

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 **Resolution**

6
7 RESOLVED: That the American Bar Association amends Model Rule 1.0
8 (Terminology) of the ABA Model Rules of Professional Conduct as follows (insertions
9 underlined, deletions ~~struck through~~):

10
11 **Rule 1.0 Terminology**

12
13 (a) **“Belief” or “believes”** denotes that the person involved actually supposed the
14 fact in question to be true. A person’s belief may be inferred from circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

64

65 **COMMENT**

66 **Confirmed in Writing**

67 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client
68 gives informed consent, then the lawyer must obtain or transmit it within a reasonable
69 time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act
70 in reliance on that consent so long as it is confirmed in writing within a reasonable time
71 thereafter.

72 **Firm**

73 [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on
74 the specific facts. For example, two practitioners who share office space and occasionally
75 consult or assist each other ordinarily would not be regarded as constituting a firm.
76 However, if they present themselves to the public in a way that suggests that they are a
77 firm or conduct themselves as a firm, they should be regarded as a firm for purposes of
78 the Rules. The terms of any formal agreement between associated lawyers are relevant in
79 determining whether they are a firm, as is the fact that they have mutual access to
80 information concerning the clients they serve. Furthermore, it is relevant in doubtful
81 cases to consider the underlying purpose of the Rule that is involved. A group of lawyers
82 could be regarded as a firm for purposes of the Rule that the same lawyer should not
83 represent opposing parties in litigation, while it might not be so regarded for purposes of
84 the Rule that information acquired by one lawyer is attributed to another.

85 [3] With respect to the law department of an organization, including the government,
86 there is ordinarily no question that the members of the department constitute a firm
87 within the meaning of the Rules of Professional Conduct. There can be uncertainty,
88 however, as to the identity of the client. For example, it may not be clear whether the law
89 department of a corporation represents a subsidiary or an affiliated corporation, as well as

90 the corporation by which the members of the department are directly employed. A similar
91 question can arise concerning an unincorporated association and its local affiliates.

92 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
93 organizations. Depending upon the structure of the organization, the entire organization
94 or different components of it may constitute a firm or firms for purposes of these Rules.

95 **Fraud**

96 [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is
97 characterized as such under the substantive or procedural law of the applicable
98 jurisdiction and has a purpose to deceive. This does not include merely negligent
99 misrepresentation or negligent failure to apprise another of relevant information. For
100 purposes of these Rules, it is not necessary that anyone has suffered damages or relied on
101 the misrepresentation or failure to inform.

102 **Informed Consent**

103 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed
104 consent of a client or other person (e.g., a former client or, under certain circumstances, a
105 prospective client) before accepting or continuing representation or pursuing a course of
106 conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to
107 obtain such consent will vary according to the Rule involved and the circumstances
108 giving rise to the need to obtain informed consent. The lawyer must make reasonable
109 efforts to ensure that the client or other person possesses information reasonably adequate
110 to make an informed decision. Ordinarily, this will require communication that includes a
111 disclosure of the facts and circumstances giving rise to the situation, any explanation
112 reasonably necessary to inform the client or other person of the material advantages and
113 disadvantages of the proposed course of conduct and a discussion of the client’s or other
114 person’s options and alternatives. In some circumstances it may be appropriate for a
115 lawyer to advise a client or other person to seek the advice of other counsel. A lawyer
116 need not inform a client or other person of facts or implications already known to the
117 client or other person; nevertheless, a lawyer who does not personally inform the client or
118 other person assumes the risk that the client or other person is inadequately informed and
119 the consent is invalid. In determining whether the information and explanation provided
120 are reasonably adequate, relevant factors include whether the client or other person is
121 experienced in legal matters generally and in making decisions of the type involved, and
122 whether the client or other person is independently represented by other counsel in giving
123 the consent. Normally, such persons need less information and explanation than others,
124 and generally a client or other person who is independently represented by other counsel
125 in giving the consent should be assumed to have given informed consent.

126 [7] Obtaining informed consent will usually require an affirmative response by the client
127 or other person. In general, a lawyer may not assume consent from a client’s or other
128 person’s silence. Consent may be inferred, however, from the conduct of a client or other
129 person who has reasonably adequate information about the matter. A number of Rules
130 require that a person’s consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a
131 definition of “writing” and “confirmed in writing,” see paragraphs (n) and (b). Other
132 Rules require that a client’s consent be obtained in a writing signed by the client. See,
133 e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (n).

134 **Screened**

135 [8] This definition applies to situations where screening of a personally disqualified
136 lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11,
137 1.12 or 1.18.

138 [9] The purpose of screening is to assure the affected parties that confidential information
139 known by the personally disqualified lawyer remains protected. The personally
140 disqualified lawyer should acknowledge the obligation not to communicate with any of
141 the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the
142 firm who are working on the matter should be informed that the screening is in place and
143 that they may not communicate with the personally disqualified lawyer with respect to
144 the matter. Additional screening measures that are appropriate for the particular matter
145 will depend on the circumstances. To implement, reinforce and remind all affected
146 lawyers of the presence of the screening, it may be appropriate for the firm to undertake
147 such procedures as a written undertaking by the screened lawyer to avoid any
148 communication with other firm personnel and any contact with any firm files or other
149 ~~materials~~ information, including information in electronic form, relating to the matter,
150 written notice and instructions to all other firm personnel forbidding any communication
151 with the screened lawyer relating to the matter, denial of access by the screened lawyer to
152 firm files or other ~~materials~~ information, including information in electronic form,
153 relating to the matter, ~~written notice and instructions to all other firm personnel~~
154 ~~forbidding any communication with the screened lawyer relating to the matter, denial of~~
155 ~~access by the screened lawyer to firm files or other materials relating to the matter~~ and
156 periodic reminders of the screen to the screened lawyer and all other firm personnel.

157 [10] In order to be effective, screening measures must be implemented as soon as
158 practical after a lawyer or law firm knows or reasonably should know that there is a need
159 for screening.

160

161 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
162 **1.1 (Competence) of the ABA Model Rules of Professional Conduct as follows**
163 **(insertions underlined, deletions ~~struck through~~):**

164

165 **Rule 1.1 Competence**

166

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

170

171 **COMMENT**

172 **Legal Knowledge and Skill**

173 [1] In determining whether a lawyer employs the requisite knowledge and skill in a
174 particular matter, relevant factors include the relative complexity and specialized nature
175 of the matter, the lawyer's general experience, the lawyer's training and experience in the
176 field in question, the preparation and study the lawyer is able to give the matter and
177 whether it is feasible to refer the matter to, or associate or consult with, a lawyer of
178 established competence in the field in question. In many instances, the required

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

181 [2] A lawyer need not necessarily have special training or prior experience to handle legal
182 problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be
183 as competent as a practitioner with long experience. Some important legal skills, such as
184 the analysis of precedent, the evaluation of evidence and legal drafting, are required in all
185 legal problems. Perhaps the most fundamental legal skill consists of determining what
186 kind of legal problems a situation may involve, a skill that necessarily transcends any
187 particular specialized knowledge. A lawyer can provide adequate representation in a
188 wholly novel field through necessary study. Competent representation can also be
189 provided through the association of a lawyer of established competence in the field in
190 question.

191 [3] In an emergency a lawyer may give advice or assistance in a matter in which the
192 lawyer does not have the skill ordinarily required where referral to or consultation or
193 association with another lawyer would be impractical. Even in an emergency, however,
194 assistance should be limited to that reasonably necessary in the circumstances, for ill-
195 considered action under emergency conditions can jeopardize the client's interest.

196 [4] A lawyer may accept representation where the requisite level of competence can be
197 achieved by reasonable preparation. This applies as well to a lawyer who is appointed as
198 counsel for an unrepresented person. See also Rule 6.2.

199 **Thoroughness and Preparation**

200 [5] Competent handling of a particular matter includes inquiry into and analysis of the
201 factual and legal elements of the problem, and use of methods and procedures meeting
202 the standards of competent practitioners. It also includes adequate preparation. The
203 required attention and preparation are determined in part by what is at stake; major
204 litigation and complex transactions ordinarily require more extensive treatment than
205 matters of lesser complexity and consequence. An agreement between the lawyer and the
206 client regarding the scope of the representation may limit the matters for which the
207 lawyer is responsible. See Rule 1.2 (c).

208 **Maintaining Competence**

209 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
210 changes in the law and its practice, including the benefits and risks associated with
211 technology, engage in continuing study and education and comply with all continuing
212 legal education requirements to which the lawyer is subject.

213

214 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
215 **1.6 (Duty of Confidentiality) of the ABA Model Rules of Professional Conduct as**
216 **follows (insertions underlined, deletions ~~struck through~~):**

217

218 **Rule 1.6 Confidentiality of Information**

219

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

- 224 (b) A lawyer may reveal information relating to the representation of a client to the
225 extent the lawyer reasonably believes necessary:
- 226 (1) to prevent reasonably certain death or substantial bodily harm;
 - 227 (2) to prevent the client from committing a crime or fraud that is reasonably certain
228 to result in substantial injury to the financial interests or property of another and in
229 furtherance of which the client has used or is using the lawyer’s services;
 - 230 (3) to prevent, mitigate or rectify substantial injury to the financial interests or
231 property of another that is reasonably certain to result or has resulted from the
232 client’s commission of a crime or fraud in furtherance of which the client has used
233 the lawyer’s services;
 - 234 (4) to secure legal advice about the lawyer’s compliance with these Rules;
 - 235 (5) to establish a claim or defense on behalf of the lawyer in a controversy between
236 the lawyer and the client, to establish a defense to a criminal charge or civil claim
237 against the lawyer based upon conduct in which the client was involved, or to
238 respond to allegations in any proceeding concerning the lawyer’s representation of
239 the client; or
 - 240 (6) to comply with other law or a court order.
- 241 (c) A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of,
242 or unauthorized access to, information relating to the representation of a client.

243
244 **COMMENT**

245 [1] This Rule governs the disclosure by a lawyer of information relating to the
246 representation of a client during the lawyer’s representation of the client. See Rule 1.18
247 for the lawyer’s duties with respect to information provided to the lawyer by a
248 prospective client, Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating
249 to the lawyer’s prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
250 the lawyer’s duties with respect to the use of such information to the disadvantage of
251 clients and former clients.

252 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the
253 client’s informed consent, the lawyer must not reveal information relating to the
254 representation. See Rule 1.0(e) for the definition of informed consent. This contributes to
255 the trust that is the hallmark of the client-lawyer relationship. The client is thereby
256 encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
257 even as to embarrassing or legally damaging subject matter. The lawyer needs this
258 information to represent the client effectively and, if necessary, to advise the client to
259 refrain from wrongful conduct. Almost without exception, clients come to lawyers in
260 order to determine their rights and what is, in the complex of laws and regulations,
261 deemed to be legal and correct. Based upon experience, lawyers know that almost all
262 clients follow the advice given, and the law is upheld.

263 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
264 the attorney-client privilege, the work-product doctrine and the rule of confidentiality
265 established in professional ethics. The attorney-client privilege and work-product
266 doctrine apply in judicial and other proceedings in which a lawyer may be called as a
267 witness or otherwise required to produce evidence concerning a client. The rule of client-
268 lawyer confidentiality applies in situations other than those where evidence is sought

269 from the lawyer through compulsion of law. The confidentiality rule, for example,
270 applies not only to matters communicated in confidence by the client but also to all
271 information relating to the representation, whatever its source. A lawyer may not disclose
272 such information except as authorized or required by the Rules of Professional Conduct
273 or other law. See also Scope.

274 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
275 representation of a client. This prohibition also applies to disclosures by a lawyer that do
276 not in themselves reveal protected information but could reasonably lead to the discovery
277 of such information by a third person. A lawyer's use of a hypothetical to discuss issues
278 relating to the representation is permissible so long as there is no reasonable likelihood
279 that the listener will be able to ascertain the identity of the client or the situation involved.

280 **Authorized Disclosure**

281 [5] Except to the extent that the client's instructions or special circumstances limit that
282 authority, a lawyer is impliedly authorized to make disclosures about a client when
283 appropriate in carrying out the representation. In some situations, for example, a lawyer
284 may be impliedly authorized to admit a fact that cannot properly be disputed or to make a
285 disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in
286 the course of the firm's practice, disclose to each other information relating to a client of
287 the firm, unless the client has instructed that particular information be confined to
288 specified lawyers.

289 **Disclosure Adverse to Client**

290 [6] Although the public interest is usually best served by a strict rule requiring lawyers to
291 preserve the confidentiality of information relating to the representation of their clients,
292 the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the
293 overriding value of life and physical integrity and permits disclosure reasonably
294 necessary to prevent reasonably certain death or substantial bodily harm. Such harm is
295 reasonably certain to occur if it will be suffered imminently or if there is a present and
296 substantial threat that a person will suffer such harm at a later date if the lawyer fails to
297 take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has
298 accidentally discharged toxic waste into a town's water supply may reveal this
299 information to the authorities if there is a present and substantial risk that a person who
300 drinks the water will contract a life-threatening or debilitating disease and the lawyer's
301 disclosure is necessary to eliminate the threat or reduce the number of victims.

302 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the
303 lawyer to reveal information to the extent necessary to enable affected persons or
304 appropriate authorities to prevent the client from committing a crime or fraud, as defined
305 in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or
306 property interests of another and in furtherance of which the client has used or is using
307 the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client
308 forfeits the protection of this Rule. The client can, of course, prevent such disclosure by
309 refraining from the wrongful conduct. Although paragraph (b)(2) does not require the
310 lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in
311 conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16
312 with respect to the lawyer's obligation or right to withdraw from the representation of the
313 client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client

314 is an organization, to reveal information relating to the representation in limited
315 circumstances.

316 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the
317 client's crime or fraud until after it has been consummated. Although the client no longer
318 has the option of preventing disclosure by refraining from the wrongful conduct, there
319 will be situations in which the loss suffered by the affected person can be prevented,
320 rectified or mitigated. In such situations, the lawyer may disclose information relating to
321 the representation to the extent necessary to enable the affected persons to prevent or
322 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3)
323 does not apply when a person who has committed a crime or fraud thereafter employs a
324 lawyer for representation concerning that offense.

325 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
326 confidential legal advice about the lawyer's personal responsibility to comply with these
327 Rules. In most situations, disclosing information to secure such advice will be impliedly
328 authorized for the lawyer to carry out the representation. Even when the disclosure is not
329 impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance
330 of a lawyer's compliance with the Rules of Professional Conduct.

331 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
332 client's conduct or other misconduct of the lawyer involving representation of the client,
333 the lawyer may respond to the extent the lawyer reasonably believes necessary to
334 establish a defense. The same is true with respect to a claim involving the conduct or
335 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
336 or other proceeding and can be based on a wrong allegedly committed by the lawyer
337 against the client or on a wrong alleged by a third person, for example, a person claiming
338 to have been defrauded by the lawyer and client acting together. The lawyer's right to
339 respond arises when an assertion of such complicity has been made. Paragraph (b)(5)
340 does not require the lawyer to await the commencement of an action or proceeding that
341 charges such complicity, so that the defense may be established by responding directly to
342 a third party who has made such an assertion. The right to defend also applies, of course,
343 where a proceeding has been commenced.

344 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services
345 rendered in an action to collect it. This aspect of the rule expresses the principle that the
346 beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

347 [12] Other law may require that a lawyer disclose information about a client. Whether
348 such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.
349 When disclosure of information relating to the representation appears to be required by
350 other law, the lawyer must discuss the matter with the client to the extent required by
351 Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,
352 paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply
353 with the law.

354 [13] A lawyer may be ordered to reveal information relating to the representation of a
355 client by a court or by another tribunal or governmental entity claiming authority
356 pursuant to other law to compel the disclosure. Absent informed consent of the client to
357 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
358 the order is not authorized by other law or that the information sought is protected against

359 disclosure by the attorney-client privilege or other applicable law. In the event of an
360 adverse ruling, the lawyer must consult with the client about the possibility of appeal to
361 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6)
362 permits the lawyer to comply with the court’s order.

363 [14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
364 the disclosure is necessary to accomplish one of the purposes specified. Where
365 practicable, the lawyer should first seek to persuade the client to take suitable action to
366 obviate the need for disclosure. In any case, a disclosure adverse to the client’s interest
367 should be no greater than the lawyer reasonably believes necessary to accomplish the
368 purpose. If the disclosure will be made in connection with a judicial proceeding, the
369 disclosure should be made in a manner that limits access to the information to the tribunal
370 or other persons having a need to know it and appropriate protective orders or other
371 arrangements should be sought by the lawyer to the fullest extent practicable.

372 [15] Paragraph (b) permits but does not require the disclosure of information relating to a
373 client’s representation to accomplish the purposes specified in paragraphs (b)(1) through
374 (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such
375 factors as the nature of the lawyer’s relationship with the client and with those who might
376 be injured by the client, the lawyer’s own involvement in the transaction and factors that
377 may extenuate the conduct in question. A lawyer’s decision not to disclose as permitted
378 by paragraph (b) does not violate this Rule. Disclosure may be required, however, by
379 other Rules. Some Rules require disclosure only if such disclosure would be permitted by
380 paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires
381 disclosure in some circumstances regardless of whether such disclosure is permitted by
382 this Rule. See Rule 3.3(c).

383 **Acting Competently to Preserve Confidentiality**

384 [16] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information
385 relating to the representation of a client against inadvertent or unauthorized disclosure by
386 the lawyer or other persons or entities who are participating in the representation of the
387 client or who are subject to the lawyer’s supervision or monitoring. See Rules 1.1, 5.1
388 and 5.3. Factors to be considered in determining the reasonableness of the lawyer’s
389 efforts include the sensitivity of the information, the likelihood of disclosure if additional
390 safeguards are not employed, and the cost of employing additional safeguards. Whether a
391 lawyer may be required to take additional steps to safeguard a client’s information in
392 order to comply with other law, such as state and federal laws that govern data privacy or
393 that impose notification requirements upon the loss of, or unauthorized access to,
394 electronic information, is beyond the scope of these Rules.

395 [17] When transmitting a communication that includes information relating to the
396 representation of a client, the lawyer must take reasonable precautions to prevent the
397 information from coming into the hands of unintended recipients. This duty, however,
398 does not require that the lawyer use special security measures if the method of
399 communication affords a reasonable expectation of privacy. Special circumstances,
400 however, may warrant special precautions. Factors to be considered in determining the
401 reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the
402 information and the extent to which the privacy of the communication is protected by law
403 or by a confidentiality agreement. A client may require the lawyer to implement special

404 security measures not required by this Rule or may give informed consent to the use of a
405 means of communication that would otherwise be prohibited by this Rule.

406

407 **Former Client**

408 [18] The duty of confidentiality continues after the client-lawyer relationship has
409 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
410 information to the disadvantage of the former client.

411

412 **FURTHER RESOLVED: That the American Bar Association amends Model Rule**
413 **4.4 (Respect for Rights of Third Persons) of the ABA Model Rules of Professional**
414 **Conduct as follows (insertions underlined, deletions ~~struck through~~):**

415

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

417

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

421 (b) A lawyer who receives information or material ~~a document~~ relating to the
422 representation of the lawyer's client and knows or reasonably should know that the
423 information or material ~~document~~ was inadvertently sent shall promptly notify the
424 sender.

425

426 **COMMENT**

427 [1] Responsibility to a client requires a lawyer to subordinate the interests of others to
428 those of the client, but that responsibility does not imply that a lawyer may disregard the
429 rights of third persons. It is impractical to catalogue all such rights, but they include legal
430 restrictions on methods of obtaining evidence from third persons and unwarranted
431 intrusions into privileged relationships, such as the client-lawyer relationship.

432 [2] Paragraph (b) recognizes that lawyers sometimes receive information or material
433 ~~documents~~ that ~~were~~ was mistakenly sent or produced by opposing parties or their
434 lawyers. If a lawyer knows or reasonably should know that such a ~~document~~ information
435 or material was sent inadvertently, then this Rule requires the lawyer to promptly notify
436 the sender in order to permit that person to take protective measures. Whether the lawyer
437 is required to take additional steps, such as returning the information or material ~~original~~
438 ~~document~~, is a matter of law beyond the scope of these Rules, as is the question of
439 whether the privileged status of a ~~document~~ the information has been waived. Similarly,
440 this Rule does not address the legal duties of a lawyer who receives a ~~document~~
441 information or material that the lawyer knows or reasonably should know may have been
442 wrongfully obtained by the sending person. For purposes of this Rule, "~~document~~"
443 "information or material" includes paper documents, email, and other forms of
444 electronically stored information, including electronic documents and the data contained
445 in those documents (commonly referred to as "metadata"), that are email or other
446 electronic modes of transmission subject to being read or put into readable form. Receipt
447 of electronic information containing "metadata" does not, standing alone, create a duty
448 under this Rule.

ABA Commission on Ethics 20/20 Initial Draft Proposals – Technology and

Confidentiality

May 2, 2011

449 [3] Some lawyers may choose to return ~~a document~~ information or material unread, for
450 example, when the lawyer learns before receiving the ~~document~~ information or material
451 that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by
452 applicable law to do so, the decision to voluntarily return such ~~a document~~ information or
453 material is a matter of professional judgment ordinarily reserved to the lawyer. See Rules
454 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. The Commission released an Issues Paper identifying a wide range of confidentiality-related issues and received and reviewed numerous comments from both 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 has first requested 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 lawyer's 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 heard 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 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 rule and comment-based proposals necessarily offer more general guidance that are not tied to the use of any particular form of technology.¹

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. 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 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 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 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 inadvertently disclosed privileged information. The current provision describes the receipt of "documents" containing privileged information, but privileged information can be inadvertently 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.

¹ The Commission will also be recommending that the ABA's Standing Committee on Ethics and Professional Responsibility develop opinions on particular confidentiality-related issues relating to technology that cannot be suitably addressed in the Model Rules or their Comments.

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.

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 1.6 (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 Commission decided that it could not propose any particular security procedures, because technology is changing too rapidly for such detailed guidance. The Commission concluded, however, that lawyers should have an obligation to act reasonably when using technology and that Rule 1.6 should clearly state this general obligation. Of course, the definition of what is reasonable may change as technology evolves and as new risks and security procedures become available. To emphasize the evolving nature of this obligation, the Commission is proposing accompanying amendments to Comment [16]. This Comment currently explains that a lawyer has a duty to protect a client’s confidential information from inadvertent disclosure or unauthorized access, but the Commission proposes to identify in that Comment 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, and the cost of employing additional safeguards.

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 lawyers need to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence to the end of Comment [16] 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.

IV. 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 a lawyer receives a document that the lawyer knows or reasonably should know was inadvertently sent, the lawyer 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, privileged information can now be inadvertently 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 recommending that the word “document” be replaced with the phrase “information or material.”

In addition to clarifying that Rule 4.4(b) extends to various forms of information and material, 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 inadvertently sent. 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 privileged 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.

V. 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.