RESOLVED, That the American Bar Association amends the ABA Model Rules of Professional Conduct dated August 2012, to provide guidance regarding the detection of conflicts of interest when lawyers move from one firm to another, firms merge or there is a sale of a law practice, as follows (insertions underlined, deletions struck through):

(a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and
(b) the Comments to Model Rule 1.17 (Sale of Law Practice).

Rule 1.6 Confidentiality of Information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the
client's commission of a crime or fraud in furtherance of which the client has used
the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the
lawyer and the client, to establish a defense to a criminal charge or civil claim
against the lawyer based upon conduct in which the client was involved, or to
respond to allegations in any proceeding concerning the lawyer's representation of
the client; or
(6) to comply with other law or a court order; or
(7) to detect and resolve conflicts of interest between lawyers in different
firms arising from the lawyer's change of employment or from changes in the
composition or ownership of a firm, but only if the revealed information would not
compromise the attorney-client privilege or otherwise prejudice the client.
(c) A lawyer shall make reasonable efforts to prevent the inadvertent or
unauthorized disclosure of, or unauthorized access to, information relating to the
representation of a client.

Comment
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Detection of Conflicts of Interest

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

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

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

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

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

Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a lawyer to act competently to safeguard information
relating to the representation of a client against unauthorized access by third parties and against
inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are
participating in the representation of the client or who are subject to the lawyer’s supervision.
See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized
disclosure of, confidential information relating to the representation of a client does not
constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the
access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s
efforts include, but are not limited to, the sensitivity of the information, the likelihood of
disclosure if additional safeguards are not employed, the cost of employing additional
safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards
adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important
piece of software excessively difficult to use). A client may require the lawyer to implement
special security measures not required by this Rule or may give informed consent to forgo
security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

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

Former Client

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

Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

and

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

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
(d) The fees charged clients shall not be increased by reason of the sale.

Comment

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