

**AMERICAN BAR ASSOCIATION  
COMMISSION ON ETHICS 20/20  
STANDING COMMITTEE ON CLIENT PROTECTION  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY  
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE  
STANDING COMMITTEE ON PROFESSIONALISM  
STANDING COMMITTEE ON SPECIALIZATION  
NEW YORK STATE BAR ASSOCIATION  
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION  
SECTION OF INTERNATIONAL LAW  
NEW YORK COUNTY LAWYERS' ASSOCIATION  
SECTION OF BUSINESS LAW**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional  
2 Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest  
3 when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as  
4 follows (insertions underlined, deletions ~~struck through~~):  
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- 6 (a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and  
7 (b) the Comments to Model Rule 1.17 (Sale of Law Practice).  
8

9 **Rule 1.6 Confidentiality of Information**

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

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

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

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

20 (3) to prevent, mitigate or rectify substantial injury to the financial interests  
21 or property of another that is reasonably certain to result or has resulted from the

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22 client's commission of a crime or fraud in furtherance of which the client has used  
23 the lawyer's services;

24 (4) to secure legal advice about the lawyer's compliance with these Rules;(5)  
25 to establish a claim or defense on behalf of the lawyer in a controversy between the  
26 lawyer and the client, to establish a defense to a criminal charge or civil claim  
27 against the lawyer based upon conduct in which the client was involved, or to  
28 respond to allegations in any proceeding concerning the lawyer's representation of  
29 the client; ~~or~~

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

31 (7) to detect and resolve conflicts of interest between lawyers in different  
32 firms arising from the lawyer's change of employment or from changes in the  
33 composition or ownership of a firm, but only if the revealed information would not  
34 compromise the attorney-client privilege or otherwise prejudice the client.

35 (c) A lawyer shall make reasonable efforts to prevent the inadvertent or  
36 unauthorized disclosure of, or unauthorized access to, information relating to the  
37 representation of a client.

## 38 Comment

39 ...

## 40 Detection of Conflicts of Interest

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42 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose  
43 limited information to each other to detect and resolve conflicts of interest, such as when a  
44 lawyer is considering an association with another firm, two or more firms are considering a  
45 merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7].  
46 Under these circumstances, lawyers and law firms are permitted to disclose limited information,  
47 but only once substantive discussions regarding the new relationship have occurred. Any such  
48 disclosure should ordinarily include no more than the identity of the persons and entities  
49 involved in a matter, a brief summary of the general issues involved, and information about  
50 whether the matter has terminated. Even this limited information, however, should be disclosed  
51 only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise  
52 from the possible new relationship. Moreover, the disclosure of any information is prohibited if  
53 it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact  
54 that a corporate client is seeking advice on a corporate takeover that has not been publicly  
55 announced; that a person has consulted a lawyer about the possibility of divorce before the  
56 person's intentions are known to the person's spouse; or that a person has consulted a lawyer  
57 about a criminal investigation that has not led to a public charge). Under those circumstances,  
58 paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A  
59 lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring  
60 an association with another firm and is beyond the scope of these Rules.

61 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further  
62 disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7)  
63 does not restrict the use of information acquired by means independent of any disclosure  
64 pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information  
65 within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a  
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68 lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve  
69 conflicts of interest that could arise in connection with undertaking a new representation.

70 [153] A lawyer may be ordered to reveal information relating to the representation of a  
71 client by a court or by another tribunal or governmental entity claiming authority pursuant to  
72 other law to compel the disclosure. Absent informed consent of the client to do otherwise, the  
73 lawyer should assert on behalf of the client all nonfrivolous claims that the order is not  
74 authorized by other law or that the information sought is protected against disclosure by the  
75 attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer  
76 must consult with the client about the possibility of appeal to the extent required by Rule 1.4.  
77 Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's  
78 order.

79 [164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes  
80 the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the  
81 lawyer should first seek to persuade the client to take suitable action to obviate the need for  
82 disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the  
83 lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made  
84 in connection with a judicial proceeding, the disclosure should be made in a manner that limits  
85 access to the information to the tribunal or other persons having a need to know it and  
86 appropriate protective orders or other arrangements should be sought by the lawyer to the fullest  
87 extent practicable.

88 [175] Paragraph (b) permits but does not require the disclosure of information relating to  
89 a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).  
90 In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the  
91 nature of the lawyer's relationship with the client and with those who might be injured by the  
92 client, the lawyer's own involvement in the transaction and factors that may extenuate the  
93 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not  
94 violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require  
95 disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),  
96 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of  
97 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

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## 99 **Acting Competently to Preserve Confidentiality**

100 [186] Paragraph (c) requires a lawyer must to act competently to safeguard information  
101 relating to the representation of a client against unauthorized access by third parties and against  
102 inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are  
103 participating in the representation of the client or who are subject to the lawyer's supervision.  
104 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized  
105 disclosure of, confidential information relating to the representation of a client does not  
106 constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the  
107 access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's  
108 efforts include, but are not limited to, the sensitivity of the information, the likelihood of  
109 disclosure if additional safeguards are not employed, the cost of employing additional  
110 safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards  
111 adversely affect the lawyer's ability to represent clients (e.g., by making a device or important  
112 piece of software excessively difficult to use). A client may require the lawyer to implement  
113 special security measures not required by this Rule or may give informed consent to forgo

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114 security measures that would otherwise be required by this Rule. Whether a lawyer may be  
115 required to take additional steps to safeguard a client's information in order to comply with other  
116 law, such as state and federal laws that govern data privacy or that impose notification  
117 requirements upon the loss of, or unauthorized access to, electronic information, is beyond the  
118 scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside  
119 the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

120  
121 [197] When transmitting a communication that includes information relating to the  
122 representation of a client, the lawyer must take reasonable precautions to prevent the information  
123 from coming into the hands of unintended recipients. This duty, however, does not require that  
124 the lawyer use special security measures if the method of communication affords a reasonable  
125 expectation of privacy. Special circumstances, however, may warrant special precautions.  
126 Factors to be considered in determining the reasonableness of the lawyer's expectation of  
127 confidentiality include the sensitivity of the information and the extent to which the privacy of  
128 the communication is protected by law or by a confidentiality agreement. A client may require  
129 the lawyer to implement special security measures not required by this Rule or may give  
130 informed consent to the use of a means of communication that would otherwise be prohibited by  
131 this Rule. Whether a lawyer may be required to take additional steps in order to comply with  
132 other law, such as state and federal laws that govern data privacy, is beyond the scope of these  
133 Rules.

## 134 **Former Client**

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136 [2048] The duty of confidentiality continues after the client-lawyer relationship has  
137 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such  
138 information to the disadvantage of the former client.

## 139 **Rule 1.17 Sale of Law Practice**

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

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

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

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

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

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

152 **and**

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

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

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

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162 **Comment**

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165 **Client Confidences, Consent and Notice**

166 [7] Negotiations between seller and prospective purchaser prior to disclosure of  
167 information relating to a specific representation of an identifiable client no more violate the  
168 confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the  
169 possible association of another lawyer or mergers between firms, with respect to which client  
170 consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~  
171 detailed information relating to the representation, ~~and to~~ such as the client's file, however,  
172 requires client consent. The Rule provides that before such information can be disclosed by the  
173 seller to the purchaser the client must be given actual written notice of the contemplated sale,  
174 including the identity of the purchaser, and must be told that the decision to consent or make  
175 other arrangements must be made within 90 days. If nothing is heard from the client within that  
176 time, consent to the sale is presumed.

177 ...