal fees."); Mark Richard Cummisford, Resolving Fee Disputes and Legal Malpractice Claims Using ADR, 85 Marq. L. Rev. 975, 981 (2002) ("Studies indicate that when an attorney files suit to collect attorney fees, 'such a suit virtually guarantees a counterclaim for [legal] malpractice.'"); see id. at 975-76 ("It should be of no surprise that attorney malpractice and fee disputes are often found lurking in the same lair. In both malpractice and fee disputes, the client believes that he did not get what he paid for.").

481. On a related note, Louisiana's law governing liens and privileges to secure the payment of lawyers' fees is an absolute mess. The profession, the Court, and the legislature should undertake a comprehensive reevaluation of the laws and regulations bearing on this issue.

482. See, e.g., Warren E. Burger, The Decline in Professionalism, 61 Tenn. L. Rev. 1 (1993); see generally Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society (1994); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993); Sol M. Linowitz & Martin Mayer, The Betrayed Profession: Lawyering at the End of the Twentieth Century (1994); see also Samuel J. Levine, Essay, Faith in Legal Professionalism: Believers and Heretics, 61 Md. L. Rev. 217 (2002); Therese Maynard, Teaching Professionalism: The Lawyer as Professional, 34 Ga. L. Rev. 895, 895 n.2 (2000) ("[t]he literature teems with articles that describe, often in rather distressing terms, the crisis within the legal profession today"); Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303, 1307 (1995) ("[o]ver the past two decades, hundreds of articles and speeches have focused on the meaning of professionalism, its perceived 'decline,' and steps the bar should take to improve it").