Resources for Mandatory Clinical Ethics Training
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PRESENTER BIOGRAPHIES

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Michael Gregory is an Assistant Clinical Professor at Harvard Law School, where he works as part of the Trauma and Learning Policy Initiative (TLPI). TLPI is a partnership between Harvard Law School and Massachusetts Advocates for Children. TLPI’s mission is to ensure that children traumatized by exposure to violence succeed in school. Prof. Gregory is a co-author of both volumes of TLPI’s landmark report Helping Traumatized Children Learn, and is also a co-author of Educational Rights of Children Affected by Homelessness and/or Domestic Violence, a manual for child advocates. At HLS, Prof. Gregory co-teaches the Education Law Clinic with Susan Cole, in which law students represent individual families of traumatized children in the special education system and engage in systemic advocacy in education reform at the state level. In conjunction with the clinic, he co-teaches with Ms. Cole the seminars “Education Advocacy and Systemic Change: Children at Risk” and “Legislative Lawyering in Education Law.” Prof. Gregory has also taught Education Law and Policy and Education Reform Movements.

Prof. Gregory received his JD from Harvard Law School in 2004, graduating cum laude. He also graduated magna cum laude with a Bachelor of Arts in American Civilization from Brown University in 1998, and received a Master of Arts in Teaching, also from Brown University, in 1999. He was the recipient of a Skadden Fellowship in 2004.
HARVARD LAW SCHOOL
CLINICAL CONFIDENTIALITY POLICY

Purpose
This policy defines the confidentiality and disclosure practices at HLS clinics to ensure effective representation of clients and compliance with legal ethics guidelines. Given the frequent turnover of students, transfer of cases between students and supervisors, extensive communication among students, clients and supervisors, and the challenge of limited physical space, clinics must have put in place systems to ensure compliance with legal ethics guidelines. This policy is specifically intended to address the scenarios involving students and supervisors that pose the most common threats to the confidentiality of cases and clients in clinical representation at Harvard Law School.

This policy is drafted in the most generic form possible to provide wide application to all programs and instances of clinical practice by students at Harvard Law. Each clinic should adopt these policies, adding specifics that pertain to its individual clinic’s circumstances.

Persons affected
All HLS staff, students, co-counsel, and volunteers who engage in any kind of official or unofficial work within the clinical program.

Policy statement
Confidentiality is the foundation of trust between the lawyer and the client. Students and supervisors shall abide by the ABA Model Rules of Professional Conduct and the rules of any jurisdiction in which the clinic practices.

Definitions
Confidential information may be, depending on the client’s perspective and situation, any information relating to the representation of a client or case. With the exception of information that is already a matter of public record, confidential information could include anything that would make the case or client identifiable to anyone not involved in the client’s representation. Some information is public record, but if obtained in the course of representation must be considered confidential. HLS staff, students and volunteers shall not disclose information (including, but not limited to case strategy, privileged communications, facts of the case, and any agreements) to anyone unless the client gives express permission or the disclosure is appropriate to further the goals of the representation. Clients may consent to disclosure of confidential information.
either orally or in writing. Confidentiality extends beyond the period of representation in perpetuity.

**High Risk Confidential Information (HRCI)** includes a person's name in conjunction with the person's Social Security, credit or debit card, individual financial account, driver's license, state ID, or passport number, or a name in conjunction with biometric information about the named individual. High-risk confidential information also includes personally identifiable medical information.

**Metadata** refers to the embedded stratum of data in electronic files that may include such information as who authored a document, when it was created, what software was used, any comments embedded within the content, and a record of changes made to the document that are still discernable through generally available technology within an electronic document.

**Individuals involved in representation** include any staff, students, faculty, interns, co-counsel, outside consultants or experts, volunteers or temporary staff working with the client on their case. It also includes clinical staff and students who share work space with other clinics.

**Responsibilities**

(From this date April 2, 2012 forward)

To ensure confidentiality and to abide by the ABA Model Rules of Professional Conduct and the rules of any jurisdiction in which each clinic practices, all individuals involved in representation must agree to the following statements. If anyone is uncertain or unclear about any aspect of the confidentiality policy, it is his responsibility to consult with a supervising attorney.

1) Individuals involved in representation must not share any case or client information that reveals legal strategy, identifiable facts, or other information critical to the representation of a client with anyone outside the clinic without talking to a supervisor. Individuals involved in representation must not disclose confidential information in any form, including orally, via email, through social media, over the phone, or in written or faxed communication, to their friends, family, roommates, or others unless such persons are involved in representation of the client. This includes, but is not limited to, high risk confidential information (HRCI).

2) Individuals involved in representation must not disclose confidential information outside of the team involved in representation unless the client consents to the disclosure orally or in writing. Students and staff must explain fully to the client in writing what information will be disclosed and to whom prior to obtaining the client’s consent and must ensure that the client understands the potential ramifications of the disclosure. Students must consult with supervisors before making disclosures authorized by a client.

3) Individuals involved in representation must not discuss confidential information in a location where someone not involved in the client’s representation could overhear
them. To do so would automatically constitute a breach of confidentiality. Examples of locations in which conversations could potentially violate confidentiality include lounges, dining commons, elevators, restrooms, public transportation such as the subway or bus, courthouses, or other public places. In clinical work space shared by two or more HLS clinics, individuals must maintain as confidential the information seen or heard belonging to the other clinic or the other clinic’s clients. In such cases, it is recognized that the prohibition against discussion of information is impractical.

4) Individuals involved in representation must not leave written confidential information such as paper documents, computer screens or PDAs open and unattended in shared spaces, including the student’s place of residence. Students must not leave written information in fax machines, copiers, or printer trays in public spaces. Mail should be delivered to a secure area. In clinical work space shared by two or more HLS clinics, individuals must maintain as confidential the information seen or heard belonging to the other clinic or the other clinic’s clients.

5) Individuals involved in representation must confer with their supervising attorney before contacting former clinical students. As a general rule, it is acceptable for current students and staff to ask former students for information about past representation if current students and staff have the same clients. It is not acceptable for current students to share updates on the status of a case with former students unless the client gives explicit consent.

6) Individuals involved in representation must review metadata and scrub data where appropriate before transmitting electronic files outside of the clinic.

7) Individuals involved in representation who receive a confidential communication not intended for them and to which they are not a party must immediately report it to their supervisor. Their supervisor will determine how to proceed.

8) Individuals involved in representation performing clinical work must abide by the Harvard Law School clinical email policy.

9) Students placed at externship organizations or firms must abide by the security and confidentiality rules of those organizations or firms. If there are no explicit confidentiality rules or policies, they will abide by the policies set forth in this document.

10) When individuals involved in representation are no longer working on a case, or are no longer involved in the representation, they must continue to preserve confidentiality, extending in perpetuity after the case itself has been closed or terminated. This rule applies to writing samples provided to employers and discussions in job interviews and career advising. All work products from clinical cases belong to the clinic; any sample of work from a case requires the permission of the supervisor on how it can be used outside of clinical work. The duty of confidentiality prohibits submission of any names (including clients, opposing parties) to future employers.
What to Do If a Breach Occurs

If a breach of confidentiality occurs, the onus is upon the student or other individual to bring it to the supervisor's attention. The supervisor is then responsible for advising how to rectify the breach and/or for determining whether the Office of Clinical and Pro Bono Programs and/or the Harvard University Office of General Counsel needs to be made aware of the breach. If the student is no longer in the clinic, or if the student’s supervisor has left, the student should bring the breach to the attention of the current director of the clinic.

Consequences of Violating Policy

Any student or volunteer who violates this confidentiality policy may be forced to withdraw from the clinic, banned from participating in future clinical programs or student organizations, and/or be taken to the Administrative Board.

Any staff member who violates this confidentiality policy may face disciplinary sanctions with the clinic or the bar.

Related Policies

HLS Clinical Email Policy once issued HLS
Clinical Conflicts Policy once issued ABA
Model Rules of Professional Conduct
Massachusetts Rules of Professional Conduct

American Bar Association Metadata Ethics Opinions Around the U.S.
http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html?ecamp=t-r128
PREAMBLE: A LAWYER’S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

1. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

2. In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

3. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

4. As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

5. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

6. A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

7. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues
must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

8. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

9. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

10. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

11. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may" are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[2] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily on understanding and voluntary compliance, secondarily on reinforcement by peer and public opinion, and, finally, when necessary, on enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[3] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the
lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[4] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth.

[5] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act on uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, including the wilfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[6] "A violation of a canon of ethics or a disciplinary rule . . . is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of the attorney's negligence." Id. at 649.

[7] Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

[8] [RESERVED]
RULE 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.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. See Rule 7.4.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.
Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. While the Supreme Judicial Court has not established a formal system of peer review, some of the bar associations have informal systems, and the lawyer should consider making use of them in appropriate circumstances.

**Corresponding ABA Model Rule.** Identical to Model Rule 1.1.

**Corresponding Former Massachusetts Rule.** DR 6-101.

**RULE 1.3 DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

**Comment**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued subject to Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[1A] It is implicit in the second sentence of the rule that a lawyer may not intentionally prejudice or damage his client during the course of the professional relationship.

[2] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**Corresponding ABA Model Rule.** Identical to Model Rule 1.3 with the addition of the clause at the end of the Rule.

**Corresponding Former Massachusetts Rule.** DR 6-101 (A) (3); DR 7-101.
RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:

(1) to prevent the commission of 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 interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary 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;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3(e);

(4) when permitted under these rules or required by law or court order.

(c) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (c) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this rule.

Comment

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

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (and the related work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely to matters communicated in confidence by the client but also to virtually all information relating to the representation, whatever its source. The term "confidential information" relating to representation of a client therefore includes information described as "confidences" and "secrets" in former DR 4-101(A) but without the limitation in the prior rules that the information be "embarrassing" or "detrimental" to the client. Former DR 4-101(A) provided: "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." See also Scope.

The word "virtually" appears in the fourth sentence of paragraph 5 above to reflect the common sense understanding that not every piece of information that a lawyer obtains relating to a representation is protected confidential information. While this understanding may be difficult to apply in some cases, some information is so widely available or generally known that it need not be treated as confidential. The lawyer's discovery that there was dense fog at the airport at a particular time does not fall within the rule. Such information is readily available. While a client's disclosure of the fact of infidelity to a spouse is protected information, it normally would not be after the client publicly discloses such information on television and in newspaper interviews. On the other hand, the mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule. A client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not generally known.

The exclusion of generally known or widely available information from the information protected by this rule explains the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words "or is generally known" in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in that subparagraph has been achieved more generally throughout the rules by the addition of the word "confidential" in this rule. It might be misleading to repeat the concept in just one specific subparagraph. Moreover, even information that is generally known may in some circumstances be protected, as when the client instructs the lawyer that generally known information, for example, spousal infidelity, not be revealed to a specific person, for example, the spouse's parent who does not know of it.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.
**Authorized Disclosure**

[7] A lawyer is authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion. Rule 1.6(b)(4) has been added to make clear the purpose to carry forward the explicit statement of former DR 4-101(C)(2).

[8] 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. Before accepting or continuing representation on such a basis, the lawyers to whom such restricted information will be communicated must assure themselves that the restriction will not contravene firm governance rules or prevent them from discovering disqualifying conflicts of interests.

**Disclosure Adverse to Client**

[9] One premise of the confidentiality rule is that to the extent a lawyer is required or permitted to disclose a client's confidential information, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. The implication of that premise is that generally the public will be better protected if full and open communication by the client is encouraged than if it is inhibited. Nevertheless, there are instances when the confidentiality rule is subject to exceptions.

[9A] Rule 1.6(b)(1) is derived from the original Kutak Commission proposal for the ABA Model Rules which permitted disclosure of confidential information to prevent criminal or fraudulent acts likely to result in death or substantial bodily harm or in substantial injury to the financial interests or property of another. The former Massachusetts Disciplinary Rules permitted revelation of confidential information with respect to all crimes and all injuries, no matter how trivial. The use of the term "substantial" harm or injury restricts permitted revelation by limiting the permission granted to instances when the harm or injury is likely to be more than trivial or small. The reference to bodily harm is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm. Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.

[10] Several situations must be distinguished.

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

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character. See Rule 4.1, Comment 3. With regard to conduct before a tribunal, however, see the special meaning of the concept of assisting in Rule 3.3, Comment 2A.
[12A] When the lawyer's services have been used by the client to perpetrate a fraud, that is a perversion of the lawyer-client relationship and Rule 1.6(b)(3) permits the lawyer to reveal confidential information necessary to rectify the fraud.

[13] Third, the lawyer may have confidential information whose disclosure the lawyer reasonably believes is necessary to prevent the commission of a crime that is likely to result in death or substantial bodily or financial harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal such information. Before disclosure is made, the lawyer should have a reasonable belief that a crime is likely to be committed and that disclosure of confidential information is necessary to prevent it. The lawyer should not ignore facts that would lead a reasonable person to conclude that disclosure is permissible.

[13A] The language of paragraph (b)(1) has been changed from the ABA Model Rules version to permit disclosure of a client's confidential information when the harm will be the result of the activities of third parties as well as of the client.

[14] The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this rule, but in particular circumstances, it might violate Rule 3.3(e) or Rule 4.1.

**Withdrawal**

[15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client has already used the lawyer's services to commit fraud, the lawyer may reveal confidential information to rectify the fraud in accordance with Rule 1.6(b)(3).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6, Rule 3.3, Rule 4.1, and Rule 8.3. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

**Dispute Concerning a Lawyer's Conduct**

[18] 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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) 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, of course, applies where a proceeding has been
commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2) 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

**Notice of Disclosure to Client.**

[19A] Whenever the rules permit or require the lawyer to disclose a client's confidential information, the issue arises whether the lawyer should, as a part of the confidentiality and loyalty obligation and as a matter of competent practice, advise the client beforehand of the plan to disclose. It is not possible to state an absolute rule to govern a lawyer's conduct in such situations. In some cases, it may be impractical or even dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact. Indeed, such revelation might thwart the reason for creation of the exception. It might hasten the commission of a dangerous act by a client or it might enable clients to prevent lawyers from defending themselves against accusations of lawyer misconduct. But there will be instances, such as the intended delivery of whole files to prosecutors to convince them not to indict the lawyer, where the failure to give notice would prevent the client from making timely objection to the revelation of too much confidential information. Lawyers will have to weigh the various policies and make reasonable judgments about the demands of loyalty, the requirements of competent practice, and the policy reasons for creating the exception to confidentiality in order to decide whether they should give advance notice to clients of the intended disclosure.

**Disclosures Otherwise Required or Authorized**

[20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. Whether a lawyer should consider an appeal before complying with a court order depends on such considerations as the gravity of the harm to the client from compliance and the likelihood of prevailing on appeal.

[21] These rules in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.3, 3.3, 4.1, and 8.3. The reference to Rules 3.3, 4.1(b), and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these rules that deals with the disclosure of confidential information and that in some circumstances disclosure of such information may be required and not merely permitted. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give
information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules.

**Former Client**

[22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

**Corresponding ABA Model Rule.** (a) identical to Model Rule 1.6(a) except that the information must be confidential information; (b) different, in part taken from DR 4-101 (C); (c) based on DR 4-101 (E).

**Corresponding Former Massachusetts Rule.** DR 4-101 (C), see also DR 7-102 (B).

**Cross-reference:** See definition of "consultation" in Rule 9.1 (c).

**RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**Comment**

**Loyalty to a Client**

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The 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 parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.
As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is 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.

Lawyer's Interests

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. 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. 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 interest. Likewise, a lawyer should not accept referrals from a referral source, including law enforcement or court personnel, if the lawyer's desire to continue to receive referrals from that source or the lawyer's relationship to that source would or would reasonably be viewed as discouraging the lawyer from representing the client zealously.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible 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. In criminal cases,
the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one codefendant, or more than one person under investigation by law enforcement authorities for the same transaction or series of transactions, including any investigation by a grand jury. On the other hand, common representation of persons having similar interests is proper if the lawyer reasonably believes the risk of adverse effect is minimal and all persons have given their informed consent to the multiple representation, as required by paragraph (b).

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. A lawyer representing the parent or a subsidiary of a corporation is not automatically disqualified from simultaneously taking an adverse position to a different affiliate of the represented party, even without consent. There may be situations where such concurrent representation will be possible because the effect of the adverse representation is insignificant with respect to the other affiliate or the parent and the management of the lawsuit is handled at completely different levels of the enterprise. But in many, perhaps most, cases, such concurrent representation will not be possible without consent of the parties.

[8A] The situation with respect to government lawyers is special, and public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to a private lawyer.

[9] A lawyer may ordinarily represent parties having antagonistic positions on a legal question that has arisen in different matters. However, the antagonism may relate to an issue that is so crucial to the resolution of a matter as to require that the clients be advised of the conflict and their consent obtained. On rare occasions, such as the argument of both sides of a legal question before the same court at the same time, the conflict may be so severe that a lawyer could not continue the representation even with client consent.

**Interest of Person Paying for a Lawyer’s Service**

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have competing interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

**Other Conflict Situations**

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.
[12] 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 of interest among them. Thus, a lawyer may seek to establish or to 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 conflicting 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.

[12A] In considering whether to represent clients jointly, a lawyer should be mindful that if the joint representation fails because the potentially conflicting interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. In some situations the risk of failure is so great that joint representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. A lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by joint 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 a relationship between the parties or terminating one.

Confidentiality and Privilege

[12B] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the attorney-client privilege. With regard to the evidentiary 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 client should be so advised.

[12C] As to the duty of confidentiality, while each client may assert that the lawyer keep something in confidence between the lawyer and the client, which is not to be disclosed to the other client, each client should be advised at the outset of the joint representation that making such a request will, in all likelihood, make it impossible for the lawyer to continue the joint representation. This is so because the lawyer has an equal duty of loyalty to each client. Each client has a right to expect that the lawyer will tell the client anything bearing on the representation that might affect that client's interests and that the lawyer will use that information to that client's benefit. But the lawyer cannot do this if the other client has sworn the lawyer to secrecy about any such matter. Thus, for the lawyer to proceed would be in derogation of the trust of the other client. To avoid this situation, at the outset of the joint representation the lawyer should advise both (or all) clients that the joint representation will work only if they agree to deal openly and honestly with one another on all matters relating to the representation, and that the lawyer will have to withdraw, if one requests that some matter material to the representation be kept from the other. The lawyer should advise the clients to consider carefully whether they are willing to share information openly with one another because above all else that is what it means to have one lawyer instead of separate representation for each.

[12D] In limited circumstances, it may be appropriate for a lawyer to ask both (or all) clients, if they want to agree that the lawyer will keep certain information confidential, i.e., from the other client. For example, an estate lawyer might want to ask joint clients if they each want to agree that in the
eventuality that one becomes mentally disabled the lawyer be allowed to proceed with the joint representation, appropriately altering the estate plan, without the other's knowledge. Of course, should that eventuality come to pass, the lawyer should consult Rule 1.14 before proceeding. However, aside from such limited circumstances, the lawyer representing joint clients should emphasize that what the clients give up in terms of confidentiality is twofold: a later right to claim the attorney-client privilege in disputes between them; and the right during the representation to keep secrets from one another that bear on the representation.

**Consultation**

[12E] When representing clients jointly, the lawyer is required to consult with them on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances. When the lawyer is representing clients jointly, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

**Withdrawal**

[12F] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[13] Conflict questions may also 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 arise. In estate administration the lawyer should make clear the relationship to the parties involved.

[14] 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.

[14A] A lawyer who proposes to represent a class should make an initial determination whether subclasses within the class should have separate representation because their interests differ in material respects from other segments of the class. Moreover, the lawyer who initially determines that subclasses are not necessary should revisit that determination as the litigation or settlement discussions proceed because as discovery or settlement talks proceed the interests of subgroups within the class may begin to diverge significantly. The class lawyer must be constantly alert to such divergences and to whether the interests of a subgroup of the class are being sacrificed or undersold in the interests of the whole. The lawyer has the responsibility to request that separate representation be provided to protect the interests of subgroups within the class. In general, the lawyer for a class should not simultaneously represent individuals, not within the class, or other classes, in actions against the defendant being sued by the class. Such simultaneous representation invites defendants to propose global settlements that require the class lawyer to trade off the interest of the class against the interests of other groups or individuals. Given the difficulty of obtaining class consent and the difficulty for the class action court of monitoring the details of the other settlements, such simultaneous representation should be avoided. In some limited circumstances, it may be reasonable for class counsel to represent simultaneously the class and another party or parties
against a common party if the other matter is not substantially related to the class representation and there is an objective basis for believing that the lawyer’s representation will not be materially affected at any stage of either matter. For example, a lawyer might reasonable proceed if the common defendant were the government and the government’s decision making in the class action was entrusted to a unit of the government unlikely to be affected by the decision maker for the government in the other matter.

**Conflict Charged by an Opposing Party**

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

**Corresponding ABA Model Rule.** Identical to Model Rule 1.7.

**Corresponding Former Massachusetts Rule.** DR 5-101 (A), 5-105 (A) and (C), 5-107 (B).

**Cross-reference:** See definition of "consultation" in Rule 9.1 (c).

**RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT**

(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 consents after consultation.

(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 Rules 1.6 and 1.9(c) that is material to the matter, unless the former client consents after consultation.

(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, unless the former client consents after consultation:

(1) use confidential information relating to the representation to the disadvantage of the former client, to the lawyer's advantage, or to the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

**Comment**
[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, 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.

[2] The scope of a "matter" for purposes of this Rule may depend 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 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 wholly 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 jurisdiction. 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.

**Lawyers Moving Between Firms**

[3] 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.

[4] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[5] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved
either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, 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.

[7] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[8] 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(b). 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.

[9] 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.

Adverse Positions

[10] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

[11] 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 or to the advantage of the lawyer or a third party. See Rule 1.8(b) and Comment 1A to that Rule. 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.

[12] Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.
With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Corresponding ABA Model Rule. Identical to Model Rule 1.9 except for (c).

Corresponding Former Massachusetts Rule. DR 4-101 (B) and (C), DR 5-105; (c) no counterpart.

Cross-reference: See definition of "consultation" in Rule 9.1 (c).

RULE 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 Rules 1.7, 1.8(c), or 1.9. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

(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 Rules 1.6 and 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 Rule 1.7.

(d) When a lawyer becomes associated with a firm, the firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter ("material information"); or

(2) the personally disqualified lawyer (i) had neither substantial involvement nor substantial material information relating to the matter and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:
(1) all material information which the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the client relating to the matter, and any witness for or against the client;

(3) the personally disqualified lawyer and the firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

In any matter in which the former client and the person being represented by the firm with which the personally disqualified lawyer is associated are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated
corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.


Principles of Imputed Disqualification

[6] 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), (d) and (e).

[7] 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).

[8] Paragraphs (d) and (e) of Rule 1.10 are new. They apply when a lawyer moves from a private firm to another firm and are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (d) and (e) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's firm, to handle a matter with respect to which the disqualified lawyer was personally and substantially involved, or had substantial material information, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(d) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer's new firm.

[9] If the lawyer has no confidential information about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact
that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[10] If the lawyer does have material information about the representation of the client of his former firm, the firm with which he or she is associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer had no substantial involvement with the matter or substantial material information about the matter, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened.

[11] In situations where the personally disqualified lawyer was substantially involved in a matter, or had substantial material information, the new firm will generally only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the law firm consents and the firm reasonably believes that the representation will not be adversely affected, all as required by Rule 1.7. This differs from the provisions of Rule 1.11, in that Rule 1.11(a) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers was personally and substantially involved for that agency, provided that the procedures of Rule 1.11(a)(1) and (2) are followed. Likewise, Rule 1.11(b) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers had substantial material information even if that lawyer was not personally and substantially involved for that agency, provided that the lawyer is screened and not apportioned any part of the fee.

[12] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

Corresponding ABA Model Rule. (a) similar to Model Rule 1.10 (a) and last two sentences added; (b) and (c) identical to Model Rule 1.10(b) and (c); (d) & (e) new.

Corresponding Former Massachusetts Rule. See DR 5-105 (D) for last two sentences in (a); (b) - (e) no counterpart.

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, arbitrator, or mediator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. See Comment 8 to Rule 1.7. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

[3] Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A
lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

[5] Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[6] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

[7] Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[8] Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[9] Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Corresponding ABA Model Rule. Similar to Model Rule 1.11.

Corresponding Former Massachusetts Rule. (b) and (e) no counterpart; DR 9-101 (B).

Cross-reference: See definition of "person" in Rule 9.1(h).

RULE 2.4: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not
understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. In particular, lawyers in Massachusetts may be subject to the Uniform Rules of Dispute Resolution set forth in Supreme Judicial Court Rule 1.18.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. See also Uniform Rule of Dispute Resolution 9(e) set forth in S.J.C. Rule 1.18.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Corresponding ABA Model Rule. Identical to Model Rule 2.4. [But additions made to comments 2 and 4.]
ACCESS & USE OF CLINICAL EMAIL ACCOUNT

All JD and LL.M. students will have two HLS email accounts, the regular student account (astudent@jd##.law.harvard.edu) and the clinical account (astudentjd##@clinics.law.harvard.edu). Both accounts reflect the last two digits of the year of graduation. Clinical visiting students and/or volunteers will be assigned a clinical account if or when they begin doing clinical work.

The clinical email account must be used exclusively for work related to an HLS clinic and/or Student Practice Organization (SPO). Students working at externship and/or pro bono organizations for HLS clinical or pro bono credit must adhere to the email policies of their placement organizations. Many external organizations provide students with an email address to use for their work during the placement. If the placement does not provide this, students should discuss the existence of their HLS clinical account with the supervisor and should use this account. Students should not use their regular HLS or personal email accounts for externship or pro bono work.

The clinical email account has extra security measures in place to protect the confidentiality and integrity of privileged client communication and case information. These measures protect the student, the supervisor, and the clients from inadvertent disclosure of confidential information. This email account should never be used for personal or other matters unrelated to clinical work.

MANAGING EMAIL CONTENT

The clinical email account is set up in a manner designed to make the forwarding of client information extremely difficult in order to protect confidential information. Students will be trained by their individual clinics and SPOs on how to deal with their email, how to upload information into the case management system, and where to file client/case related information before they leave a clinic or SPO at the end of each semester.

Students should never send High Risk Confidential Information through any kind of email account. Instead, they should use the Secure File Transfer System.

Students should also consider whether sensitive document data, also known as metadata, should be removed from documents before sending any attachments from their clinical email account. Students should always discuss this and any other issue with their supervisor if they are unsure about an appropriate course of action.

AFTER GRADUATION

Once students have completed their time at the law school, and after HLS provides adequate notice, their clinical account will be terminated without access to send, receive, or auto-reply to email. For May graduates access will be terminated on July 31st. In the rare event a student does not properly file this information before leaving a placement, the Office of Clinical and Pro Bono Programs will have sole access to their archived clinical emails.

For more specifics on how to use the email system, see the HLS ITS website.