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Updated Missouri Rules of Professional Conduct Effective September 26, 2017: What You Need to Know

by Melinda J. Bentley¹

As the practice of law evolves with each new piece of technology, and our Missouri-based world is impacted more and more by global legal issues, our Missouri Rules of Professional Conduct are adjusted to address these changes. On September 26, 2017, the Supreme Court of Missouri issued an Order, effective that same day, either repealing and replacing subdivisions of Rules and Comments, or adding new subdivisions of Rules or Comments, to nine Rules of Professional Conduct and Rule 8.105 on Limited Admission for In-House Counsel.² This article will explore the change to each Rule and/or Comment individually to help you quickly incorporate these ethical duties into your daily practices. Keep in mind as you review these changes that the text of a Rule of Professional Conduct defines the

lawyer's professional role, but a Comment does not add obligations to the Rule.³ Instead, Comments provide guidance to lawyers for practicing in compliance with the Rules and are intended to illustrate the meaning and purpose of the Rules.⁴

Rule 4-1.0 – Terminology

Rule 4-1.0(n) defines the term “writing” or “written.” This Rule has been changed to replace the term “e-mail” with “electronic communications.”⁵ An e-mail is no longer the only form of an electronic writing, so there is a broader definition of what constitutes a writing by including “electronic communications.”

Comment [10] to Rule 4-1.0 addresses how you screen, as defined in Rule 4-1.0(k), when permitted under the Rules of Professional Conduct.⁶ It replaces the term “materials” with “information, including information in electronic form” throughout the Comment.⁷ When screening, lawyers are no longer just dealing with physical, paper files. Instead, lawyers have access to a variety of electronic files. When screening is implemented, access to those sources of electronically stored information must be blocked.

Rule 4-1.1 – Competence

The text of Rule 4-1.1, Competence, remains unchanged. It states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [6] to Rule 4-1.1 has been changed to note that, in addition to maintaining competence by keeping abreast of changes in the law and practice, that responsibility also now includes knowledge regarding the benefits and risks associated with relevant technology. One of the key considerations for lawyers in keeping abreast of technology will certainly include preserving client confidentiality per Rule 4-1.6.⁸

Additionally, Comments [7] and [8] have been added to Rule 4-1.1 and provide guidance when retaining or contracting with other lawyers outside the lawyer's own firm. Comment [7] says that “the lawyer should ordinarily obtain consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.”⁹ There are also cross-references to the lawyer's ethical responsibilities pursuant to Rules 4-1.2 (Scope of Representation), 4-1.4 (Communication), 4-1.5(e) (Fees), 4-1.6 (Confidentiality of Information), and 4-5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law) so the lawyer is mindful of the professional obligations in the context of retaining or contracting with lawyers outside the lawyer's own firm.

Further, Comment [8] provides guidance that when more than one firm is providing legal services to a client on a matter:

[T]he lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 4-1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.¹⁰

Rule 4-1.4 – Communication

The text of Rule 4-1.4, Communication, remains unchanged. That Rule generally requires, among other more specific duties, that lawyers keep clients reasonably informed about the status of matters, promptly comply with reasonable requests for information about the representation, and explain matters to clients to the extent reasonable so clients can make informed decisions about the representation.¹¹ Comment [4] to Rule 4-1.4 has been updated to explain that “[a] lawyer shall promptly respond to or acknowledge client communications to the lawyer.”¹² This language replaces commentary that client telephone calls should be promptly acknowledged and returned.

Communications are much broader today than just telephone calls, so this updated Comment [4] reflects that all forms of communications should be acknowledged or responded to in a prompt manner.

Rule 4-1.6 – Confidentiality of Information

Disclosure to detect/resolve conflicts of interest:

There are two new Rule provisions in Rule 4-1.6 on client confidentiality. Rule 4-1.6(b) generally sets forth when a lawyer may reveal client confidential information relating to the representation to the extent the lawyer reasonably believes is necessary to meet one of the exceptions permitted by this Rule. First, new subdivision (b)(5) now allows a limited disclosure “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”¹³

New Comment [18] provides guidance on what can be disclosed when trying to detect and resolve conflicts pursuant to new Rule 4-1.6(b)(5), and new Comment [19] provides guidance on how the information disclosed may be used. Comment [18] explains that this limited disclosure is only permitted once substantive discussions about the new relationship have occurred, and it applies in situations such as when a lawyer is considering an association with another firm, two or more firms are considering merger, or a lawyer is considering purchasing a law practice pursuant to Rule 4-1.17.¹⁴ The disclosure ordinarily should be limited to the identity of persons or entities, a brief summary of the general issues involved, and whether the matter has terminated.¹⁵ Disclosure is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client unless the client provides informed consent¹⁶ under Rule 4-1.6(a).¹⁷ Further, Comment [18] notes that a lawyer’s fiduciary duty to the lawyer’s firm may also govern conduct when exploring association with another firm, and such fiduciary law is beyond the scope of the Rules of Professional Conduct.

New Comment [19] provides the guidance that a lawyer may only use the information disclosed

pursuant to Rule 4-1.6(b)(5) to detect and resolve these conflicts, but Comment [19] clarifies that (b)(5) “does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(5).”¹⁸ Comment [19] also notes that (b)(5) does not affect the disclosure within a law firm when otherwise authorized, such as disclosure necessary to detect and resolve a conflict when determining if a potential new representation should be accepted.¹⁹

Preventing unauthorized disclosure/access:

Second, a new subdivision, Rule 4-1.6(c), requires that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”²⁰ Additionally, updated language included in Comment [15] provides guidance on competence and “reasonable efforts,” and updated Comment [16] provides guidance on duties when transmitting client confidential information.

Comment [15] already provided guidance to lawyers regarding acting competently to safeguard client information, and the updated language also includes guidance on guarding “against unauthorized access by third parties.”²¹ Updated Comment [15] now provides factors to consider in determining the reasonableness of a lawyer’s efforts to safeguard client information and/or prevent unauthorized access by third parties.

Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).²²

Updated Comment [15] notes that there is not a violation of 4-1.6(c) if the lawyer has made reasonable efforts to prevent the unauthorized access or inadvertent disclosure.

Additionally, updated Comment [15] now provides that the client may require the lawyer to implement special security measures not required by Rule 4-1.6(c), and that the client also may give informed consent²³ to forgo security measures otherwise required by this Rule.²⁴ It also now notes in Comment [15] that “[w]hether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.” Finally, a cross-reference is added in Comment [15] to Rule 4-5.3, and its new Comments [3] and [4], on the supervisory duties of a lawyer when sharing information with nonlawyers outside the lawyer’s own firm.

Comment [16] already provided guidance to lawyers on responsibilities when transmitting client confidential information. It still requires lawyers to take reasonable precautions to prevent client confidential information from coming into the hands of unintended recipients, and it notes that no

special security measures are required if the method of communication affords a reasonable expectation of privacy.²⁵ Comment [16] continues to indicate that special circumstances may warrant special precautions, and it continues to provide factors as to the lawyer's reasonableness of the expectation of confidentiality, including the sensitivity of the information and the extent to which the privacy of the communication is protected by law or a confidentiality agreement.²⁶ Just as described in Comment [15], Comment [16] already indicated that a client may require the lawyer to implement special security measures not required by this Rule, but similarly the client may give informed consent²⁷ to the use of a means of communication otherwise prohibited by this Rule.²⁸ A sentence has been added in Comment [16] that provides "[w]hether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules."

Rule 4-1.17 – Sale of a Law Practice

The text of Rule 4-1.17 regarding the ethical requirements related to the sale of a law practice remains unchanged. Updated Comment [6] provides guidance on client confidences, client consent, and notice to clients. It has been updated to include a cross-reference to new Rule 4-1.6(b)(5) on limited disclosure of client confidences to check conflicts when discussions are underway regarding a change in the ownership of a firm.²⁹ There is also clarifying language in updated Comment [6] related to disclosures of client-specific information, such as the client's file, which would require client consent.

Rule 4-1.18 – Duties to Prospective Client

Rule 4-1.18(a) has been updated to now state: "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." The term "consults" replaces the term "discusses" in this updated Rule. Similarly, updated Comment [1] uses the term "consultations" in place of "discussions" to describe the initial contact between a lawyer and a prospective client, and updated Comment [4] uses the term "consultation" instead of "interview."³⁰

The language in Comment [2] has been replaced in full, and it provides guidance on when a person becomes a prospective client. It notes that written, oral or electronic communications could lead to a prospective client relationship depending on the circumstances.³¹ It provides an example, saying:

[A] consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. . . . In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and thus is not a "prospective client."³²

Finally, Comment [2] notes that a person who communicates with a lawyer for the purpose of disqualification does not constitute a prospective client.³³

A new Comment [8] has been added discussing screening procedures and notice when such measures are employed as permitted by Rule 4-1.18.³⁴

Rule 4-4.4 – Respect for Rights of Third Persons

Rule 4-4.4 has been updated to now include "electronically stored information," in addition to just a document, when requiring that a lawyer promptly notify the sender when the lawyer receives one of these types of information relating to a representation of a client and knows or reasonably should know that it was inadvertently sent.³⁵ Guidance is provided in updated Comment [2] to Rule 4-4.4 as to what a lawyer needs to do when a document or electronically stored information was mistakenly sent or produced by opposing parties or their lawyers.³⁶ Updated Comment [2] describes an inadvertent transmission as when something is accidentally transmitted, and the lawyer knows or reasonably should know that the document or electronically stored information was inadvertently sent. Updated Comments [2] and [3] note that steps a lawyer chooses to take beyond the required notification to the sender are matters of law and beyond the scope of the Rules of Professional Conduct.³⁷

Updated Comment [2] provides a definition of "document or electronically stored information" for purposes of Rule 4-4.4, noting that it "includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as 'metadata'), that is subject to being read or put into readable form."³⁸ In describing metadata, it goes on to state: "Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. The receiving lawyer has no obligation to look for metadata."³⁹

Rule 4-5.3 – Responsibilities Regarding Nonlawyer Assistants

Rule 4-5.3 generally sets forth the responsibilities of lawyers with managerial or direct supervisory authority over nonlawyers and the times when such lawyers are responsible for the conduct of those nonlawyers.⁴⁰ That Rule remains unchanged.

Nonlawyers within and outside the firm:

New Comment [1] contains provides an overview of the Rule, including guidance that Rule 4-5.3 applies to the supervision of nonlawyers both inside and outside the law firm.⁴¹

Nonlawyers within the firm:

Updated Comment [2] is the language from the previous version of Comment [1]. It addresses the employment of nonlawyer assistants within a law firm, such as administrative assistants, investigators, law students, and paraprofessionals who are either employees or independent contractors.⁴² This Comment provides guidance on the responsibility of lawyers to give appropriate instruction and supervision concerning the ethical aspects of the employment of these nonlawyers.⁴³

Nonlawyers outside the firm:

New Comment [3] deals with the responsibilities to make reasonable efforts to ensure that, when using nonlawyers who are outside the law firm, such services are provided in a manner that is compatible with the professional obligations of the lawyer.⁴⁴ Examples provided in this Comment of nonlawyers outside the firm include investigative or paraprofessional services, a document management company hired to create and maintain a database, third-party printers or scanners, and internet-based services that store client information.⁴⁵ Factors are provided for guidance as to the extent of this obligation and depend on the circumstances.⁴⁶ Factors include “the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.”⁴⁷

New Comment [4] addresses the lawyer’s ethical responsibilities when the client directs the selection of a nonlawyer service provider that is outside the law firm.⁴⁸

Rule 4-5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law and Rule 8.105 – Limited Admission for In-House Counsel

Rule 4-5.5(d) is an existing provision that permits a lawyer admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, to establish an office or other systematic and continuous presence in Missouri to practice law and provide legal services to an employer or its organizational affiliates if that lawyer receives a limited license under Rule 8.105 as an in-house counsel.⁴⁹ Both Rule 4-5.5 and Rule 8.105 have been updated to permit a lawyer from a foreign jurisdiction to do the same if the foreign lawyer can meet the requisite requirements of those Rules.⁵⁰ However, there is a new limitation, as Rule 4-5.5(d) now provides: “[w]hen performed by a foreign lawyer and requiring advice on the law of Missouri or another United States jurisdiction, or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice.”

If you have questions about applying these updated Rules of Professional Conduct to your own prospective conduct, you are always welcome to contact the Legal Ethics Counsel office (www.Mo-Legal-Ethics.org) to seek an informal advisory opinion.

12 Rule 4-1.4, Comment [4], effective Sept. 26, 2017.

13 Rule 4-1.6(b)(5), effective Sept. 26, 2017.

14 Rule 4-1.6, Comment [18], effective Sept. 26, 2017.

15 *Id.*

16 *See* Rule 4-1.0(e) (defining “Informed Consent” as denoting “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”)

17 Rule 4-1.6, Comment [18], effective Sept. 26, 2017.

18 Rule 4-1.6, Comment [19], effective Sept. 26, 2017.

19 *Id.*

20 *See supra* text accompanying note 8.

21 Rule 4-1.6, Comment [15], effective Sept. 26, 2017.

22 *Id.*

23 *See supra* note 17.

24 Rule 4-1.6, Comment [15], effective Sept. 26, 2017

25 Rule 4-1.6, Comment [16], effective Sept. 26, 2017.

26 *Id.*

27 *See supra* note 17.

28 Rule 4-1.6, Comment [16], effective Sept. 26, 2017.

29 *See supra* text accompanying notes 12-17.

30 Rule 4-1.18, Comments [1] and [4], effective Sept. 26, 2017.

31 Rule 4-1.18, Comment [2], effective Sept. 26, 2017.

32 *Id.*

33 *Id.*

34 Rule 4-1.18, Comment [8], effective Sept. 26, 2017.

35 Rule 4-4.4(b), effective Sept. 26, 2017.

36 Rule 4-4.4, Comment [2], effective Sept. 26, 2017.

37 Rule 4-4.4, Comments [2] and [3], effective Sept. 26, 2017.

38 Rule 4-4.4, Comment [2], effective Sept. 26, 2017.

39 *Id.* See also Mo. Informal Advisory Opinion 2014-02 (regarding ethical obligations of lawyers handling metadata). Informal Advisory Opinions are published on The Missouri Bar's website at: <http://www.mobar.org/ethics/informalopinions.htm> (<http://www.mobar.org/ethics/informalopinions.htm>).

40 Rule 4-5.3.

41 Rule 4-5.3, Comment [1], effective Sept. 26, 2017.

42 Rule 4-5.3, Comment [2], effective Sept. 26, 2017.

43 *Id.*

44 Rule 4-5.3, Comment [3], effective Sept. 26, 2017.

45 *Id.*

46 *Id.*

47 *Id.* See also Mo. Informal Advisory Opinion 20070008 (regarding third-party vendors and confidentiality).

48 Rule 4-5.3, Comment [4], effective Sept. 26, 2017.

49 Rule 4-5.5(d).

50 Rule 4-5.5(d), effective Sept. 26, 2017; Rule 8.105, effective Sept. 26, 2017.

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