

1 The views expressed herein have not been approved by the House of Delegates or the Board of
2 Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.

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5 **American Bar Association**
6 **Commission on Ethics 20/20**
7 **Resolution**
8

9 RESOLVED: That the American Bar Association amends Model Rule 1.0
10 (Terminology) of the ABA Model Rules of Professional Conduct as follows (insertions
11 underlined, deletions ~~struck through~~):
12

13 **Rule 1.0 Terminology**
14

15 (a) **“Belief” or “believes” denotes that the person involved actually supposed the**
16 **fact in question to be true. A person’s belief may be inferred from circumstances.**

17 (b) **“Confirmed in writing,” when used in reference to the informed consent of a**
18 **person, denotes informed consent that is given in writing by the person or a writing**
19 **that a lawyer promptly transmits to the person confirming an oral informed**
20 **consent. See paragraph (e) for the definition of “informed consent.” If it is not**
21 **feasible to obtain or transmit the writing at the time the person gives informed**
22 **consent, then the lawyer must obtain or transmit it within a reasonable time**
23 **thereafter.**

24 (c) **“Firm” or “law firm” denotes a lawyer or lawyers in a law partnership,**
25 **professional corporation, sole proprietorship or other association authorized to**
26 **practice law; or lawyers employed in a legal services organization or the legal**
27 **department of a corporation or other organization.**

28 (d) **“Fraud” or “fraudulent” denotes conduct that is fraudulent under the**
29 **substantive or procedural law of the applicable jurisdiction and has a purpose to**
30 **deceive.**

31 (e) **“Informed consent” denotes the agreement by a person to a proposed course of**
32 **conduct after the lawyer has communicated adequate information and explanation**
33 **about the material risks of and reasonably available alternatives to the proposed**
34 **course of conduct.**

35 (f) **“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in**
36 **question. A person’s knowledge may be inferred from circumstances.**

37 (g) **“Partner” denotes a member of a partnership, a shareholder in a law firm**
38 **organized as a professional corporation, or a member of an association authorized**
39 **to practice law.**

40 (h) **“Reasonable” or “reasonably” when used in relation to conduct by a lawyer**
41 **denotes the conduct of a reasonably prudent and competent lawyer.**

42 (i) **“Reasonable belief” or “reasonably believes” when used in reference to a**
43 **lawyer denotes that the lawyer believes the matter in question and that the**
44 **circumstances are such that the belief is reasonable.**

45 (j) “Reasonably should know” when used in reference to a lawyer denotes that a
46 lawyer of reasonable prudence and competence would ascertain the matter in
47 question.

48 (k) “Screened” denotes the isolation of a lawyer from any participation in a matter
49 through the timely imposition of procedures within a firm that are reasonably
50 adequate under the circumstances to protect information that the isolated lawyer is
51 obligated to protect under these Rules or other law.

52 (l) “Substantial” when used in reference to degree or extent denotes a material
53 matter of clear and weighty importance.

54 (m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding
55 or a legislative body, administrative agency or other body acting in an adjudicative
56 capacity. A legislative body, administrative agency or other body acts in an
57 adjudicative capacity when a neutral official, after the presentation of evidence or
58 legal argument by a party or parties, will render a binding legal judgment directly
59 affecting a party’s interests in a particular matter.

60 (n) “Writing” or “written” denotes a tangible or electronic record of a
61 communication or representation, including handwriting, typewriting, printing,
62 photostating, photography, audio or video recording and e-mail. A “signed”
63 writing includes an electronic sound, symbol or process attached to or logically
64 associated with a writing and executed or adopted by a person with the intent to
65 sign the writing.

66

67 COMMENT

68 Confirmed in Writing

69 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client
70 gives informed consent, then the lawyer must obtain or transmit it within a reasonable
71 time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act
72 in reliance on that consent so long as it is confirmed in writing within a reasonable time
73 thereafter.

74 Firm

75 [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on
76 the specific facts. For example, two practitioners who share office space and occasionally
77 consult or assist each other ordinarily would not be regarded as constituting a firm.
78 However, if they present themselves to the public in a way that suggests that they are a
79 firm or conduct themselves as a firm, they should be regarded as a firm for purposes of
80 the Rules. The terms of any formal agreement between associated lawyers are relevant in
81 determining whether they are a firm, as is the fact that they have mutual access to
82 information concerning the clients they serve. Furthermore, it is relevant in doubtful
83 cases to consider the underlying purpose of the Rule that is involved. A group of lawyers
84 could be regarded as a firm for purposes of the Rule that the same lawyer should not
85 represent opposing parties in litigation, while it might not be so regarded for purposes of
86 the Rule that information acquired by one lawyer is attributed to another.

87 [3] With respect to the law department of an organization, including the government,
88 there is ordinarily no question that the members of the department constitute a firm
89 within the meaning of the Rules of Professional Conduct. There can be uncertainty,
90 however, as to the identity of the client. For example, it may not be clear whether the law

91 department of a corporation represents a subsidiary or an affiliated corporation, as well as
92 the corporation by which the members of the department are directly employed. A similar
93 question can arise concerning an unincorporated association and its local affiliates.

94 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
95 organizations. Depending upon the structure of the organization, the entire organization
96 or different components of it may constitute a firm or firms for purposes of these Rules.

97 **Fraud**

98 [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is
99 characterized as such under the substantive or procedural law of the applicable
100 jurisdiction and has a purpose to deceive. This does not include merely negligent
101 misrepresentation or negligent failure to apprise another of relevant information. For
102 purposes of these Rules, it is not necessary that anyone has suffered damages or relied on
103 the misrepresentation or failure to inform.

104 **Informed Consent**

105 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed
106 consent of a client or other person (e.g., a former client or, under certain circumstances, a
107 prospective client) before accepting or continuing representation or pursuing a course of
108 conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to
109 obtain such consent will vary according to the Rule involved and the circumstances
110 giving rise to the need to obtain informed consent. The lawyer must make reasonable
111 efforts to ensure that the client or other person possesses information reasonably adequate
112 to make an informed decision. Ordinarily, this will require communication that includes a
113 disclosure of the facts and circumstances giving rise to the situation, any explanation
114 reasonably necessary to inform the client or other person of the material advantages and
115 disadvantages of the proposed course of conduct and a discussion of the client’s or other
116 person’s options and alternatives. In some circumstances it may be appropriate for a
117 lawyer to advise a client or other person to seek the advice of other counsel. A lawyer
118 need not inform a client or other person of facts or implications already known to the
119 client or other person; nevertheless, a lawyer who does not personally inform the client or
120 other person assumes the risk that the client or other person is inadequately informed and
121 the consent is invalid. In determining whether the information and explanation provided
122 are reasonably adequate, relevant factors include whether the client or other person is
123 experienced in legal matters generally and in making decisions of the type involved, and
124 whether the client or other person is independently represented by other counsel in giving
125 the consent. Normally, such persons need less information and explanation than others,
126 and generally a client or other person who is independently represented by other counsel
127 in giving the consent should be assumed to have given informed consent.

128 [7] Obtaining informed consent will usually require an affirmative response by the client
129 or other person. In general, a lawyer may not assume consent from a client’s or other
130 person’s silence. Consent may be inferred, however, from the conduct of a client or other
131 person who has reasonably adequate information about the matter. A number of Rules
132 require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a
133 definition of “writing” and “confirmed in writing,” see paragraphs (n) and (b). Other
134 Rules require that a client’s consent be obtained in a writing signed by the client. See,
135 e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (n).

136 **Screened**

137 [8] This definition applies to situations where screening of a personally disqualified
138 lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11,
139 1.12 or 1.18.

140 [9] The purpose of screening is to assure the affected parties that confidential information
141 known by the personally disqualified lawyer remains protected. The personally
142 disqualified lawyer should acknowledge the obligation not to communicate with any of
143 the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the
144 firm who are working on the matter should be informed that the screening is in place and
145 that they may not communicate with the personally disqualified lawyer with respect to
146 the matter. Additional screening measures that are appropriate for the particular matter
147 will depend on the circumstances. To implement, reinforce and remind all affected
148 lawyers of the presence of the screening, it may be appropriate for the firm to undertake
149 such procedures as a written undertaking by the screened lawyer to avoid any
150 communication with other firm personnel and any contact with any firm files or other
151 materials information, including information in electronic form, relating to the matter,
152 written notice and instructions to all other firm personnel forbidding any communication
153 with the screened lawyer relating to the matter, denial of access by the screened lawyer to
154 firm files or other materials information, including information in electronic form,
155 relating to the matter, ~~written notice and instructions to all other firm personnel~~
156 ~~forbidding any communication with the screened lawyer relating to the matter, denial of~~
157 ~~access by the screened lawyer to firm files or other materials relating to the matter and~~
158 periodic reminders of the screen to the screened lawyer and all other firm personnel.

159 [10] In order to be effective, screening measures must be implemented as soon as
160 practical after a lawyer or law firm knows or reasonably should know that there is a need
161 for screening.

162

163 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
164 **1.1 (Competence) of the ABA Model Rules of Professional Conduct as follows**
165 **(insertions underlined, deletions ~~struck through~~):**

166

167 **Rule 1.1 Competence**

168

169 **A lawyer shall provide competent representation to a client. Competent**
170 **representation requires the legal knowledge, skill, thoroughness and preparation**
171 **reasonably necessary for the representation.**

172

173 **COMMENT**

174 **Legal Knowledge and Skill**

175 [1] In determining whether a lawyer employs the requisite knowledge and skill in a
176 particular matter, relevant factors include the relative complexity and specialized nature
177 of the matter, the lawyer's general experience, the lawyer's training and experience in the
178 field in question, the preparation and study the lawyer is able to give the matter and
179 whether it is feasible to refer the matter to, or associate or consult with, a lawyer of
180 established competence in the field in question. In many instances, the required

181 proficiency is that of a general practitioner. Expertise in a particular field of law may be
182 required in some circumstances.

183 [2] A lawyer need not necessarily have special training or prior experience to handle legal
184 problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be
185 as competent as a practitioner with long experience. Some important legal skills, such as
186 the analysis of precedent, the evaluation of evidence and legal drafting, are required in all
187 legal problems. Perhaps the most fundamental legal skill consists of determining what
188 kind of legal problems a situation may involve, a skill that necessarily transcends any
189 particular specialized knowledge. A lawyer can provide adequate representation in a
190 wholly novel field through necessary study. Competent representation can also be
191 provided through the association of a lawyer of established competence in the field in
192 question.

193 [3] In an emergency a lawyer may give advice or assistance in a matter in which the
194 lawyer does not have the skill ordinarily required where referral to or consultation or
195 association with another lawyer would be impractical. Even in an emergency, however,
196 assistance should be limited to that reasonably necessary in the circumstances, for ill-
197 considered action under emergency conditions can jeopardize the client's interest.

198 [4] A lawyer may accept representation where the requisite level of competence can be
199 achieved by reasonable preparation. This applies as well to a lawyer who is appointed as
200 counsel for an unrepresented person. See also Rule 6.2.

201 **Thoroughness and Preparation**

202 [5] Competent handling of a particular matter includes inquiry into and analysis of the
203 factual and legal elements of the problem, and use of methods and procedures meeting
204 the standards of competent practitioners. It also includes adequate preparation. The
205 required attention and preparation are determined in part by what is at stake; major
206 litigation and complex transactions ordinarily require more extensive treatment than
207 matters of lesser complexity and consequence. An agreement between the lawyer and the
208 client regarding the scope of the representation may limit the matters for which the
209 lawyer is responsible. See Rule 1.2 (c).

210 **Maintaining Competence**

211 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
212 changes in the law and its practice, including the benefits and risks associated with
213 technology, engage in continuing study and education and comply with all continuing
214 legal education requirements to which the lawyer is subject.

215

216 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
217 **1.4 (Communication) of the ABA Model Rules of Professional Conduct as follows**
218 **(insertions underlined, deletions ~~struck through~~):**

219

220 **Rule 1.4 Communication**

221 **(a) A lawyer shall:**

222 **(1) promptly inform the client of any decision or circumstance with respect to which**
223 **the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**

224 **(2) reasonably consult with the client about the means by which the client's**
225 **objectives are to be accomplished;**

226 (3) keep the client reasonably informed about the status of the matter;
227 (4) promptly comply with reasonable requests for information; and
228 (5) consult with the client about any relevant limitation on the lawyer's conduct
229 when the lawyer knows that the client expects assistance not permitted by the Rules
230 of Professional Conduct or other law.

231 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the
232 client to make informed decisions regarding the representation.
233

234 COMMENT

235 [1] Reasonable communication between the lawyer and the client is necessary for the
236 client effectively to participate in the representation.
237

238 Communicating with Client

239 [2] If these Rules require that a particular decision about the representation be made by
240 the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the
241 client's consent prior to taking action unless prior discussions with the client have
242 resolved what action the client wants the lawyer to take. For example, a lawyer who
243 receives from opposing counsel an offer of settlement in a civil controversy or a proffered
244 plea bargain in a criminal case must promptly inform the client of its substance unless the
245 client has previously indicated that the proposal will be acceptable or unacceptable or has
246 authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

247 [3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the
248 means to be used to accomplish the client's objectives. In some situations — depending
249 on both the importance of the action under consideration and the feasibility of consulting
250 with the client — this duty will require consultation prior to taking action. In other
251 circumstances, such as during a trial when an immediate decision must be made, the
252 exigency of the situation may require the lawyer to act without prior consultation. In such
253 cases the lawyer must nonetheless act reasonably to inform the client of actions the
254 lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the
255 lawyer keep the client reasonably informed about the status of the matter, such as
256 significant developments affecting the timing or the substance of the representation.

257 [4] A lawyer's regular communication with clients will minimize the occasions on which
258 a client will need to request information concerning the representation. When a client
259 makes a reasonable request for information, however, paragraph (a)(4) requires prompt
260 compliance with the request, or if a prompt response is not feasible, that the lawyer, or a
261 member of the lawyer's staff, acknowledge receipt of the request and advise the client
262 when a response may be expected. ~~Client telephone calls should be promptly returned or~~
263 ~~acknowledged.~~ Lawyers should promptly respond to or acknowledge client
264 communications.
265

266 Explaining Matters

267 [5] The client should have sufficient information to participate intelligently in decisions
268 concerning the objectives of the representation and the means by which they are to be
269 pursued, to the extent the client is willing and able to do so. Adequacy of communication
270 depends in part on the kind of advice or assistance that is involved. For example, when
271 there is time to explain a proposal made in a negotiation, the lawyer should review all

272 important provisions with the client before proceeding to an agreement. In litigation a
273 lawyer should explain the general strategy and prospects of success and ordinarily should
274 consult the client on tactics that are likely to result in significant expense or to injure or
275 coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial
276 or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill
277 reasonable client expectations for information consistent with the duty to act in the
278 client's best interests, and the client's overall requirements as to the character of
279 representation. In certain circumstances, such as when a lawyer asks a client to consent to
280 a representation affected by a conflict of interest, the client must give informed consent,
281 as defined in Rule 1.0(e).

282 [6] Ordinarily, the information to be provided is that appropriate for a client who is a
283 comprehending and responsible adult. However, fully informing the client according to
284 this standard may be impracticable, for example, where the client is a child or suffers
285 from diminished capacity. See Rule 1.14. When the client is an organization or group, it
286 is often impossible or inappropriate to inform every one of its members about its legal
287 affairs; ordinarily, the lawyer should address communications to the appropriate officials
288 of the organization. See Rule 1.13. Where many routine matters are involved, a system of
289 limited or occasional reporting may be arranged with the client.

290

291 **Withholding Information**

292 [7] In some circumstances, a lawyer may be justified in delaying transmission of
293 information when the client would be likely to react imprudently to an immediate
294 communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when
295 the examining psychiatrist indicates that disclosure would harm the client. A lawyer may
296 not withhold information to serve the lawyer's own interest or convenience or the
297 interests or convenience of another person. Rules or court orders governing litigation may
298 provide that information supplied to a lawyer may not be disclosed to the client. Rule
299 3.4(c) directs compliance with such rules or orders.

300

301 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
302 **1.6 (Duty of Confidentiality) of the ABA Model Rules of Professional Conduct as**
303 **follows (insertions underlined, deletions ~~struck through~~):**

304

305 **Rule 1.6 Confidentiality of Information**

306

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

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

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

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

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

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

322 (5) to establish a claim or defense on behalf of the lawyer in a controversy between
323 the lawyer and the client, to establish a defense to a criminal charge or civil claim
324 against the lawyer based upon conduct in which the client was involved, or to
325 respond to allegations in any proceeding concerning the lawyer's representation of
326 the client; or (6) to comply with other law or a court order.

327 **(c) A lawyer shall make reasonable efforts to prevent the unintended disclosure of,**
328 **or unauthorized access to, information relating to the representation of a client.**

329

330 **COMMENT**

331 [1] This Rule governs the disclosure by a lawyer of information relating to the
332 representation of a client during the lawyer's representation of the client. See Rule 1.18
333 for the lawyer's duties with respect to information provided to the lawyer by a
334 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
335 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
336 the lawyer's duties with respect to the use of such information to the disadvantage of
337 clients and former clients.

338 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the
339 client's informed consent, the lawyer must not reveal information relating to the
340 representation. See Rule 1.0(e) for the definition of informed consent. This contributes to
341 the trust that is the hallmark of the client-lawyer relationship. The client is thereby
342 encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
343 even as to embarrassing or legally damaging subject matter. The lawyer needs this
344 information to represent the client effectively and, if necessary, to advise the client to
345 refrain from wrongful conduct. Almost without exception, clients come to lawyers in
346 order to determine their rights and what is, in the complex of laws and regulations,
347 deemed to be legal and correct. Based upon experience, lawyers know that almost all
348 clients follow the advice given, and the law is upheld.

349 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
350 the attorney-client privilege, the work-product doctrine and the rule of confidentiality
351 established in professional ethics. The attorney-client privilege and work-product
352 doctrine apply in judicial and other proceedings in which a lawyer may be called as a
353 witness or otherwise required to produce evidence concerning a client. The rule of client-
354 lawyer confidentiality applies in situations other than those where evidence is sought
355 from the lawyer through compulsion of law. The confidentiality rule, for example,
356 applies not only to matters communicated in confidence by the client but also to all
357 information relating to the representation, whatever its source. A lawyer may not disclose
358 such information except as authorized or required by the Rules of Professional Conduct
359 or other law. See also Scope.

360 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
361 representation of a client. This prohibition also applies to disclosures by a lawyer that do
362 not in themselves reveal protected information but could reasonably lead to the discovery

363 of such information by a third person. A lawyer’s use of a hypothetical to discuss issues
364 relating to the representation is permissible so long as there is no reasonable likelihood
365 that the listener will be able to ascertain the identity of the client or the situation involved.

366 **Authorized Disclosure**

367 [5] Except to the extent that the client’s instructions or special circumstances limit that
368 authority, a lawyer is impliedly authorized to make disclosures about a client when
369 appropriate in carrying out the representation. In some situations, for example, a lawyer
370 may be impliedly authorized to admit a fact that cannot properly be disputed or to make a
371 disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in
372 the course of the firm’s practice, disclose to each other information relating to a client of
373 the firm, unless the client has instructed that particular information be confined to
374 specified lawyers.

375 **Disclosure Adverse to Client**

376 [6] Although the public interest is usually best served by a strict rule requiring lawyers to
377 preserve the confidentiality of information relating to the representation of their clients,
378 the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the
379 overriding value of life and physical integrity and permits disclosure reasonably
380 necessary to prevent reasonably certain death or substantial bodily harm. Such harm is
381 reasonably certain to occur if it will be suffered imminently or if there is a present and
382 substantial threat that a person will suffer such harm at a later date if the lawyer fails to
383 take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has
384 accidentally discharged toxic waste into a town’s water supply may reveal this
385 information to the authorities if there is a present and substantial risk that a person who
386 drinks the water will contract a life-threatening or debilitating disease and the lawyer’s
387 disclosure is necessary to eliminate the threat or reduce the number of victims.

388 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the
389 lawyer to reveal information to the extent necessary to enable affected persons or
390 appropriate authorities to prevent the client from committing a crime or fraud, as defined
391 in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or
392 property interests of another and in furtherance of which the client has used or is using
393 the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client
394 forfeits the protection of this Rule. The client can, of course, prevent such disclosure by
395 refraining from the wrongful conduct. Although paragraph (b)(2) does not require the
396 lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in
397 conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16
398 with respect to the lawyer’s obligation or right to withdraw from the representation of the
399 client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client
400 is an organization, to reveal information relating to the representation in limited
401 circumstances.

402 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the
403 client’s crime or fraud until after it has been consummated. Although the client no longer
404 has the option of preventing disclosure by refraining from the wrongful conduct, there
405 will be situations in which the loss suffered by the affected person can be prevented,
406 rectified or mitigated. In such situations, the lawyer may disclose information relating to
407 the representation to the extent necessary to enable the affected persons to prevent or
408 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3)

409 does not apply when a person who has committed a crime or fraud thereafter employs a
410 lawyer for representation concerning that offense.

411 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
412 confidential legal advice about the lawyer's personal responsibility to comply with these
413 Rules. In most situations, disclosing information to secure such advice will be impliedly
414 authorized for the lawyer to carry out the representation. Even when the disclosure is not
415 impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance
416 of a lawyer's compliance with the Rules of Professional Conduct.

417 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
418 client's conduct or other misconduct of the lawyer involving representation of the client,
419 the lawyer may respond to the extent the lawyer reasonably believes necessary to
420 establish a defense. The same is true with respect to a claim involving the conduct or
421 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
422 or other proceeding and can be based on a wrong allegedly committed by the lawyer
423 against the client or on a wrong alleged by a third person, for example, a person claiming
424 to have been defrauded by the lawyer and client acting together. The lawyer's right to
425 respond arises when an assertion of such complicity has been made. Paragraph (b)(5)
426 does not require the lawyer to await the commencement of an action or proceeding that
427 charges such complicity, so that the defense may be established by responding directly to
428 a third party who has made such an assertion. The right to defend also applies, of course,
429 where a proceeding has been commenced.

430 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services
431 rendered in an action to collect it. This aspect of the rule expresses the principle that the
432 beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

433 [12] Other law may require that a lawyer disclose information about a client. Whether
434 such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.
435 When disclosure of information relating to the representation appears to be required by
436 other law, the lawyer must discuss the matter with the client to the extent required by
437 Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,
438 paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply
439 with the law.

440 [13] A lawyer may be ordered to reveal information relating to the representation of a
441 client by a court or by another tribunal or governmental entity claiming authority
442 pursuant to other law to compel the disclosure. Absent informed consent of the client to
443 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
444 the order is not authorized by other law or that the information sought is protected against
445 disclosure by the attorney-client privilege or other applicable law. In the event of an
446 adverse ruling, the lawyer must consult with the client about the possibility of appeal to
447 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6)
448 permits the lawyer to comply with the court's order.

449 [14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
450 the disclosure is necessary to accomplish one of the purposes specified. Where
451 practicable, the lawyer should first seek to persuade the client to take suitable action to
452 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
453 should be no greater than the lawyer reasonably believes necessary to accomplish the
454 purpose. If the disclosure will be made in connection with a judicial proceeding, the

455 disclosure should be made in a manner that limits access to the information to the tribunal
456 or other persons having a need to know it and appropriate protective orders or other
457 arrangements should be sought by the lawyer to the fullest extent practicable.

458 [15] Paragraph (b) permits but does not require the disclosure of information relating to a
459 client's representation to accomplish the purposes specified in paragraphs (b)(1) through
460 (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such
461 factors as the nature of the lawyer's relationship with the client and with those who might
462 be injured by the client, the lawyer's own involvement in the transaction and factors that
463 may extenuate the conduct in question. A lawyer's decision not to disclose as permitted
464 by paragraph (b) does not violate this Rule. Disclosure may be required, however, by
465 other Rules. Some Rules require disclosure only if such disclosure would be permitted by
466 paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires
467 disclosure in some circumstances regardless of whether such disclosure is permitted by
468 this Rule. See Rule 3.3(c).

469 **Acting Competently to Preserve Confidentiality**

470 [16] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information
471 relating to the representation of a client against inadvertent or unauthorized disclosure by
472 the lawyer or other persons or entities who are participating in the representation of the
473 client or who are subject to the lawyer's supervision or monitoring. See Rules 1.1, 5.1
474 and 5.3. Factors to be considered in determining the reasonableness of the lawyer's
475 efforts include the sensitivity of the information, the likelihood of disclosure if additional
476 safeguards are not employed, the cost of employing additional safeguards, the difficulty
477 of implementing the safeguards, and the extent to which the safeguards adversely affect
478 the lawyer's ability to represent clients (e.g., by making a device or important piece of
479 software excessively difficult to use). A client may require the lawyer to implement
480 special security measures not required by this Rule or may give informed consent to
481 forego security measures that would otherwise be required by this Rule. Whether a
482 lawyer may be required to take additional steps to safeguard a client's information in
483 order to comply with other law, such as state and federal laws that govern data privacy or
484 that impose notification requirements upon the loss of, or unauthorized access to,
485 electronic information, is beyond the scope of these Rules.

486 [17] When transmitting a communication that includes information relating to the
487 representation of a client, the lawyer must take reasonable precautions to prevent the
488 information from coming into the hands of unintended recipients. This duty, however,
489 does not require that the lawyer use special security measures if the method of
490 communication affords a reasonable expectation of privacy. Special circumstances,
491 however, may warrant special precautions. Factors to be considered in determining the
492 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the
493 information and the extent to which the privacy of the communication is protected by law
494 or by a confidentiality agreement. A client may require the lawyer to implement special
495 security measures not required by this Rule or may give informed consent to the use of a
496 means of communication that would otherwise be prohibited by this Rule. Whether a
497 lawyer may be required to take additional steps in order to comply with other laws, such
498 as state and federal laws that govern data privacy, is beyond the scope of these Rules.

499 **Former Client**

500 [18] The duty of confidentiality continues after the client-lawyer relationship has
501 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
502 information to the disadvantage of the former client.

503

504 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
505 **4.4 (Respect for Rights of Third Persons) of the ABA Model Rules of Professional**
506 **Conduct as follows (insertions underlined, deletions ~~struck through~~):**

507

508 **Rule 4.4 Respect for Rights of Third Persons**

509

510 **(a) In representing a client, a lawyer shall not use means that have no substantial**
511 **purpose other than to embarrass, delay, or burden a third person, or use methods of**
512 **obtaining evidence that violate the legal rights of such a person.**

513 **(b) A lawyer who receives a document or electronically stored information relating**
514 **to the representation of the lawyer's client and knows or reasonably should know**
515 **that the document or electronically stored information ~~document~~ was not intended**
516 **to be disclosed to the lawyer ~~inadvertently sent~~ shall promptly notify the sender.**

517

518 **COMMENT**

519 [1] Responsibility to a client requires a lawyer to subordinate the interests of others to
520 those of the client, but that responsibility does not imply that a lawyer may disregard the
521 rights of third persons. It is impractical to catalogue all such rights, but they include legal
522 restrictions on methods of obtaining evidence from third persons and unwarranted
523 intrusions into privileged relationships, such as the client-lawyer relationship.

524 [2] Paragraph (b) recognizes that lawyers sometimes receive a documents or
525 electronically stored information that ~~were~~ ~~was~~ mistakenly sent or produced by opposing
526 parties or their lawyers. If a lawyer knows or reasonably should know that such a
527 document or electronically stored information was not intended to be disclosed to the
528 lawyer, then this Rule requires the lawyer to promptly notify the sender in order to permit
529 that person to take protective measures. Whether the lawyer is required to take additional
530 steps, such as returning the document or electronically stored information ~~original~~
531 ~~document~~, is a matter of law beyond the scope of these Rules, as is the question of
532 whether the privileged status of a document or electronically stored information has been
533 waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a
534 document or electronically stored information that the lawyer knows or reasonably
535 should know may have been ~~wrongfully~~ inappropriately obtained by the sending person.
536 For purposes of this Rule, “document or electronically stored information” includes
537 paper documents, email, and other forms of electronically stored information, including
538 electronic documents and the hidden data about the information contained in those
539 documents (commonly referred to as “metadata”), that are ~~email or other electronic~~
540 ~~modes of transmission~~ subject to being read or put into readable form. Receipt of
541 electronic information containing “metadata” does not, standing alone, create a duty
542 under this Rule.

543 [3] Some lawyers may choose to return a document or electronically stored information
544 unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was

545 not intended by the sender to be received by the lawyer ~~inadvertently sent to the wrong~~
546 ~~address.~~ Where a lawyer is not required by applicable law to do so, the decision to
547 voluntarily return such a document or electronically stored information is a matter of
548 professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

Introduction

Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. One of the ABA Commission on Ethics 20/20's objectives has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology.

To develop appropriate recommendations in this area, the Commission studied how lawyers use various forms of technology and the current state of data security measures. In particular, the Commission conducted significant research about and heard testimony from providers of law practice-related technology, lawyers who advise other lawyers on their use of technology, and lawyers who regularly use different types of technology in their practices.¹ The Commission released an Issues Paper identifying a wide range of confidentiality-related issues and received and reviewed numerous comments from technology providers as well as lawyers in a range of practice settings. Finally, the Commission's Technology Working Group included participants from the Law Practice Management Section, the Litigation Section, the Standing Committee on Ethics and Professional Responsibility, and the Young Lawyer's Division. They made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report.

As a result of these efforts, the Commission developed two proposals. First, it has asked that the ABA Center for Professional Responsibility work with relevant entities within the Association to create a centralized user-friendly website that contains continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers' use of technology, including the latest data security standards. The [ABA's Legal Technology Resource Center](#) and [Law Practice Management Section's eLawyering Task Force](#) have developed excellent technology-related resources, but those resources exist in different places on the ABA website. The Commission found that lawyers are seeking a website that serves as a centralized and continuously updated resource on these issues.

The Commission believes that the information contained on this website should be presented in such a way that lawyers who may not have extensive knowledge about technology and associated ethics issues can easily understand the information. For example, this resource should identify the key issues that lawyers should consider when using technology in their

¹ Among other resources, the Commission examined the ABA Legal Technology Resource Center's *Legal Technology Survey Report*, which contains extensive information about how lawyers use technology. The 2011 Report is available at:
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/publications.html.

practices and, at the same time, highlight additional cutting-edge and more sophisticated topics. The website also should include regularly updated information about security standards, including the identification of standards-setting organizations, so that lawyers can more easily determine whether the technology that they employ is compliant with those standards. In sum, the Commission concluded that this web-based resource is critical given that rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology.

The Commission is also proposing to amend several Model Rules of Professional Conduct and their Comments. Unlike the proposed website, which can be regularly updated in light of new technology and changing security concerns, the black letter Rule and Comment-based proposals necessarily offer more general guidance that are not tied to the use of any particular form of technology.²

The Commission identified four areas that would benefit from this guidance. First, the Commission concluded that technology has raised new issues for law firms that employ screens pursuant to Model Rules 1.10, 1.11, 1.12, and 1.18. In particular, the Commission concluded that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Commission is proposing an amendment to address this point in Comment [9] of Model Rule 1.0 (Terminology), which concerns the definition of a screen under Model Rule 1.0(k).

Second, the Commission concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Commission is recommending an amendment to Comment [6] of Model Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of technology's benefits and risks.

Third, the Commission is proposing a change to the last sentence of Comment [4] to Model Rule 1.4, which currently says that, "[c]lient telephone calls should be promptly returned or acknowledged." The Commission proposes to replace that admonition with the following language: "Lawyers should promptly respond to or acknowledge client communications." Although not related to a lawyer's confidentiality obligations, the Commission nevertheless concluded that this language more accurately describes a lawyer's obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fourth, the Commission is proposing to add a new paragraph to the black letter provisions of Model Rule 1.6 (Confidentiality of Information). Proposed new Model Rule 1.6(c) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from unintended disclosure and unauthorized access. This duty is already implicit in Model Rule 1.6 and is described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit

² The Commission will also ask the ABA's Standing Committee on Ethics and Professional Responsibility to develop Formal Opinions on particular confidentiality-related issues relating to technology that cannot be suitably addressed in the Model Rules or their Comments.

confidential client information, this obligation should be stated explicitly in the black letter of Model Rule 1.6.

Finally, the Commission is proposing new language to clarify the scope of Model Rule 4.4(b), which concerns a lawyer's obligations upon receiving confidential information that was not intended for the lawyer. The current provision describes the receipt of "documents" containing privileged information, but privileged information can be disclosed in various forms, including in emails, hard drives, and data embedded in electronic documents. Thus, the Commission concluded that Rule 4.4(b) should be amended to reflect this broader understanding.

The Commission concluded that these clarifying amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology's many benefits. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

I. Model Rule 1.0(k) (Terminology; Screening)

Model Rule 1.0 is the Terminology Section of the Model Rules. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer's access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Commission concluded and heard that greater clarity and specificity is needed. To that end, the Commission is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

II. Model Rule 1.1 (Competence)

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice, lawyers necessarily need to understand basic features of technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or to create or edit an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that the addition of the phrase "including the benefits and risks associated with technology" would offer greater clarity regarding a lawyer's obligations in this area and emphasize the importance of technology to

modern law practice. The proposed amendment does not impose any new obligations on lawyers. Rather, the amendment is intended to emphasize that a lawyer should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent.

III. Model Rule 1.4 (Communication)

Model Rule 1.4 describes a lawyer's duty to communicate with clients, and the last sentence of Comment [4] to Model Rule 1.4 currently instructs lawyers that "[c]lient telephone calls should be promptly returned or acknowledged." Clients, however, now communicate with lawyers in an increasing number of ways, including by email, so a lawyer's obligation to respond to such communications exists regardless of the medium that is used. Accordingly, the Commission proposes to replace the last sentence of Comment [4] with the following language: "Lawyers should promptly respond to or acknowledge client communications." The Commission concluded that this language more accurately describes a lawyer's obligations in light of changes in technology and evolving methods of communication.

IV. Model Rule 1.6 (Duty of Confidentiality)

Currently, Model Rule 1.6(a) states that a lawyer has a duty not to reveal a client's confidential information, except for the circumstances described in Model Rule 1.6(b). The Rule, however, does not indicate what ethical obligations lawyers have to *prevent* such a revelation. Although this obligation is described in Comments [16] and [17], the Commission concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Model Rule 1.6(c).

The idea of explaining a lawyer's duty to safeguard information within the black letter of the Rule is not new. The proposed Model Rule 1.6(c) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Commission concluded that a similar provision should appear in Model Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

To be clear, the proposal should not be understood to mean that a lawyer engages in professional misconduct every time a client's confidences are inadvertently disclosed or subject to unauthorized access. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state explicitly in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not and cannot prevent every disclosure or unauthorized access.

The Commission decided that technology is changing too rapidly to offer detailed guidance as to the specific precautions that a lawyer should take, and that a lawyer's obligations will necessarily change as technology evolves and as new risks and security procedures become available. Nevertheless, the Commission is proposing new language to Comment [16] to identify several factors that lawyers should consider when determining whether their efforts in this regard have been reasonable, including 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).

The new Comment language also makes clear that a client might require the lawyer to implement special security measures not required by the Rule or may give informed consent to the use of security measures that would otherwise be prohibited by the Rule. A nearly identical observation appears in Comment [17] in the context of security measures that lawyers might have to employ when transmitting confidential information. The Commission concluded that a similar thought should be expressed in the context of Comment [16], which pertains to the storage of such information.

Finally, the Commission's research revealed that there has been a dramatic growth in federal, state, and international laws and regulations relating to data privacy. The Commission found that this body of law increasingly applies to lawyers and law firms, and that lawyers need to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence to the end of Comment [16] and Comment [17] that would remind lawyers that other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Model Rules of Professional Conduct. Other Comments in the Model Rules instruct lawyers to consult law outside of the ethics rules, and the Commission concluded that a lawyer's duty of confidentiality is another area where other legal obligations have become sufficiently important and common that a lawyer should be expressly reminded to consider those obligations, both when storing confidential information (Comment [16]) and when transmitting it (Comment [17]).

V. Model Rule 4.4 (Respect for Rights of Third Persons)

Technology has increased the risk that confidential information will be inadvertently disclosed, and Model Rule 4.4(b) addresses one particular ethics issue associated with this risk. Namely, it provides that, if lawyers receive documents that they know or reasonably should know were not intended for them, they must notify the sender.

The Commission concluded that the word "document" is inadequate to express the various ways in which information can be unintentionally disclosed. For example, confidential information can now be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata). To make clear that the Rule applies to those situations, the Commission has proposed that the word "document" be replaced with the phrase that is commonly used in the context of discovery – "document or electronically stored information."

In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, Comment [2] expressly states that metadata is included within the scope of the Rule, at least when the receiving lawyer knows or has reason to believe that the metadata was not intended to be disclosed. The Comment makes clear that the mere existence of metadata in a document does not give rise to a duty under this Rule, but if a lawyer discovers that an electronic document contains confidential metadata, that discovery may implicate the Rule's reporting requirement.

ABA Formal Opinion 06-442 addressed the related issue of whether lawyers should even be permitted to look at a sending party's electronic metadata. That Opinion concluded that there is no ethical prohibition against doing so. Several state bar association ethics opinions, however, have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party's metadata. Implicit in the Commission's recommendation is that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances. For example, even in states that prohibit lawyers from looking at metadata, lawyers are permitted to do so with the opponent's permission. The Commission's proposal recognizes that, when reviewing metadata with permission (or otherwise), a lawyer might discover particular metadata that the lawyer knows the sending lawyer did not intend to include. The Commission's proposed amendments are designed to ensure that, under these circumstances, Rule 4.4(b)'s notification requirement is triggered.

Finally, the Commission is proposing to replace the word "inadvertent" with the phrase "not intended to be disclosed to the lawyer." The purpose of the change is to recognize that a lawyer might send a document intentionally, but mistakenly send it to the wrong party. Under those circumstances, the document or electronically stored information is sent intentionally, not inadvertently. Nevertheless, the lawyer who receives the document or electronically stored information erroneously would still have a duty under Rule 4.4(b) to report the error to the sender.

VI. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients' confidential information and that reasonable safeguards are ethically required. The Commission's proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology's many benefits. The Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.