

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.

4
5 **American Bar Association**
6 **Commission on Ethics 20/20**

7
8 **Resolutions**

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

13
14 **Rule 1.0 Terminology**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

67

68 COMMENT

69 Confirmed in Writing

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

75

76 Firm

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

89 [3] With respect to the law department of an organization, including the
90 government, there is ordinarily no question that the members of the department constitute

91 a firm within the meaning of the Rules of Professional Conduct. There can be
92 uncertainty, however, as to the identity of the client. For example, it may not be clear
93 whether the law department of a corporation represents a subsidiary or an affiliated
94 corporation, as well as the corporation by which the members of the department are
95 directly employed. A similar question can arise concerning an unincorporated association
96 and its local affiliates.

97 [4] Similar questions can also arise with respect to lawyers in legal aid and legal
98 services organizations. Depending upon the structure of the organization, the entire
99 organization or different components of it may constitute a firm or firms for purposes of
100 these Rules.

101 **Fraud**

102 [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct
103 that is characterized as such under the substantive or procedural law of the applicable
104 jurisdiction and has a purpose to deceive. This does not include merely negligent
105 misrepresentation or negligent failure to apprise another of relevant information. For
106 purposes of these Rules, it is not necessary that anyone has suffered damages or relied on
107 the misrepresentation or failure to inform.
108

109 **Informed Consent**

110 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the
111 informed consent of a client or other person (e.g., a former client or, under certain
112 circumstances, a prospective client) before accepting or continuing representation or
113 pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The
114 communication necessary to obtain such consent will vary according to the Rule involved
115 and the circumstances giving rise to the need to obtain informed consent. The lawyer
116 must make reasonable efforts to ensure that the client or other person possesses
117 information reasonably adequate to make an informed decision. Ordinarily, this will
118 require communication that includes a disclosure of the facts and circumstances giving
119 rise to the situation, any explanation reasonably necessary to inform the client or other
120 person of the material advantages and disadvantages of the proposed course of conduct
121 and a discussion of the client’s or other person’s options and alternatives. In some
122 circumstances it may be appropriate for a lawyer to advise a client or other person to seek
123 the advice of other counsel. A lawyer need not inform a client or other person of facts or
124 implications already known to the client or other person; nevertheless, a lawyer who does
125 not personally inform the client or other person assumes the risk that the client or other
126 person is inadequately informed and the consent is invalid. In determining whether the
127 information and explanation provided are reasonably adequate, relevant factors include
128 whether the client or other person is experienced in legal matters generally and in making
129 decisions of the type involved, and whether the client or other person is independently
130 represented by other counsel in giving the consent. Normally, such persons need less
131 information and explanation than others, and generally a client or other person who is
132 independently represented by other counsel in giving the consent should be assumed to
133 have given informed consent.
134

135 [7] Obtaining informed consent will usually require an affirmative response by
136 the client or other person. In general, a lawyer may not assume consent from a client's or
137 other person's silence. Consent may be inferred, however, from the conduct of a client or
138 other person who has reasonably adequate information about the matter. A number of
139 Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and
140 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and
141 (b). Other Rules require that a client's consent be obtained in a writing signed by the
142 client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

143
144 **Screened**

145 [8] This definition applies to situations where screening of a personally
146 disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules
147 1.10, 1.11, 1.12 or 1.18.

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

165 [10] In order to be effective, screening measures must be implemented as soon as
166 practical after a lawyer or law firm knows or reasonably should know that there is a need
167 for screening.

168
169 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
170 **1.1 (Competence) of the ABA Model Rules of Professional Conduct as follows**
171 **(insertions underlined, deletions ~~struck through~~):**

172
173 **Rule 1.1 Competence**

174
175 **A lawyer shall provide competent representation to a client. Competent**
176 **representation requires the legal knowledge, skill, thoroughness and preparation**
177 **reasonably necessary for the representation.**

178 **COMMENT**

179 **Legal Knowledge and Skill**

180 [1] In determining whether a lawyer employs the requisite knowledge and skill in
181 a particular matter, relevant factors include the relative complexity and specialized nature
182 of the matter, the lawyer's general experience, the lawyer's training and experience in the
183 field in question, the preparation and study the lawyer is able to give the matter and
184 whether it is feasible to refer the matter to, or associate or consult with, a lawyer of
185 established competence in the field in question. In many instances, the required
186 proficiency is that of a general practitioner. Expertise in a particular field of law may be
187 required in some circumstances.

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

198 [3] In an emergency a lawyer may give advice or assistance in a matter in which
199 the lawyer does not have the skill ordinarily required where referral to or consultation or
200 association with another lawyer would be impractical. Even in an emergency, however,
201 assistance should be limited to that reasonably necessary in the circumstances, for ill-
202 considered action under emergency conditions can jeopardize the client's interest.

203 [4] A lawyer may accept representation where the requisite level of competence
204 can be achieved by reasonable preparation. This applies as well to a lawyer who is
205 appointed as counsel for an unrepresented person. See also Rule 6.2.

206

207 **Thoroughness and Preparation**

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

216

217 **Maintaining Competence**

218 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
219 changes in the law and its practice, including the benefits and risks associated with
220 technology, engage in continuing study and education and comply with all continuing
221 legal education requirements to which the lawyer is subject.

222 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
223 **1.4 (Communication) of the ABA Model Rules of Professional Conduct as follows**
224 **(insertions underlined, deletions ~~struck through~~):**
225

226 **Rule 1.4 Communication**

227
228 **(a) A lawyer shall:**

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

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

234 **(3) keep the client reasonably informed about the status of the matter;**

235 **(4) promptly comply with reasonable requests for information; and**

236 **(5) consult with the client about any relevant limitation on the lawyer's**
237 **conduct when the lawyer knows that the client expects assistance not permitted by**
238 **the Rules of Professional Conduct or other law.**

239 **(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the**
240 **client to make informed decisions regarding the representation.**

241

242 **COMMENT**

243 [1] Reasonable communication between the lawyer and the client is necessary for
244 the client effectively to participate in the representation.

245

246 **Communicating with Client**

247 [2] If these Rules require that a particular decision about the representation be
248 made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and
249 secure the client's consent prior to taking action unless prior discussions with the client
250 have resolved what action the client wants the lawyer to take. For example, a lawyer who
251 receives from opposing counsel an offer of settlement in a civil controversy or a proffered
252 plea bargain in a criminal case must promptly inform the client of its substance unless the
253 client has previously indicated that the proposal will be acceptable or unacceptable or has
254 authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

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

265 [4] A lawyer's regular communication with clients will minimize the occasions on
266 which a client will need to request information concerning the representation. When a

267 client makes a reasonable request for information, however, paragraph (a)(4) requires
268 prompt compliance with the request, or if a prompt response is not feasible, that the
269 lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise
270 the client when a response may be expected. ~~Client telephone calls should be promptly~~
271 ~~returned or acknowledged.~~ Lawyers should promptly respond to or acknowledge client
272 communications.

273 274 **Explaining Matters**

275 [5] The client should have sufficient information to participate intelligently in
276 decisions concerning the objectives of the representation and the means by which they
277 are to be pursued, to the extent the client is willing and able to do so. Adequacy of
278 communication depends in part on the kind of advice or assistance that is involved. For
279 example, when there is time to explain a proposal made in a negotiation, the lawyer
280 should review all important provisions with the client before proceeding to an agreement.
281 In litigation a lawyer should explain the general strategy and prospects of success and
282 ordinarily should consult the client on tactics that are likely to result in significant
283 expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be
284 expected to describe trial or negotiation strategy in detail. The guiding principle is that
285 the lawyer should fulfill reasonable client expectations for information consistent with
286 the duty to act in the client's best interests, and the client's overall requirements as to the
287 character of representation. In certain circumstances, such as when a lawyer asks a client
288 to consent to a representation affected by a conflict of interest, the client must give
289 informed consent, as defined in Rule 1.0(e).

290 [6] Ordinarily, the information to be provided is that appropriate for a client who
291 is a comprehending and responsible adult. However, fully informing the client according
292 to this standard may be impracticable, for example, where the client is a child or suffers
293 from diminished capacity. See Rule 1.14. When the client is an organization or group, it
294 is often impossible or inappropriate to inform every one of its members about its legal
295 affairs; ordinarily, the lawyer should address communications to the appropriate officials
296 of the organization. See Rule 1.13. Where many routine matters are involved, a system of
297 limited or occasional reporting may be arranged with the client.

298 299 **Withholding Information**

300 [7] In some circumstances, a lawyer may be justified in delaying transmission of
301 information when the client would be likely to react imprudently to an immediate
302 communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when
303 the examining psychiatrist indicates that disclosure would harm the client. A lawyer may
304 not withhold information to serve the lawyer's own interest or convenience or the
305 interests or convenience of another person. Rules or court orders governing litigation may
306 provide that information supplied to a lawyer may not be disclosed to the client. Rule
307 3.4(c) directs compliance with such rules or orders.

308 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
309 **1.6 (Duty of Confidentiality) of the ABA Model Rules of Professional Conduct as**
310 **follows (insertions underlined, deletions ~~struck through~~):**
311

312 **Rule 1.6 Confidentiality of Information**
313

314 (a) A lawyer shall not reveal information relating to the representation of a client
315 unless the client gives informed consent, the disclosure is impliedly authorized in
316 order to carry out the representation or the disclosure is permitted by paragraph
317 (b).

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

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

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

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

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

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

335 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or
336 unauthorized disclosure of, or unauthorized access to, information relating to the
337 representation of a client.
338

339 **COMMENT**

340 [1] This Rule governs the disclosure by a lawyer of information relating to the
341 representation of a client during the lawyer's representation of the client. See Rule 1.18
342 for the lawyer's duties with respect to information provided to the lawyer by a
343 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
344 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
345 the lawyer's duties with respect to the use of such information to the disadvantage of
346 clients and former clients.

347 [2] A fundamental principle in the client-lawyer relationship is that, in the
348 absence of the client's informed consent, the lawyer must not reveal information relating
349 to the representation. See Rule 1.0(e) for the definition of informed consent. This
350 contributes to the trust that is the hallmark of the client-lawyer relationship. The client is
351 thereby encouraged to seek legal assistance and to communicate fully and frankly with
352 the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs

353 this information to represent the client effectively and, if necessary, to advise the client to
354 refrain from wrongful conduct. Almost without exception, clients come to lawyers in
355 order to determine their rights and what is, in the complex of laws and regulations,
356 deemed to be legal and correct. Based upon experience, lawyers know that almost all
357 clients follow the advice given, and the law is upheld.

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

369 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
370 representation of a client. This prohibition also applies to disclosures by a lawyer that do
371 not in themselves reveal protected information but could reasonably lead to the discovery
372 of such information by a third person. A lawyer's use of a hypothetical to discuss issues
373 relating to the representation is permissible so long as there is no reasonable likelihood
374 that the listener will be able to ascertain the identity of the client or the situation involved.
375

376 **Authorized Disclosure**

377 [5] Except to the extent that the client's instructions or special circumstances limit
378 that authority, a lawyer is impliedly authorized to make disclosures about a client when
379 appropriate in carrying out the representation. In some situations, for example, a lawyer
380 may be impliedly authorized to admit a fact that cannot properly be disputed or to make a
381 disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in
382 the course of the firm's practice, disclose to each other information relating to a client of
383 the firm, unless the client has instructed that particular information be confined to
384 specified lawyers.
385

386 **Disclosure Adverse to Client**

387 [6] Although the public interest is usually best served by a strict rule requiring
388 lawyers to preserve the confidentiality of information relating to the representation of
389 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)
390 recognizes the overriding value of life and physical integrity and permits disclosure
391 reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such
392 harm is reasonably certain to occur if it will be suffered imminently or if there is a
393 present and substantial threat that a person will suffer such harm at a later date if the
394 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
395 that a client has accidentally discharged toxic waste into a town's water supply may
396 reveal this information to the authorities if there is a present and substantial risk that a

397 person who drinks the water will contract a life-threatening or debilitating disease and the
398 lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

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

413 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of
414 the client's crime or fraud until after it has been consummated. Although the client no
415 longer has the option of preventing disclosure by refraining from the wrongful conduct,
416 there will be situations in which the loss suffered by the affected person can be prevented,
417 rectified or mitigated. In such situations, the lawyer may disclose information relating to
418 the representation to the extent necessary to enable the affected persons to prevent or
419 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3)
420 does not apply when a person who has committed a crime or fraud thereafter employs a
421 lawyer for representation concerning that offense.

422 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
423 confidential legal advice about the lawyer's personal responsibility to comply with these
424 Rules. In most situations, disclosing information to secure such advice will be impliedly
425 authorized for the lawyer to carry out the representation. Even when the disclosure is not
426 impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance
427 of a lawyer's compliance with the Rules of Professional Conduct.

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

441 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the
442 services rendered in an action to collect it. This aspect of the rule expresses the principle
443 that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the
444 fiduciary.

445 [12] Other law may require that a lawyer disclose information about a client.
446 Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these
447 Rules. When disclosure of information relating to the representation appears to be
448 required by other law, the lawyer must discuss the matter with the client to the extent
449 required by Rule 1.4. If, however, the other law supersedes this Rule and requires
450 disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary
451 to comply with the law.

452 [13] A lawyer may be ordered to reveal information relating to the representation
453 of a client by a court or by another tribunal or governmental entity claiming authority
454 pursuant to other law to compel the disclosure. Absent informed consent of the client to
455 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
456 the order is not authorized by other law or that the information sought is protected against
457 disclosure by the attorney-client privilege or other applicable law. In the event of an
458 adverse ruling, the lawyer must consult with the client about the possibility of appeal to
459 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6)
460 permits the lawyer to comply with the court's order.

461 [14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably
462 believes the disclosure is necessary to accomplish one of the purposes specified. Where
463 practicable, the lawyer should first seek to persuade the client to take suitable action to
464 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
465 should be no greater than the lawyer reasonably believes necessary to accomplish the
466 purpose. If the disclosure will be made in connection with a judicial proceeding, the
467 disclosure should be made in a manner that limits access to the information to the tribunal
468 or other persons having a need to know it and appropriate protective orders or other
469 arrangements should be sought by the lawyer to the fullest extent practicable.

470 [15] Paragraph (b) permits but does not require the disclosure of information
471 relating to a client's representation to accomplish the purposes specified in paragraphs
472 (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may
473 consider such factors as the nature of the lawyer's relationship with the client and with
474 those who might be injured by the client, the lawyer's own involvement in the transaction
475 and factors that may extenuate the conduct in question. A lawyer's decision not to
476 disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be
477 required, however, by other Rules. Some Rules require disclosure only if such disclosure
478 would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on
479 the other hand, requires disclosure in some circumstances regardless of whether such
480 disclosure is permitted by this Rule. See Rule 3.3(c).

481

482 **Acting Competently to Preserve Confidentiality**

483 [16] Paragraph (c) requires a A lawyer ~~must~~ to act competently to safeguard
484 information relating to the representation of a client against unauthorized access by third
485 parties and against inadvertent or unauthorized disclosure by the lawyer or other persons

486 or entities who are participating in the representation of the client or who are subject to
487 the lawyer's supervision or monitoring. See Rules 1.1, 5.1 and 5.3. The unauthorized
488 access to, or the inadvertent or unauthorized disclosure of, confidential information does
489 not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to
490 prevent the access or disclosure. Factors to be considered in determining the
491 reasonableness of the lawyer's efforts include the sensitivity of the information, the
492 likelihood of disclosure if additional safeguards are not employed, the cost of employing
493 additional safeguards, the difficulty of implementing the safeguards, and the extent to
494 which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by
495 making a device or important piece of software excessively difficult to use). A client may
496 require the lawyer to implement special security measures not required by this Rule or
497 may give informed consent to forego security measures that would otherwise be required
498 by this Rule. Whether a lawyer may be required to take additional steps to safeguard a
499 client's information in order to comply with other law, such as state and federal laws that
500 govern data privacy or that impose notification requirements upon the loss of, or
501 unauthorized access to, electronic information, is beyond the scope of these Rules.

502 [17] When transmitting a communication that includes information relating to the
503 representation of a client, the lawyer must take reasonable precautions to prevent the
504 information from coming into the hands of unintended recipients. This duty, however,
505 does not require that the lawyer use special security measures if the method of
506 communication affords a reasonable expectation of privacy. Special circumstances,
507 however, may warrant special precautions. Factors to be considered in determining the
508 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the
509 information and the extent to which the privacy of the communication is protected by law
510 or by a confidentiality agreement. A client may require the lawyer to implement special
511 security measures not required by this Rule or may give informed consent to the use of a
512 means of communication that would otherwise be prohibited by this Rule. Whether a
513 lawyer may be required to take additional steps in order to comply with other law, such
514 as state and federal laws that govern data privacy, is beyond the scope of these Rules.

515

516 **Former Client**

517 [18] The duty of confidentiality continues after the client-lawyer relationship has
518 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
519 information to the disadvantage of the former client.

520

521 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
522 **4.4 (Respect for Rights of Third Persons) of the ABA Model Rules of Professional**
523 **Conduct as follows (insertions underlined, deletions ~~struck through~~):**

524

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

526

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

530 (b) A lawyer who receives a document or electronically stored information relating
531 to the representation of the lawyer’s client and knows or reasonably should know
532 that the document or electronically stored information was inadvertently sent shall
533 promptly notify the sender.
534

535 COMMENT

536 [1] Responsibility to a client requires a lawyer to subordinate the interests of
537 others to those of the client, but that responsibility does not imply that a lawyer may
538 disregard the rights of third persons. It is impractical to catalogue all such rights, but they
539 include legal restrictions on methods of obtaining evidence from third persons and
540 unwarranted intrusions into privileged relationships, such as the client-lawyer
541 relationship.

542 [2] Paragraph (b) recognizes that lawyers sometimes receive a documents or
543 electronically stored information that ~~were~~ was mistakenly sent or produced by opposing
544 parties or their lawyers. A document or electronically stored information is inadvertently
545 sent when it is accidentally transmitted to an unintended recipient, such as when an email
546 or letter is misaddressed or when a document or electronically stored information is
547 accidentally included in discovery. If a lawyer knows or reasonably should know that
548 such a document or electronically stored information was sent inadvertently, then this
549 Rule requires the lawyer to promptly notify the sender in order to permit that person to
550 take protective measures. Whether the lawyer is required to take additional steps, such as
551 returning the document or electronically stored information ~~original document~~, is a matter
552 of law beyond the scope of these Rules, as is the question of whether the privileged status
553 of a document or electronically stored information has been waived. Similarly, this Rule
554 does not address the legal duties of a lawyer who receives a document or electronically
555 stored information that the lawyer knows or reasonably should know may have been
556 ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule,
557 “document or electronically stored information” includes, in addition to paper
558 documents, email and other forms of electronically stored information, including
559 embedded data (commonly referred to as “metadata”), that is email or other electronic
560 ~~modes of transmission~~ subject to being read or put into readable form. Receipt of
561 electronic information containing “metadata” does not, by itself, mean that the
562 information was inadvertently sent.

563 [3] Some lawyers may choose to return a document or electronically stored
564 information unread, for example, when the lawyer learns before receiving ~~it the document~~
565 that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by
566 applicable law to do so, the decision to voluntarily return such a document or
567 electronically stored information is a matter of professional judgment ordinarily reserved
568 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 objectives of the ABA Commission on Ethics 20/20 has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology.

The Commission recommends two ways to provide this guidance. First, the Commission 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 practices, such as the administrative, technical, and physical safeguards that should be employed. The resource should also 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.

Second, the Commission is 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 Rule and Comment-based proposals necessarily offer more general guidance and do not offer advice regarding the use of any particular type of technology.

The Commission identified four areas that would benefit from this more general 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. The Commission

determined 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 inadvertent or unauthorized disclosures as well as from unauthorized access. This duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6. The Commission also concluded that the Comments should be amended to offer lawyers more guidance about how to comply with this obligation.

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 inadvertently disclosed confidential information. The current provision describes the receipt of "documents" containing such information, but confidential information can also take the form of electronically stored information. Thus, the Commission is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to give lawyers more guidance as to when Rule 4.4(b) is triggered.

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.

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

To be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances.

The Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use

will necessarily change as technology evolves and as new risks emerge and new 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 are 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). Moreover, as explained above, the Commission has recommended that the ABA create a centralized user-friendly website that contains continuously updated and detailed information about data security.

In addition to setting out the factors that lawyers need to consider when securing their clients' confidences, the proposed Comment language recognizes that some clients 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 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 inadvertently sent to 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 inadvertently 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 is proposing that the word "document" be replaced with a 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.

The Commission is also proposing to define the phrase "inadvertently sent." The phrase is ambiguous and potentially misleading, because (for example) it could be read to exclude information that is *intentionally* sent, but to the wrong person. To ensure that the purpose of the Rule is clear, the Commission proposes to add the following sentence: "A document or electronically stored information is inadvertently sent when it is accidentally transmitted to an unintended recipient, such as when an email or letter is misaddressed or when a document or electronically stored information is accidentally included in discovery."

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.