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Mum's the Word: Maintaining Client Confidentiality and Dealing with Ethical Challenges while Working from Anywhere and Everywhere

Jeffrey D. Chadwick

Author Contact Information:
Jeffrey D. Chadwick
Winstead PC
Houston, Texas 77002
The Woodlands, Texas 77380

jchadwick@winstead.com
281.681.5960

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By:

Jeffrey D. Chadwick
Winstead PC

I. Introduction

Loose lips sink ships. They also violate ethical duties and destroy client relationships. Clients are seeking trusted advisors, after all, and clients simply cannot trust advisors who fail to uphold their duty of confidentiality.

While it has never been easy to safeguard client information, it certainly seems harder today with so many methods of communication. As the COVID-19 pandemic has transformed kitchen tables and basements into home offices, the need (and struggle) to maintain client confidentiality has never been greater. Like it or not, however, working remotely is here to stay. Clients have grown accustomed to the ease and comfort of virtual meetings and around-the-clock communications, and many temporary working conditions are likely to become permanent fixtures.

Working remotely presents estate planning advisors with unique ethical challenges, chief among which is how to preserve client confidentiality. This paper discusses how the traditional duty of confidentiality applies to a virtual estate planning practice, and provides practical suggestions for addressing conflicts of interests, structuring engagement letters, and safeguarding client communications across all mediums. Specifically:

- Part II provides an in-depth review of the duty of confidentiality, spanning the life cycle of a client relationship;
- Part III explores how a virtual estate planning practice implicates other ethical duties, including the duties of competence, communication, and supervision; and
- Part IV lists practical recommendations for establishing an effective remote working environment.

This paper is focused primarily on the American Bar Association Model Rules of Professional Conduct (each a "Model Rule" and collectively, the "Model Rules") and its comments

(each a "Comment" and collectively, the "Comments"). This paper also discusses opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee"). An index of applicable Model Rules is included at the end of this paper.[1] Importantly, each state has its own sets of ethical rules and opinions, which are often based on the Model Rules, but may have significant differences. Lawyers should certainly review and adhere to applicable state and local ethical rules. Although the Model Rules and their state counterparts apply only to lawyers, all estate planning advisors can draw on the principles contained therein to help implement best practices for protecting client confidentiality.

Moreover, this paper is not intended to be a definitive ethics guide for estate planning advisors working remotely. Rather, it is designed to raise awareness by providing an overview of ethical issues to consider and confront. This paper is not intended to be, and should not be construed as constituting, the author's opinion regarding any specific case or transaction, or the author's legal advice regarding any specific set of facts.

II. Duty of Confidentiality

Lawyers are required to keep client information confidential, not only to preserve the attorney-client privilege, but also because of the ethical duty of confidentiality. The paragraphs below examine Model Rule 1.6, which sets forth the duty of confidentiality, and compares it to the attorney-client privilege. With that framework established, the remaining paragraphs address common confidentiality issues that arise during the beginning, middle, and end of a client relationship, including specific challenges posed by working remotely.

A. Model Rule 1.6: Confidentiality of Information

Model Rule 1.6 sets forth the general rule regarding a lawyer's duty to maintain client confidentiality. Absent certain exceptions, "[a] lawyer shall not reveal information relating to the representation of a client."[2] Those exceptions include when the client gives informed consent, when disclosure is impliedly authorized to carry out the representation, and when the lawyer believes disclosure is reasonably necessary to prevent death, substantial bodily harm, or criminal activity, as further discussed in Part II.D.2.

Model Rule 1.6 seems simple enough, and all lawyers should know and understand the importance of the phrase "shall not reveal," compared to "may not reveal." Still, there seem to be endless details buried within this simple rule, along with a number of unique client situations that do not fit neatly into the rule itself.[3] In practice, it is probably best to work backwards. Start with the blanket prohibition that "[a] lawyer shall not reveal information relating to the representation

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[1] All Model Rules and Comments are available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

[2] MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

[3] For an in-depth review of client hypotheticals implicating the duty of confidentiality, see Thomas E. Spahn, *Confidentiality: Part I (Strength and Scope of the Duty)*, MCGUIRE WOODS, June 2, 2015, available at http://media.mcguirewoods.com/publications/Ethics-Programs/6693340.pdf.

of a client."[4] Then, if disclosure would be helpful in a particular situation, work through the exceptions to determine if disclosure is authorized. Finally, even if disclosure is authorized, query whether disclosure is truly necessary and the impact, if any, such disclosure would have on the client relationship.

B. Distinguishing the Duty of Confidentiality from the Attorney-Client Privilege

Most members of the public, and many members of the bar, conflate the duty of confidentiality and the attorney-client privilege. There are critical differences between the two, however, particularly in how they are applied and what they cover. As a general matter, the duty of confidentiality is much broader than the attorney-client privilege. All communications between a lawyer and client are confidential, but only a subset of those communications are protected by the attorney-client privilege.[5]

The attorney-client privilege is an evidentiary rule found in state statutes and common law. The privilege applies to communications made in confidence by a client or attorney for the purpose of seeking or providing legal advice.[6] When applicable, the privilege prevents disclosure of confidential attorney-client communications during discovery or at trial.[7] While most clients believe that every communication with an attorney is privileged, the privilege does not cover all communications and can be waived inadvertently by the attorney or the client. As further discussed in Part II.C.3.d, communications with third parties generally waive the privilege, unless such communication facilitates the rendering of legal advice.

The duty of confidentiality is an ethical rule that is not limited to the laws of evidence. As succinctly stated in Model Rule 1.6, a lawyer is required to keep all information regarding a client's representation confidential. This not only includes information that is covered by the attorney-client privilege, but also information that is publicly available, yet not widely known.[8]

It makes sense that the duty of confidentiality is more expansive than the attorney-client privilege, as the attorney-client privilege is principally designed to protect certain communications

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4 MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

5 *See* John F. Bergner & Jeffrey D. Chadwick, *Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security*, 51ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 11, 2017. The attorney-client privilege can be further distinguished from the work product doctrine, which prevents disclosure of documents or other tangible items prepared in anticipation of litigation or trial. *See* FED. R. CIV. P. 26(b)(3)(A)); *see also* Margaret A. Dale & Yasmin M. Emrani, *Data Breaches: The Attorney-Client Privilege and the Work Product Doctrine*, PRACTICAL LAW, 2017, available at https://prfirmstgacctpwwwcdn0001.blob.core.windows.net/prfirmstgacctpwwwcdncont0001/uploads/5571dd0c1f3b00ab4126223e284330b8.pdf.

6 8 Wigmore on Evidence § 2292 (2003).

7 *See* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020; *see also* Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012.

8 *See* Roberta Tepper, *Ethics in the Time of COVID,* ABA LAW PRACTICE MAGAZINE, Jan. 1, 2021, available at https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2021/jf21/teppersupport/.

and information during litigation. The duty of confidentiality, by contrast, pervades all aspects of the lawyer-client relationship. Confidentiality is crucial to establishing trust, which is the cornerstone of a vibrant professional relationship. Without confidentiality, a client may be discouraged from seeking legal assistance altogether, or from disclosing embarrassing or damaging information that an attorney needs to provide competent legal representation.[9] Again, a good rule of thumb is for lawyers to view all client information as confidential—even the fact that the lawyer represents the client—and to only explore the exceptions if disclosure would be helpful under the circumstances.

C. The Beginning of a Client Relationship

Client relationships are just like any other relationship—they have a beginning, a middle, and an end. The relationship itself can be mutually beneficial and rewarding, and it can be stressful and challenging. Most successful relationships are built on trust, and the duty of confidentiality is crucial to building trust with a client. This process begins at the very moment a prospective client is introduced and persists throughout the entire course of the lawyer-client relationship.

Trust can be hard to gain, but easy to lose, and lawyers must be vigilant in carrying out their duty of confidentiality. The remaining paragraphs of this Part II.C analyze confidentiality issues that arise at the beginning of a client relationship, and provide practical recommendations when addressing conflicts of interest and structuring engagement letters.

1. Communicating with Prospective Clients

Except in rare circumstances, a client will not formally engage a lawyer without some sort of preliminary conversation regarding the client's situation and the lawyer's initial impressions. These initial consultations can occur through email, a preliminary phone conference, or a virtual or face-to-face meeting. In addition, prospective clients often approach lawyers in informal settings, such as a cocktail party, professional conference, or even a child's piano recital or athletic event. Regardless of how these potential client interactions transpire, they all have one thing in common—each such person is a prospective client to whom the lawyer owes the same duty of confidentiality as a current or former client.

Model Rule 1.18 provides that "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[10] Even if the prospective client does not hire the lawyer, the lawyer is still bound by the duty of confidentiality and prohibited from using or revealing any information acquired from the prospective client.[11] Beyond that, a prospective client is treated in the same manner as a current client for determining conflicts of interests, and information obtained from a prospective client can

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[9] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6. cmt. 2 (describing confidentiality as a necessary factor in establishing "the trust that is the hallmark of the client-lawyer relationship").

[10] MODEL RULES OF PROF'L CONDUCT R. 1.18(a).

[11] MODEL RULES OF PROF'L CONDUCT R. 1.18(b).

preclude the representation of another prospective client.[12] Many lawyers, therefore, prefer to run a conflicts check before engaging in any substantive discussions with a prospective client.

To illustrate the potential pitfalls of dealing with prospective clients, consider a rather famous episode of The Sopranos, when Tony and Carmela were considering a divorce. Tony spoke with every good divorce attorney in town and revealed enough information to create a conflict of interest that would prevent each attorney from later representing Carmela. Tony's maneuver was as dastardly as it was effective, and even prompted some states to change their ethical rules to curb the practice of divorcing spouses using free (and often unsolicited) consultations to conflict out their future exes.[13] The Comments to Model Rule 1.18, for example, expressly provide that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'"[14]

There is a fine line between confidential communications with a prospective client and informal communications that do not create a duty of confidentiality. Given the ethical duties that attach to a prospective client, it is advisable to err on the side of caution and treat any person seeking informal legal advice as prospective clients. In cases where a prospective client begins to divulge information that may relate to a potential or existing client, it may be appropriate to stop the conversation or change the subject to avoid an inadvertent conflict of interest. Similarly, many law firms attempt to limit the potentially negative consequences of receiving an unsolicited email by including a disclaimer when a prospective client emails a lawyer through the law firm's website. While this may not provide complete protection, a sample disclaimer is below:

> *PLEASE READ BEFORE SENDING AN EMAIL*
>
> *Please note that any communication with the Firm via email through this website does not constitute or create an attorney-client relationship with the Firm. Please do not send any confidential information.*
>
> *The Firm accepts clients only in accordance with certain formal procedures, and renders legal advice only after completion of those procedures. To obtain legal representation from the Firm, you must first undergo a personal interview with a Firm attorney and establish an attorney-client relationship with the Firm by signing a written engagement letter. Whether you are a new or existing client of the Firm, the Firm cannot represent you on a new matter until it determines that there is no conflict of interest and it is willing and able to accept such new engagement in writing.*

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12 MODEL RULES OF PROF'L CONDUCT R. 1.18(c).

13 *See, e.g.*, Joe Forward, *Disqualification: New Ethics Opinions Helps Lawyers Avoid the "Tony Soprano" Situation*, WISCONSIN BAR INSIDE TRACK, Jan. 14, 2011, available at https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=3&Issue=2&ArticleID=7853 (describing a comment to the Wisconsin ethics rules providing that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [the ethical rules]").

14 MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2.

By clicking "Accept," you agree that we may review any information you transmit to us. You recognize that our review of your information, even if it is highly confidential and even if it is transmitted in a good faith effort to retain us, does not preclude us from representing another client directly adverse to you, even in a matter where that information could and will be used against you.

2. Identifying Conflicts of Interests

The best time to identify and address conflicts of interest is at the beginning of a client relationship. Being upfront and transparent regarding potential conflicts helps build trust with the client, and also helps protect the lawyer in case the conflict later matures into a dispute. Model Rule 1.7 provides that a "concurrent" conflict of interest exists if:

(i) the representation of one client will be directly adverse to another client; or

(ii) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[15]

The estate planning practice is fraught with potential conflicts, including but not limited to the following common client situations:

- **Spouses:** Federal tax law generally treats married couples as a single economic unit.[16] It is not surprising, therefore, that most married couples decide to handle their estate planning together. The joint representation of spouses has many advantages. Practically, it is often more cost-effective for spouses to hire a single attorney to prepare their estate plan. It may also be more effective in general, as the spouses can work together with a single attorney to ensure that their mutual estate planning objectives are accomplished.

  Jointly representing spouses, however, is not without risk. In addition to basic disagreements regarding the disposition of assets and appointment of fiduciaries, there could be a significant disparity in wealth between the spouses, financial obligations imposed by a pre- or post-marital agreement, or children from prior relationships, all of which add complexity and risk.[17] Even in the happiest of marriages, advising spouses regarding lifetime gifting strategies can be challenging. This is particularly true if the planning involves the partition of assets between spouses and the funding of spousal lifetime access trusts where each spouse has different economic interests in the trusts.

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15 MODEL RULES OF PROF'L CONDUCT R. 1.7.

16 *See* Lawrence Zelanek, *Marriage and the Income Tax*, 67 SOUTHERN CALIFORNIA LAW REVIEW 339 (1993).

17 For a good list of ethical issues to consider when representing spouses, see Desta K. Asfaw, Stacey Delich-Gould, & Stevie Michelle Cline, *Ethics 101 for the Estate Planner*, JOINT FALL MEETING OF THE ABA SECTION OF TAXATION & ABA SECTION OF REAL PROPERTY, TRUST & ESTATE LAW, Sept. 19, 2014.

In some cases, it makes more sense for each spouse to hire a separate estate planning attorney. This is certainly the case when prospective spouses are entering into a premarital agreement. It may also be advisable for each spouse to have separate counsel when entering into a post-marital agreement, depending on the scope of the agreement. With separate counsel, each spouse can communicate freely with his or her own attorney, and can divulge sensitive information without any requirement to share that information with the other spouse. While it is possible for one lawyer to represent both spouses as separate clients so that communications are not shared between the spouses, it is much more common (and typically more effective and appropriate) to represent spouses jointly where there are no secrets between the lawyer and the married couple,[18] as further described in Part II.C.3.

When working with spouses, it is important to remember that all marriages end; either the couple divorces or one or both spouses die. When (not if) the marriage ends, clients can sometimes have selective memories regarding the limitations of a joint representation and a lawyer's role in advising the couple as a single economic unit. It is in the best interests of the spouses and the lawyer to identify and address these potential conflicts of interest at the outset of the estate planning engagement, and to document the file throughout the course of the joint representation.

- **Other Family Members:** Many professionals, including attorneys, CPAs, and financial advisors, represent multiple generations within a single family unit. For example, when representing mom and dad, it is common for them to facilitate an introduction to their adult children, who also need estate planning. Most clients will appreciate this, as it allows the lawyer to gain a better overall understanding of the family dynamic, which should increase the effectiveness of the lawyer's services.[19] Building multigenerational ladders within a family is also good for business, as it helps cultivate long-lasting relationships with multiple clients over time.

  Despite the benefits of representing multiple generations, individual family members can have disputes, which may result in litigation against each other and even litigation with their lawyer. For instance, children may expect to inherit certain property from their parents. Similarly, siblings could have misconceptions regarding their future role in a family business. When a lawyer representing both generations has knowledge that the parents' estate plan is inconsistent with their children's expectations, what, if anything, should the lawyer communicate to the children? The answer often depends on how the engagement letter is structured, as discussed in Part II.C.3.

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[18] *See generally* John Terrill, II, *ACTEC Commentaries on the Model Rules of Professional Conduct Relating to the Representation of a Married Couple*, ACTEC 2011 SUMMER STAND ALONE MEETING, June 22-23, 2011.

[19] *See* Lauren J. Wolven, *Living in a Statistical Universe: Embracing the Art and Ethics of the Engagement Letter,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 17, 2019 (referencing the ACTEC Commentaries to Model Rule 1.7, which discuss the benefits of having a family lawyer).

In most situations, lawyers can represent multiple generations effectively and without issue. This is particularly true if mom and dad are treating all of their children equally. Lawyers should pay close attention when children or other family members are disinherited or treated unequally, however, especially if a child or other family member is heavily involved in the planning. Children may have ulterior motives in helping their parents with their financial and estate planning, and advisors should watch for red flags, including diminished capacity, over-involvement in the planning, steering the conversations, and refusing to allow a parent to speak with the attorney privately. These warning signs are typically easy to spot, and attorneys should trust their instincts when dealing with multiple generations. Again, having a clear, well-documented engagement letter setting forth the appropriate ground rules should help implement the client's true objectives while also protecting the lawyer from future claims of malpractice or tortious interference with an expected inheritance.[20]

- **Fiduciaries and Beneficiaries:** In addition to preparing estate planning documents for their clients, most estate planning attorneys will also represent clients serving as executors and trustees, guiding them through the estate and trust administration process. In many cases, a fiduciary will also be a beneficiary. In other cases, the lawyer may already represent a beneficiary, perhaps in an unrelated matter, when the lawyer agrees to also represent the fiduciary.

  For example, it is common for mom and dad to name their children as co-executors, and perhaps to name each child as sole trustee of the child's separate trust. While it may make sense for one lawyer to represent all of the children in their various capacities, it also raises potential conflicts of interest. Consider, for instance, a receipt and release agreement to be signed by a beneficiary at the conclusion of an estate administration. That agreement is typically very beneficial for the executor, but it may limit the rights of the beneficiaries.

  It is also common for a single attorney to represent co-executors and co-trustees jointly. This raises similar issues to the joint representation of married couples where the co-fiduciaries could have disagreements regarding a specific investment or distribution decision. The potential for disagreements is even higher when the estate or trust controls a second or third generation family business, as some co-fiduciaries may wish to sell the business to a third party, while others hope to continue operating it as going concern.

  It may be more economical and efficient for co-fiduciaries to hire one lawyer to represent them jointly. It can also be very effective for the family lawyer to

[20] While some states, such as California, recognize the tort of intentional interference with an expected inheritance, other states, such as Texas, do not. *See* Herb E. Tucker & Gregory B. Washington, *Tortious Interference with Inheritance*, 42 THE COLORADO LAWYER 59, May 2013, available at https://www.wadeash.com/PDF/2013-5-tortious-interference.pdf; *see also* David F. Johnson, *A Fractured Texas Supreme Court Holds That There Is No Tortious Interference with Inheritance Claim in Texas*, TEXAS FIDUCIARY LITIGATOR BLOG, June 23, 2018, available at https://www.txfiduciarylitigator.com/2018/06/a-a-fractured-texas-supreme-court-holds-that-there-is-no-tortious-interference-with-inheritance-claim-in-texas/.

represent fiduciaries and beneficiaries regarding an estate or trust. Before entering into these types of client relationships, however, the attorney should identify and explain the potential conflicts of interest to all affected clients, as further discussed in Part II.C.3.b.

- **Businesses and Their Owners:** Closely held business owners can be excellent clients. In addition to preparing estate planning documents, assisting with lifetime gifts, and facilitating business succession, the business itself may have legal needs. It is common, therefore, for an attorney to represent an individual client with respect to his or her estate planning matters, and for the same attorney or a colleague at the same law firm to also represent the business in other matters, such as negotiating a merger or acquisition, dealing with an employment dispute, or structuring a buy-sell agreement.

  Similarly, estate planners often assist their clients with forming limited partnerships or limited liability companies. Once those entities are formed, it may make sense for the attorney to represent the partnership or LLC itself with respect to any business-related matters. Many attorneys, however, continue to assist their individual estate planning clients with closely held entity issues, particularly if the client owns 100% of the business. This may work well for internal governance issues, but when dealing with third parties, it may make more sense to represent the entity, in addition to the individual client.

  Model Rule 1.13 deals with the organization as a client. The Model Rule recognizes that the business and its owners are separate and distinct, but that practically the lawyer must work through the business's representatives, such as officers, directors, or employees.[21] The Model Rule also authorizes the dual representation of the business and any of its owners or employees, but requires the lawyer to "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[22]

  The rationale behind Model Rule 1.13 is clear—just because an action is in the best interest of the business, it does not mean that the action is also in the best interest of its individual owners. In those situations, when one law firm represents both the business and its owners, the law firm may have a conflict of interest.[23] Clients can waive this potential conflict with informed consent, however, as further explained below.

- **Lawyer's Own Family Members:** Finally, a lawyer's own family members may request legal assistance from time to time (or all the time, depending on the family

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21 *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(a).

22 *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(f), (g).

23 *See, e.g.*, *Griva v. Davidson*, 637 A.2d 830 (D.C. App. 1994) (addressing conflicts issues associated with a law firm's representation of a closely held business and its individual owners, who were also siblings).

member). For example, it would seem that free estate planning would be one of the primary advantages of having a child who grows up to be an estate planning attorney. This arrangement may be perfectly fine, particularly if the parent is treating the child who is the drafting attorney and all of his or her siblings equally. This arrangement could also generate conflicts of interest, however, where the attorney's own interests and familial connection could cloud his or her independent professional judgment.[24] Again, it is important to understand and appreciate these potential conflicts before agreeing to provide pro bono legal services to a family member. It is also advisable to disclose these potential conflicts to the prospective family member client, who should consent in writing to the representation.

The client scenarios described above are extremely common, and are all fraught with potential conflicts of interest. Recall, however, that under Model Rule 1.7, a concurrent conflict of interest only exists if the representation of one client would be directly adverse to another client, such as with a premarital agreement, or if there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[25] In this regard, a lawyer should not be precluded from representing spouses, family members, or co-fiduciaries, primarily because such joint representation should not materially limit the lawyer's ability to represent all affected clients. A conflict of interest could arise during the joint representation, however, and the lawyer should inform the client of potential conflicts before agreeing to take on the representation.

Even if a concurrent conflict of interest exists, a lawyer may still represent a client if:

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

(ii) the representation is not prohibited by law;

(iii) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(iv) each affected client gives informed consent, confirmed in writing.[26]

In other words, a lawyer can generally proceed, despite a conflict, if the lawyer discloses the conflict to all affected clients and each client gives informed consent in writing. Model Rule 1.0 defines informed consent as "the agreement by a person to a proposed course of conduct after the

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[24] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 ("When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.").

[25] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a).

[26] MODEL RULES OF PROF'L CONDUCT R. 1.7(b).

lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[27]

Identifying and addressing conflicts at the beginning of the client relationship is not only required by the ethical rules, but also critical in building trust with clients and minimizing potential exposure from unhappy clients in the future. As discussed below, the best place to disclose and address these conflicts is in the initial engagement letter, which should be supplemented as needed throughout the course of the representation.

3. Structuring Engagement Letters

Once an attorney has had an initial conversation with a prospective client and identified any potential conflicts of interest, if the prospective client agrees to retain the attorney, the attorney-client relationship should be formalized through a written engagement letter signed by the client. Engagement letters can be effective tools that enable attorneys to define the scope of their representation, explain how their fees will be charged, identify potential conflicts, and describe the attorney's efforts to protect the client's confidential information. While most law firms have standard terms of engagement, a comprehensive engagement letter can avoid misunderstandings and limit disputes, and attorneys should resist the temptation of providing a quick, standard engagement letter in lieu of the right one.

The below paragraphs discuss common confidentiality issues that may arise when preparing engagement letters.[28]

a. Identifying the Client (and Non-Clients)

Courts typically treat an engagement letter as a contract between the client and the law firm, which is only enforceable by and between such parties.[29] It is critical, therefore, for the engagement letter to expressly identify the client. Any person identified as a client should sign the engagement letter, and an authorized representative should sign on behalf of any client that is an entity. While it is common to represent a business entity, the lawyer typically represents an executor or trustee in its fiduciary capacity, and does not represent the estate or trust itself.[30]

In certain situations, it may be just as important to identify who is not the client. Model Rule 4.3 provides that "[w]hen the lawyer knows or reasonably should know that [an]

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[27] *Id.*

[28] ACTEC has prepared an excellent and comprehensive guide to engagement letters for estate planning attorneys, including sample forms and clauses. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

[29] *See* Lauren J. Wolven, *Living in a Statistical Universe: Embracing the Art and Ethics of the Engagement Letter,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 17, 2019 (citing *Bayoud v. Shank, Irwin, Conant & Williamson*, 774 S.W.2d 22 (Texas App. 1989), for the principle that a law firm's engagement letter is the "controlling contract when a dispute arises over the attorney's fees").

[30] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27 ("In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.").

unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[31] Model Rule 4.3 also prohibits a lawyer from giving legal advice to an unrepresented person, "other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[32]

It is extremely important to identify clients and non-clients in the estate and trust administration context. If the lawyer represents a fiduciary, the engagement letter should clearly identify the fiduciary as the client and explain that the lawyer is not representing any of the beneficiaries or the estate itself. Sample language is below:

> *The Law Firm will represent you solely in your capacity as Executor of the Estate. Importantly, the Law Firm will not be representing any beneficiaries of the Estate individually, any other fiduciaries, or any other individuals who may be involved with the administration of the Estate. The Law Firm will also not be representing the Estate itself.*

While it is important to clarify who is not a client in the engagement letter, it is rare that a lawyer will actually send an engagement letter to a non-client. Therefore, it may be appropriate to send a separate letter to the non-client confirming that the lawyer does not represent such person and suggesting that such person retain separate counsel. This is particularly important when the lawyer knows at the outset that a non-client will be significantly involved in the representation, such as when a family member or business associate has agreed to help an executor with an estate administration. Below is sample language to include in a letter to a non-client at the beginning of a new client engagement:

> *Dear Son:*
>
> *As you know, your Mother has engaged our firm to represent her as Executor of Father's Estate and as Successor Trustee of Father's Revocable Trust. From time to time, Mother will want to include you in meetings and discussions regarding the assets of the Estate and Revocable Trust, including certain business entities, and to help you understand the administration process generally. While we are happy to explain how the Estate and Trust are being administered and to answer any questions you may have, please know that our legal representation is limited to Mother in the above capacities. Therefore, any explanations, answers, or assistance we provide to you cannot include legal advice regarding your beneficial interests in the Estate and Trust.*
>
> *Because we do not represent you, you may consider engaging the services of independent legal counsel to advise you during the administration process. If you*

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[31] MODEL RULES OF PROF'L CONDUCT R. 4.3.

[32] *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt 1 ("In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.").

decide to do so, please provide us with the contact information for your attorney and we will be happy to work with him or her directly.

Sincerely,

Attorney

The universe of potentially significant non-clients is not always clear at the outset of the representation, and at certain times, it may be prudent to remind non-clients that the lawyer does not represent them. In accordance with Model Rule 4.3, a lawyer should make reasonable efforts to communicate the lawyer's role in only representing the client whenever appropriate, such as in communications that may include the client and non-clients. For example, when representing an executor, a lawyer may communicate directly with unrepresented beneficiaries regarding the status of the estate administration, and perhaps send notices or proposed agreements on behalf of the executor. In those situations, the beneficiaries may reasonably believe that the lawyer represents them or the estate itself. The lawyer should take every opportunity to correct any potential misunderstanding the beneficiaries may have. A sample explanation of non-representation is below:

Dear Beneficiary:

As you know, my name is Attorney and I represent Client in his capacity as Executor of the Estate. The administration of the Estate is nearly complete and, before distributing assets to you as a beneficiary, we are requesting that you sign a Receipt, Release, and Refunding Agreement. I have attached a draft copy of the Agreement to this email for your review.

Once you have had a chance to review the attached Agreement, please let me or Client know if you have any questions or concerns whatsoever. If the Agreement is acceptable, please sign it where indicated and a return a signed copy to me.

While this type of Agreement is fairly common in the estate administration context, recall that I only represent Client as Executor of the Estate. I do not represent you, any of the other beneficiaries, or the Estate itself. Consequently, you may wish to consult with your own attorney, who can review the enclosed Agreement with you and advise you independently.

Thank you for your time and attention to this matter. We hope to hear from you soon.

Sincerely,

Attorney

Misconceptions may also arise when an attorney represents a senior generation, but is working through a junior generation, or vice versa. For example, as a parent ages, a child may assist a parent with financial and estate planning matters. It is also common for a wealthy parent

to pay a child's legal fees.[33] In both cases, it is important to identify the client—the parent in the first scenario, and the child in the second—and to disclose the potential conflicts and misconceptions that could arise during the course of the representation. Below is a sample notice to a child regarding a parent's payment of the child's legal fees:[34]

> *Your Father has asked that we send our invoices for your estate planning to him for payment. We understand that you consent to your father's payment of your legal fees, as evidenced by your signing of this engagement letter. Even though your Father will be paying for the legal services and costs associated with this engagement, you will be our client for this engagement and your Father will not be entitled to any confidential information concerning this engagement (other than such information as may be disclosed in your billing statements). Consequently, we will not follow any direction or instruction from your Father with respect to this engagement. Anything you discuss with us remains subject to our duty of confidentiality to you unless you authorize us to disclose such confidential information to your Father.*

In the same situation, below is a sample notice to the parent, which may be included in the child's engagement letter or in a standalone letter addressed solely to the parent:

> *You have asked that we send our invoices for your Daughter's estate planning to you for payment. Even though you will be paying for the legal services and costs associated with your Daughter's estate planning engagement, your Daughter (and not you) will be our client for this engagement. Consequently, you will not be entitled to any confidential information concerning this engagement (other than such information as may be disclosed in our billing statements). Furthermore, we will not follow any direction or instruction from you with respect to your Daughter's estate planning. Anything your Daughter discusses with us remains subject to our duty of confidentiality to her unless she authorizes us to disclose such confidential information to you. By contrast, anything you discuss with us regarding this matter is not confidential and may be shared with your Daughter, unless otherwise agreed in advance by your Daughter.*
>
> *By your signature below, you confirm that you agree to be responsible for paying the legal fees and costs of your Daughter in this engagement with our firm and to abide by the terms of this letter. You also acknowledge that your payment of legal fees and costs for your Daughter does not create an attorney-client relationship between you and the firm.*

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[33] Under Model Rule 1.7, legal fees may be paid from a source other than the client as long as the client consents and the arrangement does not jeopardize the lawyer's duty of loyalty or independent judgment to the client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt 13.

[34] The sample notices are based, in part, on the ACTEC sample forms. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

When a third party is paying the client's legal fees, the lawyer should be mindful of the descriptions included in the client's billing statements, as such descriptions may inadvertently disclose confidential information. Moreover, if the third party payer is a client, the lawyer must also navigate potential conflicts of interest, as further described below.

b. Disclosing Potential Conflicts of Interest

As discussed in Part II.C.2, conflicts of interest can arise in many estate planning scenarios. It is important to disclose these potential conflicts to all affected clients and, if necessary, obtain their informed consent in the engagement letter or a separate conflicts waiver. Identifying and confronting these issues at the outset of a client relationship sets appropriate expectations, builds trust between the attorney and the client, and may minimize the risk of potential malpractice claims, while establishing the ground rules for the sharing of confidential information among clients and third parties, as further explained in Part II.C.3.c.

The most common disclosure of potential conflicts relates to the joint representation of spouses. Below is a sample provision to be included in an engagement letter signed by both spouses:

> *You have asked us to represent both of you with respect to your estate planning, which we are pleased to do, as we represent many married couples. It is important, however, that you fully understand the considerations involved in this "joint representation." As we discussed, spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, you may have different views on how property should pass upon your respective deaths. Our representation may also involve lifetime gifting or other asset protection strategies that may impact the division of property in the event of divorce. These are just a few general examples. Each couple's situation is unique.*
>
> *If you each had a separate lawyer, you would have an "advocate" for your position and would receive completely independent advice. Information given to your separate lawyer should be confidential and cannot be obtained by your spouse without your consent. That is not the case here when we are advising both of you. We cannot be advocates for one of you against the other. Information that either of you gives us relating to your planning cannot be kept from the other. Our focus will be to assist in developing an overall plan for each of you and your family and to encourage the resolution of differing interests in an equitable manner and in the best interests of your marriage. After considering these factors, if at any time either of you wishes to have the advice of separate counsel, you are completely free to do so.*

The attorney may consider expanding this disclosure, perhaps by referencing information gathered from other sources in the required disclosures, or by addressing whether the lawyer will withdraw or represent only one spouse if a conflict of interest materializes.[35]

[35] The ACTEC sample form also includes an express provision that the law firm will not take any action or refrain from taking an action (pertaining to the subject matter of the representation) that affects one spouse without the

It is also advisable, and in some cases required, to obtain conflict waivers when representing multiple generations of the same family. Assuming a child agrees to engage an attorney who is already representing a parent, below is a sample provision to be included in the child's engagement letter:

> *As you know, we currently represent your Mother with regard to her estate planning matters. In representing your Mother, we may gather confidential information regarding her planning and prepare certain documents for her. Some of these discussions may involve you, and some of these documents may include you as a beneficiary. It is in your best interest that you fully understand the considerations involved in our representing you while also representing your Mother. In fact, we have an ethical obligation to inform you of these considerations.*
>
> *You and your Mother may have differing, and sometimes conflicting, interests and objectives regarding your respective estate plans. In addition, you and your Mother may have misconceptions regarding each other's estate plans going forward. For example, you could have expectations of receiving certain property from your Mother, or being named by your Mother to act in a fiduciary role (i.e., as executor, trustee, guardian, or agent), which your Mother may not in fact intend. These are just a few examples.*
>
> *Before we can represent you in connection with your estate planning, we must advise you of the possibility of these potentially conflicting interests and objectives, and of their potential consequences. We do not believe our representation of you will prejudice you or your Mother, nor do we believe it will adversely affect our ability to exercise our independent judgment on behalf of you or your Mother. We want you to consider this aspect of our relationship, however, and make sure you are comfortable with it. We also must obtain your Mother's consent prior to our representation of you with regard to your estate planning.*

In the above situation, the attorney should also obtain the consent of the parent before agreeing to represent the child, even if the parent is the one who introduced the child to the attorney.[36] The parent could countersign the child's engagement letter, or the conflicts waiver could be contained in a standalone letter addressed to the parent. Below is a sample waiver addressed to the parent, whom the attorney already represents:

> *As you know, we have been asked by your Daughter to represent her in connection with her estate planning. While we are pleased to do so, it is in your best interest*

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other spouse's knowledge and consent. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

[36] The ACTEC sample form explains that "[t]here is no reason why we cannot represent [your child] and you in your respective estate planning affairs as long as everyone is aware of the potential conflicts of interest that may arise when our firm undertakes to represent more than one unit of the family." *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

that you fully understand the considerations involved in our representing you while also representing your Daughter. In fact, we have an ethical obligation to inform you of these considerations.

You and your Daughter may have differing, and sometimes conflicting, interests and objectives regarding your respective estate plans. In addition, you and your Daughter may have misconceptions regarding each other's estate plans going forward. For example, your Daughter could expect to receive certain property from you or be named by you to act in a fiduciary role (i.e., as executor, trustee, guardian, or agent), which you may not in fact intend. These are just a few examples.

Before we can represent your Daughter in connection with her estate planning, we must advise you of the possibility of these potentially conflicting interests and objectives, and of their potential consequences. We do not believe our representation of your Daughter will prejudice you or her, nor do we believe it will adversely affect our ability to exercise our independent judgment on behalf of you or her. We want you to consider this aspect of our relationship, however, and make sure you are comfortable with it. We must obtain your written consent before we can accept representation of your Daughter with regard to her estate planning.

When representing multiple generations of the same family unit, the engagement letter should also confirm whether each client's information will stay confidential, or whether such confidential information may be disclosed to other family members, as further discussed in Part II.C.3.c.

Similar considerations exist when representing co-fiduciaries. Below is a sample conflicts provision to be included in an engagement letter for co-executors of an estate:

You have asked us to represent you both as Co-Executors of the Estate. We are pleased to do so, as we often represent Co-Executors in estate administration matters. We are ethically obligated, however, and it is in your own best interest, to explain how we will handle this joint representation.

Based on our initial discussions, we do not expect any material conflicts of interest to arise. At certain times, however, you may disagree regarding the best course of action for the Estate. For example, you could disagree regarding investments, distribution timing, reporting positions, decisions related to the Decedent's Closely Held Business, or other administrative matters. If you each had a separate lawyer, you would have an "advocate" for your position and would receive completely independent advice. Information given to your own lawyer is confidential and cannot be obtained by or shared with another person without your consent. That is not the case when we are representing both of you. We cannot be advocates for one of you against the other. Information you provide to us relating to the Estate cannot be kept from the other Co-Executor. If you wish us to represent you as Co-Executors, our objective will be to assist in developing a coordinated effort to administer the Estate in the most efficient and effective manner possible. If,

however, a conflict should arise among you that cannot be resolved, we may be forced to withdraw as counsel in this matter.

We do not believe our joint representation will adversely affect our ability to serve you effectively. In fact, we believe it will be advantageous to have a single attorney assist and coordinate administration matters on your behalf. Nevertheless, after considering these factors, each of you must confirm to the terms of this joint representation. If you wish to seek the advice of separate counsel now or at any time in the future, you are completely free to do so.

Finally, as indicated by Model Rule 1.13, conflicts can arise when representing business entities, regardless of whether the attorney also represents the owners individually. For example, co-owners of a business could retain a lawyer to prepare a buy-sell agreement for all the owners, and the lawyer could structure the engagement by representing the business. Below is a sample provision for an engagement letter addressed to a business's authorized representatives when an attorney represents only the business, and not the individual owners:[37]

Our client will be the Corporation. As described below, we will not represent any of you individually. It is important each of you understands that the interests of the Corporation may not always be identical to your interests as its officers, directors, or owners, and that the interests of any one of you may not always be identical to the interests of the others. Therefore, each of you should be aware that in your individual capacity you may need to consider retaining independent counsel to advise and represent you separately from the Corporation and from the others.

c. Sharing Confidential Information Among Clients

When a potential conflict of interest exists, it is important for the engagement letter to establish how confidential information will be shared with (or withheld from) other represented parties. There are two basic approaches—"closed communication" and "open communication."[38]

When communication is "closed," the lawyer cannot share information received from one client with another client without the client's consent. While possible, it is often impractical and ineffective for communication to be closed when jointly representing spouses and fiduciaries, or when jointly representing beneficiaries or other parties in the same matter. It is much more common, however, to observe the typical boundaries of confidentiality when representing multiple members of the same family or business, such as siblings or co-owners. Below is a sample closed communication provision to include in an engagement letter for a child when the lawyer is also representing a parent:

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[37] This sample provision is based on the ACTEC sample forms. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

[38] Lauren Wolven describes open communication as the "show and tell" approach and closed communication as the "priestly" approach. *See* Lauren J. Wolven, *Living in a Statistical Universe: Embracing the Art and Ethics of the Engagement Letter,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 17, 2019.

Generally, we cannot disclose any information we receive from a client to another person without the client's consent. Consequently, we will not disclose any information we receive from you to your Father without your consent. Similarly, we will not disclose any information we receive from your Father to you without your Father's consent. Because we will not reveal any confidential information we receive from you or your Father without consent, it is possible that circumstances may arise in which we are aware of conflicts of interest and misperceptions, even if you and/or your Father are not. In such circumstances, we may not be able to correct the conflict of interest or misperception. By signing this engagement letter, you release the Law Firm from any obligation to disclose to you information related to the representation of your Father, even if such information is material or adverse to your interests.[39]

When communication is "open," the lawyer is obligated to share all relevant information with all represented parties. Open communication is the typical approach when jointly representing spouses, fiduciaries, and beneficiaries. Open communication may also be beneficial when representing multiple generations of the same family unit, such as parents and their adult children, although this may be less common. With open communication, there are no secrets among represented parties, and the lawyer generally has an affirmative obligation to disclose all information obtained while representing one party to the other parties. Below is a sample open communication provision to include in an engagement letter for a child when the lawyer is also representing a parent:

Generally, we cannot disclose any information we receive from a client to another person without the client's consent. Based on our discussions, however, we understand that you desire for us to share information regarding your estate planning with your Mother. Consequently, we are requesting your written consent to disclose information we receive from you regarding your estate planning to your Mother. Assuming you do consent to such disclosure, you are free to withdraw your consent at any time.

Note that by structuring a representation with either open or closed communication, the client is making a choice of whether the attorney must share, or keep confidential, information obtained among represented parties. Neither approach cures potential conflicts of interest, and under either arrangement, the attorney may be forced to withdraw if a conflict materializes and cannot be waived. For example, Model Rule 1.7(b) only permits clients to waive a concurrent conflict of interest if the representation does not involve the assertion of a claim by one client against another client. As a result, if an attorney represents both a parent and a child in their respective estate planning matters, and the child later sues the parent for breach of fiduciary duty, the attorney's law firm generally cannot represent the parent in the litigation defense.

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[39] *See id.* (providing similar sample language for closed communications when a law firm is representing multiple generations of the same family unit).

d. Sharing Confidential Information with Third Parties

Estate planning attorneys receive referrals of potential clients from a variety of sources, including financial advisors, CPAs, insurance professionals, other attorneys, in-house counsel, and family office personnel. In many cases, it can be beneficial (and even necessary) to work with the referral source, who may be in a unique position to help communicate and implement the client's objectives. As a general matter, it may also be advisable to coordinate with the client's other professional advisors, regardless of how the client was referred, to ensure that the estate plan is consistent with the client's other tax and financial planning.

From a confidentiality perspective, lawyers must navigate two issues when working with a client's third party advisor. First, would disclosing the client's confidential information to a third party advisor violate the attorney's ethical duty of confidentiality? Second, even if disclosure is authorized, would it waive the attorney-client privilege? As discussed in Part II.B, the duty of confidentiality and the attorney-client privilege are separate, albeit related considerations.

It can be relatively easy to justify disclosure of a client's confidential information to a third party advisor. While a lawyer is generally prohibited from revealing any information related to the representation of a client under Model Rule 1.6, disclosure is permissible if it is "impliedly authorized in order to carry out the representation."[40] Implied authorization can arise in a number of third party contexts. For example, if a lawyer is helping a client fund a trust, the lawyer may be required to provide certain information regarding the trust to a financial institution. Similarly, if a lawyer is preparing a transfer tax return on behalf of a client, a lawyer may need to communicate with the client's CPA to coordinate filings, extensions, and income tax deductions. Often, it may be uneconomical, impractical, and ineffective to route every communication through the client, and the Model Rules recognize this.

Even better than relying on implied authorization, when a lawyer knows he or she will be working closely with a third party advisor, the lawyer should obtain the client's written consent to disclose the client's confidential information to such advisors. If the third party advisor is present at the outset of the client relationship, the client can consent in the initial engagement letter. If the third party relationship develops over time, the client can consent to disclosure in a standalone communication, such as an email from the client to the lawyer authorizing the sharing of information with the third party advisor. Below is a sample provision authorizing shared communications with a client's financial advisor:

> *We believe it would be beneficial to work directly with your financial advisor, Johnny Investments, and his team at Big Bank, to ensure that your financial and estate planning are coordinated. By signing this engagement letter, you consent to our sharing of confidential information with Johnny and other employees or agents of Big Bank as necessary and appropriate. You are free to withdraw your consent to such information disclosure at any time.*

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[40] MODEL RULES OF PROF'L CONDUCT R. 1.6.

Although providing information to third parties may not violate an attorney's ethical duty of confidentiality, it can (and usually does) waive the attorney-client privilege.[41] For the privilege to attach, the communication must generally be confidential between the attorney and the client. When a third party advisor is present, the communication is no longer confidential between the attorney and the client, and the privilege is typically waived. It does not matter if the advisor is in the room, on the phone, or copied on an email or letter. All such instances can waive the privilege, even if the third party disclosure is inadvertent or if the client did not participate in the communication.[42] Below is a sample provision informing a client that communications with a financial advisor may waive the attorney-client privilege:

> *With few exceptions, communications between us should be protected by the attorney-client privilege. However, if someone else whom we do not represent, such as Johnny Investments or another professional advisor, is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be lost as to things disclosed in that meeting or correspondence. As a result, you or the third party may be forced to disclose the content of a communication in a court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties, including Johnny Investments and his team at Big Bank, or when you share information with (or grant access to) others who are not part of our attorney-client relationship.*

Clients often assume that all communications with their lawyer are privileged, but that is simply not the case. It is important, though, to keep things in perspective. Recall that the attorney-client privilege is an evidentiary principle that only applies in the litigation context. In many cases, waiving the privilege is not an issue for the attorney because the client does not end up in litigation or under audit by the Internal Revenue Service ("IRS" or "Service"). When a third party, however, asserts that a communication is not privileged, it may be a big issue for the client (and by extension, the lawyer). Consider, for example, a lawyer who helps her clients with the creation of a limited partnership and the transfer of minority interests to an intentionally defective grantor trust. If the IRS later audits the transaction, and the lawyer communicated regularly with the client's financial advisor and CPA, all of those communications are likely discoverable. Preserving the privilege can also be extremely beneficial in the event of family disputes, when sons and daughters can quickly turn into plaintiffs.

If it becomes necessary to assert the privilege for a third party communication, most attorneys attempt to rely on the pivotal case of *U.S. v. Kovel*.[43] *Kovel* has become synonymous

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[41] For a general discussion regarding the potential loss of the attorney-client privilege in the context of third party communications, see David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020; Lauren J. Wolven, *Living in a Statistical Universe: Embracing the Art and Ethics of the Engagement Letter,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 17, 2019; Kim Kamin, Terrence M. Franklin, Jon Scuderi, & Michael Simon, *"You're Keepin' Too Many Secrets from Me": Lawyers and Other Advisors Working Together – Are Your Communications Privileged?*, ACTEC NATIONAL MEETING, Oct. 20, 2017.

[42] *See* Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, 2017 (describing how an attorney generally has the authority and the obligation to assert or waive the privilege on behalf of a client).

[43] 296 F.2d 918 (2d. Cir. 1961).

with *Kovel* letters, in which lawyers retain outside advisors, such as appraisers, in order to create an attorney-client privilege that is separate and apart from the privilege between the attorney and estate planning client. While *Kovel* letters are useful in the right circumstances, many clients would balk at the suggestion of separate *Kovel* letters for every third party advisor. Even without a formal *Kovel* letter, some courts may respect the privilege if a third party's involvement was deemed necessary to facilitate or translate the attorney's communications for the client.[44] Consider this approach as a last resort, however, as it can be difficult to prove that a third party advisor falls within the "circle of privilege."[45]

Privilege issues keep lawyers up at night. To sleep a little better, lawyers should educate their clients regarding privilege issues and dispel any preconceived notion that all communications with a lawyer are protected. Lawyers should also remember how easy it is to inadvertently waive the privilege when communicating with third party advisors, and thoughtfully balance the benefits of third party communication against the detriment of waiving the privilege on behalf of their clients. All things being equal, it is generally better for lawyers to make every reasonable effort to preserve the privilege.

e. Listing Methods of Communication

With constant advancements in technology, there are seemingly endless methods for lawyers to communicate with their clients. This has been both a blessing and a curse, as clients will typically reach for the first device that connects them to their lawyers the fastest. As further discussed in Part II.D.1, all of these communication methods are capable of being intercepted, which could result in the loss of the attorney-client privilege, not to mention the client's confidence. Below is a sample provision to include in an engagement letter regarding potential methods of communication and the fleeting nature of the attorney-client privilege:[46]

> *You should be aware that we customarily communicate with our clients by letter, telephone (including, digital, analog, satellite or other portable telephones), video conference, fax, and e-mail (including, wireless e-mail). All of these modes of communication are susceptible of being intercepted. Such interception, even though unauthorized and perhaps illegal, could potentially expose confidential communication and result in the loss of the attorney-client privilege under certain circumstances. Moreover, by furnishing us with an e-mail address, cell phone number, or similar contact information, you authorize us to communicate with you using these modes of communication notwithstanding the inherent confidentiality risks. By executing this engagement letter, you will be deemed to have*

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44 *See* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020 (summarizing applicable case law).

45 *See id.*

46 This sample clause is based, in part, on the ACTEC sample forms. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

acknowledged your awareness of these risks and to have consented to our use of such modes of communication unless you otherwise instruct us in writing.

Please also be aware that, with few exceptions, communications among us should be protected by the attorney-client privilege. However, if someone else whom we do not represent, such as a family member, financial advisor, CPA, or other third party, is included in a meeting or phone call or is copied on correspondence, then the attorney-client privilege may be waived as to items disclosed in that meeting or correspondence. Similarly, if you choose to communicate with us or authorize us to communicate with you using an e-mail address or other contact information to which others have access, the attorney-client privilege may also be waived. As a result, you or the third party may be forced to disclose the content of that communication in a court of law or otherwise in the context of litigation. Please keep this in mind when asking us to share information with third parties or when you share information with (or grant access to) others who are not part of our attorney-client relationship.

D. The Middle of a Client Relationship

With a signed engagement letter firmly in hand (or placed somewhere high up in the cloud), the real legal work can begin. The lawyer's duty of confidentiality persists throughout the entire course of the client relationship, and can present many ethical challenges. Lawyers working remotely must exercise an enhanced level of vigilance, as many of the safety measures taken for granted in a traditional work environment may not be present at home or on the road. The paragraphs below explore how lawyers can uphold their duty to safeguard client information while working remotely, as well as exceptions to the duty of confidentiality, inadvertent data breaches, and the disclosure of information by tax return preparers.

1. Safeguarding Client Information

a. Recent Updates to the Model Rules and Comments

Model Rule 1.6(a), as discussed in Part II.A, establishes the basic rule that a lawyer "shall not reveal information relating to the representation of a client," subject to certain exceptions contained in Model Rule 1.6(b). Part II.D.2 examines those exceptions. Inherent within the core duty of confidentiality, and contained in Model Rule 1.6(c), is the duty to safeguard client information, including communications, notes, work product, data, and all other general information. Specifically, Model Rule 1.6(c) provides that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[47]

While the mandates contained in Model Rule 1.6 are fairly straightforward, it is important to remember that the Model Rules themselves are based on the ABA's Canons of Professional Ethics originally adopted in 1908. The Canons go back even further, drawing on sources

[47] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6.

developed in the 1800s.[48] Although the principles of Model Rule 1.6 are timeless and sound, those who drafted the Canons could not consider the ethical implications of a lawyer's response to a client's criticism on Facebook. The Model Rules, just like lawyers, have had to adapt over time.

Most applications of the Model Rules have focused on what constitutes a lawyer's "reasonable efforts" to prevent the disclosure of a client's confidential information, particularly in response to advances in technology. For example, in ABA Formal Opinion 99-413, the Ethics Committee examined the impact of the increasing use of email to communicate with clients.[49] The Ethics Committee found that email communications provided a reasonable expectation of privacy, because it would be illegal to intercept an email, similar to how it would be illegal to wiretap a telephone.[50] Despite blessing email communications for the legal profession, the Ethics Committee emphasized lawyers' continuing obligation to act reasonably under the circumstances, which could require additional security measures for particularly sensitive information.[51]

In 1999, email was still relatively new to many members of the public. As email communications became more commonplace and technology continued to infiltrate the legal profession, the ABA updated a number of Model Rules and Comments to address technology-related issues.[52] For instance, the ABA added Comment 8 to Model Rule 1.1 dealing with the duty of competence. Comment 8 now provides that, in order "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[53] Put simply, to provide competent representation under the Model Rules, a lawyer should know how to use technology. Several states, including Florida and North Carolina, require lawyers to devote a certain number of continuing legal education hours per year to technology training.[54]

In 2012, the ABA added Model Rule 1.6(c), codifying the duty to safeguard client information, and updated Comment 18 to Model Rule 1.6. Consistent with ABA Formal Opinion 99-413, Comment 18 clarifies that a lawyer should consider additional security measures in certain

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48 *See* Steven K. Mignogna, *Ethics in Technology*, 2015 DELAWARE TRUST CONFERENCE, Oct. 27, 2015.

49 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413, *Protecting the Confidentiality of Unencrypted E-Mail* (1999).

50 *See id.*

51 *See id.* ("The conclusions reached in this opinion do not, however, diminish a lawyer's obligation to consider with her client the sensitivity of the communication, the costs of its disclosure and the relative security of the contemplated medium of communication. Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. Those measures might include the avoidance of email, just as they would warrant the avoidance of the telephone, fax and mail.").

52 *See id.*

53 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8.

54 *See* Bob Ambrogi, *Another State Moves Closer to Mandating Tech CLE, But Limited to Cybersecurity*, LAWSITE BLOG, July 2, 2020, available at https://www.lawsitesblog.com/2020/07/another-state-moves-closer-to-mandating-tech-cle-but-limited-to-cybersecurity.html#:~:text=Two%20states%20currently%20require%20mandatory,%E2%80%9Cin%20approved%20technology%20programs.%E2%80%9D.

circumstances, such as when the information being communicated is highly sensitive.[55] Specifically, Comment 18 lists the following factors to be considered in determining the reasonableness of a lawyer's efforts to safeguard information:

- The sensitivity of the information;
- The likelihood of disclosure if additional safeguards are not employed;
- The cost of employing additional safeguards;
- The difficulty of implementing the safeguards; and
- The extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use).[56]

In 2017, again in response to continuing advances in technology, the Ethics Committee issued Formal Opinion 477R.[57] Citing ABA Formal Opinion 99-413, the Ethics Committee confirmed that "the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication."[58] Due to the increasing threat of cybersecurity breaches, however, Formal Opinion 477R provided that "it is not always reasonable to rely on the use of unencrypted email," and cited electronic communications through mobile applications, message boards, and unsecured networks as those that may not afford a basic expectation of privacy.[59]

As recent ABA guidance indicates, in order to fulfill their duty of confidentiality, lawyers must analyze, on a case-by-case basis, whether their security measures are reasonable when communicating with clients. ABA Formal Opinion 477R concludes by providing a non-exhaustive list of steps a lawyer should take, regardless of the mode of communication:[60]

- **Understand the Nature of the Threat:** The reasonableness of a lawyer's efforts to protect a client's confidential information depends on the sensitivity of the information itself. Unfortunately, law firms are a treasure trove for sensitive information, as client files regularly include tax returns, social security numbers, asset details, account numbers, trade secrets, health care information, and other

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55 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 18.

56 *Id.* To provide further flexibility, Comment 18 provides that "[a] client may require the lawyer to implement special security measures not required by [Mode Rule 1.6] or may give informed consent to forgo security measures that would otherwise be required by [Model Rule 1.6]."

57 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R, *Securing Communication of Protected Client Information*, May 22, 2017.

58 *Id.*

59 *Id.*

60 *Id.*

sensitive information.[61] When there is a greater risk of data theft, greater efforts are typically required.

- **Understand How Client Confidential Information Is Transmitted and Where It Is Stored:** It is not enough to "let IT handle it." A lawyer should have a basic understanding of how the law firm stores and manages client data, including access points such as desktop and laptop computers, tablets, mobile phones, and video conferencing equipment. This is harder when working remotely, where the universe of potential cybersecurity threats expands dramatically.

- **Understand and Use Reasonable Electronic Security Measures:** Lawyers should understand basic electronic security measures, both in and out of the office. This may involve encrypting data, changing passwords regularly, installing antivirus software, using secure Wi-Fi or a virtual private network, relying on dual-factor authentication when logging in remotely, and other cybersecurity measures.[62]

- **Determine How Electronic Communications About Client Matters Should Be Protected:** As discussed in Part II.C.3, lawyers should discuss with clients upfront the data security measures that are appropriate in certain situations, such as when transmitting sensitive documents as email attachments. Lawyers should also advise their clients regarding the use of devices that may be accessed by third parties, and the potential waiver of the attorney-client privilege.

- **Label Confidential Information:** Lawyers should mark appropriate communications as "privileged and confidential," or include a disclaimer at the bottom of their email communications. This can alert a third party who may have inadvertently received a communication that it was intended to be confidential. Under Model Rule 4.4(b), a lawyer who "knows or reasonably should know" that he or she has received information that was inadvertently disclosed is required to promptly notify the sender.[63]

- **Train Lawyers and Nonlawyer Assistants in Technology and Information Security:** As further discussed in Part III.D, the duty of confidentiality is an organizational effort. As such, lawyers must take steps to ensure that other professionals, including associates, paralegals, and support staff, are implementing

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61 *See generally* John F. Bergner & Jeffrey D. Chadwick, *Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security*, 51ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 11, 2017 (discussing the omnipresent threat of cybersecurity breaches, and how to protect against them).

62 In a somewhat sobering word of caution, ABA Formal Opinion 477R advises that "a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all."

63 *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

reasonable security measures.[64] This typically involves the establishment of policies and procedures, periodic training, and reasonable supervision.[65]

- **Conduct Due Diligence on Vendors Providing Communication Technology:** Also as further discussed in Part III.D, lawyers should exercise reasonable diligence in retaining and monitoring outside vendors that provide technology services. Lawyers have a duty to ensure that the vendor's cybersecurity protocols are reasonable and compatible with the lawyer's professional obligations.[66]

In 2021, in response to the marked increase in lawyers practicing remotely, the Ethics Committee issued Formal Opinion 498, aptly titled "Virtual Practice."[67] The Ethics Committee defined "virtual practice" as "technologically enabled law practice beyond the traditional brick-and-mortar law firm."[68] The opinion covers a number of different ethical duties implicated by remote practice, but admittedly "does not address every ethical issue arising in the virtual practice context."[69] With respect to confidentiality, the opinion cites and relies upon the factors set forth in ABA Formal Opinion 477R and Comment 18 to Model Rule 1.6, before applying these principles to advances in technology such as hardware devices, software systems, virtual meeting platforms, document exchange platforms, and listening-enabled devices.[70]

The guideposts laid out in ABA Formal Opinion 477R and Comment 18 to Model Rule 1.6, and reinforced by ABA Formal Opinion 498, are extremely helpful, but may also be challenging for attorneys who seek (or are forced) to implement a virtual estate planning practice. With this basic framework in mind, the remaining paragraphs of this Part II.D.1 examine how an attorney may uphold the duty to safeguard client information with respect to specific modes of communications and associated devices.

b. Safeguarding Verbal Communications

Many attorneys prefer face-to-face meetings held at their own offices. In addition to the practicality of walking down the hall to meet with a client, face-to-face meetings may cultivate and preserve a better sense of confidentiality, professionalism, and personal connection. Face-to-face meetings are not always possible, however, especially during a global pandemic. Although video conferencing technology has been available for many years, its use has skyrocketed during the COVID-19 pandemic, and for many clients and advisors has replaced the telephone as the preferred method of remote verbal communication. Video conferencing is here to stay, even when social distancing no longer demands it.

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64 *See* MODEL RULES OF PROF'L CONDUCT R. 5.1.

65 *See* MODEL RULES OF PROF'L CONDUCT R. 5.2.

66 *See* MODEL RULES OF PROF'L CONDUCT R. 5.3.

67 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498, *Virtual Practice*, March 10, 2021.

68 *Id.*

69 *Id.*

70 *Id.*

Modern technology certainly makes it easier for lawyers and clients to communicate. Unfortunately, it is also makes it easier for other people (and even other devices) to hear those conversations as well, which could violate the lawyer's duty of confidentiality and waive the attorney-client privilege.[71] With so many attorneys learning and using new technology for the first time, it is not surprising that the Oxford Dictionary added the word "Zoom-bombing" in 2020.[72] And with many courts forced to rely on video conferencing, it is also not surprising that some lawyers struggled mightily, such as Texas attorney Rod Ponton, who rose to national prominence when he was unable to turn off the "cat filter" while appearing at a virtual court hearing.[73] In addition to concerns with video conferencing, self-listening devices such as Alexa, Google Home, and Siri continue to pose major threats to client confidentiality as smart technology expands into nearly every facet of modern life.[74]

Attorneys are not expected to be technology experts. Under the Model Rules, though, attorneys must at least make reasonable efforts to safeguard verbal communications with a client.[75] Reasonableness is a question of fact, and the Model Rules do not expressly address whether a law firm should select Zoom, Microsoft Teams, Cisco Webex, or some other service to host its video conferences.[76] Given the gap between the Model Rules and lawyers' need to rely on remote lawyering technology, several state bars issued helpful guidance in 2020.[77] Primarily these states sought to raise ethical awareness among the bar by providing practical tips when verbally communicating with clients from a remote location. For example:

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71 *See* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020 (aptly describing how "[t]he convenience of modern technology is part of its curse").

72 *See* Barry Collins, *Zoom Zings into the Oxford Dictionary Words of the Year*, FORBES, Nov. 23, 2020, https://www.forbes.com/sites/barrycollins/2020/11/23/zoom-zings-into-the-oxford-dictionary-words-of-the-year/?sh=71313715a465 (defining "Zoom-bombing" as "disrupting video calls with violent, pornographic or offensive content"); *see also* Kate O'Flaherty, *Beware Zoom Users: Here's How People Can "Zoom-Bomb" Your Chat*, FORBES, Mar. 27, 2020, available at https://www.forbes.com/sites/kateoflahertyuk/2020/03/27/beware-zoom-users-heres-how-people-can-zoom-bomb-your-chat/?sh=6b235383618e.

73 *See* Scott Stump, *The Man Behind the Meow! Meet the "Cat Lawyer" Who Went Viral After Zoom Filter Mishap*, TODAY, Feb. 10, 2021, available at https://www.today.com/popculture/meet-cat-lawyer-rod-ponton-who-went-viral-after-zoom-t208597.

74 *See* John F. Bergner & Jeffrey D. Chadwick, *Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security*, 51ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 11, 2017 (discussing the proliferation of smart technology and the cybersecurity risks that it poses).

75 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

76 *See* Karen Boxx, *When There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, ESTATE PLANNING COUNCIL OF SEATTLE 65TH ANNUAL ESTATE PLANNING SEMINAR, Oct. 29, 2020 (discussing security concerns with each platforms, and providing general tips for practitioners working remotely).

77 *See* Devika Kewalramani, John Baranello, & Eliza Barrocas, *Social Distance Lawyering – How Close Is Your Ethical Compliance?*, NEW YORK STATE BAR ASSOCIATION, June 12, 2020, available at https://nysba.org/social-distance-lawyering-how-close-is-your-ethical-compliance/ (summarizing guidance from the state bars of Wisconsin, Pennsylvania Michigan, and Florida, among others).

- Lawyers should have a basic understanding of how video conferencing technology works, and should familiarize themselves with how to set up and participate in virtual meetings, consistent with their ethical duty of competence;[78]

- Law firms should ensure that their video conferencing software is current, and regularly update their security software to the latest versions;[79]

- Attorneys should utilize all available safety features, such as requiring passwords for meetings and enabling the waiting room function for new participants;

- When not in use, lawyers should cover cameras and disable microphone and camera features;[80]

- When speaking from home, lawyers (and clients) should be mindful of who may be within earshot, as even the presence of a family member may waive the attorney-client privilege in certain circumstances;[81]

- Lawyers (and clients) should also be aware of "what" may be listening, and should manually check the privacy settings of household devices with smart technology or disable self-listening devices altogether when speaking with clients;

- When appearing on video, lawyers should ensure that confidential files related to other clients are not visible, and perhaps use an automated or blurred background to prevent inadvertent disclosure;[82]

- To the extent possible, lawyers should avoid verbally communicating with clients in public places or using unsecured, public Wi-Fi networks to access video conferencing technology; and

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78 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (providing that lawyers should keep abreast of technological changes, as discussed in Part II.D.1.a).

79 Interestingly, the New York Attorney General's Office investigated Zoom in in response to widespread criticism regarding the safety features of Zoom. Ultimately, in settling the investigation, Zoom agreed to enhance its cybersecurity measures. *See* Elizabeth Rogers, *"Remote" Lawyering*, TEXAS BAR JOURNAL, Dec. 2020, available at https://lsc-pagepro.mydigitalpublication.com/publication/?i=683328&article_id=3814857&view=articleBrowser.

80 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498, *Virtual Practice*, March 10, 2021 ("Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.").

81 *See, e.g.*, Kenneth P. Vogel, *"Isn't That the Trump Lawyer?": A Reporter's Accidental Scoop*, N.Y. TIMES, Sept. 19, 2017, available at https://www.nytimes.com/2017/09/19/us/politics/isnt-that-the-trump-lawyer-a-reporters-accidental-scoop.html (describing a conversation overheard at BLT Steak in Washington, D.C. between former President Trump's legal team regarding the status of the investigation into Russian meddling in the 2016 election).

82 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498, *Virtual Practice*, March 10, 2021.

- Finally, because technology is constantly changing, lawyers should stay as up to date as possible on current technology and cybersecurity developments.

c. Safeguarding Written Communications

Lawyers must also protect written communications from inadvertent disclosure. Unlike verbal communications, written communications are virtually impossible to delete.

The Model Rules do not discriminate against the form of written communication, and a lawyer should generally treat an informal email the same as a substantive memorandum for purposes of discharging the duty of confidentiality.[83] Text messages, private messages on social media sites, and even handwritten notes are all forms of written communication that lawyers should strive to protect.[84] Before sending any form of written communication to a client, a lawyer should consider whether he or she is comfortable with the contents of the message being read aloud in open court or being reprinted in published case law. If not, the lawyer should then consider whether it is necessary to evidence that communication in writing. Going through this simple exercise should help lawyers slow down and carefully consider each written response to a client, rather than succumbing to the desire (or perhaps the client demand) to respond as quickly as possible.

Under Model Rule 1.6, a lawyer must make reasonable efforts to safeguard written communications from inadvertent disclosure.[85] Many of these efforts are similar to those designed to protect verbal communications, as described in Part II.D.1.b. For example, lawyers should be careful when copying non-clients, such as third party advisors, on written communications, because this may waive the attorney-client privilege, as further discussed in Part II.C.3.d. Lawyers should also implement reasonable security protocols when sending any form of electronic message, although ABA Formal Opinions 99-413 and 477R confirm that unencrypted email is appropriate in most cases. Again, relying on unsecured Wi-Fi networks is always dangerous, and lawyers should ensure that their home and mobile networks are just as secure as their office network when sending written communications.

Even if a lawyer implements reasonable security measures, a lawyer could still have an ethical problem if the client fails to safeguard written communications and the lawyer neglected to inform the client regarding potential, foreseeable breaches. For example, in ABA Formal Opinion 11-459, the Ethics Committee considered a hypothetical involving a client who retained a lawyer to assist in an employment dispute.[86] If the lawyer is aware that the client intends to use her work computer for communications, the lawyer should warn the employee that her employer may access and review the employee's email communications, regardless of whether they are on a

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83 *See* Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012.

84 *See* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020.

85 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

86 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459, *Duty To Protect the Confidentiality of E-Mail Communications with One's Client* (2011).

work or personal email account, resulting in the loss of the attorney-client privilege.[87] In the estate planning context, a similar situation could arise if a lawyer represents only one spouse, but sends emails to a shared spousal email address or sends hard copy letters to the marital home.

For highly sensitive matters, query whether it is ever appropriate for a client to use a work or shared email address, or whether the lawyer should advise the client to create a standalone email address for all legal communications. Even if that suggestion is over the top, the lawyer should advise the client regarding the risks associated with the inadvertent disclosure of written communications. The best place to document this advice is in the engagement letter, as discussed in Part II.C.3.e, or in a written disclaimer prominently displayed in an email, letter, or memorandum.

d. Safeguarding the Client File

Sometimes, estate planning clients switch law firms. Perhaps the client has moved to a new state, or has decided to make a change for another reason. The new estate planning attorney typically requests the "client file" from the prior estate planning attorney. What all parties quickly realize is that the client file not only includes emails, letters, and memoranda, but also signed legal documents, the attorney's handwritten notes, financial and family information, and a myriad of other documentation relating to the representation. Unless the file has gone completely paperless, it usually contains both physical documents and electronic data.

Lawyers have a duty to keep the client file confidential, regardless of its physical or electronic form.[88] Many lawyers rely on a legal assistant to stay organized and an IT department or third party IT provider for cybersecurity.[89] When a lawyer is working almost entirely from home, however, tending to the client file can be much more difficult. The paragraphs below discuss how to safeguard electronic and physical files, particularly when working remotely.

1) The Electronic File

The beauty, and the danger, of electronic files is that they are always there. Exactly where they are may be another question. Electronic records are typically stored in multiple places, including a law firm's document management system, an individual lawyer's virtual desktop, in the "cloud," or in portable electronic storage devices, such as flash drives.[90] Each location has its

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87 *See id.* The Ethics Committee did acknowledge that the case law was still evolving as to whether an employee should have a "reasonable expectation of privacy" when using an employer's device to send or receive emails with the employer's personal lawyer. *See id.* (comparing Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010) and other cases upholding the privilege to Holmes v. Petrovich Development Co., 191 Cal. App. 4th 1047 (2011) and other cases denying the privilege).

88 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.15 (providing that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property").

89 For a list of law firm best practices to protect client privacy, see John F. Bergner & Jeffrey D. Chadwick, *Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security*, 51ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 11, 2017.

90 The "cloud" generally refers to a file server (or series of file servers) where the hard equipment required to store the data is not physically located in the lawyer's office, but in an outside location (or locations) that is that is

benefits and drawbacks, and all require reasonable cybersecurity measures to adequately protect confidential client information. For example, a number of ethics opinions have approved the use of cloud computing for electronic data storage, but have emphasized that a lawyer must still take reasonable precautions in selecting the third party vendor and accessing cloud-based files.[91]

Setting aside the challenges of implementing a comprehensive cybersecurity regime, it is relatively easy to store and access client data in traditional formats such as Word, pdf, or Outlook. It can be much harder, however, if client communications are sent informally. Consider, for example, a client who insists on texting a lawyer's personal cell phone or a family friend who habitually uses a lawyer's personal email address. Without affirmative action by the lawyer, these messages would not be stored and protected in the same manner as the client's other information. Yet, these messages are still written communications that a lawyer has an obligation to secure.

Preservation is particularly important when there is a reasonable chance of litigation, as courts can impose stiff penalties for failing to secure material evidence.[92] Even in the absence of litigation, it is important to preserve and secure all client information, including unsolicited informal communications, in order to have a complete record of the representation and legal services rendered. This has led many attorneys to adopt a "no text and no personal email" policy with clients.[93] Despite all due care, these informal communications are bound to occur from time to time, and when they do, lawyers should promptly file those communications in an appropriate electronic location. This can be as simple as forwarding a personal email to a work email address, or taking a screen shot of a text message and saving it in a client's electronic file.

It also important for lawyers to understand the concept of "metadata," which is often described as "data about data."[94] In essence, metadata is the fingerprint of an electronic file, containing information such as who created the file, who edited the file and when, and what

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owned and operated by a third party vendor. *See* Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012; *see also* Bonnie Cha, *Too Embarrassed To Ask: What Is "The Cloud" and How Does It Work?*, VOX, Apr. 30, 2015, available at https://www.vox.com/2015/4/30/11562024/too-embarrassed-to-ask-what-is-the-cloud-and-how-does-it-work.

91 *See, e.g.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398, *Access of Nonlawyers to a Lawyer's Data Base* (1995); Alabama Formal Ethics Opinion 2010-02 (2010); The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2010-179 (2010); New York State Bar Association Committee on Professional Ethics Opinion 842 (Sept. 10, 2010). For an excellent overview of principles gleaned from these ethics opinions, see Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012.

92 *See* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020 (discussing penalties associated with the spoliation of legal evidence).

93 *See id.*

94 *See* Ali Moinuddin, *Metadata 101 for Lawyers*, ATTORNEY AT WORK, Apr. 13, 2019, available at https://www.attorneyatwork.com/metadata-101-lawyers/#:~:text=A%20popular%2C%20if%20slightly%20ambiguous,edits%20made%20along%20the%20way..

changes were made to a file. It also includes hidden text and embedded objects.[95] Metadata is significant because it potentially contains confidential information, which lawyers have a duty to protect. For instance, if an estate planning attorney is drafting a complicated trust provision for one client, and copies and pastes a similar provision from another client's trust agreement, the other's client's confidential information could be inadvertently disclosed through the metadata. The best way to protect against inadvertent disclosure is to utilize a "metadata scrubber," or to only send pdfs to clients instead of Word documents.[96]

2) The Physical File

Many lawyers are more comfortable retaining and safekeeping physical files compared to electronic files. Lawyers can see, touch, and move paper, after all, and there is a certain comfort in being able to place your hands on an actual document. Law firms often secure important original documents, such as hand-signed Wills, under lock and key in the firm's weatherproof vault, and regularly collect and dispose of designated shred boxes containing confidential information. Through time and experience, many lawyers have come to rely on the rhythm and security of historical law firm protocols.

As a result of the COVID-19 pandemic, many lawyers have enhanced their home offices. Still, most home offices do not include walls of filing cabinets, a weatherproof Will vault, or even a designated shred box. A lawyer's duty to safeguard a client's physical files, however, does not stop because the lawyer works from home. In fact, a lawyer must arguably exercise more diligence in securing client files at home, given the number of third parties who may occupy or visit the same space, such as spouses, children, personal guests, and home service providers. Lawyers should ensure that all client files kept at home are stored in a safe and private location, limiting the possibility of inadvertent disclosure. Likewise, lawyers should not simply throw client documents in the garbage, and must take reasonable steps to dispose of any client documents in a confidential manner. This may involve shredding or burning paper copies, or transporting paper copies to the office where they can be placed in the firm's shred box. Like most aspects of the duty of confidentiality, the key is reasonableness, and a little common sense can go a long way.[97]

One issue that continues to cause headaches for lawyers is how to furnish copies of a client's signed estate planning documents. Law firms will either store original documents at their office or send them to the client for safekeeping. Most law firms will also provide the client with a binder of physical copies, and perhaps a flash drive or compact disc containing electronic copies. Alternatively, the law firm could provide the client with a link to access their documents on the cloud. Clients certainly appreciate having physical and electronic copies readily accessible, but

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[95] *See What is Metadata?*, HARVARD LAW SCHOOL, available at https://hls.harvard.edu/dept/its/what-is-metadata/#:~:text=Metadata%20is%20information%20stored%20within,just%20looking%20at%20the%20file.&text=In%20addition%20to%20data%20that,hidden%20text%20and%20embedded%20objects.

[96] *See* Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012.

[97] For a good discussion of basic ethical considerations while working from home, including the duty of confidentiality under Model Rule 1.6, see Karen Boxx, *When There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, ESTATE PLANNING COUNCIL OF SEATTLE 65TH ANNUAL ESTATE PLANNING SEMINAR, Oct. 29, 2020.

lawyers should not sacrifice their duty of confidentiality for the client's convenience. When sending any physical documents to a client, lawyers should communicate the importance of storing such physical documents in a safe location to protect the client's confidentiality and preserve the attorney-client privilege. The lawyer should also take reasonable steps to secure and restrict access to any electronic copies. Most clients like flash drives, but they are small and easy to lose. Many financial institutions refuse to use flash drives over concerns regarding their misplacement and data security. At the very least, all flash drives and other portable storage devices should generally be password-protected, and it may be prudent to send the password in a separate written communication.

Finally, most lawyers have multiple electronic devices, including desktop computers, laptops, tablets, phones, and storage devices. While these devices store electronic information, the devices themselves are physical objects. Before disposing of any electronic device, lawyers should ensure that all confidential information is removed. If sensitive information is not properly removed, it may be discoverable.[98] Physically destroying the electronic device is always an option (and also a good stress reliever), or lawyers can work with IT professionals to ensure that all sensitive information has been removed from a device before it is discarded. In this regard, the Federal Trade Commission has a useful website that provides information regarding the disposal of electronic devices and securing online accounts.[99]

2. Exceptions to the Duty of Confidentiality

The duty of confidentiality is strong, but not ironclad. In certain situations, a lawyer may be authorized to disclose client information. Model Rule 1.6 provides that a lawyer shall not reveal information relating to the representation of a client unless:

- the client gives informed consent;
- disclosure is impliedly authorized in order to carry out the representation; or
- disclosure is necessary:
    - to prevent reasonably certain death or substantial bodily harm;
    - to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of

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[98] To illustrate the risks associated with the disposal of electronic devices, as a test, a security software company purchased 20 phones on eBay. The prior owners had performed a factory reset, believing that pictures and personal information had been permanently deleted. The security company, however, was able to recover approximately 40,000 photographs, 750 emails, 250 contacts with names and addresses, and other files containing highly personal information *See* Pete Pachal, *Hard Proof That Wiping Your Phone Doesn't Actually Delete Everything*, MASHABLE, July 9, 2014, available at http://mashable.com/2014/07/09/data-wipe-recovery-smartphones/#vB5w91vJh5qp.

[99] *See* FEDERAL TRADE COMMISSION, CONSUMER INFORMATION: ONLINE SECURITY, https://www.consumer.ftc.gov/topics/online-security; *see also Disposing of Records Containing Personal Information*, PRIVACY RIGHTS CLEARINGHOUSE, July 15, 2019, available at https://privacyrights.org/resources/disposing-records-containing-personal-information.

another and in furtherance of which the client has used or is using the lawyer's services;

- to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- to secure legal advice about the lawyer's compliance with the Model Rules;
- 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;
- to comply with other law or a court order; or
- to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[100]

In many situations, a lawyer can obtain a client's informed consent to disclose confidential information to a co-client, family member, or third party advisor at the beginning of a client relationship, as discussed in Part II.C.3.[101] The client can also provide informed consent during the course of the representation, either by a signed consent letter or affirmative email response.[102] In cases where disclosure is impliedly authorized to carry out the representation, as discussed in Part II.C.3.d with respect to sharing information with third parties, informed consent is not required, but it still may be a good idea.[103]

Disclosing client information with informed consent or implied authorization are the easy exceptions to the duty of confidentiality. The other exceptions involve situations a lawyer typically hopes to avoid. The first three exceptions under Model Rule 1.6(b) deal with disclosure to prevent

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[100] MODEL RULES OF PROF'L CONDUCT R. 1.6.

[101] For a definition of "informed consent," see MODEL RULES OF PROF'L CONDUCT R. 1.0(e), as discussed in Part II.C.2. Comment 6 to Model Rule 1.0 describes the type of information the lawyer needs to provide to enable the client to make an informed decision (*i.e.*, "a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives").

[102] *See* MODEL RULES OF PROF'L CONDUCT R. 1.0(b) ("If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."). Model Rule 1.0(n) confirms that a "writing" or "written" denotes a "tangible record of a communication or representation," including handwriting and electronic communications.

[103] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 ("a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter").

reasonably certain death, substantial bodily harm, criminal activity, fraud, or substantial financial damage.[104] The Comments to Model Rule 1.6 justify disclosure in these circumstances due to the high value placed on human life and property. In effect, the client has forfeited the protection of confidentiality by the client's own actions.[105] Even then, Model Rule 1.6(b) states that the lawyer "may" reveal client information, and not that the lawyer "shall" reveal such information.[106] Obviously, each potential disclosure under Model Rule 1.6(b) requires careful analysis on a case-by-case basis, and reasonable minds could differ on whether disclosure is authorized in a particular situation.[107]

Fortunately, and perhaps because lawyers drafted the rules, the last four exceptions under Model Rule 1.6(b) are primarily designed to protect lawyers. A lawyer may reveal confidential information to secure legal advice about complying with the Model Rules, defend himself or herself against a criminal charge or civil claim, comply with a court order, or detect and resolve conflicts of interest.[108] These exceptions all make sense, as they facilitate the lawyer's overall compliance with the Model Rules. The lawyer should view the disclosure of a client's information as a last resort, however, and should first explore all viable alternatives.[109]

There are several notable omissions from the exceptions listed in Model Rule 1.6(b). For example, a lawyer cannot reveal confidential information when blogging, tweeting, commenting on social media, or delivering speeches.[110] This applies to all client information, even if it is generally known or publicly available.[111] Client hypotheticals are also dangerous if they veer too

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104 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1), (2), & (3).

105 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 6, 7, & 8.

106 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (stating that a lawyer's decision not to disclose as permitted by Model Rule 1.6(b) does not violate the Model Rule, but that disclosure may be required by other Model Rules). Under Model Rule 3.3(b), for example, a lawyer who represents a client in an adjudicative proceeding is required to disclose information to a tribunal if the lawyer knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

107 The Comments provide that "reasonably certain death or substantial bodily harm . . . is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat." *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 For example, "a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims." *Id.*

108 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4), (5), (6), & (7).

109 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 16 ("Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.").

110 *See* Anita Soucy, Thomas J. Kane, Guinevere Moore, Fred F. Murray, Jennifer Breen, Jeremiah Coder, Lawrence Mack, & Shamik Trivedi, *Current Ethics Issues*, FEDERAL BAR ASSOCIATION ANNUAL TAX LAW CONFERENCE, Mar. 7-8, 2019; *see also* N.Y. State Bar Ass'n Op. 1032 (2014) (providing that a lawyer may not disclose confidential client information solely to respond to a former client's criticism of the lawyer on a lawyer-rating website).

111 *See, e.g.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 480, *Confidentiality Obligations for Lawyer Blogging and Other Public Commentary* (2018).

close to a client's actual set of facts.[112] The best practice is to speak generically in all circumstances and, if a client hypothetical would be beneficial for educational purposes, to vary the facts significantly so that the client's identity is adequately protected.

3. Addressing Breaches of the Duty of Confidentiality

As the world learned from Forrest Gump, it happens. It, in this case, is the inevitable, inadvertent disclosure of a client's confidential information. It could be as simple as failing to correct a mistaken "autofill" when sending an email to a client, hitting "reply to all" instead of "reply" when responding to a client's email, or failing to delete a string of messages when forwarding an email.[113] It could also occur if a legal assistant mislabels a package or if a client's physical file is accidentally left in a public place. Perhaps in a worst case scenario, cyber criminals could attack your law firm, resulting in a widespread data breach. Working remotely only seems to increase the risk that a lawyer will inadvertently disclose a client's information.

While it may be embarrassing, lawyers have a duty to communicate a material breach of confidentiality to a client. Under Model Rule 1.4, a lawyer shall "keep the client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[114] This generally includes providing notice to clients when their information is inadvertently disclosed to a third party.[115] For minor, non-material breaches, such as when a non-substantive email is sent to the wrong recipient, but quickly and effectively recalled, the lawyer may be justified in not informing the client. Again, the key is reasonableness, and erring on the side of caution in these situations is the best practice.

Beyond routine email mishaps, lawyers must also concern themselves with the omnipresent threat of cyber-attacks. The number and sophistication of cyber-attacks are steadily increasing, and law enforcement officials often divide businesses and individuals into two categories—those that have been hacked and those that do not know they have been hacked.[116] Law firms are prime targets with the vast amount of sensitive information they store electronically. In 2017, for example, global law firm DLA Piper was the victim of a major cyber-attack that shut down their

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[112] *See id.* ("A violation of [Model] Rule 1.6(a) is not avoided by describing public commentary as a 'hypothetical' if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical."); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-411, *Ethical Issues in Lawyer-to-Lawyer Consultation* (1998).

[113] *See* Hugh Kendall & John T. Rogers, Jr., *Where No Ethics Have Gone Before – Staying on the Right Course in an Expanding Universe of Technology*, ACTEC 2012 ANNUAL MEETING, Mar. 8, 2012 (discussing the dangers of email communications).

[114] *See* MODEL RULES OF PROF'L CONDUCT R. 1.4.

[115] Generally, when a lawyer receives an email that he or she knows or reasonably should know was inadvertently sent, the lawyer is obligated to promptly notify the sender. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460, *Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel* (Aug. 4, 2011).

[116] *See* Robert S. Mueller, III, *Combatting Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), available at https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

email and phone systems, and caused significant economic damage.[117] More recently, a hacker named "Clop" claimed to have stolen a number of client files belonging to law firm Jones Day, posting them on the "dark web."[118]

Cyber-security threats are not going away, and lawyers must exercise reasonable precautions to protect against them, as discussed in Part II.D.1. Even when a lawyer has implemented reasonable security measures, all systems are susceptible to attack, and data breaches will continue to occur. ABA Formal Opinion 483 discusses a lawyer's obligations after an electronic data breach or cyber-attack.[119] The Ethics Committee explains that under Model Rule 1.1, the lawyer is required to act reasonably and promptly to stop the breach and mitigate the damage.[120] In this regard, it is certainly beneficial if the lawyer already has an incident response plan in place, which the lawyer can implement quickly and effectively.[121] Once the damage has been mitigated and assessed, the lawyer has an affirmative duty to communicate the breach to current clients under Model Rule 1.4.[122] The Ethics Committee declined to extend this affirmative duty to notify to former clients, however because the Model Rules do not contain an express provision to that effect.[123] As for the contents of the notice, the Ethics Committee concluded that the lawyer's disclosure "must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything," and, "as a matter of best practices, a lawyer also should inform the client of the lawyer's plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security."[124]

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117 *See* Debra Cassens Weiss, *DLA Piper Hit by "Major Cyber Attack" Amid Larger Hack Spreading to US*, ABA JOURNAL, June 27, 2017, available at https://www.abajournal.com/news/article/dla_piper_is_hit_by_major_cyber_attack_amid_larger_hack_spreading_to_us.

118 *See* Tawnell D. Hobbs & Sara Randazzo, *Hacker Claims To Have Stolen Files Belong to Prominent Law firm Jones Day*, THE WALL STREET JOURNAL, Feb. 16, 2021, available at https://www.wsj.com/articles/hacker-claims-to-have-stolen-files-belonging-to-prominent-law-firm-jones-day-11613514532. Jones Day disputed Clop's claims, stating that its network was secure and the breach occurred through a third party file-sharing site it had used. *See id.*

119 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 483, *Lawyers' Obligations after an Electronic Data Breach or Cyberattack* (Oct. 17, 2018); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-398, *Access of Nonlawyers to a Lawyer's Data Base* (1995)

120 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 483, *Lawyers' Obligations after an Electronic Data Breach or Cyberattack* (Oct. 17, 2018).

121 *Id.* (citing Steven M. Puiszis, *Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning*, THE PROF'L LAWYER, Vol. 24, No. 3 (Nov. 2017).

122 *Id.* (citing N.Y. State Bar Ass'n Op. 842 (2010)).

123 *See id.* ("The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.").

124 *Id.* ("In a data breach scenario, the minimum disclosure required to all affected clients under [Model] Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.").

4. Disclosure of Information by Tax Return Preparers

The Model Rules require a lawyer to safeguard client information. Furthermore, Sections 6713 and 7216 of the Internal Revenue Code (the "Code") impose civil and criminal penalties on any tax return preparer who knowingly or recklessly discloses any information obtained in connection with the preparation of such return or uses any such information for any purpose other than preparing such return.[125] Under Code § 6713, each disclosure is subject to a $250 penalty not to exceed a total of $10,000 per year (or $1,000 per disclosure not to exceed $50,000 total in the case of identity theft). Under Code § 7216, a tax return preparer may be imprisoned for up to one year and responsible for additional fines and the costs of prosecution. In both cases, there are exceptions for disclosures made pursuant to court order or other law.[126]

E. The End of a Client Relationship

All client relationships end in some form or fashion. If a client hired a lawyer for a discrete project, the lawyer can complete the project and send the client an express disengagement letter acknowledging that the lawyer-client relationship has terminated.[127] Many estate planning lawyers, however, prefer to send a "soft" disengagement letter with the hope that the client will re-engage the lawyer for future legal needs. A client relationship can also end if the client terminates the lawyer or if the lawyer voluntarily withdraws from the representation. A lawyer can change firms or professions, a fiduciary client can resign in favor of a successor fiduciary, or a client can become incapacitated, all of which may terminate the lawyer-client relationship. Finally, the client can pass away, in which case the executor of the deceased client's estate may choose to engage the same lawyer to help with the estate administration.[128]

1. The Duty of Confidentiality Survives

Even when a client relationship terminates, the lawyer's duty of confidentiality survives. Under Model Rule 1.9, a lawyer shall not reveal any information relating to the representation of a former client, unless otherwise permitted by the Model Rules.[129] In this regard, consider Model

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[125] *See* Code § 6713(a); Code § 7216(a).

[126] *See* Code § 6713(c); Code § 7216(b). There are also instances in which the IRS may disclose tax return information that it is otherwise required to keep confidential under Code § 6103. *See Disclosure Laws,* IRS, available at https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws.

[127] ACTEC has provided a sample disengagement letter to be sent once the lawyer has performed all the services described in the initial engagement letter. *See Engagement Letters: A Guide for Practitioners*, ACTEC, 3d ed. 2017, available at http://www.actec.org/assets/1/6/ACTEC_2017_Engagement_Letters.pdf.

[128] *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (detailing various circumstances in which the lawyer-client relationship terminates). Under Model Rule 1.16(d), upon termination of the representation, the lawyer shall take reasonable steps to protect a client's interest, and may retain files relating to the client to the extent permitted by other law.

[129] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9(c); *see also* Barry F. Spivey, *Post-Death Confidentiality of Estate Planning Communications Between Attorney and Client*, FLA. B.J. (Apr. 2003) (noting that "the answer appears to be, uniformly, yes" in response to the question, "Does the lawyer's ethical duty of confidentiality survive the client's death?"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 111 cmt. c (stating that a "duty of confidentiality extends . . . beyond the death of the client").

Rule 1.6, which authorizes disclosure if the client gives informed consent.[130] When a former client is still living, the lawyer can simply request the former client's consent to reveal information. When a former client is incapacitated or deceased, however, obtaining informed consent is more nuanced. Can the guardian or executor of the former client's estate consent to disclosure, or does that authority (if any) rest with the beneficiaries of the former client's estate? The answer may depend, in part, on applicable state law.[131]

When a client is suffering from diminished capacity, the lawyer is required to maintain a normal lawyer-client relationship to the extent possible.[132] If the lawyer reasonably believes that the client is at risk of substantial physical, financial, or other harm, the lawyer may take reasonably protective action, including consulting with third parties that have the ability to take action to protect the client and, in severe cases, seeking the appointment of a guardian or conservator of the client's estate.[133] While the client's information is still protected by Model Rule 1.6, the lawyer is impliedly authorized to reveal information about the client to the extent reasonably necessary to protect the client's interests.[134] This is an extremely high bar, and a lawyer should only disclose information regarding a client's diminished capacity when absolutely necessary. The Comments to the Model Rules acknowledge that "[t]he lawyer's position in such cases is an unavoidably difficult one."[135]

These client situations are not easy. The ACTEC Commentaries to Model Rule 1.6 provide some general guidelines regarding the lawyer's duty of confidentiality following the death or incapacity of a client:

> *Obligation After Death of Client*. In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or

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130 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a). Even without informed consent, a lawyer may reveal confidential information if disclosure is impliedly authorized to carry out the representation. *See id.* In addition, under Model Rule 1.9, a lawyer may use (but not necessarily reveal) information relating the representation of a former client to the disadvantage of the former client when the information has become "generally known." MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(1). The Ethics Committee has defined "generally known" as information that has become widely recognized by the public in the relevant geographic area or widely recognized in the former client's industry, profession, or trade; information that is a matter of public record is not necessarily generally known for purposes of Model Rule 1.9. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 479, *The "Generally Known" Exception to Former-Client Confidentiality*, (Dec. 15, 2017).

131 *See, eg.*, FLA. RUL. PROF'L CONDUCT R. 4-1.6 (permitting disclosure to serve the best interest of the client, unless the decedent expressly prohibited the disclosure prior to death); Washington D.C. Bar Ass'n Op. 324, *Disclosure of Deceased Client's Files* (2004) (grappling with the question of whether a law firm should turn over the files of a deceased client upon the request of a spouse who was not a client but is serving as executor of the deceased client's estate); *see also* Barry Spivey, *Post-Death Confidentiality of Estate Planning Communications Between Attorney and Client*, 77 FL. BAR JOURNAL 4, 77 (Apr. 2003), available at https://www.floridabar.org/the-florida-bar-journal/post-death-confidentiality-of-estate-planning-communications-between-attorney-and-client/.

132 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(a).

133 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

134 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(c).

135 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 8.

impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's dispositive instruments and intent, including prior instruments and communications relevant thereto. The personal representative or client may also authorize disclosure of other confidential information learned during the representation if there is a need for that information. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Disclosures to Client's Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client's affairs, the attorney-in-fact often will ask the lawyer for copies of the client's estate planning documents in order to manage the client's assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney's duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client's preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client.[136]

The ACTEC Commentaries, while helpful, only summarize general legal principles that the lawyer must apply on a case-by-case basis in accordance with governing state law. For example, states may have different definitions of "interested parties" in the context of estate litigation, and some states may require lawyers to reveal more information as a witness than other states. Given the breadth of the duty of confidentiality, lawyers should stick to the general rule that all client information is confidential, even when the client is deceased or incapacitated. If the lawyer reasonably believes that disclosure would further the former client's interests, or if disclosure would otherwise be beneficial under the circumstances, the lawyer may consider exceptions to the duty of confidentiality, perhaps in consultation with the former client's executor, attorney-in-fact, or duly appointed agent.

2. The Attorney-Client Privilege Generally Survives

Similar to the duty of confidentiality, the attorney-client privilege survives a client's incapacity or death, subject to certain exceptions.[137] For example, the privilege does not typically

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[136] *ACTEC Commentaries on the Model Rules of Professional Conduct* (5th ed. 2016), available at http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf.

[137] *See* Swindler & Berlin v. United States, 524 U.S. 399 (1998) ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this."); *see also* 64 A.L.R. 185 and cases cited therein.

apply when a beneficiary is contesting a decedent's Will or other testamentary instrument.[138] In some states, the privilege also does not apply when the beneficiary of a trust seeks information from a trustee, based on the principle that the beneficiary is true owner of all trust information.[139] Certain states also permit an executor of a deceased client's estate to waive the privilege, if doing so is in the best interest of the estate.[140]

III. Other Ethical Duties

The Model Rules do not contain a remote working exception, or otherwise limit the ethical obligations of lawyers when working outside of the office.[141] In ABA Formal Opinion 482, the Ethics Committee confirmed that a lawyer's ethical duties are largely unaffected by a natural disaster.[142] For purposes of applying the Model Rules, the COVID-19 pandemic is analogous. The preceding paragraphs of this paper have focused on the duty of confidentiality. This Part III addresses some, but not all, of the other ethical duties implicated by working remotely.

A. Model Rule 1.1: Competence

Model Rule 1.1 provides that "[a] lawyer shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[143] There is a reason this is the first substantive Model Rule. The

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138 *See, e.g.*, TEX. R. EVID. § 503(d)(2) ("The privilege does not apply . . . [i]f the communication is relevant to an issue between parties claiming through the same deceased client."); *see also* Eixholtz. v. Grunewald, 21 N.W.2d 914, 917 (Mich. 1946); David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020 (discussing the "testamentary exception" to the attorney-client privilege).

139 *See Riggs National Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976); *but see Wells Fargo Bank, N.A. v. Superior Court*, 990 P.2d 591 (Cal. 2000); *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *see also* David C. Blickenstaff, Lorraine Cavataio, & Lauren J. Wolven, *Fire Cannot Kill a Dragon: Hot Topics in Privilege and Ethics Issues,* 54TH ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, Jan. 15, 2020 (discussing the "fiduciary exception" to the attorney-client privilege).

140 *See, e.g.*, OHIO REV. CODE ANN. § 2317.02; TEX. R. EVID. § 503(c) ("The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf – and is presumed to have authority to do so."); *see also* In re Estate of Colby, 723 N.Y.S.2d 631, 698 (Surr. Ct. New York County 2001) ("Since the client could have waived the privilege to protect himself or to promote his interest, it is reasonable to conclude that, after his death, his personal representative stands in his shoes for the same purpose."); *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or by Guardian of Incompetent,* 67 A.L.R.2d 1268; *but see* McKinney v. Kalamazoo-City Bank, 221 N.W. 156 (Mich. 1928) (holding that a personal representative may only waive the privilege to protect the estate, but may "not for the dissipation or the diminution thereof").

141 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498, *Virtual Practice*, March 10, 2021 ("[A] lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office. . . . [T]he ethics rules apply to both traditional and virtual law practice").

142 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 482, *Ethical Obligations Related to Disasters* (Sept. 19, 2018).

143 MODEL RULES OF PROF'L CONDUCT R. 1.1.

duty of competence is the foundation for all of a lawyer's actions in representing a client.[144] It requires knowing the law and staying current on changes in the law. For example, to provide competent representation, an estate planning lawyer should certainly know the requirements to execute a Will under applicable state law. During a pandemic or natural disaster, the estate planning lawyer should also know if there are any exceptions to the document execution requirements, such as notarization or witnessing by video rather than in person.[145]

Clients may also ask lawyers a wider variety of legal questions in exigent circumstances, and lawyers should be prepared to advise the client as competently as possible.[146] This may require quick thinking and practical advice, or perhaps a referral to another attorney or specialist.[147] Lawyers should be resources to their clients during times of need, and that should not change just because a lawyer or client is working remotely.

Competence is not limited to knowing the law. As discussed in Part II.D.1.a, Comment 8 to Model Rule 1.1 provides that lawyers should also have a basic understanding of technology.[148] This is especially true for lawyers practicing remotely. Lawyers maintaining a virtual practice should be familiar with remote access and security principles, video conferencing technology, document management systems, cloud storage, and other applicable technology. The lawyer should exercise reasonable care in selecting third party service providers and should monitor the security and effectiveness of communication platforms.[149]

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144 *See* Karen Boxx, *When There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, ESTATE PLANNING COUNCIL OF SEATTLE 65TH ANNUAL ESTATE PLANNING SEMINAR, Oct. 29, 2020.

145 *See id.* (describing potential issues with signing estate planning documents during the COVID-19 pandemic); *see also* Press Release, *Governor Abbott Temporarily Suspends Certain Statutes To Allow For Appearance Before Notary Public Via Videoconference*, OFFICE OF THE TEXAS GOVERNOR, Apr. 8, 2020, available at https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference; Margo H.K Tank, David Whitaker, Elizabeth S.M. Caires, & Andrew Grant, *Coronavirus: Federal and State Governments Work Quickly To Enable Remote Online Notarization To Meet Global Crisis*, DLA PIPER FINANCIAL SERVICES ALERT, Feb. 11, 2021, available at https://www.dlapiper.com/en/us/insights/publications/2020/03/coronavirus-federal-and-state-governments-work-quickly-to-enable-remote-online-notarization/.

146 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 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.).

147 *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 3 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

148 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8.

149 *See generally* Mich. St. Bar, *Ethics in the COVID-19 Pandemic*, available at https://www.michbar.org/opinions/ethics/COVID-19.

B. Model Rule 1.3: Diligence

Model Rule 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[150] It does not provide that a lawyer shall act with reasonable diligence and promptness . . . unless it would be really difficult and inconvenient. In fact, the Comments require "a lawyer [to] pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer."[151] In short, a lawyer's responsibilities to his or her client do not stop just because it may be difficult, at times, to work from home.[152]

While working remotely, it is important to promptly respond to clients and set reasonable expectations. This can be challenging under normal circumstances, but can be even more challenging with the distractions of home.[153] During a pandemic or natural disaster, lawyers should also be aware of filing extensions granted by the court or the IRS,[154] and should monitor any physical mail delivered to the office to stay current on all deadlines and communications.

Finally, all lawyers, but especially sole practitioners, should consider implementing a backup or succession plan if the lawyer is unavailable for an extended period of time, becomes incapacitated, or dies.[155] If working from home, lawyers should at least leave clear instructions regarding the storage of physical client files and other important documentation. An ounce of prevention is worth a pound of cure, and lawyers should make reasonable efforts to protect their clients' interests if they are unexpectedly unable to represent them.

C. Model Rule 1.4: Communications

Model Rule 1.4 requires a lawyer to "keep the client reasonably informed about the status of the matter" and "promptly comply with reasonable requests for information."[156] Like the other ethical rules, there is not a remote working or pandemic exception to the duty of communication.

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150 MODEL RULES OF PROF'L CONDUCT R. 1.3.

151 MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

152 *See* Suzanne Lever & Brian Oten, *Professional Responsibility in a Pandemic*, N.C. BAR, available at https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/professional-responsibility-in-a-pandemic/ (describing how lawyers can still prepare documents, respond to discovery, and perform routine tasks while working from home).

153 *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 3 ("Perhaps no professional shortcoming is more widely resented than procrastination.").

154 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 482, *Ethical Obligations Related to Disasters* (Sept. 19, 2018).

155 *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 5 ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."); *see also* Karen Boxx, *When There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, ESTATE PLANNING COUNCIL OF SEATTLE 65TH ANNUAL ESTATE PLANNING SEMINAR, Oct. 29, 2020.

156 *See* MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3), (4).

Communication allows the client to participate in the representation, and is arguably more important when the lawyer is not physically in the office or readily accessible.

The duty of communication is both proactive and reactive. Lawyers should proactively communicate with their clients, especially during difficult times. If a lawyer is working from home under a shelter-in-place order, the lawyer should provide clients with the lawyer's best contact information and, ideally, the contact information of others at the law firm who can assist if the lawyer is unavailable.[157] If a court is taking longer than usual to schedule a probate hearing or rule on a matter, the lawyer should inform the client and provide periodic status updates.[158] When a client requests information or emails the lawyer with a question, the lawyer should respond promptly, even if it is just to acknowledge receipt of the client's request.[159] As further discussed in Part II.D.3, if the client's information is inadvertently disclosed, perhaps through a data breach, the lawyer should promptly notify the client, describe the disclosure, and offer practical advice to enable the client to take appropriate action, if any.[160] While these are all basic rules of good client management, they are even more important while working remotely.

D. Model Rules 5.1 & 5.3: Supervision of Other Lawyers, Staff, and Third Party Service Providers

Lawyers have an ethical duty to supervise under certain working conditions, including any partner in a law firm or any lawyer having managerial authority or direct supervisory authority over another lawyer or staff member.[161] In some cases, a lawyer's duty to supervise extends to non-lawyers employed by or retained by the law firm, such as technology service providers.[162] The duty to supervise requires reasonable efforts to ensure that the law firm has structures in place to facilitate compliance with the Model Rules by other lawyers, staff, and third parties.[163]

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157 *See* Suzanne Lever & Brian Oten, *Professional Responsibility in a Pandemic*, N.C. BAR, available at https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/professional-responsibility-in-a-pandemic/.

158 *See* Mich. St. Bar, *Ethics in the COVID-19 Pandemic*, available at https://www.michbar.org/opinions/ethics/COVID-19.

159 MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 4 ("When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.").

160 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 483, *Lawyers' Obligations after an Electronic Data Breach or Cyberattack* (Oct. 17, 2018).

161 *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3; *see also* MODEL RULES OF PROF'L CONDUCT R. 5.1 cmt. 5 ("Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.").

162 *See* MODEL RULES OF PROF'L CONDUCT R. 5.3.

163 *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3; *see also ACTEC Commentaries on the Model Rules of Professional Conduct* (5th ed. 2016), available at http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf (discussing the practical implications of Model Rule 5.3).

Satisfying the duty to supervise can be a challenge when attorneys and staff work at the office. It is even tougher when critical team members are working from anywhere and everywhere.[164]

The first step in ensuring that lawyers and firm employees comply with the Model Rules is establishing formal policies to govern confidentiality, communications, document management, and other client matters. With so many personnel working remotely, now is the time to update these policies, or if they exist only as part of the firm's oral tradition, to finally write them down.[165] With good policies and procedures in place, the firm should then train its personnel and offer continuing education and resources, particularly with respect to the use of technology.[166] Finally, just because lawyers and staff are working from home does not mean that all communication and interaction must cease. Lawyers can use the same technology to communicate with colleagues as they use to communicate with clients, and can schedule regular telephone or video conferences to monitor workloads, obtain case status updates, and help troubleshoot remoting working issues.[167]

Under Model Rule 5.3, a lawyer's duty to supervise may extend outside the law firm. In ABA Formal Opinion 08-451, the Ethics Committee considered how Model Rule 5.3 applies when outsourcing non-legal services, such as vendors providing electronic communication services.[168] The lawyer must exercise reasonable diligence in outsourcing services, including a reasonable investigation of the vendor's references, credentials, security policies and protocols, hiring practices, and use of confidentiality agreements, among other factors.[169]

Since the issuance of ABA Formal Opinion 08-451, Comment 3 to Model Rule 5.3 has been updated to provide that when using services outside the firm, including "an Internet-based service to store client information," a lawyer must make "reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."[170] Reasonable efforts depend on the circumstances, and may include factors such as the education, experience, and reputation of the non-lawyer, the nature of the services rendered, and the terms of

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[164] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498, *Virtual Practice*, March 10, 2021 ("Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct. Practicing virtually does not change or diminish this obligation.").

[165] *See* Suzanne Lever & Brian Oten, *Professional Responsibility in a Pandemic*, N.C. BAR, available at https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/professional-responsibility-in-a-pandemic/.

[166] *See* Mich. St. Bar, *Ethics in the COVID-19 Pandemic*, available at https://www.michbar.org/opinions/ethics/COVID-19.

[167] *See id.; see also* Devika Kewalramani, John Baranello, & Eliza Barrocas, *Social Distance Lawyering – How Close Is Your Ethical Compliance?*, NEW YORK STATE BAR ASSOCIATION, June 12, 2020, available at https://nysba.org/social-distance-lawyering-how-close-is-your-ethical-compliance/.

[168] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451, *Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services* (Aug. 5, 2008).

[169] *See id.*; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R, *Securing Communication of Protected Client Information*, May 22, 2017.

[170] *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 3.

any confidentiality arrangements.[171] This due diligence process is not just limited to technology, and should also apply when the lawyer hires other service providers, such as appraisal firms or local counsel. When retaining any outside vendor, the lawyer should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[172]

Unless the client has sourced the third party vendor, the lawyer will be responsible for monitoring the services being performed.[173] Even if the lawyer has exercised reasonable diligence in hiring the vendor, the lawyer must periodically review the factors set forth in Comment 3 to Model Rule 5.3 to ensure that the continued retention of the vendor complies with the lawyer's ethical duties and has not been rendered inadequate by changes in circumstance or technology.[174]

E. Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Not many initially expected the COVID-19 pandemic to persist as long as it has. With extended quarantines, many lawyers left their home states, choosing to practice from a vacation home or from a family member's house. Under Model Rule 5.5, a lawyer who is not admitted to practice in a state shall not "establish an office or other systematic and continuous presence" in the state for the practice of law.[175] Otherwise, the lawyer will be deemed to engage in the unauthorized practice of law.[176] There is an exception, however, for lawyers who provide legal services on a "temporary basis" in another state that "arise out of or are reasonably related to the lawyer's practice" in a state in which the lawyer is admitted.[177]

Model Rule 5.5 primarily concerns lawyers who advise clients with respect to the law of a jurisdiction in which the lawyer is not licensed to practice. It does not address lawyers working remotely from another state, although several states have previously opined on situations involving lawyers who relocate to the state and begin practicing while their bar application is pending.[178] In response to the relocation of lawyers caused by the pandemic, the District of Columbia Court of

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171 *See id.*

172 *Id.*

173 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R, *Securing Communication of Protected Client Information*, May 22, 2017.

174 *Id.*

175 MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1).

176 *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(a).

177 *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4).

178 *See, e.g.*, *In re Complaint as to the Conduct of James D. Harris*, 366 OR. 475 (2020) (finding that the temporary practice exception under Oregon's equivalent to Model Rule 5.5 applied to a lawyer who moved from Pennsylvania to Oregon and began working while waiting for his bar application to be approved); *In re Application of Jones*, 156 Ohio St.3d 1 (2018) (concluding that a Kentucky lawyer who moved to Ohio, but continued to work on Kentucky matters while her Ohio bar application was pending, was not engaged in the unauthorized practice of law); *see also* Karen Boxx, *When There's a Will: Ethical Concerns for Estate Planners Raised by Remote Lawyering*, ESTATE PLANNING COUNCIL OF SEATTLE 65TH ANNUAL ESTATE PLANNING SEMINAR, Oct. 29, 2020 (discussing this case law).

Appeals issued Opinion 24-20, which authorizes attorneys who are not members of the D.C. Bar to practice law from their residence in the District of Columbia so long as the attorney:

- is practicing from home due to the COVID-19 pandemic;
- maintains a law office in a jurisdiction where the attorney is admitted to practice;
- avoids using a D.C. address in any business document or otherwise holds himself or herself out as authorized to practice law in the District of Columbia; and
- does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.[179]

In December 2020, the Ethics Committee issued ABA Formal Opinion 495, which concluded as follows:[180]

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

This conclusion makes common sense and is consistent with the conclusions reached by the District of Columbia and other jurisdictions.[181] Most attorneys are hopeful that, coming out of the COVID-19 pandemic, states will update their ethical rules to clarify that the unauthorized practice

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179 D.C. Ethics Opinion 24.20, *Teleworking from Home and the COVID-19 Pandemic*, Mar. 23, 2020, available at https://www.dccourts.gov/sites/default/files/2020-03/CUPL-Opinion-24-20_0.pdf.

180 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 495, *Lawyers Working Remotely*, December 16, 2020.

181 *See, e.g.*, Utah Ethics Opinion 19-03 (2019) ("[W]hat interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."); Maine Ethics Opinion 189 ("Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.").

of law should be focused on the nature of the legal services being rendered, and not the physical location of the attorney.[182]

IV. Practical Recommendations

When the COVID-19 pandemic first began, a number of resources offered remote working tips,[183] some of which were specifically designed for lawyers.[184] Below are a few practical recommendations for estate planning professionals seeking to establish or enhance their virtual practice:

- **Embrace the Challenge:** No pressure, no diamonds. For those lawyers who avoided technology for most of their careers, now is the time to fully embrace it. Now is also the time to learn new things and develop better habits in an effort to maximize the efficiency and effectiveness of your practice.

- **Carve Out a Spot at Home:** When working from home, it is important to establish a dedicated work space. Hopefully, this is a separate office that is reasonably private and soundproof. That may not always be an option, however, and many lawyers have converted kitchen counters into standing desks and dining room tables into home offices. Regardless of the location, take the time to create a designated workspace; it will pay off in the end.

- **Invest in the Right Equipment:** Nothing is more frustrating than working from a tiny laptop in an uncomfortable chair or relying on a slow internet connection as you try to spread out a large client file on the carpet. It is also bad for business when you cannot log into Zoom or, even if you can, your audio drops out every few seconds. Investing in the right equipment is critical to maintaining a seamless virtual practice. Secure a second monitor, buy a comfortable chair, and set up a high-powered printer. You will be more efficient and your work product will reflect that.

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182 *See* Lyle Moran, *Ethics Attorneys Hopeful COVID-19 Will Prompt Changes in Remote Working Rules*, ABA JOURNAL, Dec. 28, 2020, available at https://www.abajournal.com/web/article/ethics-attorneys-hopeful-covid-19-will-prompt-changes-in-remote-working-rules#:~:text=Heading%20into%202021%2C%20ethics%20attorneys,ethics%20rules%20to%20modify%20them.

183 *See, e.g.*, Jill Duffy, *20 Tips for Working from Home*, PC MAG, Nov. 2, 2020, available at https://www.pcmag.com/news/get-organized-20-tips-for-working-from-home; Lindsey Pollak & Eileen Coombes, *23 Essential Tips for Working Remotely*, INC., Mar. 17, 2020, available at https://www.inc.com/lindsey-pollak-eileen-coombes/remote-work-home-productivity-communication-self-care-morale-team.html; Gaetano Dinardi, *32 Working from Home Tips You Can Do Right Now*, NEXTIVA BLOG, Mar. 15, 2020, available at https://www.nextiva.com/blog/working-from-home-tips.html.

184 *See, e.g.*, Lauren J. Wolven, Emily Watson & Erin Mayer, *Managing Psychological and Legal Obstacles During the Pandemic: A Lawyer's Guide*, 2020; Mark Beese, *12 Productivity Tips When Working from Home*, JDSUPRA, Mar. 18, 2020, available at https://www.jdsupra.com/legalnews/12-productivity-tips-when-working-from-45818/; *5 Tips To Successfully Work from Home as a Lawyer*, THOMSON REUTERS, May 13, 2020, available at https://www.westlawnextcanada.com/blog/insider/5-tips-to-successfully-work-from-home-as-a-lawyer-1088/.

- **Create a Routine:** Most professionals have an office routine that involves waking up, getting ready, and commuting to and from work. Working from home should be no different. It is important to establish and maintain a working routine to stay motivated and create some level of normalcy. This could involve showering and getting dressed each morning, having a cup of coffee out on the porch as you take in the day, or breaking for lunch and exercise. The order and substance of your routine is not important, but establishing one is.

- **Limit Distractions:** Try to limit distractions as much as possible. This is easier written than accomplished, of course, and for lawyers with spouses, children, pets, and other roommates, this can be next to impossible. Noise-cancelling headphones are a great invention, and at times it may be necessary to keep odd hours to ensure uninterrupted work time.

- **Overprotect Client Information:** If there is one takeaway from this paper, it is that a lawyer's duty of confidentiality does not disappear simply because the lawyer is working remotely. It is quite the opposite, in fact, as lawyers must take extra precautions to ensure that their home networks are secure, their client communications are private, and client files are protected. While common sense helps, the right equipment may help even more. In addition to setting strong passwords and limiting third party access to physical files, lawyers should consider screen shields for their computers and using a virtual background while participating in video conferences. Remember, if you leave a confidential document out in the open during a video conference, the other participant may be able to see that document or may even take a screen shot and zoom in on the photo to access the details. Do not throw confidential documents in your home trashcan, and always ensure that client information is disposed of confidentially. When it comes to protecting client information at home, you cannot really overdo it.

- **Over-Communicate with Clients and Colleagues:** Clients are typically unwilling to tolerate non-responsive lawyers. Now is the time to communicate proactively with your clients. Let them know you are available to help and how they can reach you. If you receive an email, send a response, even if it is to say that the substantive answer is forthcoming. If a project will be delayed, be upfront about it. Similarly, check in with other lawyers and staff. Strive to be a professional and personal resource, and make sure to visit regularly regarding workloads, outstanding projects, and individualized challenges.

- **Stay Aware of Legal Updates:** The COVID-19 pandemic has not stopped the law from evolving. It is important to stay on top of current developments in your area of practice, as well as special rules that may apply during public health crises or other emergency situations. Attend web-based seminars, review legal blogs, and speak with other professionals in your field. Now is not the time to lose your edge.

- **Set Reasonable Boundaries:** When working from home, the lines between your professional life and your personal life can blur into oblivion. Try to avoid work creep, and set reasonable boundaries with family members and with clients. In

most cases, it is okay to wait until Monday to respond to a Friday night email. It is also okay to take a vacation, even if that just means binge-watching your favorite show on Netflix.

- **Have Fun and Take Advantage of The Time at Home:** Appreciate the silver lining of the extra flexibility afforded by working from home. Now may be the time to dig out your old baseball cards to see if they are worth anything (sadly, they are not) or to finally purchase and plant that herb garden sitting in your Amazon cart for several years. Pour time into your loved ones and work on those home projects; you may never have an opportunity like this again.

- **Do Not Be Afraid to Ask for Help:** Dealing with the stress of the pandemic has been hard on everyone. Estate planning advisors may feel isolated or may be struggling with substance abuse or other issues. There is no shame or embarrassment in asking your friends, family members, and colleagues for help, or in taking advantage of available resources.

- **Be Excellent to One Another:** We all have a little cabin fever, and many are dealing with extraordinary challenges as we try to juggle work and home responsibilities. Be gracious, courteous, and professional to one another, and do your part to make the estate planning profession a kind and welcoming place.

V. Conclusion

The COVID-19 pandemic has been a generation-defining event for many lawyers, clients, and their families. After the country fully emerges, some estate planning advisors may never go back into the office full-time, while others cannot wait to escape their homes. Regardless of where you decide to work once you have the freedom of choice, it is undeniable that the pandemic has forever changed the practice of law, or at least accelerated the inevitable.

More than ever, clients expect their lawyers to know and use technology. At the same time, lawyers are obligated to protect client information, despite inherent risks in video conferencing, electronic messaging, and other modes of communication. This is not an easy balance, and a lawyer's ethical duty of confidentiality will continue to evolve along with technology. No matter what the future holds, clients will always value confidentiality, trustworthiness, and sound judgment. Estate planners can now rejoice (or lament) that they can demonstrate these traits from anywhere, at any time, through any number of devices. The future is now—just keep it between you and your client.

ABA MODEL RULES OF PROFESSIONAL CONDUCT:
SELECTED MODEL RULES

Model Rule 1.0: Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
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(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Model 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.

Model Rule 1.3: Diligence

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

Model Rule 1.4: Communications

(a) A lawyer shall:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Model Rule 1.6: Confidentiality of Information

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

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

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

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

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

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

(5) 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;

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

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Model Rule 1.7: Conflict of Interest: Current Clients

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

(1) the representation of one client will be directly adverse to another client; or

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

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

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

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Model Rule 1.9: Duties to Former Clients

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

(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 gives informed consent, confirmed in writing.

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

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

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

Model Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer

reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Model Rule 1.14: Client with Diminished Capacity

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

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

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

Model Rule 1.15: Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Model Rule 1.16: Declining or Terminating Representation

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

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

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

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

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

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

Model Rule 1.18: Duties to Prospective Client

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

Model Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Model Rule 4.3: Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Model Rule 4.4: Respect for Rights of Third Persons

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

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

Model Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

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

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

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

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

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

Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

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

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

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

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

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

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

Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

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