

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

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

- 5
6 (a) the black letter and Comments to Model Rule 1.6 (Confidentiality); and
7 (b) the Comments to Model Rule 1.17 (Sale of Law Practice).
8

9 **Rule 1.6 Confidentiality of Information**

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

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

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

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

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

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

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

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

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31 (7) to detect and resolve conflicts of interest between lawyers in different
32 firms, but only if the revealed information would not compromise the attorney-
33 client privilege or otherwise prejudice the client.
34

35 **Comment**

36 ...

37
38 **Detection of Conflicts of Interest**

39
40 [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose
41 limited information to each other to detect and resolve conflicts of interest, such as when a
42 lawyer is considering an association with another firm, two or more firms are considering a
43 merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17,
44 Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose
45 limited information, but only once substantive discussions regarding the new relationship have
46 occurred. Any such disclosure should ordinarily include no more than the identity of the persons
47 and entities involved in a matter, a brief summary of the general issues involved, and information
48 about whether the matter has terminated. Even this limited information, however, should be
49 disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that
50 might arise from the possible new relationship. Moreover, the disclosure of any information is
51 prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client
52 (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been
53 publicly announced; that a person has consulted a lawyer about the possibility of divorce before
54 the person's intentions are known to the person's spouse; or that a person has consulted a lawyer
55 about a criminal investigation that has not led to a public charge). Under those circumstances,
56 paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A
57 lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring
58 an association with another firm and is beyond the scope of these Rules.

59 [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further
60 disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7)
61 does not restrict the use of information acquired by means independent of any disclosure
62 pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information
63 within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a
64 lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve
65 conflicts of interest that could arise in connection with undertaking a new representation.

66 [15] A lawyer may be ordered to reveal information relating to the representation of a
67 client by a court or by another tribunal or governmental entity claiming authority pursuant to
68 other law to compel the disclosure. Absent informed consent of the client to do otherwise, the
69 lawyer should assert on behalf of the client all nonfrivolous claims that the order is not
70 authorized by other law or that the information sought is protected against disclosure by the
71 attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer
72 must consult with the client about the possibility of appeal to the extent required by Rule 1.4.
73 Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's
74 order.

75 [16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
76 the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the

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77 lawyer should first seek to persuade the client to take suitable action to obviate the need for
78 disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the
79 lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
80 in connection with a judicial proceeding, the disclosure should be made in a manner that limits
81 access to the information to the tribunal or other persons having a need to know it and
82 appropriate protective orders or other arrangements should be sought by the lawyer to the fullest
83 extent practicable.

84 [175] Paragraph (b) permits but does not require the disclosure of information relating to
85 a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).
86 In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the
87 nature of the lawyer's relationship with the client and with those who might be injured by the
88 client, the lawyer's own involvement in the transaction and factors that may extenuate the
89 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not
90 violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require
91 disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),
92 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
93 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

94

95 **Acting Competently to Preserve Confidentiality**

96 [186] A lawyer must act competently to safeguard information relating to the
97 representation of a client against inadvertent or unauthorized disclosure by the lawyer or other
98 persons who are participating in the representation of the client or who are subject to the
99 lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

100 [197] When transmitting a communication that includes information relating to the
101 representation of a client, the lawyer must take reasonable precautions to prevent the information
102 from coming into the hands of unintended recipients. This duty, however, does not require that
103 the lawyer use special security measures if the method of communication affords a reasonable
104 expectation of privacy. Special circumstances, however, may warrant special precautions.
105 Factors to be considered in determining the reasonableness of the lawyer's expectation of
106 confidentiality include the sensitivity of the information and the extent to which the privacy of
107 the communication is protected by law or by a confidentiality agreement. A client may require
108 the lawyer to implement special security measures not required by this Rule or may give
109 informed consent to the use of a means of communication that would otherwise be prohibited by
110 this Rule.

111

112 **Former Client**

113 [2048] The duty of confidentiality continues after the client-lawyer relationship has
114 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
115 information to the disadvantage of the former client.

116

117 **Rule 1.17 Sale of Law Practice**

118

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

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

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

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

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

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

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

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

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

138
139 **Comment**

140 ...
141 **Client Confidences, Consent and Notice**

142 [7] Negotiations between seller and prospective purchaser prior to disclosure of
143 information relating to a specific representation of an identifiable client no more violate the
144 confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the
145 possible association of another lawyer or mergers between firms, with respect to which client
146 consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~
147 detailed information relating to the representation, ~~and to such as the client's~~ file, however,
148 requires client consent. The Rule provides that before such information can be disclosed by the
149 seller to the purchaser the client must be given actual written notice of the contemplated sale,
150 including the identity of the purchaser, and must be told that the decision to consent or make
151 other arrangements must be made within 90 days. If nothing is heard from the client within that
152 time, consent to the sale is presumed.

153 ...

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REPORT

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,¹ 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.² 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.

¹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 [hereinafter ABA Formal Op. 09-455] (2009).

² *Id.* at 1 n.6 (citing LAWRENCE J. FOX & SUSAN MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 6.07 (ALI-ABA 2005)); *id.* at 4 (citing COLO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [5A] (2008); Boston Bar Ass'n Ethics Comm., Ethics Op. 2004-1 (2004); D.C. Bar Legal Ethics Comm., Ethics Op. 312 (2002); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 720 (1999); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2000-3 (2000)). See also Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

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.³ 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. First, Comment [13] 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.⁴ 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.

Second, 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

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.

example, the 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.⁵ 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.⁶

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.”⁷ 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.⁸ Finally, the Formal Opinion, like the Commission’s proposal, provides that a lawyer can nevertheless disclose privileged or prejudicial information after getting “informed consent.”⁹

A third 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.”¹⁰

Fourth, 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.¹¹

Fifth, 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

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.

¹¹ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-414, at 2 (1999).

lawyers in the same firm are nevertheless permitted to use the information if it was acquired from an 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.

Finally, proposed Comment [14] 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,¹² 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.¹³

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.

¹² See ABA Formal Op. 09-455, *supra* note 1.

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.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.

Finally, 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. First, 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.

Second, the Formal Opinion provides that a lawyer can disclose privileged or prejudicial information after getting "informed consent."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.

Third, the Commission 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

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 4.

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.

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.