



Ethics Lessons from TV Lawyers: “The Good Wife”

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Why *The Good Wife*?

Several legal commentators have written about the ethical errors that occur with regularity on *The Good Wife*. In each episode, there are at least two or three actions that would get any lawyer sanctioned, if not disbarred, yet there are rarely consequences for those unethical actions. Even worse, many of those actions seem to be portrayed as “good lawyering.” While TV shows are not meant to be academic instruction on the legal system, the misrepresentations of the profession and its standards of conduct do real harm. Not only do the misrepresentations damage respect for the rule of law and the legal system, they also damage the lawyer-client relationship.¹

The following scenarios will examine some of the ethical issues raised by *The Good Wife*, how the lawyers resolved those issues, and how the lawyers should have resolved the issues. These scenarios will also explore the role of professionalism and how it relates to the lawyer’s ethical duties.

1. Ransomware

Diane Lockhart, already overwhelmed by dripping water and roaches in her new law firm’s office, clicks on an unknown link in an email allegedly from her partner Alicia Florrick. Suddenly, all the computers in the office go dark and a message pops up on Diane’s computer that says she has 72 hours to pay \$50,000 or else all of the files in the entire firm – on phones, laptops and desktop computers – will be deleted. She learns from one of her colleagues that the firm has no dedicated IT services and that none of the files have been backed up. The firm decides to pay the ransom rather than risk losing clients and public humiliation.

- What Rules of Professional Conduct, if any, did Diane violate?
- What Rules of Professional Conduct, if any, did Alicia violate?

Some Real Life Examples

In February 2015, a San Diego attorney received an email with an address ending in usps.gov. Thinking he had received a legitimate email from the U.S. Postal Service, he clicked on the attachment. He lost \$289,000 from his bank account to hackers who likely installed a virus that recorded his keystrokes. His bank declined to cover the loss.

Some laptops are more vulnerable to hackers than others. Until recently, Lenovo’s laptops came with Superfish adware pre-installed. Lenovo uses Superfish software to funnel advertising onto Google search results that Lenovo wants users to see. By doing this, Superfish software throws open encryptions by giving itself authority to take over connections and declare them as trusted and secure, even when they are not. Hackers can then commandeer these connections and “eavesdrop.” Superfish is no longer pre-installed and has been disabled on all products in the market since January 2015, when Lenovo also stopped pre-installing the software.

¹Christopher S. Krimmer, *I Blame The Good Wife for My Disappointed Clients*, Wis. Law., June 2014.
<http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=87&Issue=6&ArticleID=11605>

2. Eavesdropping

The webcam in opposing counsel's office is accidentally left on after a teleconferenced deposition was adjourned. Alicia and three other lawyers in her firm watch and listen as opposing counsel discuss firm politics. Two of the lawyers debate whether the Rules of Professional Conduct prohibit them from watching and listening as they look up the Rules on their cellphones. One lawyer compares watching and listening to "dumpster diving."

Alicia tries to tell opposing counsel that their webcam is still on, but apparently opposing counsel cannot hear her. Alicia decides that they should not continue to watch and listen. As she begins to turn off the system, she hears opposing counsel say that her firm will be "done and gone in 48 hours."

"They just said they're going to destroy us in 48 hours: that changes everything," Alicia proclaims. She and the three other lawyers from the firm continue to watch and listen.

- What duties, if any, under the Rules of Professional Conduct, do Alicia and the other lawyers in her firm owe to opposing counsel?
- What Rules of Professional Conduct, if any, did Alicia and the other lawyers in her firm violate?
- What Rules of Professional Conduct, if any, did opposing counsel violate?

3. A Duty to Distract?

Alicia represents a fired female CEO in a sex discrimination suit against her former company. On the first day of trial, Alicia is surprised when Elsbeth Tascioni appears as co-counsel for the company.

Elsbeth was a lawyer for Alicia's husband on his appeal of corruption charges. Elsbeth also helped defend Alicia against pressure from the Department of the Treasury to obtain information about an alleged terrorist that Alicia was representing.

Although Elsbeth appears flighty and absent-minded, she has a keen legal mind. She also has a penchant for seeing animated images of certain animals and objects. These animated images distract her, especially while she is trying to examine a witness or make an objection. Alicia presumably knows of this penchant due to her prior relationship with Elsbeth.

Alicia befuddles Elsbeth in court by placing a picture of penguins and a steamship where Elsbeth can see them. Alicia even wears a pair of gaudy earrings after Elsbeth gets sidetracked by a client's brooch.

- What Rules of Professional Conduct, if any, did Alicia violate?
- If no Rules were violated, do Alicia's actions evidence a lack of professionalism? Do the Rules require Alicia to take these actions?
- What Rules, if any, did Elsbeth violate?

4. Stern Warnings?

Jonas Stern is the founding partner of Stern, Lockhart and Gardner where Alicia is an associate after having spent the previous thirteen years as a stay-at-home mother.

Stern was charged with a DUI and battery, but the charges resulted from the medication he has been taking for progressive dementia, not from alcohol. To prevent others from learning about his dementia, he left the scene of the accident and went to a bar. When arrested, his blood alcohol content was above the legal limit.

Stern asks Alicia to represent him because she had successfully represented his daughter. Stern does not tell Alicia about his dementia. She is unsure how to proceed with representation because Stern is not providing her with any information. She tells the firm's investigator, Kalinda, that she "needs more help." Kalinda picks the lock on a small chest on Stern's desk and then photographs the medication container in the chest. The medication is one that is prescribed to treat progressive dementia.

- What Rules of Professional Conduct, if any, did Kalinda violate?
- What Rules of Professional Conduct, if any, did Alicia violate?

Alicia confronts Stern about the medication. She does not tell him how she found out about the medication: she merely tells him that her father-in-law had dementia. Although Stern is facing jail time and his condition is his defense, he orders Alicia not to disclose his condition to anyone, not in his defense and not to any of the other attorneys in the firm. He reminds her of obligations under the attorney-client privilege.

- What Rules of Professional Conduct, if any, did Alicia violate? What ethical obligations does Alicia owe to Stern? What ethical obligations does Alicia owe to the firm?
- What Rules of Professional Conduct, if any, did Stern violate? What ethical obligations does Stern owe to the firm? What ethical obligations does Stern owe to his clients?

Stern then announces that he is leaving the firm and taking most of the clients with him. Alicia warns him about his ethical duty, and he once again reminds her that she is prohibited by the attorney-client privilege from disclosing his condition to anyone. He assures Alicia that he "will zealously represent [his] clients with a team of young and hungry lawyer to back [him] up."

- What Rules of Professional Conduct, if any, did Stern violate? What ethical obligations does Stern owe to the young lawyers that he is recruiting for his new firm? What ethical obligations does Stern owe to his clients?
- What Rules of Professional Conduct, if any, did Alicia violate? What ethical obligations, if any, does Alicia owe to the firm's clients who may be departing with Stern? What ethical obligations, if any, does Alicia owe to the young lawyers from the firm who are leaving to join Stern's new firm?

After Stern leaves the firm, he surprises Lockhart Gardner when he becomes successor counsel for a widow who is seeking punitive damages for her husband's death. The widow claims that the newspaper is liable because it recklessly placed her husband at risk. A Muslim extremist group claimed responsibility for the pipe bomb explosion after the newspaper published a controversial

political cartoon showing an image of the Prophet Muhammad being humiliated. Lockhart Gardner represents the newspaper.

When Stern and Alicia meet at a settlement negotiation conference, Stern once again reminds Alicia of her obligations under the attorney-client privilege.

Stern also has a not-so-secret agenda for representing the widow: he wants to destroy Lockhart Gardner and take all its clients.

- What Rules of Professional Conduct, if any, did Stern violate?
- What Rules of Professional Conduct, if any, did Alicia violate?

When the head of the litigation department, who was assigned to try the case, is unable to do so, Diane Lockhart assigns Alicia to do so. The following discussion ensues between Alicia and Kalinda (the firm's investigator and the only other person in the firm other than Alicia who knows of Stern's dementia).

Kalinda: "The fact is that you know something about Stern that nobody else knows."

Alicia: "I can't use it, Kalinda."

Kalinda: "You can't not use it."

Alicia: "It violates attorney-client privilege."

Kalinda: "Only if you tell someone. So don't tell someone."

During Stern's cross-examination of the newspaper's owner, Alicia continues to object to his questions even though the judge overrules her objections. She even withdraws one of her objections. The constant interruptions cause Stern to lose his concentration. He becomes angry and lashes out at the court.

- What Rules of Professional Conduct, if any, did Alicia violate?

Stern writes a note in court to Diane Lockhart offering to settle for \$350,000, which is a huge reduction from the multi-millions claimed in the complaint. Diane writes out a counter offer of \$250,000 and passes it back to him. He wearily nods his head.

- What Rules of Professional Conduct, if any, did Alicia violate?
- What Rules of Professional Conduct, if any, did Stern violate?

Wisconsin Formal Ethics Opinion EF-15-01:
Ethical Obligations of Attorneys Using Cloud Computing

March 23, 2015

Synopsis

A lawyer may use cloud computing as long as the lawyer uses reasonable efforts to adequately address the risks associated with it. The Rules of Professional Conduct require that lawyers act competently to protect client information and confidentiality as well as to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed.

To be reasonable, the lawyer's efforts must be commensurate with the risks presented. Among the factors to be considered in assessing that risk are the information's sensitivity; the client's instructions and circumstances; the possible effect that inadvertent disclosure or unauthorized interception could pose to a client or third party; the attorney's ability to assess the technology's level of security; the likelihood of disclosure if additional safeguards are not employed; the cost of employing additional safeguards; the difficulty of implementing the safeguards; the extent to which the safeguards adversely affect the lawyer's ability to represent clients; the need for increased accessibility and the urgency of the situation; the experience and reputation of the service provider; the terms of the agreement with the service provider; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

To determine what efforts are reasonable, lawyers should understand the importance of computer security, such as the use of firewalls, virus and spyware programs, operating systems updates, strong passwords and multifactor authentication, and encryption for information stored both in the cloud and on the ground. Lawyers should also understand the dangers of using public Wi-Fi and file sharing sites. Lawyers who outsource cloud computing services should understand the importance of selecting a provider that uses appropriate security protocols. Lawyers should also understand the importance of regularly backing up data and storing data in more than one place. A lawyer may consult with someone who has the necessary knowledge to help determine what efforts are reasonable.

Introduction

Technology has dramatically changed the practice of law in many ways, including the ways in which lawyers process, transmit, store, and access client information. Perhaps no area has seen greater change than "cloud computing." While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely "a fancy way of saying stuff's not on your

computer.”¹ In other words, cloud computing includes the processing, transmission, and storage of the client’s information using shared computer facilities or remote servers owned or leased by a third-party service provider.² These facilities and services are accessed over the Internet by the lawyer’s networked devices such as computers, tablets, and smart phones.³

Many lawyers welcome cloud computing as a way to reduce costs, improve efficiency, and provide better client service. The cloud service provider assumes responsibility for infrastructure, application software, development platforms, developer and programming staff, licensing, updates, security and maintenance, while the lawyer enjoys access to the client information from any location that has Internet access. Along with the lawyer’s increased accessibility comes the loss of direct control over the client’s information. The provider of cloud computing adds a layer of risk between the lawyer and client’s information because most of the physical, technical, and administrative safeguards are managed by the cloud service provider. Yet the ultimate responsibility for insuring the confidentiality and security of the client’s information lies with the lawyer.

As cloud computing becomes more ubiquitous and as clients demand more efficiency, the question for counsel is no longer whether to use cloud computing, but how to use cloud computing safely and ethically. Lawyers may disagree about how to balance the competing risks of security breaches and provider outages, on the one hand, and the convenience of access and protection from natural or local disasters, on the other. Yet, whatever decision a lawyer makes must be made with reasonable care, and the lawyer should be able to explain what factors were considered in making that decision.

Ethics opinions from other states that have addressed the issue of cloud computing have generally concluded that a lawyer may use cloud computing if the lawyer uses reasonable efforts to adequately address the risks in doing so.⁴ But the definition of what is reasonable varies.

The State Bar’s Standing Committee on Professional Ethics (the “Committee”) agrees with the conclusion of ethics opinions from other states that cloud computing is permissible as long as the lawyer uses reasonable efforts to adequately address the potential risks associated with it. Part I of this opinion

¹ Pennsylvania Bar Ass’n Comm. on Legal Ethics and Professional Responsibility Formal Ethics Opinion 2011-200 (2011), at 1 (quoting Quinn Norton, “Byte Rights,” *Maximum PC*, September 2010, at 12). A more detailed definition is difficult to formulate because cloud computing is not a single system, but includes different technologies, configurations, service models, and deployment models. For example, cloud computing encompasses web-based email, online data storage, software-as-a-service (SaaS), platform-as-a-service (PaaS), and infrastructure-as-a-service (IaaS). Deployment models include public clouds, private clouds, hybrid clouds, and managed clouds.

² “These remote servers may be hosted in data centers worldwide, allowing cloud service providers to distribute computing power, storage capacity and data across their data centers dynamically to provide fast delivery and on-demand bandwidth.” Stuart D. Levi and Kelly C. Riedel, “Cloud Computing: Understanding the Business and Legal Issues,” *Practical Law*, <http://us.practicallaw.com/8-501-5479>

³ The National Institute of Standards and Technology defines cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.” Wayne Jansen & Timothy Grance, Guidelines on Security and Privacy in Public Cloud Computing, U.S. Department of Commerce, Special Publication # 800-145 (September 2011). Almost any information technology or computing resource can be delivered as a cloud service.

⁴ Appendix A to this opinion provides a brief description of the ethics opinions from other states.

identifies the specific rules of Wisconsin's Rules of Professional Conduct for Attorneys that are implicated by cloud computing and the duties imposed by those rules. Part II of this opinion discusses what constitutes reasonable efforts to protect the lawyer's access to and the confidentiality of client information.

Part I: The Applicable Rules

Several rules are implicated by the use of cloud computing. These rules are SCR 20:1.1 Competence, SCR 20:1.4 Communication, SCR 20:1.6 Confidentiality, and SCR 20:5.3 Responsibilities regarding nonlawyer assistants.

A. SCR 20:1.1 Competence

SCR 20:1.1 requires a lawyer to perform legal services competently.⁵ ABA Comment [8] to Model Rule 1.1, amended in 2012, recognizes that technology is an integral part of contemporary law practice and explicitly reminds lawyers that the duty to remain competent includes keeping up with technology.

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

Moreover, ABA Comment [5] recognizes that competency also requires the "use of methods and procedures meeting the standards of competent practitioners."

Lawyers who use cloud computing have a duty to understand the use of technologies and the potential impact of those technologies on their obligations under the applicable law and under the Rules. In order to determine whether a particular technology or service provider complies with the lawyer's professional obligations, a lawyer must use reasonable efforts. Moreover, as technology, the regulatory framework, and privacy laws change, lawyers must keep abreast of the changes.

B. SCR 20:1.4 Communication

SCR 20:1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions concerning the representation.⁶ While it is not necessary for a

⁵ SCR 20:1.1 Competence

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

⁶ SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

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

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

(4) promptly comply with reasonable requests by the client for information; and

lawyer to communicate every detail of a client's representation, the client should have sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued.⁷ Of concern is whether a lawyer must inform the client of the means by which the lawyer processes, transmits, and stores the client's information in all representations or only when the circumstances call for it, such as where the information is particularly sensitive.

None of the ethics opinions have suggested that a lawyer is required in all representations to inform the client of the means by which the lawyer processes, transmits, and stores information. One ethics opinion, however, suggests that a lawyer should consider giving notice to the client about the proposed method for storing client information.⁸ Yet, lawyers' remote storage of client information is not a new occurrence: lawyers have been using off-site brick-and-mortar storage facilities for many years. Another opinion suggests that "it may be necessary, depending on the scope of representation and the sensitivity of the data involved, to inform the client of the nature of the attorney's use of 'cloud computing' and the advantages as well as the risks endemic to online storage and transmission."⁹

While none of the ethics opinions have suggested that a client's informed consent is required in all instances before a lawyer may use cloud computing, one opinion has suggested that client consent may be necessary to use a third-party service provider when the information is highly sensitive.¹⁰ If consent is required, SCR 20:1.4(a)(1) requires that the lawyer promptly inform the client.

The Committee agrees with other ethics opinions that a lawyer is not required in all representations to inform the client that the lawyer uses the cloud to process, transmit or store information. SCR 20:1.4 does not require the lawyer to inform the client of every detail of representation. It does, however, require the lawyer to provide the client with sufficient information so that the client is able to meaningfully participate in his or her representation. "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."¹¹

While a lawyer is not required in all representations to inform clients that the lawyer uses the cloud to process, transmit or store information, a lawyer may choose, based on the needs and expectations of the clients, to inform the clients. A provision in the engagement agreement or letter is a convenient way to provide clients with this information.

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

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

⁷ SCR 20: 1.4 ABA Comment [5].

⁸ Vt. Ethics Op. 2010-6 (2011) at 7.

⁹ Pa. Ethics Op. 2011-200 at 6.

¹⁰ N.H. Ethics Op. 2012-13/4 at 2.

¹¹ SCR 20:1.4 ABA Comment [5] (2012).

If there has been a breach of the provider's security that affects the confidentiality or security of the client's information, SCR 20:1.4(a)(3) and SCR 20:1.4(b) require the lawyer to inform the client of the breach.

C. SCR 20:1.6 Confidentiality

The duty to protect information relating to the representation of the client is one of the most significant obligations imposed on the lawyer. SCR 20:1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless that client gives informed consent or unless the disclosure is impliedly authorized in order to carry out the representation.¹² The processing, transmission, and storage of information in the cloud may be deemed an impliedly authorized disclosure to the provider as long as the lawyer takes reasonable steps to ensure that the provider of the cloud computing services has adequate safeguards.¹³

Although a lawyer has a professional duty to protect information relating to the representation of the client from unauthorized disclosure, this duty does not require any particular means of handling protected information and does not prohibit the employment of service providers who may handle documents or data containing protected information. Lawyers are not required to guarantee that a breach of confidentiality cannot occur when using a cloud service provider, and they are not required to use only infallibly secure methods of communication.¹⁴ They are, however, required, to use reasonable efforts to protect information relating to the representation of their clients from unauthorized disclosure.

The 2012 revision of ABA Model Rule 1.6 and its Comment made "clear that a lawyer has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure, unauthorized disclosure, and unauthorized access, regardless of the medium used."¹⁵ A new

¹² The provisions in SCR 20:1.6(b) and (c) are not implicated in cloud computing.

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.

¹³ Pa. Ethics Op. 2011-200 at 6.

¹⁴ A.B.A. Comm'n on Ethics 20/20 *Introduction & Overview*, at 8 (August 2012).

¹⁵ A.B.A. Comm'n on Ethics 20/20 *Introduction & Overview*, at 8 (August 2012).

paragraph was added to Model Rule 1.6 stating that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”¹⁶

Moreover, the 2012 revision of ABA Comment [18] to Model Rule 1.6 emphasizes that unauthorized access to or the inadvertent or unauthorized disclosure of information relating to the representation of a client does not constitute a violation of the rule “if the lawyer has made reasonable efforts to prevent the access or disclosure.” The comment identifies a number of factors to be considered in determining the reasonableness of the lawyer’s efforts. These factors “include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).”¹⁷

¹⁶ Model Rules of Prof’l Conduct R. 1.6(c) (2012). The numbering for SCR 20:1.6 differs from the Model Rule 1.6 because Wisconsin retains in our paragraph (b) the mandatory disclosure requirements that have been a part of the Wisconsin Supreme Court Rules since their initial adoption. SCR 20:1.6(c) contains the discretionary disclosure requirements. Wisconsin Committee Comment to SCR 20:1.6.

¹⁷ ABA Comment [18] to Model Rule 1.6 states:

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and 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. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

Similarly, the 2012 revision of ABA Comment [19] requires a lawyer, when transmitting a communication that includes information relating to the representation of the client, to take reasonable precautions to prevent the information from coming into the hands of unintended recipients. ABA Comment [19] to Model Rule 1.6 states:

[19] 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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

A lawyer using cloud computing may encounter circumstances that require unique considerations to secure client confidentiality. For example, if a server used by a cloud service provider is physically located in another country, the lawyer must be sure that the data on that server are protected by laws that are as protective as those of the United States. Whether a lawyer is required to take additional precautions to protect a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.¹⁸

D. SCR 20:5.3 Responsibilities regarding nonlawyer assistants

Although a lawyer may use nonlawyers outside the firm to help provide legal services, SCR 20:5.3 requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.¹⁹ The extent of this obligation when using a cloud service provider to process, transmit, store, or access information protected by the duty of confidentiality will depend greatly on the experience, stability, security measures and reputation of the provider as well as the nature of the information relating to the representation of the client.

ABA Comment [3], added as part of the 2012 revisions, identifies distinct concerns that arise when services are performed outside the firm. It recognizes that nonlawyer services can take many forms, such as services performed by individuals and services performed by automated products. It identifies the factors that determine the extent of the lawyer's obligations when using such services, and it also references other Rules of Professional Conduct that the lawyer should consider when using such services. Comment [3] also emphasizes that the lawyer has an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, when a lawyer retains an investigative service, the lawyer may not be able to directly supervise how a particular investigator completes an assignment, but the lawyer's instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator's conduct is compatible with the lawyer's professional obligations.²⁰

¹⁸ Model Rules of Prof'l Conduct R. 1.6 Comment [18] (2012).

¹⁹ SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

²⁰ ABA Comment [3] to Model Rule 5.3 states:

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When

ABA Comment [4], also added as part of the 2012 revisions, recognizes that clients sometimes direct lawyers to use particular nonlawyer service providers.²¹ In such situations, the Comment advises that the lawyer should ordinarily consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring²² the performance of the nonlawyer services.

Part II: Reasonable Efforts

The Rules of Professional Conduct do not impose a strict liability standard on lawyers who use cloud computing, and none of the ethics opinions require extraordinary efforts or a guarantee that information will not be inadvertently disclosed or that the information will always be accessible when needed.²³ Instead, the Rules require that lawyers act competently to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed, as well as to protect client information from unauthorized access and disclosure, whether intentional or inadvertent. Competency requires the lawyer to make reasonable efforts; and to be reasonable, those efforts must be commensurate with the risk presented.

using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

²¹ ABA Comment [4] to Model Rule 5.3 states:

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

²² The ABA Commission on Ethics 20/20 acknowledged that the word "monitoring" reflects "a new ethical concept," but concluded that the new concept was needed because it may not be possible for the lawyer to "directly supervise" a nonlawyer when the nonlawyer is performing the services outside the firm. Report to the House of Delegates Resolution 105C, Report p. 8. The word "monitoring" makes it clear that the lawyer has an obligation to remain aware of how nonlawyer services are being performed. The Comment also reminds lawyers that they have duties to tribunal that may not be satisfied through compliance with this Rule. For example, if a client instructs a lawyer to use a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client because the lawyer may have to make certain representations to the tribunal regarding the vendor's work. *Id.*

²³ As one ethics opinion stated: "Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax." N.J. Advisory Committee on Professional Ethics Op. No. 701 (2006).

What constitutes reasonable efforts has been the subject of much discussion. It has been suggested that some of the ethics opinions may place unrealistic demands on attorneys.²⁴ At the same time, it has been suggested that “[i]n sum, basic knowledge of cybersecurity has become an essential lawyer competency.”²⁵

This Committee agrees with other ethics opinions that lawyers cannot guard against every conceivable danger when using the cloud to process, transmit, store and access client information. This Committee concludes that lawyers must make reasonable efforts to protect client information and confidentiality as well as to protect the lawyer’s ability to reliably access and provide information relevant to a client’s matter when needed. To be reasonable, those efforts must be commensurate with the risks presented. Because technologies differ and change rapidly, the risks associated with those technologies will vary. Moreover, because the circumstances of each law practice vary considerably, the risks associated with those law practices will also vary. Consequently, what may be reasonable efforts commensurate with the risks for one practice may not be for another. And even within a practice, what may be reasonable efforts for most clients may not be for a particular client.

A. Factors to Consider when Assessing the Risks

To be reasonable, the lawyer’s efforts must be commensurate with the risks presented by the technology involved, the type of practice, and the individual needs of a particular client. The ABA in its Comments to Model Rules 1.6 and 5.3 as well as other ethics opinions have identified factors for lawyers to consider when assessing the risks. These factors, which are not exclusive, include:

- the information’s sensitivity;²⁶
- the client’s instructions and circumstances;²⁷

²⁴ One expert in the field of data security, Stuart L. Pardau, points out that some ethics opinions, such as Pennsylvania Ethics Op. 2011-200, direct attorneys to negotiate favorable terms of use with the cloud service providers, even though the opinions acknowledge that the providers’ terms are usually “take it or leave it” and that a typical attorney is powerless to require a cloud provider to do anything beyond the boilerplate terms. Stuart L. Pardau, “But I’m Just a Lawyer: Do Cloud Ethics Opinions Ask Too Much?” *The Professional Lawyer*, Vol. 22, Number 4 2014. Pardau also notes that some opinions require attorneys to know information that they have no practical way of knowing. As examples, Pardau cites Nevada Formal Ethics Op. 33 (2006), which concludes that the attorney will not be responsible for a cloud service provider’s breach of confidentiality if the attorney “instructs and requires the third party contractor to keep the information confidential and inaccessible,” and New Hampshire Ethics Op. 2012-13/4 opinion, which advises that the attorney “must know at all times where sensitive client information is stored, be it in the cloud or elsewhere.” Pardau further observes that “[s]ome of the state bar ethics opinions go too far in requiring attorneys to understand cloud security and monitor providers,” citing Alabama Formal Ethics Op. 2010-02, which states that a lawyer has “a continuing duty to stay abreast of the appropriate safeguards that should be employed by ... the third-party vendor.”

²⁵ Andrew Perlman, “The Twenty-First Century Lawyer’s Evolving Ethical Duty of Competence” *The Professional Lawyer*, Vol. 22, Number 4 2014. Perlman, a law school professor who directs an institute on law practice technology, observes that lawyers “store a range of information in the ‘cloud’ (both private and public) as well as on the ‘ground’ using smartphones, laptops, tablets, and flash drives.” He further observes that this “information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; it can be intercepted in transit; and it can be accessed without permission by foreign governments or the National Security Agency.” He concludes that “[i]n light of these dangers, lawyers need to understand how to competently safeguard confidential information.”

²⁶ ABA Model Rule 1.6 Comment [18]. The more sensitive the information, the less risk an attorney should take.

²⁷ Calif. Formal Ethics Op. 2010-179 (2010). A lawyer must follow the client’s instructions unless doing so would cause the lawyer to violate the Rules of Professional Conduct or other law. Moreover, a lawyer should consider any circumstances that may be

- the possible effect that inadvertent disclosure or unauthorized interception could pose to a client or third party;²⁸
- the attorney's ability to assess the technology's level of security;²⁹
- the likelihood of disclosure if additional safeguards are not employed;³⁰
- the cost of employing additional safeguards;³¹
- the difficulty of implementing the additional safeguards;³²
- the extent to which the additional safeguards adversely affect the lawyer's ability to represent clients;³³
- the need for increased accessibility and the urgency of the situation;³⁴
- the experience and reputation of the service provider;³⁵
- the terms of the agreement with the service provider;³⁶ and
- the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.³⁷

relevant. For example, if the attorney is aware that other people have access to the client's devices or accounts and may intercept client information, the attorney should consider that in assessing the risk.

²⁸ ABA Model Rule 1.6 Comment [18].

²⁹ Calif. Formal Ethics Op. 2010-179 (2010). The opinion concludes:

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 the 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.

Similarly, Iowa Ethics Op. 11-01 (2011) concludes:

The Committee recognizes that performing due diligence regarding information technology can be complex and requires specialized knowledge and skill. This due diligence must be performed by individuals who possess both the requisite technology expertise and as well as an understanding of the Iowa Rules of Professional Conduct. The Committee believes that a lawyer may discharge the duties created by Comment 17 by relying on the due diligence services of independent companies, bar associations or other similar organizations or through its own qualified employees.

³⁰ ABA Model Rule 1.6 Comment [18].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Calif. Formal Ethics Op. 2010-179 (2010).

³⁵ ABA Model Rule 5.3 Comment [3].

³⁶ *Id.*

³⁷ *Id.*

Once the lawyer has assessed the risks by considering the various factors, the lawyer is able to determine what efforts are reasonable to protect against those risks.

B. General Guidance

It is impossible to provide specific requirements for reasonable efforts because lawyers' ethical duties are continually evolving as technology changes. Specific requirements would soon become obsolete. Moreover, the risks vary with the technology involved, the type of practice, and the individual needs of a particular client.³⁸ Lawyers must exercise their professional judgment in adopting specific cloud-based services, just as they do when choosing and supervising other types of service providers, and specific requirements would do little to assist the exercise of professional judgment. It is possible, however, to provide some guidance.

- Lawyers should have “at least a base-level comprehension of the technology and the implications of its use.”³⁹ While attorneys are not required to understand precisely how the technology works, competence requires at least a cursory understanding of the technology used. Such a cursory understanding is necessary to explain to the client the advantages and risks of using the technology in the representation.⁴⁰
- Lawyers should understand the importance of computer security, such as the use of firewalls, virus and spyware programs, operating systems updates, strong passwords and multifactor authentication,⁴¹ and encryption for information stored both in the cloud and on the ground.⁴² Lawyers should also understand the security dangers of using public Wi-Fi and file sharing sites.
- Lawyers who outsource cloud-computing services should understand the importance of selecting a provider that uses appropriate security protocols. “While complete security is never achievable, a prudent attorney will employ reasonable precautions and thoroughly research a cloud storage vendor’s security measures and track record prior to utilizing the service.”⁴³ Knowing the qualifications, reputation, and longevity of the cloud-service provider is necessary, just like knowing the qualifications, reputation, and longevity of any other service provider.

³⁸ For example, the efforts required of a lawyer whose practice is limited to patent law will vary from the efforts required of a lawyer whose practice is limited to family law because the risks presented by a patent law practice differ from risks presented by a family law practice. Even within the patent law practice, the efforts may vary depending on the needs of a particular client.

³⁹ Joshua H. Brand, “Cloud Computing Services – Cloud Storage,” *Minnesota Lawyer* (01/01/2012) at 1. Accessed at http://www.docstoc.com/docs/117971742/Cloud-Computing-Services_-_Cloud-Storage-by-Joshua-H-Brand.

⁴⁰ *Id.*

⁴¹ Multifactor authentication ensures that data can be accessed only if the lawyer has the correct password as well as another form of identification, such as a code sent by text message to the lawyer’s mobile phone.

⁴² “On the ground” refers to the use of smart phones, tablets, laptops, and flash drives.

⁴³ Brand at 2.

- Lawyers should read and understand the cloud-based service provider's terms of use or service agreement.⁴⁴
- Lawyers should also understand the importance of regularly backing up data and storing data in more than one place.
- Lawyers who do not have the necessary understanding should consult with someone who has the necessary skill and expertise, such as a technology consultant, to help determine what efforts are reasonable.⁴⁵
- Lawyers should also consider including a provision in their engagement agreements or letters that, at the least, informs and explains the use of cloud-based services to process, transmit, store and access information. Including such a provision not only gives the client an opportunity to object, but it also provides an opportunity for the lawyer and client to discuss the advantages and the risks.

⁴⁴ Lawyers should pay particularly close attention to the following terms:

Ownership of the Information

Do the terms of use specifically state that the provider has no ownership interest in the information? What happens to the information if the provider goes out of business or if the lawyer decides to terminate the business relationship, or if the lawyer defaults on payments?

Location of the Information

Where is information stored? Many providers replicate the information to data centers or servers in other countries with less stringent legal protections. What is the provider's response to government or judicial attempts to obtain client information?

Security and Confidentiality of Information

What safeguards does the provider have to prevent security breaches? What obligations does the provider have to protect the confidentiality of information? Does the provider agree to promptly notify the lawyer of known security breaches that affect the confidentiality of the lawyer's information?

Service Level

Does the service provider have an uptime guarantee? Most providers agree to a 99.9% uptime, although some providers agree to a higher uptime approaching 99.999%.

Backups

How frequently does the provider backup the information? How easy is it to restore the information from the backup?

Disaster Recovery

Does your provider have a secondary data center or redundant storage that automatically assumes control if disaster strikes the data center or server?

⁴⁵ Wa. Ethics Op. 2215 (2012) concludes:

It is also impractical to expect every lawyer who uses such services to be able to understand the technology sufficiently in order to evaluate a particular service provider's security systems. A lawyer using such a service must, however, conduct a due diligence investigation of the provider and its services and cannot rely on lack of technological sophistication to excuse the failure to do so.

Similarly, the California ethics opinion acknowledges that an attorney need not "develop a mastery of the security features and deficiencies of each technology available," but advises that if an attorney lacks the expertise to evaluate cloud providers, "he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant." Calif. Formal Ethics Op. 2010-179. Likewise, the Arizona ethics opinion concludes that lawyers must "recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field." Ariz. Ethics Op. 09-04 (2009).

Conclusion

Ethics opinions from other states that have addressed the issue of cloud-based services have generally concluded that a lawyer may use cloud computing if the lawyer takes reasonable care in doing so. This Committee agrees with the opinions issued by other states that cloud computing is permissible as long as the lawyer adequately addresses the potential risks associated with it. The Committee concludes that lawyers must make reasonable efforts to protect client information and confidentiality as well as to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed. To be reasonable, those efforts must be commensurate with the risks presented. Lawyers must exercise their professional judgment when adopting specific cloud-based services, just as they do when choosing and supervising other types of service providers.

Appendix A

Cloud Ethics Opinions

Alabama

Alabama State Bar Disciplinary Commission

Ala. Ethics Op. 2010-02 (2010)

Lawyers may outsource the storage of client files through cloud computing if reasonable steps are taken to make sure the information is protected. Lawyers must be knowledgeable about how the data will be stored and its security, and must reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Lawyers must also stay abreast of security safeguards.

Arizona

State Bar of Arizona Committee on the Rules of Professional Conduct

Ariz. Ethics Op. 09-04 (2009)

Lawyers may use an online file storage and retrieval system that enables clients to access their files as long as the lawyers take reasonable precautions to protect the security and confidentiality of the information. Lawyers must “recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field.” Lawyers must also periodically review the security measures. “If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider.”

California

State Bar of California Standing Committee on Professional Responsibility and Conduct

Calif. Formal Ethics Op. 2010-179 (2010)

A lawyer’s duties of confidentiality and competence require the lawyer to take appropriate steps to ensure that his or her use of technology does not subject client information to an undue risk of unauthorized disclosure. Among the factors to be considered are the technology’s level of security, the information’s sensitivity, the urgency of the matter, the possible effect inadvertent disclosure or unauthorized interception could pose to a client or third party, as well as client instructions and circumstances.

With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so.

Connecticut

Connecticut Bar Association Professional Ethics Committee

Conn. Informal Ethics Op. 2013-07(2013)

A “lawyer outsourcing cloud computing tasks (of transmitting, storing and processing data) must exercise reasonable efforts to select a cloud service provider whose conduct is compatible with the professional obligations of the lawyer and is able to limit authorized access to the data, ensure that the data is preserved (“backed up”), reasonably available to the lawyer, and reasonably safe from unauthorized intrusion.” The Professional Ethics Committee acknowledged that although the technology examined by it in 1999 might now be obsolete, “the need for a lawyer to thoughtfully and thoroughly evaluate the risks presented by the use of current technology remains as vital as ever.” As concluded by the Committee in 1999, the lawyer’s efforts must be commensurate with the risk presented. “The lawyer should be satisfied that the cloud service provider’s (1) transmission, storage and possession of the data does not diminish the lawyer’s ownership of and unfettered accessibility to the data, and (2) security policies and mechanisms to segregate the lawyer’s data and prevent unauthorized access to the data by others including the cloud service provider.”

Florida

The Florida Bar Professional Ethics Committee

Fla. Ethics Op. 12-3 (2013)

Relying on the New York State Bar Ethics Opinion 842 (2010) and Iowa Ethics Opinion 11-10 (2011), the opinion concludes that lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. Lawyers should research the service provider used and also consider backing up the data elsewhere as a precaution.

Iowa

Iowa State Bar Association Committee on Ethics and Practice Guidelines

Iowa Ethics Op. 11-01 (2011)

The opinion concludes that the lawyer is obligated “to perform due diligence to assess the degree of protection that will be needed and to act accordingly.” The opinion gives basic guidance by listing questions that the lawyer should ask:

Accessibility

1. *Access:*
Will I have unrestricted access to the stored data? Have I stored the data elsewhere so that if access to my data is denied I can acquire the data via another source?
2. *Legal Issues:*
Have I performed “due diligence” regarding the company that will be storing my data? Are they a solid company with a good operating record and is their service recommended by others in the field? What country and state are they located and do business in? Does their end user’s licensing agreement (EULA) contain legal restrictions regarding their responsibility or liability, choice of law or forum, or limitation on damages? Likewise does their EULA grant them proprietary or user rights over my data?

3. *Financial Obligations:*

What is the cost of the service, how is it paid and what happens in the event of non-payment? In the event of a financial default will I lose access to the data, does it become property of the SaaS company or is the data destroyed?

4. *Termination:*

How do I terminate the relationship with the SaaS company? What type of notice does the EULA require? How do I retrieve my data and does the SaaS company retain copies?

Data Protection

1. *Password Protection and Public Access:*

Are passwords required to access the program that contains my data? Who has access to the passwords? Will the public have access to my data? If I allow non-clients access to a portion of the data will they have access to other data that I want protected?

2. *Data Encryption:*

Recognizing that some data will require a higher degree of protection than others, will I have the ability to encrypt certain data using higher level encryption tools of my choosing?

The opinion recognizes that performing due diligence can be complex and requires specialized knowledge and skill. The opinion also acknowledges that a law firm may discharge the duties “by relying on the due diligence services of independent companies, bar associations or other similar organizations or through its own qualified employees.”

Maine

Maine State Bar Association Professional Ethics Committee

Maine Ethics Op. 194 (2008)

Lawyers may use third-party electronic back-up and transcription services as long as appropriate safeguards are taken, including reasonable efforts to prevent the disclosure of confidential information, and an agreement with the vendor that contains “a legally enforceable obligation” to maintain the confidentiality of the client’s information.

Massachusetts

Massachusetts Bar Association Committee on Professional Ethics

Mass. Ethics Op. 12-03 (2012)

A lawyer may generally store and synchronize electronic work files containing client information across different platforms and devices using the Internet as long as the lawyer undertakes reasonable efforts to ensure that the provider’s terms of use, privacy policies, practices and procedures are compatible with the Lawyer’s professional obligations. Reasonable efforts would include:

- (a) examining the provider’s terms of use and written policies and procedures with respect to data privacy and the handling of confidential information;
- (b) ensuring that the provider’s terms of use and written policies and procedures prohibit unauthorized access to data stored on the provider’s system, including access by the provider for any purpose other than conveying or displaying the data to authorized users;

- (c) ensuring that the provider's terms of use and written policies and procedures, as well as its functional capabilities, give the Lawyer reasonable access to, and control over, the data stored on the provider's system in the event that the Lawyer's relationship with the provider is interrupted for any reason (e.g., if the storage provider ceases operations or shuts off the Lawyer's account, either temporarily or permanently);
- (d) examining the provider's existing practices (including data encryption, password protection, and system back ups) and available service history (including reports of known security breaches or "holes") to reasonably ensure that data stored on the provider's system actually will remain confidential, and will not be intentionally or inadvertently disclosed or lost; and
- (e) periodically revisiting and reexamining the provider's policies, practices and procedures to ensure that they remain compatible with Lawyer's professional obligations to protect confidential client information reflected in Rule 1.6(a).

The lawyer should follow the client's express instructions regarding the use of cloud technology to store and transmit data; and for particularly sensitive client information, the lawyer should obtain client approval before using cloud technology to store or transmit the information.

Nevada

State Bar of Nevada Standing Committee on Ethics and Professional Responsibility

Nev. Formal Ethics Op. 33 (2006)

A lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes reasonable precautions, such as obtaining the third party's agreement to maintain confidentiality, to prevent both accidental and unauthorized disclosure of confidential information.

New Hampshire

New Hampshire Bar Association Ethics Committee

N.H. Ethics Op. 2012-13/4 (2013)

A lawyer may use cloud computing consistent with his or her ethical obligations, as long as the lawyer takes reasonable steps to ensure that client information remains confidential. The opinion lists ten issues the lawyer must consider: (1) whether the provider is a reputable organization; (2) whether the provider offers robust security measures; (3) whether the data is stored in a retrievable format; (4) whether the provider commingles data belonging to different clients or different lawyers; (5) whether the provider has a license and not an ownership interest in the data; (6) whether the provider has an enforceable obligation to keep the data confidential; (7) whether the servers are located in the United States; (8) whether the provider will retain the data, and for how long, when representation ends or the agreement between the lawyer and the provider terminates; (9) whether the provider is required to notify the lawyer if the information is subpoenaed, if the law permits such notice; and (10) whether the provider has a disaster recovery plan with respect to the data.

New Jersey

Advisory Committee on Professional Ethics (appointed by the Supreme Court of New Jersey)

N.J. Ethics Op. 701 (2006)

When using electronic filing systems, lawyers must exercise reasonable care against unauthorized access. "The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable

obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data.”

New York

New York State Bar Association Committee on Professional Ethics

N.Y. State Bar Ethics Op. 842 (2010)

A lawyer may use an online computer data storage system to store client files provided “the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained.” Reasonable care includes “(1) ensuring that the provider has enforceable obligations to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information; (2) investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances; (3) employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and (4) investigating the storage provider’s ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.” In addition, the lawyer should stay informed of both technological advances that could affect confidentiality and changes in the law that could affect any privilege protecting the information.

North Carolina

North Carolina State Bar Ethics Committee

N.C. Formal Ethics Op. 2011-6 (2012)

“This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.” The opinion, however, recommends some security measures.

- Inclusion in the SaaS vendor’s Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer’s professional responsibilities.
- If the lawyer terminates the use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor’s software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.
- Careful review of the terms of the law firm’s user or license agreement with the SaaS vendor including the security policy.
- Evaluation of the SaaS vendor’s (or any third party data hosting company’s) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.
- Evaluation of the extent to which the SaaS vendor backs up hosted data.

The opinion also encourages law firms to consult periodically with professionals competent in the area of online security because of the rapidity with which computer technology changes.

Ohio

Ohio State Bar Association Professionalism Committee

Ohio State Bar Association Informal Advisory Op. 2013-03

“[A] lawyer’s duty to preserve the confidentiality of cloud-stored client data is to exercise competence (1) in selecting an appropriate vendor, (2) in staying abreast of technology issues that have an impact on client data storage and (3) in considering whether any special circumstances call for extra protection for particularly sensitive client information or for refraining from using the cloud to store such particularly sensitive information.” When selecting a vendor, it is necessary for the lawyer to know the qualifications, reputation, and longevity of the vendor, and to read and understand the agreement entered into with the vendor. The opinion lists the following “commonly-occurring issues”:

- What safeguards does the vendor have to prevent confidentiality breaches?
- Does the agreement create a legally enforceable obligation on the vendor’s part to safeguard the confidentiality of the data?
- Do the terms of the agreement purport to give “ownership” of the data to the vendor, or is the data merely subject to the vendor’s license?
- How may the vendor respond to government or judicial attempts to obtain disclosure of your client data?
- What is the vendor’s policy regarding returning your client data at termination of its relationship with your firm? What plans and procedures does the vendor have in case of natural disaster, electric power interruption or other catastrophic events?
- Where is the server located (particularly if the vendor itself does not actually host the data, and uses a data center located elsewhere)? Is the relationship subject to international law?

Consistent with other ethics opinions, such as those from Pennsylvania and New Hampshire, the opinion concludes that storing client data in the cloud does not always require prior consultation because it interprets the language “reasonably consult” as indicating that the lawyer must use judgment in order to determine if the circumstances call for consultation.

Oregon

Oregon State Bar Legal Ethics Committee

Or. Ethics Op. 2011-88

A lawyer “may store client materials on a third-party server as long as the lawyer complies with the duties of competence and confidentiality to reasonably keep the client’s information secure within a given situation.” Reasonable steps to ensure that the vendor will reliably secure client data and keep information confidential “may include, among other things, ensuring the service agreement requires the vendor to preserve confidentiality and security of the materials. It may also require that vendor notify the lawyer of any nonauthorized third-party access to the materials.” Moreover, the lawyer “may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials” because as “technology advances, the third-party vendor’s protective measures may become less secure or obsolete over time.”

Pennsylvania

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility

Pa. Ethics Op. 2011-200

A lawyer “may ethically allow client confidential material to be stored in ‘the cloud’ provided the lawyer takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.” The opinion advises that “[l]awyers may need to consider that at least some data may be too important to risk inclusion in cloud services.” The opinion contains a list of over 30 precautions that reasonable care may require.

Vermont

Vermont Bar Association

Vt. Advisory Ethics Op. 2010-6 (2011)

Lawyers may use cloud computing in connection with client information as long as they take reasonable precautions to protect the confidentiality of and to ensure access to the information. “Complying with the required level of due diligence will often involve a reasonable understanding of: (a) the vendor’s security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer’s ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor’s commitment to protecting the confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance and document retention obligations that may apply based upon the nature of the stored data and the lawyer’s practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor’s security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor’s system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present.”

Virginia

Virginia Bar Association Standing Committee on Legal Ethics

Va. Legal Ethics Op. 1872 (2013)

“When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider’s use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.” Virginia’s Rule 1.6(b)(6) provides that to the extent a lawyer reasonably believes necessary, the lawyer may reveal “information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.”

Washington

Washington State Bar Association Rules of Professional Conduct Committee

Wa. Ethics Op. 2215 (2012)

This opinion suggests that the best practices for lawyers “without advanced technological knowledge” would include: “(1) Familiarization with the potential risks of online data storage and review of available general audience literature and literature directed at the legal profession about cloud computing industry standards and features. (2) Evaluation of the provider’s practices, reputation, and history. (3) Comparison of provisions in the service provider agreements to the extent that the service provider recognizes the lawyer’s duty of confidentiality and agrees to handle the information accordingly. (4) Comparison of provisions in service provider agreements to the extent that the agreement gives the lawyer methods for retrieving the data if the agreement is terminated or the service provider goes out of business. (5) Confirming provisions in the agreement that will give the lawyer prompt notice of any nonauthorized access to the lawyer’s stored data. (6) Ensure secure and tightly controlled access to the storage system maintained by the service provider. (7) Ensure reasonable measures for secure backup of the data that is maintained by the service provider.”

Obligations With Respect to Mentally Impaired Lawyer in the Firm

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This discussion addresses only mental impairment, which may be either temporary or permanent. Mental impairment can result from mental conditions that are age-related as well as from alcoholism and substance abuse.

This discussion, which is based on ABA Formal Opinion 03-429 (2003), addresses three duties arising under the Rules of Professional Conduct:

1. Obligations to adopt measures to prevent impaired lawyers in the firm from violating the Rules of Professional Conduct;
2. Obligations when an impaired lawyer in the firm has violated the Rules of Professional Conduct; and
3. Obligations when an impaired lawyer no longer is in the firm.

1. Obligations to Adopt Measures to Prevent Impaired Lawyers in the Firm from Violating the Model Rules

Preventive Policies and Procedures

- SCR 20:5.1(a) requires that all partners in the firm and lawyers with comparable managerial authority in professional corporations, legal departments, and other organizations deemed to be a law firm make “reasonable efforts” to establish internal policies and procedures designed to provide “reasonable assurance” that all lawyers in the firm, not just lawyers known to be impaired, fulfill the requirements of the Rules. The measures required depend on the firm's size and structure and the nature of its practice.
- SCR 20:5.1(a) does not identify what constitutes a reasonable effort or reasonable assurance, but ABA Comment [3] offers some guidance.

Preventive Direct Supervision

- In addition to the requirement that the firm establish appropriate preventive policies and procedures, SCR 20:5.1(b) requires a lawyer having direct supervisory

authority over another lawyer to make reasonable efforts to ensure that the supervised lawyer conforms to the Rules. When a supervising lawyer knows that a supervised lawyer is impaired, close scrutiny is warranted because of the risk that the impairment will result in violations. SCR 20:1.16(a)(2) requires a lawyer to withdraw

Steps to Protect the Interests of the Clients

- The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients. SCR 20:1.16(a)(2)

Accommodation of Some Impairments

- Some impairments may be accommodated. A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Rules if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.

Responsibility for Impaired Lawyer's Violation of the Rules

- If reasonable efforts have been made to institute procedures designed to assure compliance with the Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action. SCR 20:5.1(c).

Assisting Another to Violate the Rules

- Failure to intervene to prevent avoidable consequences of a violation also may violate SCR 20:8.4(a), which provides that it is professional misconduct for a lawyer to knowingly assist another to violate the Model Rules.

2. Obligations When an Impaired Lawyer in the Firm Has Violated the Model Rules

Duty to Report

- The partners in the firm or supervising lawyer may have an obligation under SCR 20:8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority. Only violations of the Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported.
- If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report.
- Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Rules and he or she nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.
- The partners in the firm or supervising lawyer may have an obligation under SCR20:8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority. 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's fitness as a lawyer to inform the appropriate professional authority. Although a lawyer may satisfy his or her obligation under Rule 8.3 by disclosing the violation without identifying the impairment that caused the violation, in most cases, disclosure of the impairment will be appropriate. However, in doing so, the lawyer must be careful to avoid potential violations of the Americans with Disabilities Act.
- If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he or she nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.

Cannot Charge for Additional Level of Supervision

- If such supervision exceeds that which would be required in the case of a lawyer who is not impaired, it would not be proper for the firm to charge the client for the additional level of supervision. Although it is appropriate to charge a client for normal supervisory activities related to the quality of the client work product, fees for additional steps taken by the supervising lawyer because of the firm's fear that an impaired lawyer's work would not be competent would not be reasonable under Rule 1.5(a) unless the necessity for supervision and the fact that the client would be charged for it is communicated to, and agreed to by, the client. Rule 1.5(b).

Must Communicate with Client if the Matter in which the Impaired Lawyer Violated his Duty Is Still Pending

- If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer.

Obligation to Mitigate Adverse Consequences

- Even if the matter in which the impaired lawyer violated the Model Rules no longer is pending, partners and lawyers in the firm with comparable managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation. Rule 5.1(c)(2).

3. Obligations When an Impaired Lawyer No Longer is in the Firm

Duty to Communicate with Clients

- The responsibility of the firm to the client does not end with the resignation from the firm, or the firm's termination of, the impaired lawyer. If the impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer. Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation.

- If such a communication also is designed to convince the client to remain with the firm rather than follow the impaired lawyer who continues to practice, it must be drafted in such a manner that it does not violate either the prohibition of false and misleading communications about the firm's services under Rule 7.1 or the prohibition of deceit or misrepresentation under Rule 8.4(c). In addition, the potential for claims of tortious interference with contractual relationships and unfair competition should be considered.

No Duty to Inform Clients Who Have Already Shifted Their Relationship to Departing Lawyer

- The firm has no obligation under the Model Rules to inform former clients who already have shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently. See Philadelphia Bar Ass'n Prof. Guidance Committee Op. 00-12 (Dec. 2000).
- However, the firm should avoid any communication with former clients who have transferred their representation to the departed lawyer that can be interpreted as an endorsement of the ability of the departed lawyer to handle the matter. For example, a joint letter from the firm and the departed lawyer regarding the transition could be seen as an implicit endorsement by the firm of the departed lawyer's competence.

Selected Rules of Professional Conduct

- SCR 20:1.1 Competence and ABA Comment [8]
- SCR 20:1.2 Scope of Representation and Allocation of Authority between Lawyer and Client
- SCR 20:1.4 Communication
- SCR 20:1.6 Confidentiality
- SCR 20:1.7 Conflict of Interest Current Clients
- SCR 20:1.9 Duties to Former Clients
- SCR 20:1.10 Imputed Disqualification General Rule
- SCR 20:1.14 Client with Diminished Capacity
- SCR 20:1.16 Declining or Terminating Representation
- SCR 20:4.4 Respect for Rights of Third Persons
- SCR 20:5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers
- SCR 20:5.2 Responsibilities of a Subordinate Lawyer
- SCR 20:5.3 Responsibilities Regarding Nonlawyer Assistants
- SCR 20:8.3 Reporting Professional Misconduct
- SCR 20:8.4 Misconduct

SCR 20:1.1 Competence

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

ABA Comment
(As amended in 2012)

Maintaining Competence

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

SCR 20:1.2 Scope of representation and allocation of authority between lawyer and client

(a) Subject to pars. (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. The client's informed consent must be in writing except as set forth in sub. (1).

(1) The client's informed consent need not be given in writing if:

- a. the representation of the client consists solely of telephone consultation;
- b. the representation is provided by a lawyer employed by or participating in a program sponsored by a nonprofit organization, a bar association, an accredited law school, or a court and the lawyer's representation consists solely of providing information and advice or the preparation of court-approved legal forms;
- c. the court appoints the lawyer for a limited purpose that is set forth in the appointment order;
- d. the representation is provided by the state public defender pursuant to Ch. 977, stats., including representation provided by a private attorney pursuant to an appointment by the state public defender; or
- e. the representation is provided to an existing client pursuant to an existing lawyer-client relationship.

(2) If the client gives informed consent in writing signed by the client, there shall be a presumption that:

- a. the representation is limited to the lawyer and the services described in the writing, and
- b. the lawyer does not represent the client generally or in matters other than those identified in the writing.

Wisconsin Committee Comment

With respect to subparagraph (c), a lawyer providing limited scope representation in an action before a court should consult s. 802.045, stats., regarding notice and withdrawal requirements.

The requirements of subparagraph (c) that require the client's informed consent, in writing, to the limited scope representation do not supplant or replace the requirements of SCR 20:1.5(b).

(cm) A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that "This document was prepared with the assistance of a lawyer." A lawyer shall advise the client to whom the lawyer provides assistance in preparing pleadings, briefs, or other documents for filing with the court that the pleading, brief, or other document must contain a statement that it was prepared with the assistance of a lawyer.

Wisconsin Committee Comment

A lawyer may prepare pleadings, briefs, and other documents to be filed with the court so long as such filings clearly indicate thereon that said filings are "prepared with the assistance of a lawyer." Such actions by the lawyer shall not be deemed an appearance by the lawyer in the case.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer has been retained by an insurer to represent an insured pursuant to the terms of an agreement or policy requiring the insurer to retain counsel on the client's behalf, the representation may be limited to matters related to the defense of claims made against the insured. In such cases, the lawyer shall, within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide.

WISCONSIN COMMENT

The Model Rule does not include paragraph (e). Paragraph (e) was added to clarify the obligations of counsel for an insurer, in conjunction with the decision to retain Wisconsin's "insurance defense" exception in SCR 20:1.8(f).

WISCONSIN COMMITTEE COMMENT

The Committee has retained in paragraph (a) the application of the duties stated to "any proceeding that could result in deprivation of liberty." The Model Rule does not include this language.

ABA COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer

shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

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

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

(4) promptly comply with reasonable requests by the client for information; and

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

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

WISCONSIN COMMITTEE COMMENT

Paragraph (a)(4) differs from the Model Rule in that the words "by the client" are added for the sake of clarity.

ABA COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

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.

ABA Comment [18] and [19]
(as amended in 2012)

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and 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. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. _

[19] 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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

SCR 20:1.7 Conflicts of interest current clients

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in a writing signed by the client.

WISCONSIN COMMENT

The Wisconsin Supreme Court Rule differs from the Model Rule in requiring informed consent to be confirmed in a writing "signed by the client."

ABA COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the

interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial

reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

SCR 20:1.9 Duties to former clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

WISCONSIN COMMENT

The Wisconsin Supreme Court Rule differs from the Model Rule in requiring informed consent to be confirmed in a writing "signed by the client."

ABA COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not

unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

SCR 20:1.10 Imputed disqualification: general rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition arises under SCR 20:1.9, and

(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated;

(ii) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written notice is promptly given to any affected former client to enable the affected client to ascertain compliance with the provisions of this rule.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by SCR 20:1.6 and SCR 20:1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in SCR 20:1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by SCR 20:1.11.

WISCONSIN COMMITTEE COMMENT

Paragraph (a) differs from the Model Rule in not imputing conflicts of interest in limited circumstances where the personally disqualified lawyer is timely screened from the matter.

ABA COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]—[4].

Principles of Imputed Disqualification

[2] The Rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The Rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case was owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The Rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

SCR 20:1.14 Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

ABA COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as

having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for

involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

SCR 20:1.16 Declining or terminating representation

(a) Except as stated in par. (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in par. (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

WISCONSIN COMMITTEE COMMENT

With respect to subparagraph (c), a lawyer providing limited scope representation in a matter before a court should consult s 802.045, stats., regarding notice and termination requirements.

With respect to the last sentence of paragraph (d), it should be noted that a state bar ethics opinion suggests that lawyers in Wisconsin do not have a retaining lien with respect to client papers. See State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-95-4 (1995).

ABA COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

SCR 20:4.4 Respect for rights of 3rd persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

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

ABA COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

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

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;
or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

SCR 20:5.2 Responsibilities of a subordinate lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ABA COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

SCR 20:8.3 Reporting professional misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) If the information revealing misconduct under subs. (a) or (b) is confidential under SCR 20:1.6, the lawyer shall consult with the client about the matter and abide by the client's wishes to the extent required by SCR 20:1.6.

(d) This rule does not require disclosure of any of the following:

(1) Information gained by a lawyer while participating in a confidential lawyers' assistance

program.

(2) Information acquired by any person selected to mediate or arbitrate disputes between lawyers arising out of a professional or economic dispute involving law firm dissolutions, termination or departure of one or more lawyers from a law firm where such information is acquired in the course of mediating or arbitrating the dispute between lawyers.

WISCONSIN COMMENT

The change from "having knowledge" to "who knows" in SCR 20:8.3(a) and (b) reflects the adoption of the language used in the ABA Model Rule. See also SCR 20:1.0(g) defining "knows." The requirement under paragraph (c) that the lawyer consult with the client is not expressly included in the Model Rule.

It deletes reference to judges. The reference to confidential lawyers' assistance programs includes programs such as the state bar sponsored Wisconsin Lawyers' Assistance Program (WISLAP), the Law Office Management Assistance Program (LOMAP), or the Ethics Hotline.

ABA COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers' assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

SCR 20:8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

WISCONSIN COMMENT

In addition to the obligations in this rule, Wisconsin Attorneys should note the obligations concerning notification set forth in SCR 21.15(5) and SCR 22.22(1).

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers;

(g) violate the attorney's oath;

(h) fail to cooperate in the investigation of a grievance filed with the office of lawyer regulation as required by SCR 21.15(4), SCR 22.001(9)(b), SCR 22.03(2), SCR 22.03(6), or SCR 22.04(1); or

(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).

WISCONSIN COMMENT

Intentional violation of tax laws, including failure to file tax returns or failure to pay taxes may violate SCR 20:8.4(f), absent a showing of inability to pay. In re Disciplinary Proceedings Against Cassidy, 172 Wis. 2d 600, 493 N.W.2d 362 (1992).

WISCONSIN COMMITTEE COMMENT

Failure to cooperate, paragraph (h), was previously enforced as a violation of paragraph (f). Paragraph (h) was added to the rule to provide better notice to lawyers of the obligation to cooperate. Other statutes, rules, orders, and decisions continue to be included within the definition of misconduct and are enforceable under paragraph (f).

Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

ABA COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another,

as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Selected Wisconsin Statutes

Wis. Stat. § 134.98 Notice of Unauthorized Acquisition of Personal Information

(1) DEFINITIONS. In this section:

(a)

1. "Entity" means a person, other than an individual, that does any of the following:

a. Conducts business in this state and maintains personal information in the ordinary course of business.

b. Licenses personal information in this state.

c. Maintains for a resident of this state a depository account as defined in s. 815.18 (2) (e).

d. Lends money to a resident of this state.

2. "Entity" includes all of the following:

a. The state and any office, department, independent agency, authority, institution, association, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.

b. A city, village, town, or county.

(am) "Name" means an individual's last name combined with the individual's first name or first initial.

(b) "Personal information" means an individual's last name and the individual's first name or first initial, in combination with and linked to any of the following elements, if the element is not publicly available information and is not encrypted, redacted, or altered in a manner that renders the element unreadable:

1. The individual's social security number.

2. The individual's driver's license number or state identification number.

3. The number of the individual's financial account number, including a credit or debit card account number, or any security code, access code, or password that would permit access to the individual's financial account.

4. The individual's deoxyribonucleic acid profile, as defined in s. 939.74 (2d) (a).

5. The individual's unique biometric data, including fingerprint, voice print, retina or iris image, or any other unique physical representation.

(c) "Publicly available information" means any information that an entity reasonably believes is one of the following:

1. Lawfully made widely available through any media.

2. Lawfully made available to the general public from federal, state, or local government records or disclosures to the general public that are required to be made by federal, state, or local law.

(2) NOTICE REQUIRED.

(a) If an entity whose principal place of business is located in this state or an entity that maintains or licenses personal information in this state knows that personal information in the entity's possession has been acquired by a person whom the entity has not authorized to acquire the personal information, the entity shall make reasonable efforts to notify each subject of the personal information. The notice shall indicate that the entity knows of the unauthorized acquisition of personal information pertaining to the subject of the personal information.

(b) If an entity whose principal place of business is not located in this state knows that personal information pertaining to a resident of this state has been acquired by a person whom the entity has not authorized to acquire the personal information, the entity shall make reasonable efforts to notify each resident of this state who is the subject of the personal information. The notice shall indicate that the entity knows of the unauthorized acquisition of personal information pertaining to the resident of this state who is the subject of the personal information.

(bm) If a person, other than an individual, that stores personal information pertaining to a resident of this state, but does not own or license the personal information, knows that the personal information has been acquired by a person whom the person storing the personal information has not authorized to acquire the personal information, and the person storing the personal information has not entered into a contract with the person that owns or licenses the personal information, the person storing the personal information shall notify the person that owns or licenses the personal information of the acquisition as soon as practicable.

(br) If, as the result of a single incident, an entity is required under par. (a) or (b) to notify 1,000 or more individuals that personal information pertaining to the individuals has been acquired, the entity shall without unreasonable delay notify all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 USC 1681a(p), of the timing, distribution, and content of the notices sent to the individuals.

(cm) Notwithstanding pars. (a), (b), (bm), and (br), an entity is not required to provide notice of the acquisition of personal information if any of the following applies:

1. The acquisition of personal information does not create a material risk of identity theft or fraud to the subject of the personal information.

2. The personal information was acquired in good faith by an employee or agent of the entity, if the personal information is used for a lawful purpose of the entity.

(3) TIMING AND MANNER OF NOTICE; OTHER REQUIREMENTS.

(a) Subject to sub. (5), an entity shall provide the notice required under sub. (2) within a reasonable time, not to exceed 45 days after the entity learns of the acquisition of personal information. A determination as to reasonableness under this paragraph shall include consideration of the number of notices that an entity must provide and the methods of communication available to the entity.

(b) An entity shall provide the notice required under sub. (2) by mail or by a method the entity has previously employed to communicate with the subject of the personal information. If an entity cannot with reasonable diligence determine the mailing address of the subject of the personal information, and if the entity has not previously communicated with the subject of the personal information, the entity shall provide notice by a method reasonably calculated to provide actual notice to the subject of the personal information.

(c) Upon written request by a person who has received a notice under sub. (2) (a) or (b), the entity that provided the notice shall identify the personal information that was acquired.

(3m) REGULATED ENTITIES EXEMPT. This section does not apply to any of the following:

(a) An entity that is subject to, and in compliance with, the privacy and security requirements of 15 USC 6801 to 6827, or a person that has a contractual obligation to such an entity, if the entity or person has in effect a policy concerning breaches of information security.

(b) An entity that is described in 45 CFR 164.104 (a), if the entity complies with the requirements of 45 CFR part 164.

(4) EFFECT ON CIVIL CLAIMS. Failure to comply with this section is not negligence or a breach of any duty, but may be evidence of negligence or a breach of a legal duty.

(5) REQUEST BY LAW ENFORCEMENT NOT TO NOTIFY. A law enforcement agency may, in order to protect an investigation or homeland security, ask an entity not to provide a notice that is otherwise required under sub. (2) for any period of time and the notification process required under sub. (2) shall begin at the end of that time period. Notwithstanding subs. (2) and (3), if an entity receives such a request, the entity may not provide notice of or publicize an unauthorized acquisition of personal information, except as authorized by the law enforcement agency that made the request.

(6m) LOCAL ORDINANCES OR REGULATIONS PROHIBITED. No city, village, town, or county may enact or enforce an ordinance or regulation that relates to notice or disclosure of the unauthorized acquisition of personal information.

(7m) EFFECT OF FEDERAL LEGISLATION. If the joint committee on administrative rules determines that the federal government has enacted legislation that imposes notice requirements substantially similar to the requirements of this section and determines that the legislation does not preempt this section, the joint committee on administrative rules shall submit to the legislative reference bureau for publication in the Wisconsin administrative register a notice of its determination. This section does not apply after publication of a notice under this subsection.

History: 2005 a. 138; 2007 a. 20; 2007 a. 97 s. 238.