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2 Governors of the American Bar Association and, accordingly, should not be construed as
3 representing the policy of the American Bar Association.

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

9 **RESOLVED:** That the American Bar Association adopts the proposed
10 amendments to Rule 1.6 of the *ABA Model Rules of Professional Conduct* as follows
11 (insertions underlined, deletions ~~struck through~~):
12

13 **Rule 1.6 Confidentiality Of Information**

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

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

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

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

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

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

27 (5) to establish a claim or defense on behalf of the lawyer in a controversy between the
28 lawyer and the client, to establish a defense to a criminal charge or civil claim against the
29 lawyer based upon conduct in which the client was involved, or to respond to allegations
30 in any proceeding concerning the lawyer's representation of the client; ~~or~~

31 (6) to comply with other law or a court order; or

32 (7) to determine if a conflict of interest would arise from the lawyer's association with a
33 firm, but only when there is a reasonable possibility of such an association and the
34 revealed information would not adversely affect the lawyer's client. Information
35 revealed under this paragraph may not be used or revealed by the lawyers receiving the

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36 information for any purpose except the identification and resolution of potential conflicts
37 of interest.

38 COMMENT

39 [1] This Rule governs the disclosure by a lawyer of information relating to the
40 representation of a client during the lawyer's representation of the client. See Rule 1.18
41 for the lawyer's duties with respect to information provided to the lawyer by a
42 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
43 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
44 the lawyer's duties with respect to the use of such information to the disadvantage of
45 clients and former clients.

46 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the
47 client's informed consent, the lawyer must not reveal information relating to the
48 representation. See Rule 1.0(e) for the definition of informed consent. This contributes to
49 the trust that is the hallmark of the client-lawyer relationship. The client is thereby
50 encouraged to seek legal assistance and to communicate fully and frankly with the lawyer
51 even as to embarrassing or legally damaging subject matter. The lawyer needs this
52 information to represent the client effectively and, if necessary, to advise the client to
53 refrain from wrongful conduct. Almost without exception, clients come to lawyers in
54 order to determine their rights and what is, in the complex of laws and regulations,
55 deemed to be legal and correct. Based upon experience, lawyers know that almost all
56 clients follow the advice given, and the law is upheld.

57 [3] The principle of client-lawyer confidentiality is given effect by related bodies of law:
58 the attorney-client privilege, the work product doctrine and the rule of confidentiality
59 established in professional ethics. The attorney-client privilege and work-product
60 doctrine apply in judicial and other proceedings in which a lawyer may be called as a
61 witness or otherwise required to produce evidence concerning a client. The rule of client-
62 lawyer confidentiality applies in situations other than those where evidence is sought
63 from the lawyer through compulsion of law. The confidentiality rule, for example,
64 applies not only to matters communicated in confidence by the client but also to all
65 information relating to the representation, whatever its source. A lawyer may not disclose
66 such information except as authorized or required by the Rules of Professional Conduct
67 or other law. See also Scope.

68 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
69 representation of a client. This prohibition also applies to disclosures by a lawyer that do
70 not in themselves reveal protected information but could reasonably lead to the discovery
71 of such information by a third person. A lawyer's use of a hypothetical to discuss issues
72 relating to the representation is permissible so long as there is no reasonable likelihood
73 that the listener will be able to ascertain the identity of the client or the situation involved.

74 **Authorized Disclosure**

75 [5] Except to the extent that the client’s instructions or special circumstances limit that
76 authority, a lawyer is impliedly authorized to make disclosures about a client when
77 appropriate in carrying out the representation. In some situations, for example, a lawyer
78 may be impliedly authorized to admit a fact that cannot properly be disputed or to make a
79 disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in
80 the course of the firm’s practice, disclose to each other information relating to a client of
81 the firm, unless the client has instructed that particular information be confined to
82 specified lawyers.

83 **Disclosure Adverse to Client**

84 [6] Although the public interest is usually best served by a strict rule requiring lawyers to
85 preserve the confidentiality of information relating to the representation of their clients,
86 the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the
87 overriding value of life and physical integrity and permits disclosure reasonably
88 necessary to prevent reasonably certain death or substantial bodily harm. Such harm is
89 reasonably certain to occur if it will be suffered imminently or if there is a present and
90 substantial threat that a person will suffer such harm at a later date if the lawyer fails to
91 take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has
92 accidentally discharged toxic waste into a town’s water supply may reveal this
93 information to the authorities if there is a present and substantial risk that a person who
94 drinks the water will contract a life-threatening or debilitating disease and the lawyer’s
95 disclosure is necessary to eliminate the threat or reduce the number of victims.

96 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the
97 lawyer to reveal information to the extent necessary to enable affected persons or
98 appropriate authorities to prevent the client from committing a crime or fraud, as defined
99 in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or
100 property interests of another and in furtherance of which the client has used or is using
101 the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client
102 forfeits the protection of this Rule. The client can, of course, prevent such disclosure by
103 refraining from the wrongful conduct. Although paragraph (b)(2) does not require the
104 lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in
105 conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16
106 with respect to the lawyer’s obligation or right to withdraw from the representation of the
107 client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client
108 is an organization, to reveal information relating to the representation in limited
109 circumstances.

110 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the
111 client’s crime or fraud until after it has been consummated. Although the client no longer
112 has the option of preventing disclosure by refraining from the wrongful conduct, there
113 will be situations in which the loss suffered by the affected person can be prevented,
114 rectified or mitigated. In such situations, the lawyer may disclose information relating to

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115 the representation to the extent necessary to enable the affected persons to prevent or
116 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3)
117 does not apply when a person who has committed a crime or fraud thereafter employs a
118 lawyer for representation concerning that offense.

119 [9] A lawyer’s confidentiality obligations do not preclude a lawyer from securing
120 confidential legal advice about the lawyer’s personal responsibility to comply with these
121 Rules. In most situations, disclosing information to secure such advice will be impliedly
122 authorized for the lawyer to carry out the representation. Even when the disclosure is not
123 impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance
124 of a lawyer’s compliance with the Rules of Professional Conduct.

125 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
126 client’s conduct or other misconduct of the lawyer involving representation of the client,
127 the lawyer may respond to the extent the lawyer reasonably believes necessary to
128 establish a defense. The same is true with respect to a claim involving the conduct or
129 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
130 or other proceeding and can be based on a wrong allegedly committed by the lawyer
131 against the client or on a wrong alleged by a third person, for example, a person claiming
132 to have been defrauded by the lawyer and client acting together. The lawyer’s right to
133 respond arises when an assertion of such complicity has been made. Paragraph (b)(5)
134 does not require the lawyer to await the commencement of an action or proceeding that
135 charges such complicity, so that the defense may be established by responding directly to
136 a third party who has made such an assertion. The right to defend also applies, of course,
137 where a proceeding has been commenced.

138 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services
139 rendered in an action to collect it. This aspect of the rule expresses the principle that the
140 beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

141 [12] Other law may require that a lawyer disclose information about a client. Whether
142 such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.
143 When disclosure of information relating to the representation appears to be required by
144 other law, the lawyer must discuss the matter with the client to the extent required by
145 Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,
146 paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply
147 with the law.

148 [13] A lawyer may be ordered to reveal information relating to the representation of a
149 client by a court or by another tribunal or governmental entity claiming authority
150 pursuant to other law to compel the disclosure. Absent informed consent of the client to
151 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
152 the order is not authorized by other law or that the information sought is protected against
153 disclosure by the attorney-client privilege or other applicable law. In the event of an
154 adverse ruling, the lawyer must consult with the client about the possibility of appeal to

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155 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6)
156 permits the lawyer to comply with the court's order.

157 [14] Paragraph (b)(7) recognizes that, before a lawyer becomes associated with a firm, it
158 may be necessary for the lawyer to reveal limited information about the lawyer's current
159 and former clients to permit the lawyer and the firm to identify conflicts of interest that
160 would arise from the lawyer's association with the firm. A lawyer is permitted to reveal
161 this limited information, typically no more than the client's identity and the general
162 nature of the work that the lawyer performed for that client, but only to the extent
163 reasonably necessary to permit the lawyer and the firm to determine if a conflict of
164 interest would arise from the lawyer's association with the firm. In no event may
165 disclosure prejudice a client or former client. In most cases, prejudice will not occur
166 from the mere disclosure of a client's or former client's identity or a brief summary of the
167 type of work that the lawyer performed for that client or former client. In certain cases,
168 however, such a disclosure could adversely affect the client's interests (e.g., the lawyer
169 reveals that a particular corporate client is seeking advice on a corporate takeover that has
170 not yet been publicly announced or that a person has consulted with a lawyer about the
171 possibility of seeking a divorce before the person's intentions are known to the person's
172 spouse). If disclosure could prejudice a client or former client, the lawyer must obtain
173 the client's consent before disclosing any information or delay the association with the
174 firm until the disclosure of the information would no longer adversely affect the client's
175 interests. Moreover, information revealed under paragraph (b)(7) may not be used or
176 revealed by the lawyers receiving the information for any purpose except the
177 identification and resolution of potential conflicts of interest. This prohibition does not
178 apply to other lawyers in the same firm who have obtained the information from an
179 independent source.

180 [154] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
181 the disclosure is necessary to accomplish one of the purposes specified. Where
182 practicable, the lawyer should first seek to persuade the client to take suitable action to
183 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
184 should be no greater than the lawyer reasonably believes necessary to accomplish the
185 purpose. If the disclosure will be made in connection with a judicial proceeding, the
186 disclosure should be made in a manner that limits access to the information to the tribunal
187 or other persons having a need to know it and appropriate protective orders or other
188 arrangements should be sought by the lawyer to the fullest extent practicable.

189 [165] Paragraph (b) permits but does not require the disclosure of information relating to
190 a client's representation to accomplish the purposes specified in paragraphs (b)(1) through
191 (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such
192 factors as the nature of the lawyer's relationship with the client and with those who might
193 be injured by the client, the lawyer's own involvement in the transaction and factors that
194 may extenuate the conduct in question. A lawyer's decision not to disclose as permitted
195 by paragraph (b) does not violate this Rule. Disclosure may be required, however, by
196 other Rules. Some Rules require disclosure only if such disclosure would be permitted by
197 paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires

198 disclosure in some circumstances regardless of whether such disclosure is permitted by
199 this Rule. See Rule 3.3(c).

200 **Acting Competently to Preserve Confidentiality**

201 [176] A lawyer must act competently to safeguard information relating to the
202 representation of a client against inadvertent or unauthorized disclosure by the lawyer or
203 other persons who are participating in the representation of the client or who are subject
204 to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3.

205 [187] When transmitting a communication that includes information relating to the
206 representation of a client, the lawyer must take reasonable precautions to prevent the
207 information from coming into the hands of unintended recipients. This duty, however,
208 does not require that the lawyer use special security measures if the method of
209 communication affords a reasonable expectation of privacy. Special circumstances,
210 however, may warrant special precautions. Factors to be considered in determining the
211 reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the
212 information and the extent to which the privacy of the communication is protected by law
213 or by a confidentiality agreement. A client may require the lawyer to implement special
214 security measures not required by this Rule or may give informed consent to the use of a
215 means of communication that would otherwise be prohibited by this Rule.

216 **Former Client**

217 [198] The duty of confidentiality continues after the client-lawyer relationship has
218 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
219 information to the disadvantage of the former client.

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REPORT

Introduction

The ABA Commission on Ethics 20/20 has examined various ways in which globalization and technology are changing the legal profession, including increased lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related issues and that one question in particular commonly arises: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer's potential association? The Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance.

To develop appropriate recommendations in this area, the Commission's Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. Moreover, the Commission relied on a recently released ethics opinion from the ABA Standing Committee on Ethics and Professional Responsibility, which addressed this issue, as well as on other ethics opinions and resources.¹

As a result of these efforts, the Commission is proposing an amendment to Rule 1.6 of the ABA Model Rules of Professional Conduct as well as a new Comment to that Rule that would more clearly explain the ethical considerations associated with these disclosures. The goal of the amendments is to ensure adequate protection of client confidences while allowing a lawyer and a firm to identify potential conflicts of interest that might arise from the lawyer's association with the firm.

¹ ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009). *See also*, Colorado Rules of Prof'l Conduct R. 1.6 cmt. [5A], available at <http://www.cobar.org/index.cfm/ID/20472/subID/22377/CETH/>; Boston Bar Ass'n Ethics Comm'n Op. 2004-1 (2005), available at http://www.bostonbar.org/sc/ethics/op04_1.pdf; D.C. Bar Ass'n Ethics Op. 312 (2002), available at http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion312.cfm; New York State Bar Ass'n Ethics Op. 720 (1999), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=18917&TEMPLATE=/CM/ContentDisplay.cfm; Ass'n of the Bar of the City of New York Ethics Op. 2003-03 (2003), available at <http://www.abcnyc.org/ethics/ethics-opinions-local/2003-opinions/819-checking-for-conflicts-of-interest>.

Proposed Amendment to Model Rule 1.6

Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently recognized that, before becoming associated with a firm, a lawyer must have some discretion to disclose confidential information about current and former clients to permit the lawyer and the firm to determine if a conflict would arise from the lawyer's association. Despite the reasonableness of this conclusion, the Formal Opinion concluded that "[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6." The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it arises, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more guidance on the limitations on such disclosures. The Commission considered a number of ways to address this issue, but concluded that the most effective way to do so is to propose the creation of Model Rule 1.6(b)(7). In particular, the proposed amendment would permit a lawyer to disclose confidential information to the extent that it is reasonably necessary to determine if a conflict of interest would arise from the lawyer's association with a firm. Any disclosure, however, is subject to several important exceptions.

First, the lawyer must determine that the disclosure is reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. As the proposed new Comment [14] explains, this condition means that a lawyer can reveal only limited information, typically a client's identity and the general nature of the work that the lawyer performed for that client. Even this limited disclosure, however, is not permissible if it will adversely affect the client. For example, the Comment explains that, if a lawyer knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible for that lawyer to disclose sufficient information to permit another firm to ensure compliance with the conflict of interest rules. Under those circumstances, the lawyer may have to postpone any association with the firm until the information, if disclosed to that firm, will no longer prejudice the client.

Second, the discussions between the lawyer and the firm must be such that there is a reasonable possibility that the lawyer may become associated with the firm. Typically, this moment occurs before a formal offer of employment is made or is imminent. For example, the disclosure can occur once the lawyer and the firm begin to engage in substantive discussions regarding the lawyer's possible association with the firm.²

The last sentence of the proposed new paragraph is intended to remind firms that they must not use or reveal the information that they receive from a potential lateral lawyer, except to determine whether a conflict would arise from that lawyer's possible association with the firm.

² ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009), at 5 (reaching a similar conclusion).

Conclusion

Globalization, changes in technology, changes in the legal marketplace, and client demands have fueled more lawyer mobility and an increase in the frequency with which lawyers become associated with new firms. When they seek these new associations, lawyers are often asked to disclose confidential information in order to ensure that the association does not give rise to a conflict of interest. The Resolution accompanying this Report is intended to establish a doctrinal basis for such disclosures and to give lawyers more guidance as to the limitations on their authority to make those disclosures. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.