

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

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~~):
4

- 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).
10

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.**

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.**

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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.

61 Comment

62 ...

63 Screened

64 ...

65 [9] The purpose of screening is to assure the affected parties that confidential information
66 known by the personally disqualified lawyer remains protected. The personally disqualified
67 lawyer should acknowledge the obligation not to communicate with any of the other lawyers in
68 the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the
69 matter should be informed that the screening is in place and that they may not communicate with
70 the personally disqualified lawyer with respect to the matter. Additional screening measures that
71 are appropriate for the particular matter will depend on the circumstances. To implement,
72

73 reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate
 74 for the firm to undertake such procedures as a written undertaking by the screened lawyer to
 75 avoid any communication with other firm personnel and any contact with any firm files or other
 76 ~~materials~~ information, including information in electronic form, relating to the matter, written
 77 notice and instructions to all other firm personnel forbidding any communication with the
 78 screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or
 79 other ~~materials~~ information, including information in electronic form, relating to the matter, and
 80 periodic reminders of the screen to the screened lawyer and all other firm personnel.

81 ...

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83 **Rule 1.1 Competence**

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

88

89 **Comment**

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...

91 **Maintaining Competence**

92 [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of
 93 changes in the law and its practice, including the benefits and risks associated with relevant
 94 technology, engage in continuing study and education and comply with all continuing legal
 95 education requirements to which the lawyer is subject.

96

97 **Rule 1.4 Communication**

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99 **(a) A lawyer shall:**

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

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

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

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

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

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

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112 **Comment**

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...

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115 **Communicating with Client**

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...

117 [4] A lawyer's regular communication with clients will minimize the occasions on which
 118 a client will need to request information concerning the representation. When a client makes a
 119 reasonable request for information, however, paragraph (a)(4) requires prompt compliance with

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120 the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's
121 staff, acknowledge receipt of the request and advise the client when a response may be expected.
122 ~~Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly~~
123 respond to or acknowledge client communications.

124 ...

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126 **Rule 1.6 Confidentiality of Information**

127

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

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

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

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

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

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

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

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

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

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153 **Comment**

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156 **Acting Competently to Preserve Confidentiality**

157 [16] Paragraph (c) requires a lawyer must to act competently to safeguard information
158 relating to the representation of a client against unauthorized access by third parties and against
159 inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are
160 participating in the representation of the client or who are subject to the lawyer's supervision.
161 See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized
162 disclosure of, confidential information does not constitute a violation of paragraph (c) if the
163 lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered
164 in determining the reasonableness of the lawyer's efforts include, but are not limited to, the
165 sensitivity of the information, the likelihood of disclosure if additional safeguards are not

166 employed, the cost of employing additional safeguards, the difficulty of implementing the
 167 safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to
 168 represent clients (e.g., by making a device or important piece of software excessively difficult to
 169 use). A client may require the lawyer to implement special security measures not required by this
 170 Rule or may give informed consent to forgo security measures that would otherwise be required
 171 by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's
 172 information in order to comply with other law, such as state and federal laws that govern data
 173 privacy or that impose notification requirements upon the loss of, or unauthorized access to,
 174 electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing
 175 information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

176 [17] When transmitting a communication that includes information relating to the
 177 representation of a client, the lawyer must take reasonable precautions to prevent the information
 178 from coming into the hands of unintended recipients. This duty, however, does not require that
 179 the lawyer use special security measures if the method of communication affords a reasonable
 180 expectation of privacy. Special circumstances, however, may warrant special precautions.
 181 Factors to be considered in determining the reasonableness of the lawyer's expectation of
 182 confidentiality include the sensitivity of the information and the extent to which the privacy of
 183 the communication is protected by law or by a confidentiality agreement. A client may require
 184 the lawyer to implement special security measures not required by this Rule or may give
 185 informed consent to the use of a means of communication that would otherwise be prohibited by
 186 this Rule. Whether a lawyer may be required to take additional steps in order to comply with
 187 other law, such as state and federal laws that govern data privacy, is beyond the scope of these
 188 Rules.

189 ...

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191 **Rule 4.4 Respect for Rights of Third Persons**

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

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

200

201 **Comment**

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203 [2] Paragraph (b) recognizes that lawyers sometimes receive a documents or
 204 electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties
 205 or their lawyers. A document or electronically stored information is inadvertently sent when it is
 206 accidentally transmitted, such as when an email or letter is misaddressed or a document or
 207 electronically stored information is accidentally included with information that was intentionally
 208 transmitted. If a lawyer knows or reasonably should know that such a document or electronically
 209 stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify
 210 the sender in order to permit that person to take protective measures. Whether the lawyer is
 211 required to take additional steps, such as returning the document or electronically stored

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212 information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the
213 question of whether the privileged status of a document or electronically stored information has
214 been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a
215 document or electronically stored information that the lawyer knows or reasonably should know
216 may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this
217 Rule, “document or electronically stored information” includes, in addition to paper documents,
218 email and other forms of electronically stored information, including embedded data (commonly
219 referred to as “metadata”), that is ~~email or other electronic modes of transmission~~ subject to
220 being read or put into readable form. Metadata in electronic documents creates an obligation
221 under this Rule only if the receiving lawyer knows or reasonably should know that the metadata
222 was inadvertently sent to the receiving lawyer.

223 [3] Some lawyers may choose to return a document or electronically stored information
224 unread, for example, when the lawyer learns before receiving ~~it the document~~ that it was
225 inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do
226 so, the decision to voluntarily return such a document or electronically stored information is a
227 matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

REPORT

Introduction

Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. One of the objectives of the ABA Commission on Ethics 20/20 has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology, and to update the Model Rules of Professional Conduct to reflect the realities of a digital age.

The Commission's recommendations in this area take two forms. First, the Commission has asked the ABA Center for Professional Responsibility to work with relevant entities within the Association to create a centralized user-friendly website with continuously updated and detailed information about confidentiality-related ethics issues arising from lawyers' use of technology, including information about the latest data security standards. The Commission concluded that this web-based resource is critical given that rule-based guidance and ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology. The [ABA's Legal Technology Resource Center](#) and [Law Practice Management Section's eLawyering Task Force](#) have developed excellent technology-related resources, but those resources exist in different places on the ABA website. The Commission found that lawyers are seeking a website that serves as a centralized and continuously updated resource on these issues.

The Commission believes that the information contained on this website should be presented in such a way that lawyers who may not have extensive knowledge about technology and associated ethics issues can easily understand the information. For example, this resource should identify the key issues that lawyers should consider when using technology in their practices, such as the administrative, technical, and physical safeguards that should be employed. The resource should also highlight additional cutting-edge and more sophisticated topics. The website also should include regularly updated information about security standards, including the identification of standards-setting organizations, so that lawyers can more easily determine whether the technology that they employ is compliant with those standards.

Second, the Commission is proposing to amend several Model Rules of Professional Conduct and their Comments. Unlike the proposed website, which can be regularly updated in light of new technology and changing security concerns, the Rule and Comment-based proposals necessarily offer more general guidance and do not offer advice regarding the use of any particular type of technology.

The Commission identified six areas that would benefit from this guidance. First, the Commission concluded that technology has raised new issues for law firms that employ screens pursuant to Model Rules 1.10, 1.11, 1.12, and 1.18. The Commission determined that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Commission is proposing an amendment to address this point in Comment [9] of Model Rule 1.0 (Terminology), which concerns the definition of a screen under Model Rule 1.0(k).

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Second, the Commission determined that the definition of a “writing” in Model Rule 1.0(n) does not reflect the full range of ways in which lawyers use technology to memorialize an understanding. Thus, the Commission is recommending that the word “e-mail” be replaced by “electronic communications.”

Third, the Commission concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Commission is recommending an amendment to Comment [6] of Model Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology.

Fourth, the Commission is proposing a change to the last sentence of Comment [4] to Model Rule 1.4, which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Commission proposes to replace that admonition with the following language: “A lawyer should promptly respond to or acknowledge client communications.” Although not related to a lawyer’s confidentiality obligations, the Commission nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fifth, the Commission is proposing to add a new paragraph to Model Rule 1.6 (Confidentiality of Information). Proposed new Model Rule 1.6(c) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent or unauthorized disclosures as well as from unauthorized access. This duty is already described in several existing Comments, but the Commission concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Model Rule 1.6. The Commission also concluded that the Comments should be amended to offer lawyers more guidance about how to comply with this obligation.

Finally, the Commission is proposing new language to clarify the scope of Model Rule 4.4(b), which concerns a lawyer’s obligations upon receiving inadvertently sent confidential information. The current provision describes the receipt of “documents” containing such information, but confidential information can also take the form of electronically stored information. Thus, the Commission is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information. Moreover, the Commission is proposing to define the phrase “inadvertently sent” in Comment [2] to give lawyers more guidance as to when notification requirement of Model Rule 4.4(b) is triggered.

The Commission concluded that these amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology’s many benefits. The proposals also update the language of the Model Rules to ensure that they reflect the realities of 21st century law practice. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

I. Model Rule 1.0(k) (Terminology; Screening)

Model Rule 1.0 is the Terminology Section of the Model Rules. Model Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Model Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer's access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Commission concluded and heard that greater clarity and specificity is needed. To that end, the Commission is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

II. Model Rule 1.0(n) (Terminology; Writing)

The word "writing" is another defined term that should be updated in light of changes in technology. Currently, Model Rule 1.0(n) defines "writing" or "written" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." The Commission concluded that this definition is not sufficiently expansive given the wide range of methods that lawyers now use (or are likely to use in the near future) when memorializing an agreement, such as written consents to conflicts of interest. The Commission, therefore, proposes to replace the word "e-mail" with "electronic communications."

III. Model Rule 1.1 (Competence)

Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase "including the benefits and risks associated with relevant technology," would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent.

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IV. Model Rule 1.4 (Communication)

Model Rule 1.4 describes a lawyer's duty to communicate with clients, and the last sentence of Comment [4] to Model Rule 1.4 currently instructs lawyers that "[c]lient telephone calls should be promptly returned or acknowledged." Clients, however, now communicate with lawyers in an increasing number of ways, including by email and other forms of electronic communication, and a lawyer's obligation to respond should exist regardless of the medium that is used. Accordingly, the Commission proposes to replace the last sentence of Comment [4] with the following language: "A lawyer should promptly respond to or acknowledge client communications." The Commission concluded that this language more accurately describes a lawyer's obligations in light of changes in technology and evolving methods of communication.

V. Model Rule 1.6 (Duty of Confidentiality)

Currently, Model Rule 1.6(a) states that a lawyer has a duty not to reveal a client's confidential information, except for the circumstances described in Model Rule 1.6(b). The Rule, however, does not indicate what ethical obligations lawyers have to *prevent* such a revelation. Although this obligation is described in Comments [16] and [17], the Commission concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Model Rule 1.6(c).

The idea of explaining a lawyer's duty to safeguard information within the black letter of the Rule is not new. The proposed Model Rule 1.6(c) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Commission concluded that a similar provision should appear in Model Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

To be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The

reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances.

The Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available. Nevertheless, the Commission is proposing new language to Comment [16] to identify several factors that lawyers should consider when determining whether their efforts are reasonable, including 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). Moreover, as explained above, the Commission has recommended that the ABA create a centralized website that contains continuously updated and detailed information about data security.

In addition to setting out the factors that lawyers need to consider when securing their clients' confidences, the proposed Comment language recognizes that some clients might require the lawyer to implement special security measures not required by the Rule or may give informed consent to the use of security measures that would otherwise be prohibited by the Rule. A nearly identical observation appears in Comment [17] in the context of security measures that lawyers might have to employ when transmitting confidential information. The Commission concluded that a similar thought should be expressed in the context of Comment [16], which pertains to the storage of such information.

Finally, the Commission's research revealed that there has been a dramatic growth in federal, state, and international laws and regulations relating to data privacy. The Commission found that this body of law increasingly applies to lawyers and law firms and that lawyers need to be aware of these additional obligations. Thus, the Commission is proposing to add a sentence to the end of Comment [16] and Comment [17] that would remind lawyers that other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Model Rules of Professional Conduct. Other Comments in the Model Rules instruct lawyers to consult law outside of the ethics rules, and the Commission concluded that a lawyer's duty of confidentiality is another area where other legal obligations have become sufficiently important and common that lawyer should be expressly reminded to consider those obligations, both when storing confidential information (Comment [16]) and when transmitting it (Comment [17]).

VI. Model Rule 4.4 (Respect for Rights of Third Persons)

Technology has increased the risk that confidential information will be inadvertently disclosed, and Model Rule 4.4(b) addresses one particular ethics issue associated with this risk. Namely, it provides that, if lawyers receive documents that they know or reasonably should know were inadvertently sent to them, they must notify the sender.

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The Commission concluded that the word “document” is inadequate to express the various kinds of information that can be inadvertently sent in a digital age. For example, confidential information can now be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata). To make clear that the Rule applies to those situations, the Commission is proposing that the word “document” be replaced with a phrase that is commonly used in the context of discovery – “document or electronically stored information.”

In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, the last sentence of Comment [2] addresses the issue of metadata. The Comment states that the receipt of metadata (i.e., data embedded in electronic information, such as the date an electronic document was created) triggers the notification duties of the Rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

The new language about metadata does not resolve a more controversial question: whether a lawyer should be permitted to look at metadata in the absence of consent or court authority to do so. Several ethics opinions, including ABA Formal Opinion 06-442, have concluded that Rule 4.4 does not prohibit a lawyer from reviewing metadata under those circumstances,¹ but other ethics opinions have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party’s metadata in the absence of consent or a court order.² The Commission’s proposal does not resolve this issue, but merely recognizes that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances (e.g., with the opponent’s or a court’s permission). The Commission’s proposal makes clear that, under those circumstances, if a lawyer uncovers metadata that the lawyer knows the sending lawyer did not intend to include, Model Rule 4.4(b)’s notification requirement is triggered.

The Commission is also proposing to define the phrase “inadvertently sent.” The phrase is ambiguous and potentially misleading, because, for example, it could be read to exclude information that is *intentionally* sent, but to the wrong person. To ensure that the purpose of the Model Rule is clear, the Commission proposes to add the following sentence: “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.”

VII. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients’ confidential information and that reasonable safeguards are ethically required.

¹ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 06-442 (2006); Md. St. Bar Ass’n. Comm. on Ethics, Docket No. 2007-09 (2007); Vt. State Bar Ass’n Ethics Comm., Ethics Op. 01 (2009).

² See, e.g., Ala. St. Bar Office of Gen. Counsel, Formal Op. 02 (2007); State Bar of Ariz. Ethics Comm., Ethics Op. 03 (2007); Fla. State Bar Prof’l Ethics Comm., Formal Op. 02 (2006); Me. Bd. of Overseers of the Bar Prof’l Ethics Comm’n, Ethics Op. 196 (2007); N.H. Bar Ass’n. Ethics Comm., Advisory Op. 4 (2008-2009); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 749 at *3 (2001); NYCLA Comm. on Prof’l Ethics, Ethics Op. 738 (2008).

The Commission's proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology's many benefits. The proposals also update the language of the Model Rules so that it reflects the way that law is practiced in the 21st century. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolutions.

Respectfully submitted,

Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

August 2012

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GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution.

Resolution 105a: Technology and Confidentiality

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."

- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.
- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

2. Approval by Submitting Entity.

The Commission approved this Resolution and Report at its April 12 -13, 2012 meeting.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

The adoption of this Resolution would result in amendments to the ABA Model Rules of Professional Conduct.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last “global” review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, and are giving rise to a variety of new

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ethics issues relating to technology and confidentiality. Resolution 105a, if adopted, would enable the ABA to offer lawyers, clients, and judges the guidance they need to address these increasingly important issues.

6. Status of Legislation. (If applicable)

N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the

National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105a: Technology and Confidentiality

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to make clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used. The Commission concluded that technological change has so enhanced the importance of this duty that it should be identified in the black letter and described in more detail in Comment [16]. The proposal identifies various factors that lawyers need to take into account when determining whether their precautions are reasonable, but makes clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.
- Rule 4.4(b) of the ABA Model Rules of Professional Conduct (Respect for Rights of Third Persons) currently provides that a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." The Commission is proposing to amend Rule 4.4(b) of the Model Rules and its Comment [2] to make clear that electronically stored information, in addition to information existing in paper form, can trigger the notification requirements of Rule 4.4(b) if the lawyer concludes that the information was inadvertently sent. Moreover, the Commission is proposing to define the phrase "inadvertently sent" in Comment [2] to help lawyers understand when the notification obligations in Rule 4.4(b) arise.
- The screening of individual lawyers from access to certain information in a firm must address not only documents, but also electronic information. For this reason, the Commission is proposing to amend Comment [9] of Rule 1.0 of the Model Rules of Professional Conduct (Terminology) to make clear that, when establishing screens to prevent the sharing of information within a firm, the screens should prevent the sharing of both tangible and electronic information. The Commission is also proposing to amend the existing definition of a "writing" in paragraph (n) of Model Rule 1.0 by replacing the word "e-mail" with the phrase "electronic information."
- The Commission is proposing an amendment to Comment [6] of Rule 1.1 of the Model Rules of Professional Conduct (Competence) to make clear that a lawyer's duty of competence, which requires the lawyer to stay abreast of

changes in the law and its practice, includes understanding relevant technology's benefits and risks. Comment [6] already implicitly encompasses such an obligation, but it is important to make this duty explicit because technology is such an integral – and yet, at times invisible – aspect of contemporary law practice.

- The last sentence of Comment [4] of Rule 1.4 of the Model Rules of Professional Conduct (Communication) instructs lawyers to respond promptly to client telephone calls. The Commission proposes to update the Comment so that it instructs lawyers to “promptly respond to or acknowledge client communications.”

2. Summary of the Issue that the Resolution Addresses

The ABA's last “global” review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) and the ABA Commission on Multijurisdictional Practice (“MJP Commission”). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

Resolution 105a addresses the ethical issues associated with technology and confidentiality of client information. Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients' confidential information. Resolution 105a provides lawyers with more guidance regarding their ethical obligations when using this technology and updates the Model Rules of Professional Conduct to reflect the realities of a digital age. Resolution 105a offers this guidance in a manner that is consistent with the principles that then-ABA President Lamm directed the Commission to follow: protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent, and self-regulated profession.

3. Please Explain How the Proposed Policy Position will address the issue

Resolution 105a updates the Model Rules of Professional Conduct to reflect a lawyer's ethical duties in a digital age. For example, the black letter of Model Rule 1.6(a) does not currently describe what, if any, ethical obligations lawyers have to prevent unauthorized or inadvertent disclosure of, or unauthorized

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access to, confidential client information. Rather, the Rule only instructs lawyers not to “reveal” that information. Thus, the black letter of the Rule does not offer lawyers any guidance regarding their ethical obligations when using technology (e.g., smart phones, laptops, or other mobile devices) to store or transmit confidential information. New paragraph (c) in Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) and new language in Comment [16] will help lawyers understand their ethical duty to take reasonable measures to protect a client’s confidential information. New Comment language would identify various factors that lawyers need to take into account when determining whether their precautions are reasonable but make clear that a lawyer does not violate the Rule simply because information was disclosed or accessed inadvertently or without authority.

Resolution 105a also updates Model Rules 1.0 (Terminology), 1.1 (Competence), 1.4 (Communication), and 4.4 (Respect for Rights of Third Persons) so that lawyers understand how technology is transforming their ethical obligations. For example, the Commission’s proposal to amend the Comment to Model Rule 1.1 makes explicit that which has been long implicit in the Rules. Namely, the duty of competence, which requires a lawyer to stay abreast of developments in the law and its practice, encompasses staying abreast of the risks and benefits associated with relevant technology (e.g., how technology used by a lawyer impacts the duty to protect confidential client information).

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105a as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105a relating to Technology and Confidentiality: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Professional Discipline, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral

comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website (click [here](#)). Moreover, the Commission created and maintained a listserv for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.