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WORKING DRAFT - FOR USE BY ETHICS 2000 COMMISSION ONLY

For discussion in Toronto, July 31 and August 1, 1998

PROPOSED RULE 1.6 - 4th Draft

Confidentiality of Information

1 (a) Unless the client gives informed consent, or the disclosure or use is permitted by paragraph (b) or
2 required by paragraph (c), a lawyer shall not

3
4 (1) reveal information relating to the representation of a client, except for disclosures that are
5 impliedly authorized in order to carry out the representation; or

6
7 (2) use information relating to representation of a client to the disadvantage of if such use is
8 reasonably likely to disadvantage the client.

9
10 (b) A lawyer may reveal or use information relating to the representation of a client to the extent that the
11 lawyer reasonably believes is necessary to

12
13 (1) prevent the client from committing a criminal act that the lawyer believes is likely to result in
14 imminent death or substantial bodily harm;

15
16 (2) prevent the client from engaging in conduct that the lawyer knows is criminal or fraudulent
17 and that the lawyer reasonably believes is likely to result in substantial injury to the financial
18 interests or property of another;

19
20 (3) rectify or mitigate substantial injury to the financial interests or property of another that the
21 lawyer comes to know has resulted from a client's crime or fraud in the furtherance of which
22 the lawyer's services had been used;

23
24 (4) enable the lawyer to secure confidential legal advice from another lawyer about the
25 lawyer's compliance with these Rules or other law in connection with the representation
26 of the client;

27
28 (5) enable the lawyer, after notice to the client, to

29
30 (i) consult with another lawyer for the sole purpose of identifying conflicts of interest
31 that may arise because of the lawyer's current or proposed association with a law firm,
32 but only if the lawyer reasonably believes that the disclosure will not materially
33 disadvantage the client; or

34
35 (ii) inform a person with whom the lawyer has previously communicated on behalf of
36 the client that the lawyer is no longer representing the client; or

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(iii) disaffirm a communication that the lawyer has previously made on behalf of the client and that the lawyer has reason to believe is false or misleading.

(6) (2) to establish a claim or defense on behalf of the lawyer in a controversy between the client and the lawyer, to establish a defense to a criminal charge or civil claim against the lawyer that is based upon conduct in which the client was involved, or to respond in any other proceeding to allegations in any proceeding concerning the lawyer's representation of the client.

(c) A lawyer shall reveal or use information relating to the representation of a client to the extent required by law or court order, or when necessary to comply with Rules 3.3, _____, _____, or _____.

Comments

~~1. The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.~~

~~2. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.~~

~~3. Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.~~

[1] [4] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation and also must not use such information to the disadvantage of the client. This contributes to the trust that must be a hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter so that the lawyer will have all the information the lawyer needs to effectively represent the client and, if necessary, to advise the client to refrain from wrongful conduct. The prohibition against the use by the lawyer of information relating to the representation of a client to the client's disadvantage is derived from the lawyer's general duty of loyalty to the client.

Information Relating to the Representation of a Client

[2] This Rule governs the disclosure or use by a lawyer of information relating to the representation of a client during the course of the lawyer's representation of the client. See Rule [] for the duties a lawyer owes to a prospective client. See Rule 1.9 for the lawyer's duties to former clients.

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2
3 [3] ~~{5}~~ The principle of lawyer-client confidentiality is given effect by the law of evidence and
4 civil procedure as well as by these Rules. ~~related bodies of law, the attorney-client privilege (which~~
5 ~~includes the work product doctrine) in the law of evidence and the rule of confidentiality established in~~
6 ~~professional ethics.~~ The attorney-client privilege applies in judicial and other proceedings in which a
7 lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The
8 work product rule applies in civil discovery proceedings and affords a defense against a request for
9 production of documents prepared in anticipation of litigation. As a matter of professional
10 responsibility, however, this Rule more broadly requires a lawyer to preserve the confidentiality of
11 information relating to the representation of the client even though some of that information may not be
12 protected by the attorney-client privilege or the work product rule. The rule of client-lawyer
13 confidentiality, for example, applies in situations other than those where evidence is sought from the
14 lawyer through compulsion of law. It ~~The confidentiality rule~~ applies not merely to matters
15 communicated in confidence by the client but also to all information ~~relating to the representation~~ gained
16 in the course of or as a result of the lawyer's representation of the client, ~~whatever its source,~~ without
17 regard to the source of the information or the timing of its acquisition. A lawyer may not disclose such
18 information except as authorized or required by the Rules of Professional Conduct or other law. ~~See~~
19 ~~also Scope.~~ The requirement of maintaining confidentiality of information relating to representation
20 applies to government lawyers who may disagree with the policy goals that their representation is
21 designed to advance.

22
23 [4] Organizational clients, including governmental agencies, are entitled to the protection of this
24 Rule. When ~~one of the~~ a constituent of an organizational client communicates with the organization's
25 lawyer in his or her ~~the person's~~ organizational capacity, the communication is protected by Rule 1.6 as
26 information related to the representation of the organizational client. Thus, by way of example, if an
27 organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the
28 course of that investigation between the lawyer and the client's employees or other constituents are
29 covered by Rule 1.6. The lawyer's duty to protect this information, however, is a duty owed to the
30 organizational client. With respect to disclosure of such information to persons not associated with the
31 organization, or the use of such information to the disadvantage of the organization, the lawyer must
32 secure the informed consent of a duly authorized organizational constituent. ~~{7}~~ Where the client is an
33 organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by
34 the organization's constituents. Where necessary to guide conduct in connection with this Rule, the
35 lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Protecting Information Related to the Representation of the Client

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37
38
39 [5] Paragraph (a)(1) prohibits a lawyer from revealing information relating to the representation
40 of a client. This duty applies without regard to the effect of the disclosure on the client, the lawyer, or
41 third persons. It also applies to statements by a lawyer that do not in themselves reveal protected

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1 information but could reasonably lead to the discovery of such information by a third person. Using an
2 anonymous “hypothetical” to discuss issues relating to the representation of a client, for example, does
3 not ordinarily reveal information relating to the client’s representation, but such a discussion may
4 constitute a disclosure requiring client consent if there is a reasonable likelihood that the hypothetical
5 would permit detection of the client’s identity or lead to the discovery of other information relating to
6 the client’s representation that otherwise would not have been discovered. This broad duty not to
7 reveal information relating to the representation comports with the client’s legitimate expectation that the
8 lawyer will not contribute to the public’s awareness of client affairs without client consent.

9
10 [6] Paragraph (a)(2) prohibits a lawyer from using information relating to a client’s
11 representation to the reasonably likely disadvantage of the client. Learning by virtue of the
12 representation of a client that the client intends to purchase and develop several parcels of land, for
13 example, a lawyer may not seek to purchase one of the parcels in competition with the client. Also, if
14 by virtue of his or her representation of a client in a business matter, a lawyer comes to know of the
15 availability of a related business opportunity of which the client is unaware, the lawyer may be under a
16 legal obligation to refrain from taking the opportunity without first affording the client an opportunity to
17 do so. The lawyer’s undisclosed seizure of the opportunity would disadvantage the client by depriving
18 the client of a first option to which he or she was legally entitled. Such a use of information relating to
19 the representation of the client violates the lawyer’s duty of loyalty to the client.

20
21 [7] In some situations, a lawyer may be able to use information relating to the representation of
22 a client for the advantage of the lawyer or a third person without revealing the information to others.
23 The lawyer may do so provided that the use of the information does not disadvantage the client or
24 violate client instructions, is not dishonest, fraudulent or deceitful, and does not constitute a crime that
25 reflects substantially on the lawyer’s fitness to practice law. See Rule 8.4. Lawyers must, of course,
26 refrain from buying or selling publicly-traded securities based on non-public information related to the
27 representation of a client. Such “insider trading” is criminal conduct that reflects adversely on the
28 lawyer’s fitness to practice law. See Rule 8.4 (b).

Informed Consent and Impliedly Authorized Disclosures

30
31
32 [8] A client’s consent to the disclosure or use of information protected by this rule must be
33 informed and secured by the lawyer in advance of the disclosure or use in question. See the definition
34 of “informed consent” in Rule []. For a consent to the disclosure of information relating to the
35 representation of a client to be informed, the client must at least be aware of the effect of the disclosure
36 on the availability of the attorney-client privilege and work-product rule. The lawyer must also advise
37 the client of any material respect in which the lawyer’s personal interests would be furthered by the
38 disclosure or use of the information in question.

39
40 [9] A lawyer may seek advance consent from a client to a possible future use or disclosure of
41 information relating to the lawyer’s representation the client, but such consent will not be informed

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1 unless the circumstances present at the time the lawyer subsequently discloses or uses the information
2 were within the contemplation of the client at the time the client's consent was obtained. A lawyer may
3 not seek a client's consent to a disclosure or use of information relating to the client's representation if
4 so doing would be inconsistent with the lawyer's duty to provide competent representation to the client.
5 See Rule 1.1.

6
7 [10] (7): A lawyer is impliedly authorized to make disclosures of information relating a client's
8 representation when appropriate in carrying out the representation, except to the extent that the client's
9 instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose
10 information by admitting a fact that cannot properly be disputed, or in negotiation by making a
11 disclosure that facilitates a satisfactory conclusion. Implied authority, however, does not extend to
12 disclosures of information that present a significant risk that the client might be substantially
13 disadvantaged by the disclosure in question. Such disclosures require the informed consent of the
14 client. See Rule 1.14 for the extent to which a lawyer who is representing an impaired client is impliedly
15 authorized to make disclosures the lawyer reasonably believes necessary to protect the client's
16 interests.

17
18 [11] {8} Lawyers associated in a firm may, in the course of the firm's practice, are impliedly
19 authorized to disclose to each other information relating to a client of the firm, unless the client has
20 instructed that particular information be confined to specified lawyers. This implied authorization also
21 extends to disclosures on a need-to-know basis to lawyers who are not associated with the firm but
22 who are participating in the representation of the client in the matter either as an independent co-counsel
23 or as a temporary lawyer. See Rule [] with respect to the need for the lawyer to secure client
24 consent prior to associating co-counsel or permitting a temporary lawyer to participate in the client's
25 representation.

26
27 **Joint Representation of Multiple Client and Cooperative Arrangements Among Separately**
28 **Represented Clients**

29
30 [12] If a lawyer is representing multiple clients in a matter in compliance with Rule 1.7, each
31 client is, absent informed consent to the contrary, entitled to the full protection of this Rule. Information
32 relating to the joint representation provided to the lawyer by one of the clients will be regarded as
33 information relating to the representation of each client. The lawyer who is jointly representing the
34 clients must obtain the informed consent of each of the clients before disclosing protected information to
35 third persons. In the absence of instructions to the contrary, however, a lawyer jointly representing
36 multiple clients is impliedly authorized to share information relating to the representation with all the
37 clients to the extent necessary to accomplish the objectives of the joint representation. See Rule 1.7 for
38 the lawyer's duties if a conflict of interest arises because one jointly-represented client refuses to permit
39 the lawyer to disclose to another jointly-represented client information relating to the representation that
40 the other client needs to know in order make informed decisions about the representation.

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1 [13] Occasionally, clients represented by separate lawyers will agree to cooperate with each
2 other in connection with a matter in which they have a common interest. It is common in such
3 arrangements for the clients to agree to share information relating to the matter in which they have a
4 common interest. This Rule specifies the duties of each lawyer to his or her own client to protect
5 information relating to such a "common-interest arrangement." See Rule [4.5] for the duty of the
6 lawyer to abide by confidentiality agreements between the lawyer's client and other participants in such
7 a "common-interest arrangement."
8

Permitted Disclosure or Use of Information Relating to a Client's Representation

9
10
11 [14] ~~f9]~~ Although the public interest is usually best served by a strict rule requiring lawyers to
12 preserve the confidentiality of information relating to the representation of their clients, the confidentiality
13 rule is subject to limited exceptions. ~~In becoming privy to information about a client, a lawyer may~~
14 ~~foresee that the client intends serious harm to another person. However, to the extent a lawyer is~~
15 ~~required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts~~
16 ~~which would enable the lawyer to counsel against a wrongful course of action. The public is better~~
17 ~~protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph~~
18 ~~(b)(1), for example, recognizes the overriding value of life and physical integrity and permits disclosure~~
19 ~~reasonably necessary to prevent death or substantial bodily harm. Substantial bodily harm includes life~~
20 ~~threatening and debilitating illnesses, such as cancer and AIDS, and the consequences of child sexual~~
21 ~~abuse.~~

22 The lawyer must reasonably believe that a person is likely to die or suffer substantial bodily harm unless
23 the lawyer reveals information otherwise protected by this Rule. The lawyer must also reveal no more
24 information relating to the client's representation than is necessary to prevent the death or substantial
25 bodily harm.
26

27 [15] Paragraph (b)(2) permits disclosure of information relating to a client's representation to
28 the extent reasonably necessary to prevent the client from consummating a crime or fraud that the
29 lawyer reasonably believes will result in substantial injury to the financial interests or property of
30 another. The lawyer must know that the conduct in question is criminal or fraudulent. The lawyer must
31 reasonably believe that the client intends to carry out the crime or fraud, that the resulting injury will be
32 substantial, and that the lawyer's disclosure is necessary to prevent the consummation of the crime or
33 fraud.
34

35 [16] Normally a lawyer is not permitted to reveal past misconduct of a client even though
36 disclosure might permit the mitigation or rectification of harm caused by the client's misconduct.
37 Paragraph (b)(3) provides a limited exception in cases in which the lawyer's services have been used in
38 furtherance of the client's crime or fraud. A lawyer's services further the commission of a client's crime
39 or fraud, for example, if the lawyer has represented the client in dealings with the affected persons, or if
40 the client has provided the affected persons with work product prepared by the lawyer or has made
41 statements about the lawyer's participation in the matter, that contributed to the consummation of the

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1 client's crime or fraud. A lawyer does not further a client's crime or fraud, however, if the lawyer's
2 participation in the matter is limited to the provision of advice to the client about the legality or
3 consequences of the client's conduct. The lawyer must not, of course, counsel or assist the client in
4 conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d).

5
6 ~~[10] Several situations must be distinguished.~~

7
8 ~~[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent.~~
9 ~~See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty~~
10 ~~is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal~~
11 ~~or fraudulent conduct.~~

12
13 ~~[12] Second, the lawyer may have been innocently involved in past conduct by the client that~~
14 ~~was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to~~
15 ~~"counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~

16
17 ~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and~~
18 ~~likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer~~
19 ~~has professional discretion to reveal information in order to prevent such consequences. The lawyer~~
20 ~~may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer~~
21 ~~reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a~~
22 ~~heinous purpose will actually be carried out, for the client may have a change of mind.~~

23
24 ~~[17] A lawyer's confidentiality obligations should not preclude a lawyer from securing legal~~
25 ~~advice about the lawyer's personal responsibility to comply with these Rules and other law in~~
26 ~~connection with the lawyer's representation of a client. Paragraph (b)(4), therefore, permits the lawyer~~
27 ~~to reveal information relating to a client's representation for the sole purpose of securing confidential~~
28 ~~legal advice about the lawyer's legal obligations and professional responsibilities. Although the lawyer~~
29 ~~may choose to inform the client of the lawyer's need to consult with another lawyer, the lawyer is not~~
30 ~~required to do so. To assure the confidentiality of the communication, this exception is limited to~~
31 ~~situations in which the consulting lawyer establishes an attorney-client relationship with the consulted~~
32 ~~lawyer. This exception does not embrace informal consultations with other lawyers about how the~~
33 ~~lawyer might best represent the client. Nor does it apply to the situation in which the lawyer wishes to~~
34 ~~associate another lawyer in the matter as co-counsel. See Rule [].~~

35
36 ~~[18] Paragraph (b)(5) permits disclosure of information relating to a client's representation in~~
37 ~~several situations in which the disclosure is necessary for the lawyer to conduct his or her practice in a~~
38 ~~professionally responsible fashion. In each case the permitted disclosure is very limited and unlikely to~~
39 ~~harm any legitimate interest of the client. As a procedural safeguard, however, the lawyer must give the~~
40 ~~client advance notice of the disclosure in question.~~

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1 [19] [18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's
2 conduct or other misconduct of the lawyer involving representation of the client, or the lawyer is
3 otherwise charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality
4 should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil,
5 criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by
6 the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to
7 have been defrauded by the lawyer and client acting together. The lawyer may respond to the extent
8 the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a
9 claim involving the conduct or representation of a former client. The lawyer's right to respond arises
10 when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to
11 await the commencement of an action or proceeding that charges such complicity, so that the defense
12 may be established by responding directly to a third party who has made such an assertion. The right to
13 defend, of course, applies where a proceeding has been commenced. Where practicable and not
14 prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third
15 party's assertion and request that the client respond appropriately. In any event, disclosure should be no
16 greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should
17 be made in a manner which limits access to the information to the tribunal or other persons having a
18 need to know it, and appropriate protective orders or other arrangements should be sought by the
19 lawyer to the fullest extent practicable.
20

21 [20] [19] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services
22 rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a
23 fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer
24 must make every effort practicable to avoid unnecessary disclosure of information relating to a
25 representation, to limit disclosure to those having the need to know it, and to obtain protective orders or
26 make other arrangements minimizing the risk of disclosure.
27

28 [21] [14] Paragraph (b) does not mandate the disclosure or use of information relating to a
29 client's representation to accomplish the specified purposes. In exercising the discretion conferred by
30 this Rule, the lawyer's exercise of discretion requires consideration of the lawyer may consider such
31 factors as the nature of the lawyer's relationship with the client and with those who might be injured by
32 the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in
33 question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any
34 case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably
35 believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by
36 paragraph (b) does not violate this Rule.
37

Mandatory Disclosure or Use of Information Relating to the Representation

38
39
40 [22] [21] The Rules of Professional Conduct in various circumstances permit or require a
41 lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In

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1 addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give
2 information about a client. A lawyer must conduct his or her practice in compliance with the law,
3 including laws that require the lawyer to reveal information relating to a client's representation. Such law
4 may take the form of a statute, a regulation authorized by statute, a court rule, or a judicial decision.
5 Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of
6 these Rules, but a presumption should exist against such a supersession. A lawyer may refrain from
7 making a disclosure if the lawyer reasonably believes, after reasonable inquiry, that the law in question
8 does not legally obligate the lawyer to make the disclosure in question.

9
10 [23] ~~[20]~~ A lawyer must also comply with a lawful order of a tribunal, an administrative or
11 executive agency, or a legislative body. ~~The attorney-client privilege is differently defined in various~~
12 ~~jurisdictions.~~ If a lawyer is called as a witness to give testimony concerning a client, or is otherwise
13 ordered to reveal information relating to the client's representation, the lawyer must, absent waiver by
14 informed consent of the client to do otherwise, ~~paragraph (a) requires the lawyer to invoke the privilege~~
15 ~~when it is applicable.~~ assert on behalf of the client all non-frivolous claims that the information sought is
16 protected against disclosure by the attorney-client privilege or other applicable law [and exhaust the
17 client's rights to appeal adverse rulings on the client's claims]. The lawyer must, however, comply with
18 the final order of a court or other tribunal of competent jurisdiction requiring the lawyer to provide
19 information about the client.

20
21 **Competence and Communication**

22
23 [24] A lawyer shall act competently to safeguard information relating to the representation of a
24 client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are
25 participating in the representation of the client and who are subject to the lawyer's supervision, [or by
26 any other person to whom the lawyer has provided such information.] See Rules 1.1, 5.1, and 5.3.

27
28 [25] When transmitting a communication that includes information relating to the representation
29 of a client, the lawyer must take reasonable precautions to prevent it from coming into the hands of
30 unintended recipients. This duty, however, does not require that the lawyer utilize extraordinary
31 security measures, such as encryption, if the method of communication employed by the lawyer affords
32 a reasonable expectation that the communication will only be read or heard by the intended recipient or
33 persons whose access to the information is necessary for its transmission and can be reasonably
34 expected to honor the confidentiality of the communication. Factors to be considered in determining the
35 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information,
36 the extent to which the privacy of the communication is protected by law or by a confidentiality
37 agreement with persons whose access to the information is necessary for its transmission, and the
38 likelihood that the method of communication would operate as a waiver of the attorney-client privilege.
39 In most cases a lawyer need not implement special security measures, such as encryption, when
40 communicating information relating to the representation of a client by telephone, cellular phone,
41 telegraph, facsimile or electronic mail. A client may, of course, require the lawyer to implement special

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1 security measures not required by this Rule and, conversely, may give informed consent to the use of a
2 means of communication that would otherwise be prohibited by this Rule.

3
4 [26] Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer
5 who has not previously represented the client shall consult with the client about the lawyer's obligations
6 to protect information relating to the representation and the circumstances in which the lawyer will be
7 required or permitted to reveal or use such information to the disadvantage of the client. The lawyer
8 must also discuss with the client the advantages and risks associated with various means of
9 communicating information relating to the representation of the client. If the lawyer subsequently has
10 reason to believe that a client misunderstands the extent to which information relating to the client's
11 representation is protected by this Rule, the lawyer shall act reasonably to correct the misunderstanding.
12 See Rule 1.4.

13
14 **Withdrawal**

15
16 [27] ~~15~~ This Rule deals exclusively with confidentiality. It does not address whether the
17 lawyer will be required or permitted to withdraw from the representation of the client in situations in
18 which this Rule is implicated. If, however, the lawyer's services will be used by the client in materially
19 furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule
20 1.16(a)(1). As provided in Rule 1.16(b), the lawyer may withdraw if the client persists in a course of
21 conduct the lawyer reasonably believes is criminal or fraudulent, has used the lawyer's services to
22 perpetrate crime or fraud, or insists on pursuing an objective that the lawyer considers repugnant or
23 imprudent. A lawyer who discloses information relating to a client's representation without the client's
24 informed consent may in some cases be required by Rule 1.7 to withdraw from further representation
25 of the client. A lawyer who must testify about his or her representation of a client may in some cases be
26 prohibited by Rule 3.7 from serving as an advocate at the client's trial. ~~16~~ After withdrawal, the
27 lawyer's confidentiality obligations are defined by Rule 1.9(c) rather than this Rule. ~~is required to~~
28 ~~refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6.~~
29 Neither this rule, Rule 1.9(c), nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of
30 withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the
31 like.

32
33 ~~22~~ The duty specified in this rule of confidentiality continues after the client-lawyer relationship has
34 terminated.

Reporter's Observations

Paragraph (a):

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No change from prior draft. I have not at this time modified the draft to incorporate the suggestion of a member of the Commission that we use separate paragraphs for the prohibition against revealing information relating to the representation of a client and the prohibition against use of such information to the disadvantage of the client. I have no particular objection to this proposal. Another possibility, of course, would be to return the prohibition against the use of information to the disadvantage of a client to Rule 1.8 from whence it came.

Paragraph (b)(1):

This draft reflects the decision of the Commission in Montreal to delete the requirement that the death or substantial bodily harm be “imminent.” It also reflects the rejection by the Commission of the requirement in §117A of the Restatement of the Law Governing Lawyers that the death or bodily harm be “reasonably certain.” I have added two sentences to Comment [14] that reflect my understanding of the significance of the new formulation.

Paragraph (b)(2):

The addition of paragraph (b)(2) reflects the decision made by the Commission in Montreal to permit disclosure to prevent the commission of crimes or frauds that are likely to result in substantial injury to the financial interests or property of another. The language in this paragraph comes from the Kutak Commission’s original proposal to the ABA House of Delegates, modified slightly to make it clear that the lawyer must know that the conduct in question is criminal or fraudulent.

I modified the Kutak Commission’s draft so that this exception would be consistent with Rule 1.2(d) that provides in pertinent part that “a lawyer shall not counsel a client to engage, or assist a client engage in conduct that the lawyers *knows* is criminal or fraudulent.(emphasis supplied). If a lawyer can counsel or assist a client engage in conduct so long as the lawyer does not know the conduct to be criminal or fraudulent, surely the lawyer should not be allowed to breach client confidentiality unless the lawyer “knows” the conduct to be criminal or fraudulent.

To provide a basis for comparison, the Kutak Commission’s original proposal (edited to eliminate references to death and substantial bodily harm that were included in the proposal) read as follows: “to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in ... substantial injury to the financial interests or property of another.”

Note also paragraph (b)(2) is narrower than Roger Cramton’s proposal, which permits disclosure to prevent the commission of a crime without regard to whether the perpetrator is the client. My proposal limits disclosure to situations in which the client will be the perpetrator. Professor Cramton’s proposal reads: “to prevent commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to the financial interests or property of another.”

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By way of background with respect to permitting disclosure for the purpose of preventing loss likely to be caused by future criminal or fraudulent conduct, § 117B of the Restatement of the Law Governing Lawyers only permits disclosure if the lawyer's services were used or will be used by the client in furtherance of the crime or fraud. The Chief Reporter (Charles Wolfram), however, was strongly opposed to limiting disclosure for the purpose of preventing substantial financial loss to situations in which the lawyer's services has been used in furtherance of the client's crime or fraud. As explained by Professor Wolfram, an earlier draft that did not limit disclosure to situations in which the client was using or had used the lawyer's services to commit the crime or fraud was premised on "a balance between protecting interests in client confidentiality and protecting the interests of society and third persons against known client wrongs." The draft that was eventually approved was premised "on concepts of waiver - reflecting the judgment that the client's wrongful abuse of the client-lawyer relationship and the consequent threat of implicating the innocent lawyer are both necessary, together with social interest in preventing harm, to warrant setting aside the general rule of confidentiality in the case of financial harm." Eight jurisdictions currently permit and three jurisdictions currently require disclosure in circumstances involving crimes and non-criminal frauds that are likely to result in substantial injury to another person's financial or property interests. None of these jurisdictions condition disclosure upon the nature of the lawyer's involvement in the client's conduct. Twenty-five jurisdictions permit and one requires a lawyer to reveal the intention of her client to commit a crime without regard to the amount of injury inflicted upon the intended victim. In these jurisdictions, however, a lawyer will not be permitted to reveal non-criminal frauds even if the fraud was likely to cause substantial injury to the financial or property interests of another. It would be my guess that such jurisdictions would be more likely to expand their exception to permit disclosure to prevent frauds than they would be to limit the exception to situations in which the client had used or would be using the lawyer's services in furtherance of a crime or fraud. Recently the drafters of the Draft Federal Rules of Attorney Conduct have proposed the adoption of Rule 2(b)(1) that would permit a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary "to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property." The current draft is accord with the Kutak Commission, the views of Professor Wolfram, and the Draft Federal Rule.

Paragraph (b)(3):

Paragraph (b)(3) has been added in response to the Commission's decision in Montreal to permit disclosure to rectify or mitigate the consequences of a client crime or fraud in which the client had used the lawyer's services. The exception is similar to the original Kutak Commission proposal, except that the Kutak proposal does not refer to mitigation, permits disclosure to rectify the consequences of a client's criminal or fraudulent act without regard to the magnitude of the consequences, and does not expressly state that the lawyer must know that the client has committed a crime or fraud. I added the reference to mitigation so as to permit disclosure even though full rectification is not possible. There is such a reference to mitigation in §117B(2) of the Restatement of

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the Law Governing Lawyers. I also limited the applicability of this Rule to situations in which there is substantial injury to be mitigated or rectified. §117B(2) of the Restatement similarly limits the option to rectify or mitigate to situations involving substantial loss. I added the knowledge requirement for the same reason I added it in paragraph (b)(2).

By way of background with respect to permitting disclosure to mitigate or rectify substantial financial loss that has resulted from a client's crime or fraud in which the lawyer's services have been used in furtherance of the crime or fraud, the Commission should be aware that a rule permitting such disclosure still represents the minority view. There are only thirteen jurisdictions that currently permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. Twenty-nine jurisdictions do not permit such disclosure. There are also eight jurisdictions in which DR 7-102(B)(1) of the ABA Model Code of Professional Responsibility (or a variation thereof) remains in force. In pertinent part DR 7-102(B)(1) provides that "a lawyer who receives information clearly establishing that ... his client has, in the course of the representation, perpetrated a fraud upon a person ... shall ... reveal the fraud to the affected person..., except when the information is protected as a privileged communication." The prevailing interpretation of this Rule, however, is that confidentiality generally trumps disclosure. The Commission should also be aware that the Kutak Commission's original proposal to allow disclosure for purposes of rectification was deleted from the Model Rules by the House of Delegates. In 1991 a proposal to add similar language to Rule 1.6(b) was again defeated in the House of Delegates by a 251-158 margin. The Draft Federal Rules of Attorney Conduct do not permit disclosure to rectify or mitigate substantial financial loss. §117B of the Restatement of the Law Governing Lawyers, on the other hand, allows disclosure for the purpose of mitigating or rectifying substantial financial loss resulting from a client's crime or fraud in which the client has used the lawyer's services.

Paragraph (b)(4):

This was approved in its current form at our meeting in Montreal.

This provision finds support in Kershen, "Further Thoughts on the Ethics of Ethics Consultation," 1997 Symposium Issue of the Professional Lawyer 7 (1997). Professor Kershen proposes the adoption of a rule that would permit a lawyer to "reveal such information to the extent the lawyer reasonably believes necessary ... to consult a non-affiliated lawyer about a client matter involving a bona-fide ethical dilemma so long as the consulting lawyer establishes a confidential relationship with the consulted lawyer." Lawyers, like others, may find themselves in need to secure legal advice about the conduct of their business or profession. As long as the lawyer protects the confidentiality interests of the client by establishing an attorney-client relationship with the consulted lawyer, I do not think a client ought to be able to preclude the lawyer from securing the advice of an independent lawyer about what the lawyer is permitted or required to do, or prohibited from doing, in connection with the lawyer's representation of the client.

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Paragraph (b)(5):

This was approved in its current form at our meeting in Montreal

Paragraph 1.6(b)(5)(i) permits such limited disclosures as are necessary to prevent the inadvertent disqualification of law firms because they bring in a new lawyer without knowledge that the lawyer has a conflict of interest relative to an existing client of the firm. The exception is carefully worded to limit the exception to the minimum amount of information need to “identify” conflicts. This would normally include no more than the identity of clients represented and a general statement of the nature of the representation. Such information is information relating to the client’s representation. Consequently, unless we want to require lawyers to ask their clients for permission to make these disclosures, an exception is needed. A lawyer should not, however, be permitted to make such a disclosure without client consent if it would materially disadvantage the client.

Paragraph 1.6(b)(5)(ii) finds support in Arkansas’ Rule 1.6(c) that provides: “Neither this Rule nor Rule 1.8 (b) prevents the lawyer from giving notice of the fact of withdrawal “ This language is taken from Comment [16] of the Model Rule.

Paragraph 1.6(b)(5)(iii) takes an intermediate position between New York’s DR 4-101(c)(5) and Arkansas’s Rule 1.6(c). The New York rule provides that “A lawyer may reveal ... confidences and secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied on by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.” The Arkansas rule more broadly states that a lawyer “may ... withdraw or disaffirm any opinion, document, affirmation or the like.” This language is taken from Comment [16] of the current Model Rule. This issue is also addressed in ABA Formal Ethics Opinion 92-366.

Paragraph (b)(6):

This was approved in its current form at our meeting in Montreal.

Paragraph (c):

I have reformulated paragraph (c) to track the wording in Roger Cramton’s proposal.

Comment [1]:

Comment [1] replaces Model Rule Comments [1], [2], [3], and [4]. I think the first Comment should be a concise statement of the reason for the rule. I think the proposed Comment [1] is more

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forceful than the Model Rule comments. In the the interest of shortening the Comment, I have deleted the two sentences in the prior draft that explained how the Rule protects the autonomy of the client to control the dissemination of information about the client's affairs.

Comment [2]:

Comment [2] is new. I think this cross-reference to Rule 1.9(c) and our forthcoming rule specifying the confidentiality obligations owed by a lawyer to a prospective client is important because the lawyer's duties differ.

Comment [3]:

Comment [3] is a modification of Model Rule Comment [5]. Its purpose is to explain the Rule's reference to "information relating to the representation of a client" and how such information relates to information protected by the attorney-client privilege and the work-product rule. If the Commission is inclined to approve additional commentary about this issue, I would recommend adding a new comment intended to provide an analytical framework for determining whether information possessed by a lawyer constitutes information relating to the lawyer's representation of a client. The Comment would read:

[] If there is an arguable question whether particular information relates to a lawyer's representation of a client, it must be resolved by reference to the client's reasonable expectations for confidentiality and loyalty, taking into account the nature and sensitivity of the information, the relevance of the information to the subject matter of the lawyer's representation, and the circumstances surrounding the lawyer's acquisition of the information, including the source of the information, the lawyer's role in the acquisition of the information, and whether the information was acquired prior to or during the lawyer's representation of the client.

Comment [4]:

Although taken in part from Comment [2] to Model Rule 1.13 and in part from Comment [17] to Model Rule 1.6, this Comment is basically new. Its purpose is to explain how Rule 1.6 applies to organizational clients. A member of the Commission has suggested that the discussion in Comment [4] should be placed in a comment to Rule 1.13. I think the application of Rule 1.6 to the representation of organizational clients is sufficiently important that it warrants a Comment in Rule 1.6. The second and third sentences come from Comment [2] to Rule 1.13. I think the only question for the Commission is whether to retain or delete this Comment.

Comment [5]:

Comment [5] is new and offers an explanation of the prohibition against revealing information

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relating to the representation of a client. Of particular significance is its articulation of a standard to be used in determining when a lawyer may use hypotheticals based on information relating to the representation of a client without having “revealed” the underlying information. I think this is an issue that deserves attention in a Comment.

Comment [6]:

Comment [6] is new and offers an explanation of the prohibition against using information to the reasonably likely disadvantage of a client. Per a suggestion of a member of the Commission, the last three sentences in Comment [6] attempt to make clear that a lawyer can disadvantage a client by using information relating to the client’s representation to take a business opportunity in circumstances in which the law of agency gives the client a right of first refusal.

Comment [7]:

Comment [7] is new and explains the significance of the lack of general prohibition against a lawyer using information relating to a client’s representation to the advantage of the lawyer or a third party. Does the Commission think that this Comment should be supplemented with some examples of uses to the advantage of a lawyer or a third person that are permitted by virtue of Rule 1.6’s silence on the subject?

Comment [8]:

Comment [8] is new and relates to informed consent. I think it is a good idea to provide lawyers with some specific guidance about some information that the client must always have in order for a consent to the disclosure of confidential information to be informed.

Comment [9]:

Comment [9] is new and addresses the effectiveness of a client’s advance consent to future disclosures or adverse use of information relating to the client’s representation. Substantively, the discussion of advance consent is consistent with ABA Formal Ethics Opinion 93-372’s treatment of anticipatory waivers of future conflicts of interest, but goes beyond that opinion and explicitly permits a lawyer to rely on a client’s advance consent to the disclosure or adverse use of information relating to a client’s representation so long as the consent was informed in the sense that the circumstances as eventually materialized were specifically within the contemplation of the client at the time the consent was obtained. If advanced consent is eventually addressed more globally in Rule 1.4, this Comment might be modified.

Comment [10]:

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Comment [10] adds a sentence to Model Rule Comment [7]'s discussion of impliedly authorized disclosures that explains that implied authority does not extend to disclosures of information that present a significant risk that the client might be substantially disadvantaged by the disclosure in question." I have referred to "substantial disadvantage" rather than "material disadvantage" so that this Comment will not be inconsistent with the position in Comment b to §113 of the Restatement of the Law Governing Lawyers that allows lawyers to reveal confidential information without client consent if the lawyer reasonably believes that doing so will advance the interests of the client even though doing so may entail a risk that the client may be materially disadvantaged by the disclosure. I agree with that view. When the ante goes up, however, and there is significant risk of substantial disadvantage associated with a disclosure of confidential information, I think the lawyer should be required to secure the informed consent of the client.

Comment [11]:

Comment [11] supplements Model Rule Comment [8] with a need-to-know restriction on impliedly authorized disclosures to co-counsel and temporary lawyers who are participating in the representation of a client of a law firm with which they are not "associated." There is no need-to-know restriction on impliedly authorized disclosures among lawyers associated in a firm.

Comment [12]:

Comment [12] is new and explains the application of Rule 1.6 to the joint representation of multiple clients by a single lawyer. Comment [12] is generally in accord with Comment *l* to §112 of the Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1, May 29, 1996), except for that portion of comment *l* to §112 that deals with the confidentiality obligations of a lawyer who is required to withdraw from a joint representation because one of the jointly represented clients refuses to permit the lawyer to reveal information that other co-clients need to know. Comment *l* permits not only a warning to the affected co-client "that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose," but also confers upon the lawyer "the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy." The illustrations make clear that the lawyer's discretion in this regard is broader than would be the case if the affected person was not a co-client. To distinguish this from a "noisy withdrawal," I would call this a withdrawal with "a big bang." Comment [12] does not so broaden the lawyer's discretion to reveal one co-client's confidences in order to protect the interests of other co-clients. Unless the lawyer is permitted or required to make the disclosure in question by one of the generally applicable exceptions in Rule 1.6(b) or (c), the lawyer cannot make a "big bang" in connection with the lawyer's withdrawal from a joint representation of multiple clients. The core issue for the Commission to resolve is whether traditional confidentiality norms should be modified when lawyers undertake the joint representation of multiple clients. Should the lawyer's implied authority to reveal information among the jointly represented clients be broadened to include information that would materially disadvantage one of the

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co-clients? Should there be a special rule that permits a lawyer to disclose to one co-client's confidential information to protect the interests of another co-client in situations in which such disclosure would not be permitted to protect the interests of a person who is not a co-client? I have answered these questions in the negative. If the Commission favors an affirmative answer, I think the answer belongs in the Rule rather than in a Comment.

Comment [13]:

Comment [13] is new and explains the application of Rule 1.6 to "common interest arrangements" between individuals each of whom is represented by their own lawyer. This Comment incorporates the holding in ABA Formal Ethics Opinion 95-395 (Obligations of a Lawyer Who Formerly Represented A Client in Connection with a Joint Defense Consortium). The bracketed language contemplates a new rule articulating the duties of a lawyer to a non-client who confidentially provides to a lawyer information that is related to the lawyer's representation of a client.

Comment [14]:

Comment [14] effectively replaces Model Rule Comments [9] and [13] and explains Paragraph (b)(1)'s permission to reveal client information to prevent death or substantial bodily harm.

The questions for the Commission's review are:

Should substantial bodily harm be explained as including "life threatening and debilitating illness, such as cancer and AIDS?"

Should substantial bodily harm be explained as including "the consequences of child sexual abuse?"

Should substantial bodily harm be explained as including "the consequences of wrongful imprisonment?" The Commission has previously decided not to permit disclosure to prevent or rectify the wrongful incarceration of a person. I do not think this issue should be reopened by adding Comment language suggesting that wrongful imprisonment is likely to result in death or substantial bodily harm. The prospect of a wrongful execution, of course, would trigger the right to disclose for the purpose of preventing death, but I do not think we can proceed on the assumption that imprisonment is likely to result in substantial bodily harm. The Commission should be aware, however, the Comment c to §117A of the Restatement of the Law Governing Lawyers includes within the meaning of "serious bodily harm" the "consequences of such events as imprisonment for a substantial period." If the Commission wants to reconsider its decision with respect to disclosure to prevent or rectify wrongful incarceration, I think it should do so in the Rule itself and not through strained commentary about substantial bodily harm being a consequence of incarceration.

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The second to the last sentence provides that “the lawyer must reasonably believe that a person is likely to die or suffer substantial bodily harm unless the lawyer reveals information otherwise protected by this Rule.” Does this statement accurately and adequately describe what the Commission had in mind when it deleted the requirement that death or substantial bodily harm be “imminent” or did not replace that requirement with the Restatement’s requirement that the death or harm be “reasonably certain?”

Comment [15]:

Comment [15] is new and explains paragraph 1.6(b)(2)’s grant of permission to disclose client information to the extent necessary to prevent client crimes and frauds that are likely to cause substantial economic loss. The last two sentences are intended to alert the lawyer to the four distinct questions the lawyer must ask enroute to a determination that disclosure is permitted by paragraph 1.6(b)(2). I would like the Commission to confirm the accuracy of this outline of the issues that must be addressed by a lawyer who is considering revealing client information to prevent a client crime or fraud.

Comment [16]:

Comment [16] is new and explains paragraph 1.6(b)(3)’s grant of permission to reveal client information to the extent necessary to rectify substantial loss resulting from a client’s crime or fraud in the furtherance of which the client had used the lawyer’s service. The Commission should carefully review the portion of the Comment which offers some explanation as to when a client will have used the lawyer’s services to further the commission of the client’s crime or fraud. This Comment is consistent with discussion of the client’s “use” of a lawyer’s services in a crime or fraud as found in Comment *e* to §117B of the Restatement of the Law Governing Lawyers.

Comments [15] and [16] replace Model Rule Comments [10], [11] and [12] that explained Rule 1.2(d)’s prohibition against assisting a client commit a crime or fraud.

Comment [17]:

Comment [17] is new and explains paragraph 1.6(b)(4)’s grant of permisison to a lawyer to reveal client information to the extent necessary to secure legal advice about the lawyer’s personal legal and professional responsibilities in connection with the representation of the client.

Comment [18]:

Comment [18] is new and sets forth in very general terms the rational for the exceptions in paragraph 1.6(b)(5).

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Comment [19]:

Comment [19] is identical to Model Rule Comment [18].

Comment [20]:

Comment [20] is identical to Model Rule Comment [19].

Comment [21]:

Comment [21] is substantially similar to Model Rule Comment [14].

Comment [22]:

Comment [22] is a revision of Model Rule Comment [21]. The most important sentence in Comment [22] is the last sentence that reads: "A lawyer may refrain from making a disclosure if the lawyer **reasonably believes**, after reasonable inquiry, that the law in question does not legally obligate the lawyer to make the disclosure." The key issue here is whether we should permit the lawyer to remain silent "if the lawyer has a **non-frivolous** reason for believing that the law in question does not legally obligate the lawyer to make the disclosure."

Comment [23]:

Comment [23] is a revision of Model Rule Comment [20]. The only substantive difference relates to the requirement in Comment [23] that the lawyer exhaust all rights to appeal adverse rulings denying a claim of privilege made in response to a court order to reveal information relating to a client's representation. The appropriateness of this requirement was questioned by a member of the Commission prior to our January meeting in Nashville. The member thought that the decision whether to appeal a decision denying a claim of privilege should remain a matter of practical judgment rather than an ethical requirement. The Comment as currently drafted would require the lawyer to impress upon the client the practical reasons for not pursuing an appeal and secure the client's consent to forego the appeal and make the disclosures in question. Deleting the reference to the appeal in the Comment would leave the issue to be resolved under Rule 1.2 - the issue being whether the lawyer or the client has the authority to determine whether to take an interlocutory appeal from an adverse decision rejecting the client's invocation of the attorney-client privilege. Because of the profession's general policy of allocating to the client the authority to make decisions about the disclosure of confidential information, I think the final call on whether to undertake a non-frivolous appeal of an adverse judgment on a privilege question should be made by the client after consultation with the lawyer. Thus I prefer the Comment as currently formulated.

Comment [24]:

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Colorado, D.C., Georgia, Iowa, Maine, Michigan, Minnesota, Nebraska, New York, Ohio, Oregon, Virginia, Vermont have retained the formulation that was contained in ABA Model Code DR 4-101(D): “A lawyer shall exercise reasonable care to prevent the lawyer’s employees, associates and other whose services are utilized by the lawyer from disclosing or using such information, except that the lawyer may reveal the information allowed by paragraphs (b) and (c) through such persons.” I modified this formulation to conform to the structure of the Model Rules.

A member of the Commission has recommended the deletion of the bracketed reference to “any other person to whom the lawyer has provided such information.” The concern is that it is unrealistic to expect a lawyer to monitor the conduct persons to whom confidential information is given. I do not think, however, that exercise of reasonable care would require monitoring. But it probably would require that the lawyer secure from the recipient a promise to maintain the confidentiality of the information provided by the lawyer.

Comment [25]:

Comment [25] is new and addresses how the lawyer’s duty of care and confidentiality intersect in connection with the means a lawyer might use to transmit confidential information. I have taken a case-by-case approach with a tilt in favor of allowing use of unencrypted e-mail in the ordinary course of lawyer-client communications. I believe this comment is consistent with the trend in recent Ethics Committee decisions addressing the use of e-mail and with the May 21, 1998 Discussion Draft of the Report of the Lawyer Business Ethics Committee’s Task Force on E-Mail Privacy that was provided to the Commission in Montreal. The comment leaves open the possibility that extraordinary security measures may be required in some cases in which the means of communication used in a particular situation would not afford the lawyer a “reasonable” expectation of privacy. Comment [26] also requires the lawyer to discuss these matters with the client at the outset of the representation.

Comment [26]:

Comment [26] is new. I am not aware of any jurisdiction that has adopted such a provision. The idea for such a requirement comes from Pizzamante, “The Lawyer’s Duty To Warn Clients About The Limits Of Confidentiality,” 39 Catholic U.L. Rev. 441 (1990). The author’s conclusion is that a failure to so warn or consult with a client about limitations would be unethical and might constitute actionable malpractice. Such consultation may already be required by Rule 1.4.

Comment [27]:

This Comment combines Model Rule Comments [15] and [16] in a single Comment intended to draw the lawyer’s attention to the withdrawal issues that can become entangled with confidentiality issues. Its primary purpose is to distinguish the withdrawal issues from the confidentiality issues and provide cross-references to the pertinent Rules.

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