NOTICE TO THE BAR

SPECIAL COMMITTEE ON ATTORNEY ETHICS AND ADMISSIONS

CHAIR: HON. JAMES R. ZAZZALI

VICE CHAIR: PROFESSOR PAULA A. FRANZESE

The New Jersey Supreme Court created the Special Committee on Attorney Ethics and Admissions to review the recent American Bar Association (ABA) amendments to the Model Rules of Professional Conduct and standards for admission to practice law. The ABA Commission examined admission by motion, client confidentiality in a digital age; ethics issues arising from new forms of advertising; outsourcing of legal services; issues relating to lawyer mobility; choice of law problems related to conflicts of interest; issues relating to practice of out-of-state lawyers; and practice of foreign lawyers in the United States.

The Special Committee is reviewing the new ABA Model Rules and will consider whether to recommend that our Rules of Professional Conduct and standards for admission to practice in New Jersey should be revised to, among other things, address advances in technology and global legal practice developments. The Special Committee hereby requests oral and/or written comment from the legal community and interested members of the public. The Special Committee is not making an affirmative recommendation of matters included in this Notice to the Bar; it merely seeks comment on these topics.

The Special Committee will hold a public hearing for oral comments on Thursday, May 15, 2014, 10:00 am, at the New Jersey State Bar Association Annual Conference at the Borgata in Atlantic City. If you would like to make a short presentation at the hearing, please notify Committee Staff Carol Johnston by telephone (609-292-0694) or email (carol.johnston@judiciary.state.nj.us). If time permits, other attendees may speak during this public hearing.

Any written comments should be sent by June 16, 2014, to the Special Committee on Attorney Ethics and Admissions, Attention: Committee Staff Carol Johnston, Professional Services, Richard J. Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey, 08625-0037. Comments may also be submitted via Internet e-mail to the following address: Comments.Mailbox@judiciary.state.nj.us.

The Special Committee will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by e-mail should include their name and e-mail address. Comments submitted in response may be subject to public disclosure after the Court has acted on the Special Committee's recommendations.

After the Special Committee has received and considered the comments and reached a consensus on its recommendations, it will issue an initial report and offer the legal community and interested members of the public another opportunity to comment. The Special Committee will then consider these additional comments, issue a report setting forth its specific findings, and submit it to the New Jersey Supreme Court for its review.

Hon. James R. Zazzali, Chair
Supreme Court Special Committee on Attorney
Ethics and Admissions

Dated: April 15, 2014

TO THE LEGAL COMMUNITY AND INTERESTED MEMBERS OF THE PUBLIC:

The Special Committee on Attorney Ethics and Admissions requests comments on these recommendations of the ABA and other specified matters set forth below. The topics are set forth in three groups: Admissions (numbered 1 through 4); Technology and Confidentiality (numbered 5 through 7); and Everything Else (numbered 8 through 18). The Special Committee is not making an affirmative recommendation of matters included in this Notice to the Bar; it merely seeks comment on these topics. In your comments, please note whether any changes should be made in a Rule of Professional Conduct itself or in a new or revised official comment to a Rule.

ADMISSIONS

1. ADMISSION ON MOTION

ABA Rule (Resolution 105E), a lawyer who is admitted to practice in another US jurisdiction, holds a law school degree, has practiced law in another state for 3 of last 5 years, is in good standing, not subject to discipline, possesses character and fitness, and designates Clerk of Court for service of process, may be admitted to practice law in this jurisdiction on motion. ABA urges jurisdictions that have a rule on admission by motion to eliminate restrictions such as reciprocity.

New Jersey's rules currently do not permit admission on motion. Should New Jersey adopt admission on motion?

2. PRACTICE PENDING ADMISSION

ABA Rule (Resolution 105D), if a lawyer has been practicing in another US jurisdiction for 3 of the last 5 years, the lawyer may provide legal services in an office or other systematic and continuous presence in this jurisdiction for up to a year provided the lawyer is not disbarred or suspended from practice in any jurisdiction, has not previously been denied admission to practice in this jurisdiction or failed the bar exam, notifies the jurisdiction bar counsel that he or she is practicing here, applies for admission by motion or exam within 45 days, expects to fulfill the jurisdiction's admission requirements, associates with a lawyer admitted in this jurisdiction, does not advertise for legal services in this jurisdiction, and pays the annual client fund assessment. Same general provisions for a foreign legal consultant licensed in another US jurisdiction.

MRPC 5.5(d) (Resolution 105D), authorizes, by the rule proposed above, a lawyer admitted in another US jurisdiction to "provide legal services through an office or other systematic and continuous presence in this jurisdiction."

New Jersey's current rules do not permit practice pending admission. Should New Jersey allow practice pending admission?

3. IN-HOUSE PRACTICE BY FOREIGN LAWYERS

MRPC 5.5(d) (Resolution 107A), a lawyer admitted in a foreign jurisdiction may provide legal services through an office or other systematic and continuous presence in this jurisdiction when the services are provided to the lawyer's employer, do not require pro hac vice admission, and do not involve advice on US law, unless the foreign lawyer has consulted with a US lawyer.

MRPC 5.5(e) (Resolution 107A), the foreign lawyer must be a lawyer in good standing in the foreign jurisdiction and subject to effective regulation and discipline by a professional body or public authority.

MRPC Comment [16] (Resolution 107A), when a foreign lawyer is advising on US law, the foreign lawyer needs to base that advice on the advice of a lawyer licensed and authorized by the local jurisdiction to provide it.

Model Rule for Registration of In-House Counsel (Resolution 107B), adds reference to a foreign lawyer. US lawyer or foreign lawyer who is employed by an organization that is not in the business of practicing law shall register as in-house counsel.

New Jersey's current rules do not permit foreign lawyers to be licensed as in-house counsel. Should New Jersey allow foreign lawyers to be licensed as in-house counsel?

4. PRO HAC VICE ADMISSION OF FOREIGN LAWYERS

Model Rule New Paragraph III (Admission of Foreign Lawyer in Pending Litigation Before a Court or Agency) (**Resolution 107C),** permits the court to admit a foreign lawyer pro hac vice in that proceeding with an in-state lawyer. The in-state lawyer must be responsible to the client and for the conduct of the proceeding, independently advise the client on substantive US law and procedural issues in the proceeding, and advise the client whether the in-state lawyer's judgment differs from that of the foreign lawyer.

New Jersey's current rules do not permit pro hac vice admission of foreign lawyers. Should New Jersey allow foreign lawyers to appear pro hac vice?

TECHNOLOGY AND CONFIDENTIALITY

5. COMPETENCE WITH TECHNOLOGY

MRPC 1.1 (Competence). The ABA recommends a revision to a comment on maintaining competence to add to the duties of a lawyer to "keep abreast of changes in the law and its practice," a new provision including a duty to stay informed about "the benefits and risks associated with relevant technology."

6. CONFIDENTIALITY AND COMPETENCE WITH USING TECHNOLOGY

A. **MRPC 1.0(n) (Terminology).** The ABA recommends a Rule revision clarifying that a "writing" denotes a "electronic communication," not just an "e-mail."

The ABA recommends that a comment be revised to clarify that a firm may ask a "screened" lawyer to agree in writing not to access electronic information about a matter, and may deny access by the screened lawyer to electronic information relating to the matter.

MRPC 1.4 (Communication). The ABA recommends replacing the reference in comments to client "telephone calls" with a reference to "client communications."

B. **MRPC 1.6 (Confidentiality of Information).** The ABA recommends a new paragraph be added to the existing Rule requiring 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 a client."

The ABA recommends revisions to a comment on the duty to act competently to preserve confidentiality to specifically include an obligation to safeguard information against unauthorized access by third parties. The ABA added language to the comment to explain that there is no violation if unauthorized access was accomplished after the lawyer has taken reasonable steps to prevent such access. The ABA outlined some factors to be considered in determining the reasonableness of the lawyer's efforts, including the sensitivity of the information, likelihood of disclosure if additional safeguards were not employed, cost of additional safeguards, difficulty of implementing the safeguards, and the extent to which such safeguards adversely affect the lawyer's ability to represent the client. The ABA added language permitting the client to give

informed consent to implement extra security measures not required by the Rule or give informed consent to forego security measures. The ABA also added a provision that a lawyer's duty to comply with state and federal laws governing data security is beyond the scope of the rules.

C. MRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants). The ABA recommends that the title of this Rule be changed from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."

The ABA recommends a comment that when a lawyer contracts with nonlawyers outside the firm to provide support services, including retaining document management companies for discovery and litigation, printers and scanners, and Internet-based services to store client information ("the cloud"), the lawyers "must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations." The factors include the "education, experience and reputation of the nonlawyer; the nature of the services provided; 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 provided, particularly in regard to confidentiality."

The ABA also recommends that the responsibility of a lawyer with managerial authority in the law firm be extended to nonlawyers outside the firm who work on firm matters. The ABA further recommends a comment stating that if a client directs selection of a particular nonlawyer service provider outside the firm, the lawyer should reach an agreement with the client as to who has responsibility for monitoring that provider's services.

7. DISCLOSURE OF CONFIDENTIAL INFORMATION TO DETERMINE CONFLICTS OF INTEREST

A. MRPC 1.6 (Confidentiality of Information). The ABA recommends a new paragraph be added to the Rule providing that a lawyer may reveal confidential information to the extent the lawyer believes it reasonably necessary "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."

The ABA also recommends the adoption of a new comment recognizing that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts when a lawyer is considering joining the firm or when firms are

considering merger. The disclosure should be limited and occur only after substantive discussions of hiring or merging have begun. Disclosure that would compromise the attorney-client privilege or prejudice the client is prohibited unless the client or former client gives informed consent. The lawyer's fiduciary duty to the lawyer's firm is beyond the scope of the rules.

The ABA further recommends the adoption of another new comment recognizing that information disclosed for the purpose of conflict detection may only be used or further disseminated within the law firm for the purpose of detecting conflicts.

B. **MRPC 1.17 (Sale of Law Practice).** The ABA recommends revision of a comment allowing limited disclosure of confidential information to detect conflicts in context of sale of a law firm.

EVERYTHING ELSE

8. RESPECT FOR RIGHTS OF THIRD PERSONS – RECEIPT OF ELECTRONIC INFORMATION

MRPC 4.4(b) (Respect for Rights of Third Persons). The ABA recommends a reference to electronic information in the Rule; a lawyer who receives a document "or electronically stored information" relating to representation who knows or should know that it was inadvertently sent shall notify the sender. The ABA recommends defining the term "inadvertently sent" in a comment to include certain electronically stored information such as embedded data (metadata). The ABA recommends a sentence in a comment stating that a lawyer may choose to delete an electronic document unread if the lawyer knows before opening it that it was misaddressed.

9. CONFLICTS OF INTEREST – PROSPECTIVE CLIENTS

MRPC 1.18 (Duties to Prospective Client). The ABA recommends revisions to a comment on whether communications with a prospective client comprise a "consultation." If a lawyer specifically requests or invites submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and the person provides information in response, then it is a consultation. But it is not a consultation if the person provides information to the lawyer in response to advertising that does not solicit a

response. Also, a person who communicates with a lawyer solely to disqualify that lawyer is not considered a prospective client.

10. ADVERTISING

MRPC 7.2 (Advertising). The ABA recommends a comment stating that a communication "contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." It recommends new language stating that a lawyer may pay others for generating client leads as long as the lead generator does not recommend the lawyer, there is no improper division of fees and no interference with the professional judgment of lawyer, and the lead generator's communications are consistent with Rule of Professional Conduct 7.1. The lead generator cannot state or imply that it is recommending the lawyer, that the lawyer is not paying the generator for the lead, or that the generator has analyzed the person's legal problems when determining which lawyer should receive the referral.

MPRC 7.3 (Solicitation of Clients). The ABA recommends that the title of this Rule be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients"; that the references to "prospective clients" be removed and substituted with "target of the solicitation." The ABA recommends a comment defining "solicitation" as a targeted communication initiated by the lawyer directed to a specific person that offers to provide legal services, and stating that a communication generated in response to Internet searches is not a solicitation. The ABA further recommends a comment permitting blasted emails to solicit prospective clients, noting that such communications do not have a potential for abuse, juxtaposed with "real-time" electronic communication.

11. RESPONSIBILITIES WHEN OUTSOURCING LEGAL SERVICES

MRPC 1.1 (Competence). The ABA recommends new language in a comment stating that before a lawyer retains or contracts with other lawyers outside the firm to provide legal services to a client, the lawyer should obtain informed consent from the client, and must reasonably believe that the other lawyers' services will "contribute to the competent and ethical representation of the client." The reasonableness of the decision to retain or contract with such other lawyers will depend on the circumstances, including the education, experience and reputation of the nonfirm lawyers, the nature of the services assigned to the nonfirm lawyers, and legal protections, professional conduct rules, and ethical environments of the jurisdictions where the services will be performed, particularly relating to confidentiality of information.

The ABA further recommends new language in a comment stating that when lawyers from more than one firm are providing legal services to the client in a matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them.

12. CHOICE OF LAW FOR DETERMINING WHETHER CONFLICT ARISES

MRPC 8.5 (Disciplinary Authority; Choice of Law). The ABA recommends new language in a comment regarding which jurisdiction's rules on conflicts of interest will apply. Currently, the rules of the jurisdiction in which the lawyer's conduct occurs apply or, if the predominant effect of the conduct is in a different jurisdiction, that jurisdiction's rules will apply. A lawyer is not subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur. The new proposal provides for a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction. The agreement must reflect the client's informed consent.

13. MULTIJURISDICTIONAL PRACTICE & UNAUTHORIZED PRACTICE OF LAW

MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The ABA recommends a comment stating that out-of-state lawyers may not advertise their legal services to persons in this jurisdiction even though the lawyer is authorized to provide services in certain matters as a multijurisdictional practitioner. The ABA further recommends a comment stating that a lawyer may not assist another person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

OTHER MATTERS - The Special Committee is considering further revisions to New Jersey's Rules of Professional Conduct and seeks comment from the legal community regarding these issues:

14. NEW OR REVISED RULE OF PROFESSIONAL CONDUCT OR COMMENT TO EXISTING RULE REGARDING CIVILITY AND PROFESSIONALISM

The Committee seeks comment regarding a potential new (or revised) Rule of Professional Conduct providing more specific requirements with respect to the need for professional and courteous treatment of lawyers and others inside and outside of court.

This could be a new, freestanding Rule, or it can be folded in with Rule of Professional Conduct 8.4 (Misconduct) or Rule of Professional Conduct 3.2 (Expediting Litigation).

15. NEW OR REVISED RULE OR OFFICIAL COMMENT PROVIDING "SAFE HARBOR" FOR LAWYERS WHO PRESENT ISSUES OF ETHICAL CONDUCT IN GOOD FAITH TO FIRM COUNSEL, THE APPROPRIATE COMMITTEE OF THE NEW JERSEY SUPREME COURT, OR AN APPROPRIATE BAR ASSOCIATION PROFESSIONAL SPECIALIZING IN RENDERING LEGAL OPINIONS FOR THE BENEFIT OF ITS MEMBERS, AND WHO IN GOOD FAITH FOLLOW THE ADVICE RECEIVED IN RESPONSE

A. The Committee seeks comment regarding a new or revised Rule of Professional Conduct, or Official Comment, expanding the provisions of Rule of Professional Conduct 5.2(b). Rule of Professional Conduct 5.2(b) provides that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." The Committee is considering whether this language provides a sufficient "safe harbor" for lawyers who present issues of ethical conduct in good faith to firm counsel, the appropriate committee of the New Jersey Supreme Court, or an appropriate Bar Association Professional specializing in rendering legal opinions for the benefit of its members, and who in good faith follow the advice received in response. The Committee notes the stress on associates who are instructed to do something by a more senior lawyer that the associate thinks may be a violation of the Rules and the lack of guidance for the associate in how to handle the situation.

B. In addition, the Committee is aware that some lawyers may be reluctant to report violations at their firm, as they may be obligated to due pursuant to Rule of Professional Conduct 8.3(a) (obligation to report violations of another lawyer), given the weak job market, fear of losing their job, and potential stigma as a whistleblower. The Committee seeks comment regarding a potential new or revised Rule of Professional Conduct, or Official Comment to accompany Rule of Professional Conduct 8.3, providing a "safe harbor" for the lawyer who in good faith reports infractions by other lawyers at the firm.

16. NEW LANGUAGE IN RULE OF PROFESSIONAL CONDUCT 8.5(b)(2)

The Committee seeks comment on whether to add the last sentence in Model Rule 8.5(b)(2) regarding choice of law to our Rule of Professional Conduct 8.5(b)(2). That sentence states: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

17. REVISION OF RULE OF PROFESSIONAL CONDUCT 5.5 TO INCLUDE LAWYERS LICENSED IN JURISDICTIONS OUTSIDE THE UNITED STATES AS MULTIJURISDICTIONAL PRACTITIONERS AND/OR TO INCLUDE A DEFINITION OF THE "PRACTICE OF LAW"

A. The Committee seeks comment on whether to revise Rule of Professional Conduct 5.5 (multijurisdictional practice) to include lawyers licensed in jurisdictions outside the United States. Rule of Professional Conduct 5.5(b)(3) permits an out-of-state lawyer to engage in the practice of New Jersey law in certain limited circumstances. The Rule provides:

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

* * * *

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and

discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-state lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

A lawyer who engages in the practice of New Jersey law as a multijurisdictional or crossborder practitioner under Rule of Professional Conduct 5.5(b)(3)(i), (iv), or (v) must first "register" with the Clerk of the Supreme Court. This consists of submitting a form to the Clerk consenting to appointment of the Clerk as agent for service of process. These practitioners must also comply with Rule 1:20-1(b) (payment of the annual assessment for the discipline system), Rule 1:20-1(c) (submission of the annual registration statement), Rule 1:28-2 (payment of the annual assessment for the Lawyers' Fund for Client Protection), and Rule 1:28B-1(e) (payment of the annual assessment for the Lawyers Assistance Program) "during the period of practice." RPC 5.5(c)(3) and (6).

As noted above, only lawyers admitted to practice in a United States jurisdiction may engage in limited practice in New Jersey pursuant to this Rule. The Special Committee seeks comment on whether a lawyer admitted to practice in a jurisdiction outside the United States should similarly be permitted to practice in New Jersey pursuant to this Rule.

B. In addition, the Committee seeks comment on whether the "practice of law" should be defined in this Rule, both generally and in the specific situations enumerated in the subparagraphs of Rule of Professional Conduct 5.5(b)(3).

18. ADOPTION OF ADDITIONAL OFFICIAL COMMENTS TO ANY OR ALL OF NEW JERSEY'S RULES OF PROFESSIONAL CONDUCT

The Committee seeks comment on whether the Court should adopt additional official comments to any or all of New Jersey's Rules of Professional Conduct, similar to the expansive comments that accompany the Model Rules. If so, which Rules would benefit from additional official comment?