

THE DUTY OF CONFIDENTIALITY UNDER THE RULES OF PROFESSIONAL CONDUCT

Timothy J. Pierce
Ethics Counsel
State Bar of Wisconsin
5302 Eastpark Blvd.
Madison, WI 53707-7158
(608) 250-6168
(800) 444-9404, ext. 6168
Fax: (608) 257-5502
tpierce@wisbar.org

I. **“CONFIDENTIAL” IS VERY BROADLY DEFINED.** The lawyer’s duty to protect a client’s confidential information is stated in **SCR20:1.6** (*a lawyer shall not reveal information relating to the representation of a client . . .*). It is

- A. compulsory (*shall not* reveal) ; and
- B. very broad in its coverage (all *information relating to the representation of a client*).
- C. applies to all information relating to the representation of a client, *whatever its source*. (Comment, paragraph [4]).
- D. the Rule does differentiate between (or classify) confidential and non-confidential information; all information that relates to the representation of a client is required to be kept confidential.

It would be hard to draft a definition of confidentiality that is broader than in SCR 20:1.6(a)¹.

II. **BUT, THAT BROAD DEFINITION OF CONFIDENTIALITY IS CONSTRAINED BY NUMEROUS EXCEPTIONS (BOTH REQUIRED AND PERMISSIVE).**

The real key to understanding the confidentiality Rule and applying it in real world situations is in the numerous *required and permissive exceptions*.. The exceptions to the broad duty of confidentiality (while varying from state to state) generally fall into four categories:

- A. disclosures that are *impliedly authorized* to carry out the representation
- B. situations involving risks of preventable physical harm to persons;
- C. particular situations involving preventable or reparable harms flowing from client frauds or deceptions; and
- D. situations where relief from the duty of confidentiality protects a legitimate interest of the lawyer.

¹Despite this broad definition in every state the employs some version of the Model Rules, the Restatement (Third) of the Law of Lawyering offers a looser standard of “confidential client information” which is “information relating to the representation of a client other than information that is generally known”, Restatement § 59 and then prohibits revelation of confidential information *only if* “there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information”, Restatement § 60(a)(1). This less absolutist standard of the Restatement permits a certain amount of talking about one’s cases with others so long as it doesn’t harm the client. It may be more practical and a more realistic reflection of lawyers’ actual practice. But, if the Restatement position were cited in a grievance filed by a client upset about a lawyer “talking about my case in the community,” that lawyer shouldn’t count on a disciplinary agency ignoring the plain language of the promulgated confidentiality rule.

More specifically, there are six required exceptions and eleven permissive to the general requirement of confidentiality.

■REQUIRED EXCEPTIONS TO CONFIDENTIALITY.

A lawyer **shall reveal** confidential information:

A. To a tribunal:

- (1) To correct a knowingly false statement of material fact or law the lawyer made to a tribunal. **SCR 20:3.3(a)(1)**
- (2) Legal authority in the controlling jurisdiction known by the lawyer to be directly adverse to the client’s position and that has not been disclosed by opposing counsel. **SCR 20:3.3(a)(2)**
- (3) If a lawyer comes to know² that the lawyer, the lawyer’s client or a witness called by the lawyer has offered false material evidence and the lawyer cannot otherwise take reasonable remedial measures. **SCR 20:3.3(a)(3)**
- (4) If a lawyer knows that *any* person has, is or is going to engage in criminal or fraudulent conduct relating to a proceeding before a tribunal in which the lawyer represents a client and the lawyer cannot otherwise take reasonable remedial measures **SCR 20:3.3(b)**

B. To comply with a proper pre-trial discovery request by an opposing party. **SCR 20:3.4(d)**

C. When disclosure is necessary to avoid assisting a criminal or fraudulent act by a client *unless* disclosure is prohibited by **SCR 20:1.6**. **SCR 20:4.1(a)(2)**.

Note: The restrictions on disclosure in **SCR 20:4.1(a)(2)** imposed by the phrase “unless disclosure is prohibited by **SCR 20:1.6**” must be read in conjunction with the exceptions to confidentiality contained in **1.6(b)**. A disclosure permitted by **SCR 20:1.6(b)** is **not** a disclosure “prohibited by **SCR 20:1.6**.” Thus, in a situation covered by **SCR 20:4.1(a)(2)**, permissive disclosures under **SCR 20:1.6** become *mandatory*.

The mandatory disclosures of **SCR 20:1.6(b)** (*see paragraph D, below*) are likewise **not** “disclosures prohibited by **SCR 20:1.6**.”

D. **[THE MAJOR WISCONSIN DIFFERENCE FROM THE MODEL RULES ON CONFIDENTIALITY]** To the extent reasonably necessary, to prevent a client from committing a crime or fraud the lawyer reasonably believes is likely to result in death, substantial bodily harm, or substantial economic injury to another. **SCR 20:1.6(b)**

E. All fiduciary account records under **SCR 20:1.15** upon request of the office of lawyer regulation or direction of the Supreme Court. **SCR 20:1.15(f)(7)**.

F. To cooperate with the Office of Lawyer Regulation **SCR 20:8.4(h)**.

² In Wisconsin, the definition of “know” in regard to this specific rule has been read to be limited to information based on an affirmative statement by the client that the client intends to perjure himself. *State v McDowell*, 681d N.W.2nd 500 (2004).

■ PERMITTED EXCEPTIONS TO CONFIDENTIALITY.

A lawyer *may reveal* confidential information:

- A. With the client's informed consent. **SCR 20: 1.6(a)**
- B. If disclosure is impliedly authorized to carry out the representation. **1.6(a)**
The most obvious implied authorization is revealing confidential information to persons assisting the lawyer in representing the client.

and to the extent the lawyer reasonably believes necessary

- C. To prevent reasonably likely death or substantial bodily harm. **20:1.6(c)(1)**
[Wisconsin substitutes *likely* for the term "*certain*" found in Model Rules]
- D. To *prevent, mitigate, or rectify substantial economic injury* to another that is reasonably certain to result or have resulted from a client's commission of a crime or fraud in which the client has used or is using the lawyer's services. **1.6(c)(2)**

Lawyers must also consider **SCR 20:1.2(d)** which prohibits a lawyer from counseling or assisting a client in criminal or fraudulent conduct. **Comment 10** notes that when a lawyer discovers that a client's conduct originally thought to be legally proper is discovered to be criminal or fraudulent, the lawyer has a duty to withdraw from the representation, but that withdrawal may not be sufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm prior statements, opinions or documents ("noisy withdrawal").

- E. To secure legal advice about compliance with these Rules. **SCR 20:1.6(c)(3).**
- F.. To establish or defend a claim in a dispute with a client (including a fee dispute), to defend a criminal charge, disciplinary complaint, or civil claim based on conduct in which a client was involved, or to respond to allegations made in any proceeding regarding the lawyer's representation of a client. **SCR 20:1.6(c)(4)**
- G. To comply with a court order or other law³ requiring disclosure. **1.6(c)(5)**
- I. To prevent substantial injury to an organization that a lawyer represents caused by someone in the organization acting, intending to act, or refusing to act in violation of law, *but only after* the lawyer's best efforts to inform the organization's highest authority does not result in the organization preventing such action or refusal to act. **SCR 20:1.13 (b) and (c).** Wisconsin makes plain that lawyers who represent

³The Rules, their Comments and even commentary on the Rules are not at all clear what "other Rules requiring disclosure" are meant. Is it Sarbanes-Oxley, state rules requiring reporting of child abuse, the latest version of homeland security reporting requirements? Is it laws that specifically require lawyer's to disclose or and general disclosure requirement? And what is a "law"— a statute, an administrative regulation, an executive order, something else? This exception to the duty of confidentiality (new in the 2003 Model Rules) does not require lawyer disclosure, but permits it (like compliance with a court order). But if a lawyer find herself being pressured by a government agency that wants access to client information, she is certainly deprived of her former argument that my lawyer's duty of confidentiality says I can't reveal that information; now that lawyer more likely must say "I can reveal that information, but I just don't choose to."

organizations must observe the duties imposed by **SCR 20:1.6(b)** **SCR 20:1.13(h)**.

- J. When a lawyer reasonably believes a client with diminished capacity is at risk of substantial physical, financial, or other harm unless action is taken and the lawyer cannot adequately act in the client's interest, the lawyer may consult with others or take other reasonably necessary protective action. **SCR 20:1.14(b)**.
- K. When appointed as a Guardian Ad Litem, a lawyer represents *the best interests* of the individual and the individual and all information relating to the representation may be revealed if the guardian ad litem reasonably determines that is in the best interests of the individual. **SCR 20:4.5**

III. **ANY DISCLOSURE OF CONFIDENTIAL INFORMATION MUST BE MADE ONLY AS IS NECESSARY.** The required or permitted disclosure of confidential information are not open-ended. Most explicitly state that a lawyer may reveal only *to the extent the lawyer reasonably believes necessary to prevent* whatever harm the exception is designed to avoid. Even when that phrase does not appear, similar language in the Rule, commentary, or best practices insist that the *only* permitted or required disclosure is one which is only to extent necessary to secure the exception's purpose. This is crucial to remember when making required disclosures that are likely to adversely affect a client e.g. **SCR 20:3.3**.

IV. **SOME CONSIDERATIONS IN MAKING A PERMITTED DISCLOSURE OF CONFIDENTIAL INFORMATION.** The Rules and their Comments offer little guidance to lawyers about handling situation in which disclosure of confidential information is permitted (but not required). One option is not disclose any confidential information unless required to do so. In deciding whether to exercise the discretion that the Rules vest, a lawyer should assess the effect disclosure or non-disclosure on clients, the legal system, the public interest, and others. Lawyers also may consider, as humans tend to do, the effect on their own interests and afford to that its appropriate weight. The discretion lawyers are vested with may create potential liability for consequences that flow from the choice to disclose or not disclose. Lawyers also should look to determine if other law requires disclosure or silence. Specific aspects of the client relationship including past discussions, practices or understandings regarding the handling of confidential information should also be considered. Lawyers can fall into the binary decisional trap of disclosing or not disclosing. But, intermediate courses of action that may yield better results. In all practicable instances, a lawyer should consult with and obtain the client's perspective about the decision to disclose (or even non-disclosure), even though the lawyer is not bound by the client's perspective. If a lawyer has decided that disclosure is necessary, the client may benefit from self-disclosure and generally should be afforded that opportunity. The Rules anticipate that in some instances the final decision will balance on a lawyer's own ethical standards. Sound ethical training and experience as a professional should elevate a lawyer's capacity for making wise choices.

V. **DON'T TELL YOUR CLIENT THAT "EVERYTHING YOU TELL ME IS CONFIDENTIAL"** **- BECAUSE IT'S NOT .** Confidentiality is subject to numerous exceptions – some of which *permit* a lawyer to disclose confidential information and some which may *require* a lawyer to do so. Some lawyers say little or nothing initially to clients about confidentiality. The problem is that clients may have expectations about the extent to which what they tell a lawyer is confidential. That expectation may have formed from an earlier encounter with a lawyer or from watching television. Some lawyers who do talk to their clients about confidentiality tell them that everything that is said will be held in confidence. But that is not accurate. Remember that lawyers have the duty to explain legal representation to a client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. **SCR 20:1.4(b)**.

VI. **CONFIDENTIALITY IS NOT THE SAME AS THE ATTORNEY-CLIENT PRIVILEGE.**

Some lawyers mistakenly refer to confidentiality and the attorney/client privilege interchangeably. The lawyer's duty of confidentiality (an ethical duty derived from the common law) is not the same as the client's right to assert the attorney client privilege (a statutory rule of evidence preclusion). *The duty of confidentiality is much broader.* The attorney/client privilege extends only to communications between lawyers and clients relating to legal services and which the client reasonably believes is confidential. Any disclosure may waive the attorney/client privilege as to other otherwise protected matters; not so with the duty of confidentiality. The privilege applies only to limiting testimony in a legal proceeding. The duty of confidentiality limits voluntary disclosures anywhere.

VII. **SOME USES OF CONFIDENTIAL INFORMATION THAT DO NOT INVOLVE DISCLOSURE ARE PERMITTED.** The Rules permit a lawyer to use confidential information provided that such use does not involve disclosure of the information.

- A. A lawyer may use, without disclosing, confidential information if it is not to the disadvantage of the client **or** if the client provides informed consent. **SCR 20:1.8(b).**

In representing clients, lawyers learn such things as government procedures, business practices, community information, technology, or other knowledge that may be useful in future representations. This information may be sophisticated, not widely known, and even highly valuable. While such information falls within the definition of confidential in **SCR 20:1.6(a)** ("information relating to the representation") lawyers may use such information for the benefit of subsequent clients, so as long as that use is not adverse to the interests of the former client. Some information, such as investment information, may also be of value to the lawyer. While other law, such as securities and general agency law would restrict the use of such proprietary client information, this Rule does not appear to do so unless the use is adverse to the client.

- B. A lawyer who has formerly represented a client (or that lawyer's firm) may use confidential information that is adverse to the former client in a matter as the Rules permit or require **or** when that information has become generally known. **SCR 20:1.9(c)(1)**

It is important for lawyers to bear in mind that "generally known" is not equivalent to "publically available" or "previously disclosed." In order to be considered "generally known," the information must be within the basic understanding and knowledge of the public. Obscure but publically available information, such as documents available in most courts files, are not "generally known." See e.g. *Pallon v. Reggio*, 2006 WL 2466854 (D.N.J., 2006).

VIII. **A LAWYER'S DUTY IN POTENTIAL CLIENT CRIME OR FRAUD SITUATIONS IS TRICKY.**

Conflicting obligations arise between a lawyer's duty of confidentiality and diligence and the public's interest in lawyers neither assisting client crimes or frauds or not revealing information to avoid foreseeable and avoidable harm stemming from a client's unlawful conduct. A lawyer may risk assisting client wrongdoing by (a) providing a client with advice that, without the lawyer's knowledge, is used unlawfully; (b) failing to recognize clear signs that a client's intends to engage in unlawful conduct; (c) recognizing, but failing to act on, clear signals that a client intends to engage in unlawful conduct; or (d) knowingly assisting a client in unlawful conduct.

Deciding amid these conflicting obligation involves assessing and harmonizing the duty of confidentiality [SCR20:1.6(a)] and the obligations described in seven inter-connected Rules of Professional Conduct. They are:

- SCR20:1.2(d) (counseling or assisting clients);
- SCR20:1.6(c)(1) and (2) (exception to duty of confidentiality for certain criminal or fraudulent acts)
- SCR20:4.1(a)(2) (disclosures necessary to avoid assisting a crime or fraud);
- SCR20:1.13(b) and (c) (unlawful actions by organizational clients);
- SCR20:3.3(a)(3) (offering false testimony before a tribunal);
- SCR20:8.4(c) (prohibiting dishonesty, fraud, deceit or misrepresentation); and
- SCR20:1.16(a)(1) and (b)(3) (withdrawal from representation).

Among the questions that arise when analyzing a lawyer’s duty under these Rules are the following. Is the client’s act a crime or fraud? Does the Rule require “knowledge,” “reasonable belief” or some other standard to trigger disclosure? Does the Rule(s) “require” or “permit” disclosure? Is the fraud or crime a potential, ongoing or completed act? Is the matter before a tribunal? Have the lawyer’s services been used to further the crime or fraud? Will any disclosure prevent mitigate or remedy any crime or fraud? Can the avoidance of harm be accomplished without disclosure (e.g. by client consultation) or if disclosure is required, how limited can the disclosure be to accomplish the public purpose? Beyond the Rules is there any other law requiring disclosure?

- IX. **CONFIDENTIALITY AMONG CO-CLIENTS.** Lawyers may represent two or more clients in the same matter if there is either no conflict of interest among them or the parties have appropriately waived any conflict. Sharing information among co-clients is the norm. It is assumed that clients accept that their communications with their common lawyer will be shared with their co-client, but kept in confidence as to all others.
- X. **CONFIDENTIALITY HAS A LONG TIME LINE.** A lawyer’s duty of confidentiality begins when a person first seeks representation or advice from a lawyer even though the lawyer has not yet agreed to represent or even determined whether to represent the client. **SCR20:1.18(b)** The duty of confidentiality continues after the lawyer-client relationship ends and does not extinguish with any passage of time, the client’s death, or in the case of an organization client, its dissolution.
- XI. **CAN A LAWYER TALK TO FAMILY AND FRIENDS ABOUT THEIR CLIENTS?** The Rules forbid any disclosure that does not fall within one of the enumerated exceptions. That may not recognize lawyers live outside the office or human nature. The Restatement of the Law Regarding Lawyers permits disclosures that offer no reasonable prospect of adversely affecting a material client’s interest and for which the client has not instructed the lawyer to hold in confidence⁴. The safest practice, of course, is for lawyers to never discuss anything relating to their clients with even their most intimate life partners. But, over a lifetime such a closed and compartmentalized life can exact a toll on psyches and relationships. Perhaps, it may be more reasonable to govern these discussions by a scrupulous assurance of anonymity standard – some discussions happen, but with generality and anonymity sufficient to assure that a client or the particular circumstances of their matters are protected from possible identification.

Thanks to Professor Ralph Cagle for providing the basis for this outline

APPENDIX A: CONFIDENTIALITY IN A DIGITAL WORLD

⁴ See FN 1.

This section of the outline will discuss some general principles that lawyers must bear in mind whenever lawyers have an on-line presence, such as a website, the lawyer's use of social media, the use of cloud computing, the use of mobile communication devices and electronic storage of client files.

A) Understand the Duty of Confidentiality: Perhaps no issue is of more importance for lawyers on-line than understanding the scope of the duty of confidentiality. It is necessary therefore, to understand the scope of a lawyer's duty of confidentiality. Put another way, it is necessary therefore to understand what constitutes confidential information under SCR 20:1.6.

First and foremost, attorney-client privilege should not be confused with a lawyer's ethical duty of confidentiality. Attorney-client privilege is a rule of evidence, not ethics, and thus only applies in proceedings in which the rules of evidence govern and only determines whether certain types of evidence may be admitted or compelled in such proceedings. It *does not* serve as a basis for discipline and *does not* serve as a basis for determining what information about a client that a lawyer may voluntarily reveal. SCR 20:1.6, which governs a lawyer's duty of confidentiality, applies in all other situations, *does* serve as a basis for discipline and does determine what information about clients lawyers may voluntarily reveal.

Put simply, when considering whether a lawyer may voluntarily reveal information about a current or former client, SCR 20:1.6 governs. When facing compulsion of law in a proceeding in which the rules of evidence apply, attorney-client privilege governs.

It is also important when considering the differences between attorney-client privilege and confidentiality to understand the scope of the information covered by each. Attorney client privilege essentially protects communications between a lawyer and a client, and sometimes certain third parties, made for the purpose of facilitating legal representation and which are intended to be confidential.⁵ By contrast, SCR 20:1.6 applies "not only matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁶ Much information relating to the representation of a client is normally not covered by the attorney-client privilege, but nonetheless is confidential.

In *Formal Ethics Op. 04-430 (2004)*, the ABA's ethics committee noted the breadth of confidentiality in analyzing a lawyer's duty to report a lawyer not engaged in the practice of law:

We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.

(footnotes omitted)

⁵ See sec. 905.03(2) Stats.

⁶ See SCR 20:1.6, Comment [3].

This excerpt makes the important point that even information that may be available from public sources remains confidential as long as it is information relating to the representation of a client. At the most basic level, almost any information learned by virtue of or in the course of representing a client and which relates to the representation is confidential. This means that when considering “information related to the representation of a client,” the privileged or non-privileged nature of the information is *not* determinative of whether the lawyer is obligated to keep the information confidential. What is determinative is whether the information relates to the representation of a client.

Disciplinary Proceedings against Harman, 244 Wis.2d 438, 628 N.W.2d 351 (2001) illustrates the breadth of a lawyer's duty of confidentiality. In that case, the Respondent lawyer was charged with violating his duty of confidentiality by revealing information relating to the representation of a client. The Respondent argued that he was free to reveal that information because it had already been placed in the public record in a different case. The Court rejected this argument, holding as follows:

We agree with Referee Jenkins' interpretation of this rule and her conclusion that the information obtained by Attorney Harman from his client, S.W., even if not protected or deemed confidential because it had previously been filed in the Wood County case, could not be disclosed without S.W.'s permission because that information was obtained as a result of the lawyer-client relationship he had with S.W.

This makes the important point that, while public disclosure generally waives attorney-client privilege, such disclosure does not remove that information from the protections of SCR 20:1.6.

Thus, for any lawyer considering an on-line presence, it is vital to remember that any information that relates to the representation of the client, including publicly available information or information that has already been disclosed, is confidential information and may not be disclosed without the informed consent of the client.

B) Understand the Duty to Act Competently to Preserve Confidentiality: Of crucial importance for lawyers who wish to have an on-line presence are Comments [16] and [17] to SCR 20:1.6, which provide as follows:

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

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security

measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Lawyers thus have, at a minimum, a duty to take reasonable precautions to prevent the disclosure of confidential information when “transmitting” such information and must act competently to safeguard stored client information. This plainly translates to a duty to act competently to safeguard the confidentiality of client information transmitted electronically, such as by wireless network, or stored digitally in a manner that may be accessed by third parties, such as on cloud based servers.

C) What does it mean to act competently to safeguard the confidentiality of electronically stored or transmitted client information? The question of whether it is ethically permissible for lawyers to store client files in electronic form on servers controlled by third parties generated a series of ethics opinions that shed light on what is required to act competently to preserve confidentiality. For example:

In *Ethics Opinion 09-04 (2009)*, the Arizona State Bar’s Committee on The Rules of Professional Conduct opined that lawyers providing an online file storage and retrieval system for client access of documents must take reasonable precautions to protect the security and confidentiality of client documents and information. The Opinion states that reasonable measures may include firewalls, password protection schemes, encryption and ant-virus measures, although the Opinion further cautions that that lawyers should be aware of limitations in their competence regarding online security measures and take appropriate actions to ensure that a competent review of the proposed security measures is conducted. As technology advances over time, a periodic review of the reasonability of security precautions may be necessary.

In *Ethics Opinion 701 (2006)*, the New Jersey Advisory Committee on Professional Ethics opined that lawyers may ethically store client data on servers that are not under the exclusive control of the lawyer, such as a server provided by an Internet Service Provider (ISP), provided that the lawyer uses reasonable care to ensure the confidentiality of client information. “Reasonable care” requires that the lawyer make sure that any third party that may have access to client information is aware of the lawyer’s obligation to preserve confidentiality and is itself obligated, by contract, professional standards, law or otherwise, to maintain the confidentiality of the client information. The lawyer must also use reasonable care ensure that appropriate use is made of available technology to ensure the confidentiality of client data.

In *Formal Opinion No. 33 (2006)*, the State Bar of Nevada’s Standing Committee on Ethics and Professional Responsibility likewise opined that a lawyer may store client information on a server or device that is not exclusively in the lawyer’s control, provided that the lawyer:

1. Exercises reasonable care in the selection of the third party contractor, such that the contractor can be reasonably relied upon to keep the information confidential; and
2. Has a reasonable expectation that the information will be kept confidential; and
3. Instructs and requires the third party contractor to keep the information confidential and inaccessible.

New York State Bar Ethics Op. 842 (2010), in considering the propriety of a lawyer using a cloud-based storage system for client files opined as follows:

9. We conclude that a lawyer may use an online “cloud” computer data backup system to store client files provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained. “Reasonable care” to protect a client’s confidential information against unauthorized disclosure may include consideration of the following steps:

- Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
- Investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or

10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider’s security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients’ confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. See Rule 1.4 (mandating communication with clients); see also *N.Y. State 820 (2008)* (addressing Web-based email services).

11. Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. See, e.g., *City of Ontario, Calif. v. Quon*, 130 S. Ct. 2619, 177 L.Ed.2d 216 (2010) (holding that City did not violate Fourth Amendment when it reviewed transcripts of messages sent and received by police officers on police department pagers); *Scott v. Beth Israel Medical Center*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. 2007) (e-mails between hospital employee and his personal attorneys were not privileged because employer’s policy regarding computer use and e-mail monitoring stated that employees had no reasonable expectation of privacy in e-mails sent over the employer’s e-mail server). But see *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 990 A.2d 650 (2010) (despite employer’s e-mail policy stating that company had right to review and disclose all information on “the company’s media systems and services” and that e-mails were “not to be considered private or personal” to any employees, company violated employee’s attorney-client privilege by reviewing e-mails sent to employee’s personal

attorney on employer's laptop through employee's personal, password-protected e-mail account).

12. This Committee's prior opinions have addressed the disclosure of confidential information in metadata and the perils of practicing law over the Internet. We have noted in those opinions that the duty to "exercise reasonable care" to prevent disclosure of confidential information "may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks" in transmitting information electronically. *N.Y. State 782* (2004), citing *N.Y. State 709* (1998) (when conducting trademark practice over the Internet, lawyer had duty to "stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost"); see also *N.Y. State 820* (2008) (same in context of using e-mail service provider that scans e-mails to generate computer advertising). The same duty to stay current with the technological advances applies to a lawyer's contemplated use of an online data storage system.

California State Bar Ethics Formal Op. 2010-179 provides a detailed consideration of factors:

- i) Consideration of how the particular technology differs from other media use. For example, while one court has stated that, "[u]nlike postal mail, simple e-mail generally is not 'sealed' or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted)" (*American Civil Liberties Union v. Reno* (E.D. Pa. 1996) 929 F. Supp. 824, 834, aff'd (1997) 521 U.S. 844 [117 S.Ct. 2329]), most bar associations have taken the position that the risk of a third party's unauthorized review of e-mail (whether by interception or delivery to an unintended recipient) is similar to the risk that confidential client information transmitted by standard mail service will be opened by any of the many hands it passes through on the way to its recipient or will be misdirected⁷¹ (see, e.g., *ABA Formal Op. No. 99-413K*^{8/} [concluding that attorneys have a reasonable expectation of privacy in e-mail communications, even if unencrypted, "despite some risk of interception and disclosure"]; *Los Angeles County Bar Assn. Formal Op. No. 514* (2005) ["Lawyers are not required to encrypt e-mail containing confidential client communications because e-mail poses no greater risk of interception and disclosure than regular mail, phones or faxes."]; *Orange County Bar Assn. Formal Op. No. 97-0002* [concluding use of encrypted e-mail is encouraged, but not required].) (See also *City of Reno v. Reno Police Protective Assn.* (2003) 118 Nev. 889, 897-898 [59 P.3d 1212] [referencing an earlier version of section 952 of the California Evidence Code and concluding "that a document transmitted by e-mail is protected by the attorney-client privilege as long as the requirements of the privilege are met."].)

ii) *Whether reasonable precautions may be taken when using the technology to increase the level of security.*^{9/} *As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure. For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pickup by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remains so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended. (See David Ries & Reid Trautz, Law Practice Today, "Securing Your Clients' Data While On the Road," October 2008 [noting reports that "as many as 10% of laptops used by American businesses are stolen during their useful lives and 97% of them are never recovered"].)*

iii) *Limitations on who is permitted to monitor the use of the technology, to what extent and on what grounds. For example, if a license to use certain software or a technology service imposes a requirement of third party access to information related to the attorney's use of the technology, the attorney may need to confirm that the terms of the requirement or authorization do not permit the third party to disclose confidential client information to others or use such information for any purpose other than to ensure the functionality of the software or that the technology is not being used for an improper purpose, particularly if the information at issue is highly sensitive. Under Rule 5.3 [of the MRPC], a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard. [Citation.] In connection with this inquiry, a lawyer might be well-advised to secure from the*

service provider in writing, along with or a part from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality." (ABA Formal Opn. No. 95-398.)

Many attorneys, as with a large contingent of the general public, do not possess much, if any, technological savvy. Although the Committee does not believe that attorneys must develop a mastery of these security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant (Cf. Rules Prof. Conduct, rule 3-110(C) ["If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before Performance required."].)

- b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person's electronic information. The fact that a third party could be subject to criminal charges or civil claims for intercepting, accessing or engaging in unauthorized use of confidential client information favors an expectation of privacy with respect to a particular technology. (See, e.g., 18 U.S.C. § 2510 et seq. [Electronic Communications Privacy Act of 1986]; 18 U.S.C. § 1030 et seq. [Computer Fraud and Abuse Act]; Pen. Code, § 502(c) [making certain unauthorized access to computers, computer systems and computer data a criminal offense]; Cal. Pen. Code, § 629.86 [providing a civil cause of action to "[a]ny person whose wire, electronic pager, or electronic cellular telephone communication is intercepted, disclosed, or used in violation of [Chapter 1.4 on Interception of Wire, Electronic Digital Pager, or Electronic Cellular Telephone Communications]."]; eBay, Inc. v. Bidder's Edge, Inc. (N.D. Cal. 2000) 100 F. Supp. 2d 1058, 1070 [in case involving use of web crawler that exceeded plaintiff's consent, court stated "[c]onduct that does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another's personal property, is insufficient to establish a cause of action for trespass to chattel."].)

- c) The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and m

ay have an interest in the information being disclosed that is in conflict with the client's interest, the attorney should take precaution to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion.

- d) *Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges. Section 917(a) of the California Evidence Code provides that "a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship... is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (Evid. Code, § 917(a).) Significantly, subsection (b) of section 917 states that such a communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." (Evid. Code, § 917(b). See also Penal Code, § 629.80 ["No other wise privileged communication intercepted in accordance with, or in violation of; the provisions of [Chapter 1.4] shall lose its privileged character."]; 18 U.S.C. § 2517(4) ["No other wise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of; the provisions or [18 U.S.C. § 2510 et seq.] shall lose its privileged character."].) While these provisions seem to provide a certain level of comfort in using technology for such communications, they are not a complete safeguard. For example, it is possible that, if a particular technology lacks essential security features, use of such technology could be deemed to have waived these protections. Where the attorney-client privilege is at issue, failure to use sufficient precautions may be considered in determining waiver. Further, the analysis differs with regard to an attorney's duty of confidentiality. Harm from waiver of attorney-client privilege is possible depending on if and how the information is used, but harm from disclosure of confidential client information may be immediate as it does not necessarily depend on use or admissibility of the information, including as it does matters which would be embarrassing or would likely be detrimental to the client if disclosed.*
- e) *The urgency of the situation. If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions.*
- t) *Client instructions and circumstances. If a client has instructed an attorney not to use certain technology due to confidentiality or other concerns or an attorney is aware that others have access to the client's electronic devices or accounts and may intercept or be exposed to confidential client information, then such technology should not be used in the course of the representation.*

(footnotes omitted)

These Opinions⁷ recognize the reality that a lawyer cannot, and is not required to, absolutely guarantee the confidentiality of client information but must act competently to preserve that confidentiality. Indeed, competent representation of and adequate communication with clients requires entrusting client information to third parties, such as messengers and the U.S. Mail.

However, with respect to digitally stored information there is no consensus or legal basis, as with the U.S. Mail, that there is a reasonable expectation of privacy. While lawyers appropriately do not regard special measures or client consent as necessary prerequisites to use of the U.S. Mail in the course of a client representation, that is not necessarily the case if a lawyer intends to use third-party providers for the digital storage of client information.

At present, there is no Rules based requirement as to what steps a lawyer should take before using a third-party provider, but lawyers should consider the following guidelines:

- 1) **Be aware of the need to become knowledgeable about the rudiments of digital security or recognize the need for outside expertise:** In order to fulfill the duty to act competently to preserve the confidentiality of client information when using a third-party service provider, the lawyer, the lawyer must at least know enough to ask the right questions. This does not mean that the lawyer must become a computer expert to review the security measures. Rather, the lawyer should make reasonable inquiry into security measures and be satisfied with the answers. Many lawyers are sufficiently technologically knowledgeable to do this on their own, but if this is not the case, some outside advice may be required.
- 2) **Be mindful of the type of information being stored:** Comment [17] to SCR 20:1.6 notes that special circumstances may warrant special precautions. An example of this lies in the use of e-mail. When the possibility of e-mail communications became realistic in the practice of law, some questioned whether the use of e-mail violated a lawyer's duty of confidentiality under SCR 20:1.6. One of the main causes for concern was the fact that e-mail routinely passes through servers controlled by third parties (e.g. the main e-mail service providers). These concerns were largely put to rest by *ABA Formal Opinion 99-413*,⁸ which opined that unencrypted e-mail has a reasonable expectation of privacy, like telephone and mail, and therefore was ethically permissible for lawyers to use when transmitting information relating to the representation of a client. That being said, when dealing with particularly sensitive information, such as some types of intellectual property, a lawyer should discuss the risks of e-mail with the client and abide by a client's instructions. It is not unusual for lawyers handling sensitive patent matters to encrypt e-mail communications. Similarly, lawyers should bear in mind that particularly sensitive client information may require extra security measures from a third party provider.
- 3) **Be aware of the actual terms-of-service of the third-party provider:** The way that the lawyer actually acts competently to preserve confidentiality when using a third-party

⁷ See also Arizona Ethics Opinion 05-04 (2005) and North Carolina 2008 Formal Ethics Opinion 5 (2008).

⁸ There were earlier ethics opinion reaching a similar conclusion, but the ABA opinion of most often cited.

service provider is by taking reasonable steps to ensure that the third-party service provider can and will act competently to preserve confidentiality.⁹ At a minimum, the lawyer should:

- a. Ensure that the third party understands the lawyers obligation to keep the information confidential; and
- b. Ensure that the third party is itself obligated to keep the information confidential¹⁰; and
- c. Ensure that reasonable measures are employed to preserve the confidentiality of the files.

This means that the lawyer should review the terms of service contract (not just promotional materials) to make sure that the above criteria are satisfied. In reviewing the terms of service contract, the ABA's Ethics 20/20 Commission¹¹ recommends that lawyer should consider the following factors:

- unauthorized access to confidential client information by a vendor's employees (or sub-contractors) or by outside parties (e.g., hackers) via the Internet
- the storage of information on servers in countries with fewer legal protections for electronically stored information
- a vendor's failure to back up data adequately
- unclear policies regarding ownership of stored data
- the ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business
- the provider's procedures for responding to (or when appropriate, resisting) government requests for access to information
- policies for notifying customers of security breaches
- policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms
- insufficient data encryption

It is not a necessity that a lawyer always resolve every issue, but if the terms of service contract cannot offer reasonable assurances with respect to the above referenced issues, that should serve as a red flag for that particular service provider.

- 4) Client notification/consent:** There is currently no definitive answer as to whether a lawyer must obtain a client's informed consent to use a third-party provider for storage of client information. There is no answer in the Rules and ethics opinions considering this issue are split. As prudent risk management, however, lawyers should at least consider placing an explanation of the fact that

⁹ See also SCR 20:5.3, requiring lawyers to take reasonable steps to ensure that measures are in place that give reasonable assurance that non-lawyers associated with the lawyer comport their behavior with the Rules.

¹⁰ For example, the lawyer may wish to insert a clause in the service contract requiring the service provider to maintain the confidentiality of client information, or ensure that the service provider has and enforces such a policy on their own.

¹¹ The 20/20 Commission was established to consider a variety of issues affecting the practice of law in the 21st century and recommend as to whether changes should be made to the Model Rules to reflect such changes in the practice of law.

a lawyer uses such providers, that the lawyer believes such information to be secure and inviting the client to discuss any concerns with the lawyer.

- 5) **Client notification:** While there may be uncertainty as to whether client consent for the use of third-party service providers is required, there is no question that if a lawyer learns that a client's information has been accessed or acquired by an unauthorized user, SCR 20:1.4 requires that the lawyer notify the client of the breach and its foreseeable consequences.

APPENDIX B: SCR 20:1.6

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall 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 reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

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

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

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

(3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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

WISCONSIN COMMITTEE COMMENT

The rule retains in paragraph (b) the mandatory disclosure requirements that have been a part of the Wisconsin Supreme Court Rules since their initial adoption. Paragraph (c) differs from its counterpart, Model Rule 1.6(b), as necessary to take account of the mandatory disclosure requirements in Wisconsin. The language in paragraph (c)(1) was changed from "reasonably certain" to "reasonably likely" to comport with sub. (b). Due to substantive and numbering differences, special care should be taken in consulting the ABA Comment.

ABA COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] 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. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is

permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers 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.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate

protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

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

Acting Competently to Preserve Confidentiality

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

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

Former Client

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