

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  
YOUNG LAWYERS DIVISION  
NEW YORK COUNTY LAWYERS' ASSOCIATION  
SECTION OF BUSINESS LAW  
LAW PRACTICE MANAGEMENT SECTION  
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 lawyers' use of technology and  
3 confidentiality as follows (insertions underlined, deletions ~~struck through~~):  
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- 5 (a) the black letter and Comments to Model Rule 1.0 (Terminology);  
6 (b) the Comments to Model Rule 1.1 (Competence);  
7 (c) the Comments to Model Rule 1.4 (Communication);  
8 (d) the black letter and Comments to Model Rule 1.6 (Confidentiality of Information); and  
9 (e) the black letter and Comments to Model Rule 4.4 (Respect for Rights of Third Parties).

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11 **Rule 1.0 Terminology**

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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 that a**  
17 **lawyer promptly transmits to the person confirming an oral informed consent. See**  
18 **paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or**  
19 **transmit the writing at the time the person gives informed consent, then the lawyer must**  
20 **obtain or transmit it within a reasonable time thereafter.**

# 105A Revised

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

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

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

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

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

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

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

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

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

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

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

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

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62 **Comment**

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## 67 Screened

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69 [9] The purpose of screening is to assure the affected parties that confidential information  
70 known by the personally disqualified lawyer remains protected. The personally disqualified  
71 lawyer should acknowledge the obligation not to communicate with any of the other lawyers in  
72 the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the  
73 matter should be informed that the screening is in place and that they may not communicate with  
74 the personally disqualified lawyer with respect to the matter. Additional screening measures that  
75 are appropriate for the particular matter will depend on the circumstances. To implement,  
76 reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate  
77 for the firm to undertake such procedures as a written undertaking by the screened lawyer to  
78 avoid any communication with other firm personnel and any contact with any firm files or other  
79 ~~materials~~ information, including information in electronic form, relating to the matter, written  
80 notice and instructions to all other firm personnel forbidding any communication with the  
81 screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or  
82 other ~~materials~~ information, including information in electronic form, relating to the matter, and  
83 periodic reminders of the screen to the screened lawyer and all other firm personnel.

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## 86 Rule 1.1 Competence

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

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## 92 Comment

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## 94 Maintaining Competence

95 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of  
96 changes in the law and its practice, including the benefits and risks associated with relevant  
97 technology, engage in continuing study and education and comply with all continuing legal  
98 education requirements to which the lawyer is subject.

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## 100 Rule 1.4 Communication

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102 (a) A lawyer shall:

103 (1) promptly inform the client of any decision or circumstance with respect to  
104 which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

105 (2) reasonably consult with the client about the means by which the client's  
106 objectives are to be accomplished;

107 (3) keep the client reasonably informed about the status of the matter;

108 (4) promptly comply with reasonable requests for information; and

109 (5) consult with the client about any relevant limitation on the lawyer's  
110 conduct when the lawyer knows that the client expects assistance not permitted by the  
111 Rules of Professional Conduct or other law.

112 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the  
113 client to make informed decisions regarding the representation.

# 105A Revised

114 **Comment**

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117 **Communicating with Client**

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119 [4] A lawyer's regular communication with clients will minimize the occasions on which  
120 a client will need to request information concerning the representation. When a client makes a  
121 reasonable request for information, however, paragraph (a)(4) requires prompt compliance with  
122 the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's  
123 staff, acknowledge receipt of the request and advise the client when a response may be expected.  
124 ~~Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly~~  
125 respond to or acknowledge client communications.

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128 **Rule 1.6 Confidentiality of Information**

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

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

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

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

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

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

145 (5) to establish a claim or defense on behalf of the lawyer in a controversy  
146 between the lawyer and the client, to establish a defense to a criminal charge or civil  
147 claim against the lawyer based upon conduct in which the client was involved, or to  
148 respond to allegations in any proceeding concerning the lawyer's representation of  
149 the client; or

150 (6) to comply with other law or a court order.

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

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155 **Comment**

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## 160 **Acting Competently to Preserve Confidentiality**

161 [16] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information  
162 relating to the representation of a client against unauthorized access by third parties and against  
163 inadvertent or unauthorized disclosure by the lawyer or other persons ~~or entities~~ who are  
164 participating in the representation of the client or who are subject to the lawyer's supervision.  
165 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized  
166 disclosure of, ~~confidential~~ information relating to the representation of a client does not  
167 constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the  
168 access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's  
169 efforts include, but are not limited to, the sensitivity of the information, the likelihood of  
170 disclosure if additional safeguards are not employed, the cost of employing additional  
171 safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards  
172 adversely affect the lawyer's ability to represent clients (e.g., by making a device or important  
173 piece of software excessively difficult to use). A client may require the lawyer to implement  
174 special security measures not required by this Rule or may give informed consent to forgo  
175 security measures that would otherwise be required by this Rule. Whether a lawyer may be  
176 required to take additional steps to safeguard a client's information in order to comply with other  
177 law, such as state and federal laws that govern data privacy or that impose notification  
178 requirements upon the loss of, or unauthorized access to, electronic information, is beyond the  
179 scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside  
180 the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

181 [17] When transmitting a communication that includes information relating to the  
182 representation of a client, the lawyer must take reasonable precautions to prevent the information  
183 from coming into the hands of unintended recipients. This duty, however, does not require that  
184 the lawyer use special security measures if the method of communication affords a reasonable  
185 expectation of privacy. Special circumstances, however, may warrant special precautions.  
186 Factors to be considered in determining the reasonableness of the lawyer's expectation of  
187 confidentiality include the sensitivity of the information and the extent to which the privacy of  
188 the communication is protected by law or by a confidentiality agreement. A client may require  
189 the lawyer to implement special security measures not required by this Rule or may give  
190 informed consent to the use of a means of communication that would otherwise be prohibited by  
191 this Rule. Whether a lawyer may be required to take additional steps in order to comply with  
192 other law, such as state and federal laws that govern data privacy, is beyond the scope of these  
193 Rules.

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## 196 **Rule 4.4 Respect for Rights of Third Persons**

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

201 (b) **A lawyer who receives a document or electronically stored information relating**  
202 **to the representation of the lawyer's client and knows or reasonably should know that the**  
203 **document or electronically stored information was inadvertently sent shall promptly notify**  
204 **the sender.**

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# 105A Revised

## 206 Comment

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[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ ~~was~~ mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.