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, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Comment

...
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.

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.

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

A lawyer must act competently to safeguard information relating to the
representation of a client against inadvertent or unauthorized disclosure by the lawyer or other
persons 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.

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.

Former Client

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

... 

Client Confidences, Consent and Notice

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

...
Introduction

The ABA Commission on Ethics 20/20 has examined how globalization and technology have transformed the practice of law and continue to fuel an increase in lawyer mobility. The Commission found that this increased mobility has raised a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA’s Standing Committee on Ethics and Professional Responsibility, the Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance in this important area.

To offer this guidance, the Commission is proposing black letter and Comment amendments to Model Rule 1.6 (Confidentiality of Information) that track the Formal Opinion and more clearly explain the ethical considerations associated with these disclosures. The Commission is also proposing a change to Comment [7] to Model Rule 1.17 (Sale of Law Practice), because that Comment addresses conceptually similar issues.

These proposed amendments would codify what has long been common practice and acknowledged as essential in ethics opinions: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest. By codifying existing authority and practices and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

I. Proposed Amendment to Model Rule 1.6

The Commission proposes to amend Model Rule 1.6 and its Comments in order to provide a clearer doctrinal basis for, and place appropriate limitations on, disclosures of confidential information to detect and resolve conflicts of interest.

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A. Rationale for Change

Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently explained that lawyers and law firms must have discretion to disclose limited information to each other in order to determine if a conflict of interest will arise from a lawyer’s association with the firm. The Formal Opinion nevertheless concluded that “[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6.”

The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it is arising, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more readily available guidance on the limitations on such disclosures.

B. Limitations on the Disclosure Authority

The Commission concluded that the authority to disclose information, although necessary, needs to be carefully limited and regulated to ensure client protection while permitting the detection and resolution of conflicts of interest that arise from professional mobility, benefitting both clients and lawyers. Comment [13] to Model Rule 1.6 would make clear that 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. The Comment then explains that even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. For example, if the disclosure of a client’s identity would be sufficient to detect and resolve a conflict, the lawyer should not disclose any additional information.

Formal Opinion 09-455 reached a nearly identical conclusion regarding the categories of information that may be disclosed. The Ethics Committee found that, “[i]n most situations involving lawyers moving between firms[,] lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for [a] conflicts analysis.” The Commission’s proposal goes one modest step further by allowing lawyers to disclose whether the matter has terminated. The Commission concluded that this additional information is often needed because conflicts analyses differ for former and current clients. The Commission also uses the word “ordinarily,” recognizing that there may be additional narrow categories of information that are not privileged or prejudicial and may need to be disclosed in order to detect a conflict of interest. For example, it may be necessary to disclose the location where work on a current or former matter occurred in order to address choice of law issues relating to conflicts of interest.

Even this limited disclosure is not permissible, absent informed client consent, if it would “compromise the attorney-client privilege or otherwise prejudice the client.” For example, the

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

4 ABA Formal Op. 09-455 (2009), supra note 1, at 3.
proposed Comment explains that, if a lawyer or firm knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible to disclose sufficient information to ensure compliance with the conflicts of interest rules. If the lawyer is not able to obtain informed consent, the proposed relationship may have to be postponed unless the lawyer can be screened or the firm can obtain the information needed to conduct the conflicts check from other sources.

As noted, these limitations are drawn from Formal Opinion 09-455. The Formal Opinion concluded that the disclosed information “must not compromise the attorney-client privilege or otherwise prejudice a client or former client.” Moreover, the examples of situations that could cause such prejudice (an undisclosed plan for a hostile takeover, a consultation regarding a possible divorce, and an appearance before a grand jury) are drawn directly from the Formal Opinion. Finally, the Formal Opinion, like the Commission’s proposal, provides that a lawyer can nevertheless disclose privileged or prejudicial information after getting “informed consent.”

Another limitation on the lawyer’s authority to disclose appears in Comment [13]. That Comment explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred. This timing is consistent with the Formal Opinion, which concluded that “conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.”

The last sentence of Comment [13] reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.

Proposed Comment [14] reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. Comment [14] explains that other lawyers in the same firm are nevertheless permitted to use the information if it was acquired from an

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5 Id. (concluding that an interpretation of Rule 1.6 that prohibited “any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest”).
6 Id. at 4. The last sentence of Comment [13] emphasizes that the prohibition against disclosing privileged or prejudicial information exists only under “paragraph (b)(7),” because lawyers may have the ability to disclose this kind of information pursuant to one of the other exceptions to Rule 1.6(b). For example, it may be possible to disclose the information to an independent lawyer, who may be able to help the lawyer and the firm to determine whether a conflict would arise from the possible new relationship without disclosing the lawyer’s information to the firm or the firm’s information to the lawyer. Such a disclosure would be permissible under Rule 1.6(b)(4), which permits disclosures to secure legal advice about compliance with the Rules. Id. at 5 (citing GEOFFREY C. HAZARD, & W. WILLIAM HODES, THE LAWYER OF LAWYERING, § 14.4, n.2 at 14-40 (3d ed. 2009 Supp.); Tremblay, supra note 2, at 544; Wald, supra note 2, at 227).
7 Id. at 4.
8 Id.
9 Id.
10 Id. at 5.
independent source. For example, a lawyer who works on a transaction might learn detailed information about the business structure of another party to the transaction. The lawyer can use that information, even if the lawyer for the other party to that transaction subsequently discloses the same information to the firm as part of a conflicts check.

Proposed Comment [14] also explains that law firms regularly need to conduct conflicts checks in response to inquiries from potential new clients or in response to existing clients who may wish to retain the firm on a new matter. To conduct conflicts checks in these situations, the firm may need to contact lawyers within the firm to determine whether their work on current or former matters would give rise to a conflict in the event that the firm accepts the new matter. The last sentence of the Comment makes clear that, as they always have been, such disclosures are impliedly authorized under Comment [5]. That Comment provides that “[l]awyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.” This point is also made through the inclusion of the phrase “between lawyers in different firms” in the black letter of the proposed Rule.

C. Concerns Raised in Response to the Commission’s Proposal

Although the Commission’s proposal contains important restrictions and limitations that are consistent with existing authorities and scholarly commentary, the Commission heard several concerns in response to early drafts.

One concern was that lawyers should never be permitted to disclose this sort of information without client consent. The Commission concluded that such an absolute requirement is unworkable for the reasons that the Ethics Committee explained in its Formal Opinion:

[S]eeking prior informed consent likely would involve giving notice to the lawyer’s current firm, with unpredictable and possibly adverse consequences. Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm.

The Commission had in mind, for example, a second-year associate in her current firm, looking to relocate. Under the Commission’s proposal, that lawyer cannot disclose any information that would compromise the attorney-client privilege or prejudice the client, so the client is protected. If the lawyer needs to disclose such information, client consent is required. In sum, the Commission rejected the idea that informed consent should be required in all instances, and instead sought to codify the Formal Opinion’s approach, which carefully balances the tensions between the reality of lawyer mobility and the importance of protecting confidential client information.

13 Id.
The Commission also heard claims that the proposal would jeopardize the client-lawyer relationship and the duty of confidentiality for the mere purpose of business expediency. The Commission disagrees. These disclosures are essential to ensure that lawyers comply with their ethical obligation to avoid conflicts of interest.\textsuperscript{14} Moreover, this proposal will provide more, not less protection, for client confidences by filling a void left by the lack of any express guidance regarding these disclosures, with a practical framework for regulating them. By codifying the Formal Opinion’s approach to this issue and expressly regulating and carefully limiting the scope of disclosures that can occur, the proposal will ensure that the legal profession provides more protection for client confidences than the present framework provides.

The Commission also considered the views expressed by two members, who maintain their views, that informed consent alone is not sufficient to protect the client and that client consent to disclosure of information that would compromise the attorney-client privilege or prejudice the client should not only be confirmed in writing but also be accompanied by the lawyer’s advice to the client to seek independent counsel. The reasons for this view are that the lawyer has an interest in securing consent and so is not disinterested; that in instances where the interests of the lawyer and client diverge financially, the lawyer must advise the client to seek independent counsel, as provided in Rules 1.8(a) and 1.8(h)(2); that proposed new 1.6(b)(7) contains nothing comparable to the written notice, statement, agreement, and certification requirements for effective screening, as provided in Rule 1.10(a)(2)(ii) and (iii); that consents to conflicts under Rules 1.7 and 1.9 also require confirmation in writing; and that the interests at risk here are as or more compelling than the client interests in these rules.

The Commission seriously considered these arguments, but concluded that these additional restrictions are unnecessary and inconsistent with existing procedures. Model Rule 1.6(a) currently permits a lawyer to disclose privileged or prejudicial information with a client’s informed consent; the Rule does not require the lawyer to confirm the consent in writing or advise the client to seek independent counsel. The Commission has heard of no problems arising from the existing framework and thus concluded that “informed consent,” as that term is defined in Model Rule 1.0(e) and Comment [6] to that Rule, is sufficient to protect the client’s interests.

The ABA Formal Opinion provides that a lawyer can disclose privileged or prejudicial information after getting “informed consent.”\textsuperscript{15} The Formal Opinion does not suggest that the consent should be in writing or that a lawyer should have to advise the client to seek independent counsel.

The Commission also concluded that any additional requirements would be inconsistent with how the Rules treat other, conceptually similar disclosures of information. As noted above, a lawyer already can reveal any information, regardless of what it is or the purpose of the disclosure, with just informed consent under Model Rule 1.6(a). Moreover, a lawyer may now use protected information generally to the “disadvantage” of a client, with just informed consent under Model Rule 1.8(b). In light of these provisions, the Commission concluded that it would be inconsistent to impose any requirements beyond “informed consent” when lawyers are trying to abide by their ethical duty to avoid conflicts of interest.

\textsuperscript{14} Id. at 3.
\textsuperscript{15} Id. at 4.
II. Proposed Amendment to Model Rule 1.17

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

Conclusion

For the reasons set forth above, 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
1. **Summary of Resolution(s).**

   **Resolution 105(f): Conflicts Detection**

   - The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.

   - The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

2. **Approval by Submitting Entity.**

   The Commission approved this Resolution during a meeting via conference call on May 1, 2012.

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 these resolutions 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, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA’s Standing Committee on Ethics and Professional Responsibility that address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

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 listserv 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)

Ellyn S. Rosen  
Regulation Counsel  
ABA Center for Professional Responsibility  
321 North Clark Street, 17th floor  
Chicago, IL  60654-7598  
Phone: 312/988-5311  
Fax: 312/988-5491  
Ellyn.Rosen@americanbar.org  
www.americanbar.org
12. **Contact Name and Address Information.** (Who will present the report to the House?)

Jamie S. Gorelick, Co-Chair  
WilmerHale  
1875 Pennsylvania Ave., N.W.  
Washington, DC 20006  
Ph: (202)663-6500  
Fax: (202)663-6363  
jamie.gorelick@wilmerhale.com

Michael Traynor, Co-Chair  
3131 Eton Ave.  
Berkeley, CA 94705  
Ph: (510)658-8839  
Fax: (510)658-5162  
mtraynor@traynorgroup.com
EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105(f): Conflicts Detection

- The Commission is proposing to amend Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) to codify ABA Formal Opinion 09-455. This codification will provide lawyers with limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two firms merge. The proposal reflects the reality that these disclosures are already taking place and need to be properly regulated. By providing that regulation, the proposal provides more, rather than less, protection for client confidences and addresses an important issue that is arising with increasing frequency in a modern legal marketplace.

- The Commission is also proposing a change to Comment [7] to Rule 1.17 of the Model Rules of Professional Conduct (Sale of Law Practice) because that Comment addresses conceptually similar issues.

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.

Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002, such as by facilitating lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related questions, including the following: To what extent can lawyers in different firms disclose confidential information to each other to detect conflicts of interest that might arise when lawyers consider an association with another firm, two or more firms consider a merger, or lawyers consider the purchase of a law practice? Although there are ethics opinions, including a Formal Opinion of the ABA’s Standing Committee on Ethics and Professional Responsibility that
address this question, the Commission concluded that the Model Rules of Professional Conduct do not clearly address this issue and that lawyers and firms would benefit from more guidance in this important area.

Resolution 105f provides a doctrinal basis for, and places appropriate limitations on, disclosures of confidential information that are made to detect and resolve conflicts of interest. The Resolution ensures that these disclosures occur in a manner that is consistent with the principles that have guided the Commission's work: 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 105f, if adopted, would codify what has long been common practice and acknowledged as essential in ethics opinions and seminal scholarly writings on the subject: Lawyers must have the ability to disclose limited information to lawyers in other firms in order to detect and prevent conflicts of interest. By codifying existing authority and practices, and by expressly regulating and carefully limiting the scope of these disclosures, the proposed amendments would ensure that the legal profession provides more, rather than less, protection for client confidences. Moreover, the proposed changes would offer valuable guidance to lawyers and firms regarding an issue that they are increasingly encountering due to changes in the legal marketplace.

The Commission concluded that the proposed authority to disclose information in new black letter Model Rule 1.6(b)(7), although necessary, must be carefully limited and regulated to ensure client protection. For example, new language in Comment [13] of the Rule would make clear that 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 disclosure, however, is not permissible, absent informed client consent, if it would “compromise the attorney-client privilege or otherwise prejudice the client.” Comment [13] further explains that any disclosures should occur only after substantive discussions regarding the possible new relationship have occurred and reminds lawyers that they must not use or reveal the information that they receive pursuant to a conflicts-checking process, except to determine whether a conflict would arise from the possible relationship. All of these limitations are drawn from Formal Opinion 09-455.

New Comment language also reminds lawyers that they may have fiduciary duties to their current firms that are independent of the ethical responsibilities described in the Model Rules of Professional Conduct.
Proposed amendments to Comment [7] of Model Rule 1.17 (Sale of a Law Practice) address conceptually similar ethical obligations that arise during the sale of a law practice. The Commission concluded that, in light of the proposed changes to Model Rule 1.6 described above, Comment [7] to Rule 1.17 should be updated to reflect the content of the Rule 1.6 proposal and that Comment [7] should contain a cross-reference to the proposed new Model Rule 1.6(b)(7).

4. Summary of Minority Views

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

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105f relating to Conflicts Detection: 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.