

February 21, 2012

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

4
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 **Rule 1.6 Confidentiality Of Information**

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

17 (b) A lawyer may reveal information relating to the representation of a client to the
18 extent 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
21 certain to result in substantial injury to the financial interests or property of
22 another and in furtherance of which the client has used or is using the lawyer's
23 services;

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

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

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

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

35 (7) to detect and resolve potential conflicts of interest, but only when the
36 revealed information could not adversely affect the client. Information revealed
37 under this paragraph shall not be used or revealed by the recipient for any purpose
38 except the detection and resolution of potential conflicts of interest.
39

40 **COMMENT**

41 [1] This Rule governs the disclosure by a lawyer of information relating to the
42 representation of a client during the lawyer's representation of the client. See Rule 1.18
43 for the lawyer's duties with respect to information provided to the lawyer by a
44 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating

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45 to the lawyer’s prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
46 the lawyer’s duties with respect to the use of such information to the disadvantage of
47 clients and former clients.

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

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

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

76

77 **Authorized Disclosure**

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

86

87 **Disclosure Adverse to Client**

88 [6] Although the public interest is usually best served by a strict rule requiring
89 lawyers to preserve the confidentiality of information relating to the representation of
90 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)

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91 recognizes the overriding value of life and physical integrity and permits disclosure
92 reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such
93 harm is reasonably certain to occur if it will be suffered imminently or if there is a
94 present and substantial threat that a person will suffer such harm at a later date if the
95 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
96 that a client has accidentally discharged toxic waste into a town's water supply may
97 reveal this information to the authorities if there is a present and substantial risk that a
98 person who drinks the water will contract a life-threatening or debilitating disease and the
99 lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

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

114 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of
115 the client's crime or fraud until after it has been consummated. Although the client no
116 longer has the option of preventing disclosure by refraining from the wrongful conduct,
117 there will be situations in which the loss suffered by the affected person can be prevented,
118 rectified or mitigated. In such situations, the lawyer may disclose information relating to
119 the representation to the extent necessary to enable the affected persons to prevent or
120 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3)
121 does not apply when a person who has committed a crime or fraud thereafter employs a
122 lawyer for representation concerning that offense.

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

129 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer
130 in a client's conduct or other misconduct of the lawyer involving representation of the
131 client, the lawyer may respond to the extent the lawyer reasonably believes necessary to
132 establish a defense. The same is true with respect to a claim involving the conduct or
133 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
134 or other proceeding and can be based on a wrong allegedly committed by the lawyer
135 against the client or on a wrong alleged by a third person, for example, a person claiming
136 to have been defrauded by the lawyer and client acting together. The lawyer's right to

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137 respond arises when an assertion of such complicity has been made. Paragraph (b)(5)
138 does not require the lawyer to await the commencement of an action or proceeding that
139 charges such complicity, so that the defense may be established by responding directly to
140 a third party who has made such an assertion. The right to defend also applies, of course,
141 where a proceeding has been commenced.

142 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the
143 services rendered in an action to collect it. This aspect of the rule expresses the principle
144 that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the
145 fiduciary.

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

153

154 **Detection of Conflicts of Interest**

155 [13] Paragraph (b)(7) recognizes that lawyers and firms may sometimes need to
156 disclose information to each other about current and former clients to detect and resolve
157 conflicts of interest. For example, disclosures may be necessary when a lawyer is
158 considering an association with a firm, two or more firms are considering a merger, or a
159 lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7].
160 Under these circumstances, lawyers and law firms are permitted to disclose limited
161 information to each other, but only once substantive discussions regarding the new
162 relationship have occurred and only to the extent reasonably necessary to permit the
163 lawyer and firm to detect and resolve potential conflicts of interest that might arise from
164 the possible new relationship. In many situations, the disclosure of the client's identity
165 and the general nature of the legal and factual issues involved will be sufficient to detect
166 potential conflicts of interest. In other situations, it may be necessary to disclose
167 additional information, which typically will include no more than the identity of parties
168 involved in a matter and their counsel, the dates during which the work was performed,
169 and whether the matter has ended. The disclosure of any information, however, is
170 forbidden if it could adversely affect the client or former client (e.g., the fact that a
171 corporate client is seeking advice on a corporate takeover that has not been publicly
172 announced; that a person has consulted a lawyer about the possibility of divorce before
173 the person's intentions are known to the person's spouse; or that a person has consulted a
174 lawyer about a criminal investigation that has not led to a public charge). If there could
175 be an adverse effect, the lawyer must not disclose the information unless the client or
176 former client gives informed written consent to the disclosure. Moreover, the information
177 disclosed under paragraph (b)(7) may be used or revealed to others only to the extent
178 necessary to detect and resolve potential conflicts of interest; and except for the client's
179 identity, the identity of parties involved in a matter and their counsel, no such information
180 may be revealed to lawyers at the firm who have worked on the same or a substantially
181 related matter. This prohibition does not apply to other lawyers in the same firm who
182 have obtained the information from an independent source.

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183 [143] A lawyer may be ordered to reveal information relating to the representation
184 of a client by a court or by another tribunal or governmental entity claiming authority
185 pursuant to other law to compel the disclosure. Absent informed consent of the client to
186 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
187 the order is not authorized by other law or that the information sought is protected against
188 disclosure by the attorney-client privilege or other applicable law. In the event of an
189 adverse ruling, the lawyer must consult with the client about the possibility of appeal to
190 the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6)
191 permits the lawyer to comply with the court's order.

192 [154] Paragraph (b) permits disclosure only to the extent the lawyer reasonably
193 believes the disclosure is necessary to accomplish one of the purposes specified. Where
194 practicable, the lawyer should first seek to persuade the client to take suitable action to
195 obviate the need for disclosure. In any case, a disclosure adverse to the client's interest
196 should be no greater than the lawyer reasonably believes necessary to accomplish the
197 purpose. If the disclosure will be made in connection with a judicial proceeding, the
198 disclosure should be made in a manner that limits access to the information to the tribunal
199 or other persons having a need to know it and appropriate protective orders or other
200 arrangements should be sought by the lawyer to the fullest extent practicable.

201 [165] Paragraph (b) permits but does not require the disclosure of information
202 relating to a client's representation to accomplish the purposes specified in paragraphs
203 (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may
204 consider such factors as the nature of the lawyer's relationship with the client and with
205 those who might be injured by the client, the lawyer's own involvement in the transaction
206 and factors that may extenuate the conduct in question. A lawyer's decision not to
207 disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be
208 required, however, by other Rules. Some Rules require disclosure only if such disclosure
209 would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on
210 the other hand, requires disclosure in some circumstances regardless of whether such
211 disclosure is permitted by this Rule. See Rule 3.3(c).

212

213 **Acting Competently to Preserve Confidentiality**

214 [176] A lawyer must act competently to safeguard information relating to the
215 representation of a client against inadvertent or unauthorized disclosure by the lawyer or
216 other persons who are participating in the representation of the client or who are subject
217 to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

218 [187] When transmitting a communication that includes information relating to
219 the representation of a client, the lawyer must take reasonable precautions to prevent the
220 information from coming into the hands of unintended recipients. This duty, however,
221 does not require that the lawyer use special security measures if the method of
222 communication affords a reasonable expectation of privacy. Special circumstances,
223 however, may warrant special precautions. Factors to be considered in determining the
224 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the
225 information and the extent to which the privacy of the communication is protected by law
226 or by a confidentiality agreement. A client may require the lawyer to implement special
227 security measures not required by this Rule or may give informed consent to the use of a
228 means of communication that would otherwise be prohibited by this Rule.

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229 **Former Client**

230 [198] The duty of confidentiality continues after the client-lawyer relationship has
231 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
232 information to the disadvantage of the former client.
233

234 **Further RESOLVED: that the American Bar Association adopts the proposed**
235 **amendments, dated August 2012, to Rule 1.17 of the ABA *Model Rules of***
236 ***Professional Conduct* as follows (insertions underlined, deletions ~~struck through~~):**

237

238 **Rule 1.17 Sale Of Law Practice**

239

240 **A lawyer or a law firm may sell or purchase a law practice, or an area of law**
241 **practice, including good will, if the following conditions are satisfied:**

242 (a) **The seller ceases to engage in the private practice of law, or in the area of**
243 **practice that has been sold, [in the geographic area] [in the jurisdiction] (a**
244 **jurisdiction may elect either version) in which the practice has been conducted;**

245 (b) **The entire practice, or the entire area of practice, is sold to one or more**
246 **lawyers or law firms;**

247 (c) **The seller gives written notice to each of the seller's clients regarding:**

248 (1) **the proposed sale;**

249 (2) **the client's right to retain other counsel or to take possession of the**
250 **file; and**

251 (3) **the fact that the client's consent to the transfer of the client's files**
252 **will be presumed if the client does not take any action or does not otherwise**
253 **object within ninety (90) days of receipt of the notice.**

254 **If a client cannot be given notice, the representation of that client may be**
255 **transferred to the purchaser only upon entry of an order so authorizing by a court**
256 **having jurisdiction. The seller may disclose to the court in camera information**
257 **relating to the representation only to the extent necessary to obtain an order**
258 **authorizing the transfer of a file.**

259 (d) **The fees charged clients shall not be increased by reason of the sale.**

260

261 **COMMENT**

262 [1] The practice of law is a profession, not merely a business. Clients are not
263 commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer
264 or an entire firm ceases to practice, or ceases to practice in an area of law, and other
265 lawyers or firms take over the representation, the selling lawyer or firm may obtain
266 compensation for the reasonable value of the practice as may withdrawing partners of law
267 firms. See Rules 5.4 and 5.6.

268

269 **Termination of Practice by the Seller**

270 [2] The requirement that all of the private practice, or all of an area of practice, be
271 sold is satisfied if the seller in good faith makes the entire practice, or the area of practice,
272 available for sale to the purchasers. The fact that a number of the seller's clients decide
273 not to be represented by the purchasers but take their matters elsewhere, therefore, does

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274 not result in a violation. Return to private practice as a result of an unanticipated change
275 in circumstances does not necessarily result in a violation. For example, a lawyer who has
276 sold the practice to accept an appointment to judicial office does not violate the
277 requirement that the sale be attendant to cessation of practice if the lawyer later resumes
278 private practice upon being defeated in a contested or a retention election for the office or
279 resigns from a judiciary position.

280 [3] The requirement that the seller cease to engage in the private practice of law
281 does not prohibit employment as a lawyer on the staff of a public agency or a legal
282 services entity that provides legal services to the poor, or as in-house counsel to a
283 business.

284 [4] The Rule permits a sale of an entire practice attendant upon retirement from
285 the private practice of law within the jurisdiction. Its provisions, therefore, accommodate
286 the lawyer who sells the practice on the occasion of moving to another state. Some states
287 are so large that a move from one locale therein to another is tantamount to leaving the
288 jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate
289 lawyers so situated, states may permit the sale of the practice when the lawyer leaves the
290 geographical area rather than the jurisdiction. The alternative desired should be indicated
291 by selecting one of the two provided for in Rule 1.17(a).

292 [5] This Rule also permits a lawyer or law firm to sell an area of practice. If an
293 area of practice is sold and the lawyer remains in the active practice of law, the lawyer
294 must cease accepting any matters in the area of practice that has been sold, either as
295 counsel or co-counsel or by assuming joint responsibility for a matter in connection with
296 the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e).
297 For example, a lawyer with a substantial number of estate planning matters and a
298 substantial number of probate administration cases may sell the estate planning portion of
299 the practice but remain in the practice of law by concentrating on probate administration;
300 however, that practitioner may not thereafter accept any estate planning matters.
301 Although a lawyer who leaves a jurisdiction or geographical area typically would sell the
302 entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the
303 practice, thereby preserving the lawyer's right to continue practice in the areas of the
304 practice that were not sold.

305

306 **Sale of Entire Practice or Entire Area of Practice**

307 [6] The Rule requires that the seller's entire practice, or an entire area of practice,
308 be sold. The prohibition against sale of less than an entire practice area protects those
309 clients whose matters are less lucrative and who might find it difficult to secure other
310 counsel if a sale could be limited to substantial fee-generating matters. The purchasers are
311 required to undertake all client matters in the practice or practice area, subject to client
312 consent. This requirement is satisfied, however, even if a purchaser is unable to undertake
313 a particular client matter because of a conflict of interest.

314

315 **Client Confidences, Consent and Notice**

316 [7] Negotiations between seller and prospective purchaser prior to disclosure of
317 information relating to a specific representation of an identifiable client no more violate
318 the confidentiality provisions of Model Rule 1.6 than do preliminary discussions
319 concerning the possible association of another lawyer or mergers between firms, with

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320 respect to which client consent is not required. See Rule 1.6(b)(7). Providing the
321 purchaser access to ~~client-specific~~ detailed information relating to the representation, and
322 ~~to such as the client's~~ file, however, requires client consent. The Rule provides that
323 before such information can be disclosed by the seller to the purchaser the client must be
324 given actual written notice of the contemplated sale, including the identity of the
325 purchaser, and must be told that the decision to consent or make other arrangements must
326 be made within 90 days. If nothing is heard from the client within that time, consent to
327 the sale is presumed.

328 [8] A lawyer or law firm ceasing to practice cannot be required to remain in
329 practice because some clients cannot be given actual notice of the proposed purchase.
330 Since these clients cannot themselves consent to the purchase or direct any other
331 disposition of their files, the Rule requires an order from a court having jurisdiction
332 authorizing their transfer or other disposition. The Court can be expected to determine
333 whether reasonable efforts to locate the client have been exhausted, and whether the
334 absent client's legitimate interests will be served by authorizing the transfer of the file so
335 that the purchaser may continue the representation. Preservation of client confidences
336 requires that the petition for a court order be considered in camera. (A procedure by
337 which such an order can be obtained needs to be established in jurisdictions in which it
338 presently does not exist).

339 [9] All elements of client autonomy, including the client's absolute right to
340 discharge a lawyer and transfer the representation to another, survive the sale of the
341 practice or area of practice.

342

343 **Fee Arrangements Between Client and Purchaser**

344 [10] The sale may not be financed by increases in fees charged the clients of the
345 practice. Existing arrangements between the seller and the client as to fees and the scope
346 of the work must be honored by the purchaser.

347

348 **Other Applicable Ethical Standards**

349 [11] Lawyers participating in the sale of a law practice or a practice area are
350 subject to the ethical standards applicable to involving another lawyer in the
351 representation of a client. These include, for example, the seller's obligation to exercise
352 competence in identifying a purchaser qualified to assume the practice and the
353 purchaser's obligation to undertake the representation competently (see Rule 1.1); the
354 obligation to avoid disqualifying conflicts, and to secure the client's informed consent for
355 those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for
356 the definition of informed consent); and the obligation to protect information relating to
357 the representation (see Rules 1.6 and 1.9).

358 [12] If approval of the substitution of the purchasing lawyer for the selling lawyer
359 is required by the rules of any tribunal in which a matter is pending, such approval must
360 be obtained before the matter can be included in the sale (see Rule 1.16).

361

362 **Applicability of the Rule**

363 [13] This Rule applies to the sale of a law practice of a deceased, disabled or
364 disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative
365 not subject to these Rules. Since, however, no lawyer may participate in a sale of a law

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366 practice which does not conform to the requirements of this Rule, the representatives of
367 the seller as well as the purchasing lawyer can be expected to see to it that they are met.
368 [14] Admission to or retirement from a law partnership or professional association,
369 retirement plans and similar arrangements, and a sale of tangible assets of a law practice,
370 do not constitute a sale or purchase governed by this Rule.
371 [15] This Rule does not apply to the transfers of legal representation between lawyers
372 when such transfers are unrelated to the sale of a practice or an area of practice.

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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

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and increasing lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers and law firms disclose confidential information to each other about current and former clients in order to detect conflicts of interest that might arise when (for example) a lawyer considers an association with another firm, two or more firms consider a merger, or a lawyer considers the purchase of a law practice? 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 in this important area.

To offer this guidance, the Commission is proposing an amendment to Rule 1.6 (Confidentiality of Information) 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 Commission is also proposing a change to Comment [7] to Rule 1.17 (Sale of Law Practice) because that Comment addresses conceptually similar issues.

These proposals serve two important goals. First, the proposals reflect the reality that these disclosures are already taking place and that client confidences can be more effectively protected by regulating the process through which the detection of conflicts occurs. The Commission determined that, by ensuring that disclosures are regulated and do not simply occur “under the radar,” the proposals provide more, rather than less, protection for client confidences. Second, they offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

I. Proposed Amendment to Model Rule 1.6

Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently explained that lawyers and law firms must have some discretion to disclose limited confidential information to each other about current and former clients in order to determine if a conflict would arise from a lawyer’s association with the firm.¹ The Formal Opinion nevertheless 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 already arises and will continue to occur, the Commission should propose an amendment to

¹ Formal Opinion 09-455 describes the need to perform a conflicts check when hiring (or discussing the possibility of hiring) a lateral lawyer, but the logic of the Opinion applies equally well to other conceptually similar situations, such as when law firms consider a merger or when a lawyer considers the purchase of another lawyer’s practice.

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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 a new Model Rule 1.6(b)(7). The proposed amendment would permit lawyers and firms, with restrictions, to disclose limited confidential information to each other in order to detect conflicts of interest.

The Commission concluded that these disclosures, although necessary, need to be carefully limited and regulated. First, the lawyer or firm must conclude that the disclosure is reasonably necessary to detect a conflict of interest. As proposed new Comment [13] explains, this condition means that lawyers should disclose no more information than is necessary to detect a conflict. In many situations, the disclosure of the client's identity and the general nature of the legal and factual issues involved will be sufficient to accomplish this objective. In other situations, it may be necessary to disclose additional information, but the information should typically include no more than the identity of parties involved in a matter and their counsel, the dates during which the work was performed, and whether the matter has ended.

Second, even this limited disclosure is not permissible if it could adversely affect the client. For example, the Comment explains that, if a lawyer or firm 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 to disclose sufficient information to ensure compliance with the conflict of interest rules. Under those circumstances, the proposed relationship may have to be postponed until the information, if disclosed, could no longer prejudice the client.

Third, the disclosure should occur only when there is a reasonable possibility that the relationship in question (e.g., a law firm merger or the hiring of a new lawyer) might be established. This moment can sometimes occur at an early point in discussing the possible relationship. For example, the disclosure may be permissible before the lawyer and the firm begin to engage in substantive discussions regarding the lawyer's possible association or before two firms begin serious negotiations regarding a possible merger.²

The last sentence of paragraph (b)(7) and the next to last sentence of the proposed new Comment are intended to remind lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. The Comment also emphasizes that, except for the client's identity and the identity of parties involved in a matter and their counsel, no information obtained by a firm pursuant to Rule 1.6(b)(7) may be revealed to lawyers at that firm who have worked on the same or a substantially related matter. This portion of the Comment is intended to recognize that it is often necessary to approach specific lawyers in a firm to find out more about their work in order to determine whether that work might give rise to a conflict if the firm creates a new relationship with another lawyer or firm. The Comment language reminds firms that,

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

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when approaching their own lawyers under these circumstances, the information that can be shared with those lawyers may have to be particularly limited in scope.

II. Proposed Amendment to Model Rule 1.17

Model Rule 1.17 describes a number of ethical obligations that arise during the sale of a law practice, and Comment [7] describes the information that can be shared between the owner of the law practice and the prospective buyer. The Commission concluded that, in light of the proposed changes to Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Rule 1.6(b)(7).

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 law firms merge, lawyers become associated with new firms, and law practices are purchased by other lawyers. Under these circumstances, lawyers and firms are often asked to disclose to each other confidential information in order to ensure that the new relationship does not give rise to a conflict of interest. The Resolutions accompanying this Report are intended to establish a doctrinal basis for such disclosures and to give lawyers and firms 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.