DISTRICT OF COLUMBIA BAR RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE

PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROFESSIONAL CONDUCT

As approved by the Board of Governors for submission to
the District of Columbia Court of Appeals in March 2020

FEBRUARY 2020 FINAL REPORT

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I. INTRODUCTION

This report sets forth the final recommendations of the District of Columbia Bar Rules of Professional Conduct Review Committee ("Rules Review Committee" or "Committee") on proposed amendments to the District of Columbia Rules of Professional Conduct ("D.C. Rules"). Specifically, the report recommends amendments to the Rules and/or Comments to D.C. Rules 1.1(Competence), 1.6(Confidentiality of Information), 3.8(Special Responsibilities of a Prosecutor), 4.4(Respect for Rights of Third Persons), and Rule 5.3(Responsibilities Regarding Nonlawyer Assistants).

This report reflects the Committee's undertakings following amendments to the ABA Model Rules in 2012 and 2013. It also responds to a specific request from the D.C. Court of Appeals and to a 2015 disciplinary decision affecting the language and interpretation of a Comment to an existing rule.

In establishing the Rules Review Committee as a standing Bar committee in 1994, the Board of Governors charged it with responsibility for the on-going review of the D.C. Rules. On its own initiative, or upon request by the Board, by members of the Bar, or by the public, the Rules Review Committee examines a particular rule or rules and may make recommendations for changes to the Board of Governors. The Board, in turn, may then recommend changes to the District of Columbia Court of Appeals (the "Court"), which promulgates the D.C. Rules. The Rules Review Committee also regularly reviews changes made to the American Bar Association's (ABA) Model Rules of Professional Conduct.[1]

A. February 2019 Draft Report and Public Comments

On February 4, 2019, the Committee published a Draft Report and Recommendations (February 2019 Draft Report) for a public comment period that ended on April 5, 2019. At the request of the Board on Professional Responsibility ("BPR"), the comment period was extended until April 19, 2019. The BPR provided comments on proposed amendments to Rules 1.1, 4.4 and 9.1. The Committee received one additional comment on its proposed amendments to Rule 1.1. The comments on Rules 1.1 and 4.4 are summarized and addressed herein.

The Committee also received a substantial number of comments in response to proposed amendments to Rules 8.4 and 9.1. In August 2016, the ABA adopted Model Rule 8.4(g) to prohibit discrimination and harassment in conduct related to the practice of law. The February 2019 Draft Report included proposed amendments to D.C. Rule 9.1 based on Model Rule 8.4(g), with some minor differences. Rule 9.1 currently prohibits discrimination by lawyers in conditions of employment only based on a list of enumerated classes. D.C. Rule 8.4, Comment [3] currently contains a variation of the former Comment [3] to Model Rule 8.4 that prohibited certain conduct that manifests bias or prejudice. The February 2019 Draft Report recommended an amendment to Comment [3] to Rule 8.4 that would cross reference Rule 9.1.

[1]The ABA Model Rules provide national model standards of professional ethics but are not binding upon any jurisdiction absent formal adoption.

To avoid delaying the other recommendations contained within this report, the Committee has severed its proposed amendments on Rules 9.1 and 8.4 from this final report and will continue to review the public comments received on those proposals, including the BPR comment related to Rule 9.1. It is anticipated that the Committee will deliver a final recommendation on Rules 9.1 and 8.4 in the near future.

No comments were received on the Committee's proposed amendments to Rules 1.6, 3.8 or 5.3. The Committee reaffirms its initial recommendations on these Rules as set forth in the February 2019 Draft Report and republished below.

II. EXECUTIVE SUMMARY OF PROPOSED RECOMMENDATIONS

A. ABA Ethics 20/20 Review

In 2012 and 2013 the ABA House of Delegates adopted changes to the Model Rules of Professional Conduct on recommendations from the ABA Ethics 20/20 Commission. The 20/20 Commission was charged with reviewing the ABA Model Rules of Professional Conduct in the context of advances in technology and global legal practice developments. In January 2013, the Rules Review Committee formed four subcommittees to review all of the amendments to the ABA Model Rules resulting from the ABA Ethics 20/20 Commission recommendations,[2] and to consider whether the D.C. Rules should be amended in light of those changes.[3] The four subcommittees were: 1) Technology and Confidentiality; 2) Outsourcing; 3) Confidentiality and

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[2]In August 2012, the ABA House of Delegates approved a number of the ABA Ethics 20/20 Commission's recommended amendments to the ABA Model Rules. A handful of additional Commission recommendations were approved by the ABA House of Delegates at the ABA's February 2013 mid-year meeting.

[3]The last major revisions to the D.C. Rules were effective February 1, 2007. The revisions were the result of recommendations by the Rules Review Committee (circa 1998 to 2005) in reviewing the ABA's "Ethics 2000" changes to the ABA Model Rules of Professional Conduct. The revisions were approved by the Board of Governors and adopted by the Court. The Committee's work is reflected in its June 2005 *Proposed Amendments to the District of Columbia Rules of Professional Conduct: Report and Recommendations* that was transmitted to the Court.

Revisions after 2007 included proposed changes to the Interest on Lawyer Trust Account Rules (IOLTA Rules) (D.C. Rules 1.15, 1.19, Appendix B, Rule XI Section 20) that were proposed by the Committee, approved by the Board in 2009, adopted by the Court, and became effective August 1, 2010.

In 2012, the Rules Review Committee recommended changes to D.C. Rules 1.10, 7.1, Comments to Rule 1.15 and a new proposed Rule 8.6. The Board approved the proposed changes and transmitted them to the Court. (*Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct* (March 2012 Final Report) that details the Committee's recommendations and reflects the substantial work of the Committee from 2008 to 2012). The Court adopted the recommended amendments to D.C. Rules 1.10, 7.1, and Comments to Rule 1.15, effective October 8, 2015. The Court did not adopt proposed Rule 8.6, and instead requested that the Bar study Model Rules 3.8(g) and (h). The Committee now recommends proposed changes to D.C. Rule 3.8 that are more closely aligned to Model Rules 3.8(g) and (h) as detailed in this report.

The aforementioned Committee Reports and Recommendations can be found at http://www.dcbar.org/bar-resources/legal-ethics/index.cfm under Rules Review Committee Reports.

Checking Conflicts;[4] and 4) Choice of Law/Conflicts.[5] The subcommittees met regularly, and the full committee received status reports and periodic recommendations for proposed amendments from the subcommittees during Committee meetings.

1. Technology and Confidentiality (Amendments to ABA Model Rules 1.1/1.6/4.4)

The Committee agreed that most of the changes made to the ABA Model Rules on technology on recommendation of the Ethics 20/20 Commission were unnecessary in the District of Columbia because the specific issues were already addressed in the D.C. Rules. However, the Committee considered certain amendments to Rule 1.1 (on lawyer competency and technology), to Rule 1.6 (on transmission and storage of electronic communications) and to Rule 4.4 (on inadvertent receipt of electronic information relating to a representation).

The Committee recommends changes to D.C. Rules 1.1, 1.6, and 4.4 and/or the Comments to those Rules. The proposed amendments address the continuing responsibility of a lawyer to keep abreast of changes in technology; the duty to exercise reasonable care to prevent unauthorized access to electronic information; the reasonableness of security measures to be taken by a lawyer when using and storing electronic communications; and a lawyer's obligations after receiving inadvertently sent information or metadata.

2. Outsourcing (Amendments to ABA Model Rules 1.1/5.3)

The Committee considered the amendments to ABA Model Rules 1.1 and 5.3 and whether lawyers must obtain the informed consent of clients when "outsourcing" legal work or using "outside" or contract lawyers. The Committee recommends several proposed changes to the Comments to D.C. Rules 1.1 and 5.3, including language to require the lawyer to inform the client about the use and nature of such services and the identity of the outside lawyers who will participate in the representation; however, the identity of such lawyers is not necessary when such lawyers engage in document review, transcript translation, deposition digesting or similar work. The Committee also recommends amendments to better address situations where the client rather than the lawyer is directing the outsourcing.

B. *In Re Kline* and D.C. Rule 3.8, Comment [1]

In April 2015, the Court of Appeals issued an opinion in *In re Kline*, 113 A.3d 202 (D.C. 2015), a disciplinary matter in which the Court was asked to determine whether a federal prosecutor had improperly withheld potentially exculpatory evidence *during* the prosecution of a criminal matter

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[4]Ultimately, the Rules Review Committee considered newly adopted ABA Model Rule 1.6(b)(7), which addresses a lawyer's ability to reveal 1.6 confidential information when checking conflicts with a prospective employer. The Committee concluded that the current approach to this issue under the D.C. Rules as explained in Legal Ethics Opinion 312 (Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm) is sufficient and that a new exception to Rule 1.6 is not advisable.

[5]The Committee's study of Conflicts/Choice of Disciplinary Law arising under D.C. Rule 8.5 is on-going and is not a part of this report or recommendations.

and should be disciplined under D.C. Rule 3.8(e) for failing to disclose the information. Attorney Kline argued that he did not violate Rule 3.8(e) because his ethical duties are co-extensive with the duties imposed under *Brady v. Maryland, 373, U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)*. The Court rejected the suggestion in existing Comment [1] to Rule 3.8 that Rule 3.8(e) is coextensive with and bounded by constitutional principles applicable in the criminal context. The Committee recommends amendments to Comment [1] to Rule 3.8 to make it consistent with the *Kline* holding.

C. D.C. Rule 3.8 (Special Responsibilities of a Prosecutor): Request by the D.C. Court of Appeals to Reconsider ABA Model Rules 3.8 (g) and (h)

In 2012, the D.C. Bar submitted a proposal to the Court of Appeals, asking the Court to approve a new Rule of Professional Conduct -- D.C. Rule 8.6 -- that would impose a duty on *all* D.C. lawyers – not just prosecutors -- to disclose exculpatory information about convicted persons (subject to Rule 1.6 (Confidentiality of Information)). The Bar's recommendation resulted from the Rules Review Committee's study of the 2010 amendments to ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor). The ABA's amendments added paragraphs (g) and (h) to the Model Rule, thereby imposing a duty on prosecutors to disclose certain post-conviction exculpatory information.[6]

In May 2015, the Court declined to adopt the Bar's proposal, but asked the Bar to reconsider paragraphs (g) and (h) of ABA Model Rule 3.8 to determine whether the District of Columbia should adopt similar provisions. The Committee now recommends amendments to Rule 3.8 and Comments that are more closely aligned with Model Rules 3.8(g) and (h), but with some significant differences.

[6]A full history of the Bar's 2012 recommendation about proposed Rule 8.6 is at http://www.dcbar.org/bar-resources/legal-ethics/index.cfm under Rules Review Committee Reports, *June 2012: Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct.*

III. ANALYSIS AND RECOMMENDATIONS TO AMEND THE D.C. RULES IN CONSIDERATION OF THE ABA ETHICS 20/20 AMENDMENTS

A. Competence and Technology

After a review of the amendments made to ABA Model Rules on recommendation of the Ethics 20/20 Commission, the Committee agreed that most of the amendments made to the ABA Model Rules on technology were unnecessary in the District of Columbia because the specific issues were already addressed in the existing D.C. Rules. However, the Committee recommends a handful of changes to the D.C. Rules as explained and set forth below.

1. Rule 1.1 (Competence), Comment [5]

Ethics 20/20 amendments to the ABA Model Rule 1.1 (Competence) added language to Comment [8] (formerly Comment [6]) stating that lawyers should keep abreast of relevant changes in the law and its practice, *including the benefits and risks associated with relevant technology*. The Rules Review Committee considered whether and how to incorporate a lawyer's continuing responsibility to keep abreast of changes in technology as a matter of competence under the D.C. Rules.

D.C. Rule 1.1(a) already provides that: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." The Committee initially had concerns about listing some but not all of a lawyer's responsibilities for maintaining competent skill; however, the Committee ultimately decided that addressing this issue would be appropriate in the Comments to Rule 1.1.

The Committee recommends that adding the words "procedures, and technology" to existing D.C. Rule 1.1, Comment [5] would sufficiently address competence in keeping abreast of technological changes, i.e., cloud computing, as well as the requirement of certain courts to use technologies such as e-discovery and e-filing.

Proposed amendments to D.C. Rule 1.1, Comment [5] follow:

Thoroughness and Preparation

> [5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods<u>, procedures, and technology</u> meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lessor consequences.

2. Rule 1.6 (Confidentiality of Information)

Ethics 20/20 amendments to the ABA Model Rule 1.6(c) added obligations under Model Rule 1.6 mandating 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." Model Rule 1.6, Comment [18] was also amended to (i) clarify that the Rule requires lawyers to "take reasonable measures" to prevent unauthorized access to and disclosure of information related to a representation and (ii) to provide additional guidance to lawyers such as the factors to be considered in determining the reasonableness of the lawyer's efforts in this area.

As a general matter, D.C. Rule 1.6 is significantly different from Model Rule 1.6 in form and substance. D.C. Rule 1.6(f) already requires that a lawyer exercise reasonable care to prevent employees and other service providers utilized by the lawyer *from disclosing or using* Rule 1.6-protected information. Specifically, the existing D.C. Rule provides:

> (f) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e).

Unlike ABA Model Rule 1.6(c), however, the existing D.C. Rule does not address a lawyer's obligation to prevent *unauthorized access to* information protected by the Rule. The Committee considered this gap in D.C. Rule 1.6 and agrees that while existing Rule 1.6(f) adequately addresses a lawyer's obligation to prevent the unauthorized disclosure of confidences and secrets (i.e., from a law firm to the outside), the Rule should also address unauthorized access to such confidences and secrets that initiate from the outside to within a law firm, i.e., hacking. The Committee therefore proposes an addition to D.C. Rule 1.6 by keeping current (f) but renumbering it as (f)(1) and adding (f)(2) as follows:

Rule 1.6 (f) <u>A lawyer shall exercise reasonable care to prevent</u>:

<u>(1)</u> ~~A lawyer shall exercise reasonable care to prevent~~ the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e); and

<u>(2)</u> <u>the unauthorized access to confidences or secrets of a client.</u>

a. D.C. Rule 1.6, Comment [40] and ABA Model Rule 1.6, Comment [18]

D.C. Rule 1.6, Comment [40] addresses a lawyer's transmission of a communication containing Rule 1.6 protected information; it was adopted by the D.C. Court of Appeals effective February 1, 2007, on recommendation of the Rules Review Committee and Board of Governors. Comment [40] is substantially similar to former ABA Model Rule 1.6, Comment [18] prior to the adoption of the Ethics 20/20 amendments. In considering the amendments to Model Rule 1.6, Comment [18], the Rules Review Committee concluded that most of the additional commentary is unnecessary as redundant or too specific to be useful on a broader scale. However, the Committee believes that it would be useful to provide some guidance to practitioners on the new proposed D.C. Rule 1.6(f)(2) by deleting certain existing language in D.C. Rule 1.6, Comment [40] and adding language from amended ABA Model Rule 1.6, Comment [18].

Additionally, the Committee recommends replacing "information relating to the representation of a client" in Comment [40] with "confidences and secrets of a client." The latter language is consistently used throughout the D.C. Rules and corresponds to the language in the proposed new Rule 1.6(f)(2).

The Committee debated whether to include the additional factors listed in the ABA's Comment [18] in proposed amendments to D.C. Comment [40] or whether the two factors already identified in Comment [40] -- sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement -- were the ones that most guided a lawyer's decision on the required security measures. The Committee was persuaded that the additional two factors from the Model Rule's list -- cost of the security measures and difficulty in implementing the safeguards -- would provide useful guidance to attorneys, particularly solo practitioners and small law firms. The proposed Comment indicates that the list is not exhaustive by including the phrase "among the factors."

Finally, the Committee expressed a concern that the existing language of the final sentence of Comment [40] might imply that a client could unilaterally dictate more stringent, and potentially burdensome and expensive, security measures at any time, even after the representation had begun. The proposed revision would break that sentence up into two sentences and change the wording at the beginning, so it would now read: "A client and a lawyer may agree that the lawyer will implement special security measures beyond those required by this rule. A client may give informed consent to forgo security measures that would otherwise be required by this rule."

Proposed amendments to D.C. Rule 1.6, Comment [40] follow:

Acting Competently to Preserve Confidences

[40] When ~~transmitting a communication that includes information relating to the representation of a client~~ transmitting or storing confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication or storage affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Among the f~~F~~actors to be considered in determining reasonableness of the lawyer's ~~expectation of privacy~~ conduct in transmitting or storing that information are: ~~include~~ the sensitivity of the information; ~~and~~ the extent to which the privacy of the client information is protected by law or by a confidentiality agreement; the cost of the security measures; and, difficulty in implementing the safeguards. A client and a lawyer may agree that the lawyer will implement special security measures beyond those required by this rule. A client may give informed consent to forgo security measures that would otherwise be required by this rule. ~~A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.~~ For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

3. Rule 4.4 (Respect for Rights of Third Persons)

Rule 4.4(b) addresses a lawyer's ethical obligations when the lawyer receives inadvertently sent materials. As explained below, D.C. Rule 4.4(b) is substantially different than Model Rule 4.4(b). Ethics 20/20 amendments to ABA Model Rule 4.4(b) expanded the Model Rule to apply not only to "documents" but also to "electronically stored information."[7] The amendments also expanded the Model Rule's Comments to add the new language of "electronically stored information" or "metadata" to the type of inadvertently received information to which the Model Rule applies.

The Committee believes that existing D.C. Rule 4.4(b) is already defined broadly enough to encompass documents in electronic form because of the word "writing," and sees no basis to revise the language of the D.C. Rule to conform to the Model Rule's amended language. The definition of "writing" in D.C. Rule 1.0(o) denotes "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photo stating, photography, audio or video recording, and e-mail." Significantly, D.C. Legal Ethics Opinion 341 also interprets paragraph (b) of D.C. Rule 4.4 to include metadata inadvertently disclosed in electronic files in a variety of litigation and non-litigation contexts. The Opinion describes scenarios when the Rule may apply in such a context and provides useful guidance to practitioners. As such, the Committee recommends that a reference to D.C. Legal Ethics Opinion 341 be made at the end of Comment [3] to D.C. Rule 4.4.

In addition to reviewing the Ethics 20/20 amendments to Rule 4.4(b) and Comments, the Committee also recommends several amendments to improve the clarity of D.C. Rule 4.4(b) and its explanatory Comments. The Committee thinks this is particularly important because the D.C. Rule diverges significantly from the Model Rule.

D.C. Rule 4.4(b) states:

> A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

As explained in Comment [2] to D.C. Rule 4.4, "ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but paragraph (b) of D.C. Rule 4.4 requires the receiving lawyer to do more." The difference in the two Rules reflects a decision by the Court in 2007 to maintain the obligations that have existed for D.C. lawyers since 1991 when the Court adopted the D.C. Rules.

a. February 2019 Proposed Change to Rule 4.4(b)

(1) Change the language "a client" to "the lawyer's client"

[7] Former ABA Model Rule 4.4(b) provided that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

The Committee believes that the "a client" language in the first sentence of Rule 4.4 (b) is confusing. It is not clear whether "a client" referred to is the sending or receiving lawyer's client or both. The Committee agreed that simply changing "a client" to "the lawyer's client" clarified the intent of the Rule to govern writings inadvertently sent that relate to the representation of the receiving lawyer's client only.

The proposed amendment to Rule 4.4(b) follows:

> A lawyer who receives a writing relating to the representation of ~~a~~ **<u>the lawyer's</u>** client and knows, before examining the writing, that it has been inadvertently sent shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

(2) Revised Comments [2] and [3] and Proposed Comment [4]

The Committee also determined that existing Comment [3] contains two different thoughts and therefore recommends dividing it into two separate Comments. Revised Comment [3] would be limited to the discussion of a lawyer's ethical obligations when receiving materials containing client confidences or secrets when a lawyer **does not know** that they were inadvertently sent. It is distinguished from existing Comment [2], which addresses a lawyer's ethical obligations when a lawyer **knows** such materials were inadvertently sent. The Committee recommends moving the last three sentences of existing Comment [3] into a new proposed Comment [4] that discusses circumstances the Rule does not address.

The Committee also recommends adding the language "for example" in the first sentence of Comment [2] to clarify that Paragraph (b) of Rule 4.4 does not limit the type of inadvertently received writings to those containing client secrets or confidences. The Committee believes this addition will resolve the conflict between the Rule language "relating to the representation of a lawyer's client" and the Comment language that addresses a writing "containing client secrets or confidences" from the discussion of D.C. Legal Ethics Opinion 256.

The Committee also recommends deleting "on the other hand" from Comment [3] to clarify that the Ethics Opinions addressed in Comments [2] and [3] are not the only types of examples covered by Rule 4.4(b).

Finally, the Committee recommends adding to Comment [4] a parenthetical to Legal Ethics Opinion 318 and other Rule references to guide a lawyer who is confronting the situation of receipt of wrongfully obtained materials -- a situation not addressed by Rule 4.4(b).

Proposed amendments to the Comments to Rule 4.4(b) follow. Bold represents the proposed new division of existing Comment [3]:

> [2] Paragraph (b) addresses<u>, for example,</u> the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an

adversary lawyer and who knows that the sending lawyer inadvertently included these writings. As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is "an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient." Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in these circumstances, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of D.C. Rule 4.4 requires the receiving lawyer to do more.

[3] ~~On the other hand, w~~**W**here writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. See D.C. Legal Ethics Committee Opinion 256 **(addressing writings containing client secrets or confidences). See also D.C. Legal Ethics Committee Opinion 341 (applying paragraph (b) to the receipt of inadvertently disclosed metadata imbedded in electronic files).** ~~Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.~~

[4] Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the ~~legal~~ duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. But see D.C. Bar Legal Ethics Committee Opinion 318 (analyzing a lawyer's ethical obligations when receiving privileged documents that may have been taken without authorization from an opposing party) and Rules 1.1, 1.3, 1.6, 1.15 and 8.4.

b. Public Comments on February 2019 Draft Report

During the public comment period that closed on April 19, 2019, the Committee received one comment related to its February 2019 proposed amendments to Rule 4.4.

(1) Comment by the Board on Professional Responsibility

The Board on Professional Responsibility (BPR) raised the following concern about the Committee's proposed change to D.C. Rule 4.4(b) in its comment:

> The Rules Review Committee explains that the proposed change to Rule 4.4(b) is intended to be a clarification, but we are concerned

> that it will instead be interpreted as a *narrowing* of an attorney's duty to disregard and return inadvertently delivered writings. As we read the current Rule, it broadly covers any writings received by any lawyer relating to the representation of any lawyer's client. The proposed amendment appears to narrow the applicable category of covered writings to include only those relating to the receiving lawyer's representation of his or her own clients. But there is no explanation provided as to why attorneys' obligations under the Rule should not extend beyond documents relating only to their own clients.
>
> If the purpose of the proposed change is to narrow this provision, we raise a question as to why this change should be made. If the purpose of the proposed change is not to narrow the current practice, we urge the Committee to reconsider the amendment since we do not find it to be a helpful clarification and are concerned that other attorneys will be similarly confused. The Rules Review Committee may want to consider providing an explanation to clarify the scope and purpose of any amendment.

(2) Committee's Analysis of the BPR Comment

For the reasons explained below, the Committee disagrees with the BPR that the Committee's proposed amendment narrows the current scope of Rule 4.4(b). The Committee stands by its position that current D.C. Rule 4.4(b) only requires a lawyer who receives an inadvertent writing related to the representation of the *lawyer's client* to comply with the mandates of the Rule, and thus, continues to recommend an amendment that clarifies this scope of the Rule. The legislative history of both the original ABA Model Rule 4.4(b) and D.C. Rule 4.4(b) explain why the BPR's interpretation of the current Rule is overbroad.

(a) ABA Model Rule 4.4(b) Legislative History

In August 2000, ABA Model Rule 4.4(b) was initially proposed as follows:

> A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Although on its face such language could be read quite broadly, the scope of the then-proposed Rule was explained in then-proposed Comment [2] which began: "Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by ***opposing parties or their lawyers…"*** *(emphasis added).*

Notwithstanding this seemly clear explanation of the intended scope of proposed Model Rule 4.4(b), the ABA ultimately adopted the following language in February 2002 further clarifying the Rule's scope:

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

The explanation of the underlined phrase is as follows, "[t]his phrase was added in response to a proposed amendment. It clarifies that a lawyer is only required to return inadvertently sent documents that relate to the representation of the lawyer's client."[8]

Similarly, the scope of D.C. Rule 4.4(b) can be understood from the language of D.C. Rule 4.4, Comment [2] which provides:

> Paragraph (b) addresses the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered **by an adversary lawyer** and who knows that the sending lawyer inadvertently included these writings. (*emphasis added*).

The term "adversary lawyer" has a specific meaning. It requires that the receiving lawyer represent a client who is an adversary of the sending lawyer's client.

D.C. Rule 4.4, Comment [3] also uses the term "adversary lawyer" when speaking of the receiving lawyer. A misdirected communication to another lawyer would not render such a recipient an "adversary lawyer" in the absence of the receiving lawyer's representation of an "adversary party" of the sending lawyer's client.

(b) D.C. Rule 4.4(b) Legislative History

D.C. Rule 4.4 (b) was recommended by Rules Review Committee in 2005, "to address the frequent problem of inadvertent production. [The recommendations] incorporate the approach taken by D.C. Legal Ethics Opinion 256."

Opinion 256, entitled "Inadvertent Disclosure of Privileged Material to Opposing Counsel" addresses the specific "…ethical issues raised by the no longer infrequent occurrence of inadvertent disclosure of confidential documents **to opposing counsel**."[9] (*emphasis added*).

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[8] *See* The Legislative History of the ABA Model Rules (Art Garwin) (pages 580-582).

[9] The specific facts of the opinion are as follows: "The inquirers are opposing lawyers in a securities arbitration. During the course of discovery in the arbitration proceeding, the lawyer for the respondent was given unrestricted access by claimant's lawyer to a substantial volume of documents. After their review, respondent's lawyer identified documents for copying; the copying was accomplished by claimant's lawyer and the copies were delivered to respondent's lawyer. After copying and delivery of the documents, claimant's lawyer informed respondent's lawyer that one or more documents, consisting of handwritten notes, contained privileged attorney-client communications. The documents themselves, on their face, did not contain any indication of their privileged status. Lawyers for both the claimant and the respondent have inquired whether the disclosure of the privileged material, under the circumstances described above, constitutes a waiver of the attorney-client privilege and whether respondent's lawyer may, without violating ethical rules, use the assertedly privileged material which he now has in his possession." D.C. Legal Ethics Opinion 256.

On the whole, the legislative history of the 2002 ABA Model Rule, the legislative history of the D.C. Rule, including the scope of D.C. Legal Ethics Opinion 256, and the language of Comment [2] and [3] to D.C. Rule 4.4(b) support the Rules Review Committee's understanding of the receiving lawyer's current ethical obligations.

In the area of inadvertent electronic production, a common-sense approach must also prevail. Lawyers, like most professionals, receive a vast amount of email and other electronic information. To the extent a lawyer receives misdirected communications about which he or she does not recognize the communicants involved, it is highly likely the average lawyer will hit delete without a second thought. Why would bar regulators desire to penalize someone who has nothing to do with a case, but who simply does nothing (or deletes a misdirected communication)? The ethics rules should not proport to regulate, must less mandate, that lawyers have some special obligation to third parties (not related to any work the receiving lawyer has undertaken for his or her own clients) when such lawyers have not invited and may not even recognize inadvertent production of this kind.

The Committee disagrees with the BPR that the Committee's proposed amendment narrows the current scope of Rule 4.4(b). The Committee stands by its position that current D.C. Rule 4.4(b) only requires a lawyer who receives an inadvertent writing related to the representation of the *lawyer's client* to comply with the mandates of the Rule, and thus, continues to recommend an amendment that clarifies this scope of the Rule. To the extent a lawyer receives an inadvertent writing not related to the representation of that lawyer's client, such conduct is outside of the scope of D.C. Rule 4.4(b).

B. Outsourcing: Proposed Changes to Rules 1.1 (Competence) and 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Ethics 20/20 amendments to the ABA Model Rule 1.1 (Competence) added new Comments [6] and [7] "to refer specifically to the practice of retaining and contracting with lawyers outside of the firm in light of the frequency of the practice."[10] The language of Model Rule 1.1, new Comment [6] reflects the Ethics 20/20 Commission's belief that lawyers "should ordinarily obtain informed consent of the clients before 'outsourcing' legal work, or using outside/contract lawyers." The language of Model Rule 1.1, new Comment [7] embodies the ideal that lawyers "should ordinarily consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them." The Ethics 20/20 Commission also recommended new Comments [3] and [4] to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) to clarify that Rule 5.3 applies to the use of nonlawyers both within and outside of the firm and also to specifically address distinct concerns that may arise when services are performed outside of a firm.[11]

[10] ABA Model Rules Legislative History, p. 43.

[11] ABA Model Rules Legislative History pp. 605, 606.

1. Committee Analysis

The Rules Review Committee considered and discussed various aspects of contract lawyer relationships with law firms, and whether and when a lawyer might need to obtain informed consent from the client before retaining outside legal services to assist in a representation. The Committee also agreed that any proposed comments addressing "outsourcing" should better address the increasingly common circumstance in which the client is directing the outsourcing of both legal and non-legal services.

a. February 2019 Proposed Comments [6] and [7] to D.C. Rule 1.1

The Committee rejected a *per se* requirement to obtain informed consent from the client prior to retaining or contracting with lawyers outside of the law firm. The Committee agreed that most practitioners may already seek informed consent of the client when some of the client's work is being performed by another lawyer; after discussing multiple factual scenarios, however, the Committee decided that the real issue at hand was a client's awareness of the use and nature of such services. The Committee concluded that a client would be interested in the fact that another lawyer or lawyers would be involved and the way the work would be split up. Accordingly, in the February 2019 Draft Report, the Committee recommended language in new proposed Comment [6] to D.C. Rule 1.1 to require the lawyer *to inform* the client about the "identity of the lawyers who will participate in the representation and about the contemplated division of responsibility among them" rather than to require the lawyer to obtain informed consent. The Committee suggested that where the lawyer outsources to a group of lawyers that are affiliated in some fashion, identifying the group, rather than each lawyer that works on the matter would ordinarily be sufficient.

In circumstances where the client directs that lawyers outside the firm will be assisting in the provision of legal services, proposed Comment [7] to D.C. Rule 1.1 states the "lawyer ordinarily should reach agreement with the client about the identities of the lawyers who will participate in the representation and about the contemplated division of responsibility among them." Proposed Comment [7] also cautions that if at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

b. February 2019 Proposed Comments to D.C. Rules 1.1 and 5.3

The February 2019 proposed comments to Rules 1.1 and 5.3 defined "outsourced" lawyers and nonlawyers to be those "not associated with the firm" (instead of the "not generally affiliated" language of the ABA Model Rule Comments) to track language historically used elsewhere in the D.C. Rules. The Committee also added "pursuant to Rule 1.16" language at the end of both proposed Comment [7] to Rule 1.1 and proposed Comment [4] to Rule 5.3 to reinforce the fact that withdrawal in this context must conform to Rule 1.16 (Declining or Terminating a Representation). Existing Comment [6] to D.C. Rule 1.1 will become Comment [8].

c. Public Comments on February 2019 Proposals

During the public comment period that closed on April 19, 2019, the Committee received two comments related to its outsourcing proposals.

(1) Comment by a Bar member

A Bar member expressed concern that the first sentence to proposed Comment [6] "could be interpreted to impose an unnecessary burden in circumstances commonly encountered by firms …which represent plaintiffs in large class action or consolidated litigation… or [where lawyers] hire attorneys on a contract basis mostly in connection with large scale document reviews." The member noted that such contract attorneys are supervised by other attorneys in the firm, are bound by the same ethical rules, and clients neither want nor need to know the identities of such contract lawyers. The member recommended that either the first sentence of the proposed Comment not be adopted or that the Comment be amended to explicitly provide attorneys with the normal latitude to decide as an exercise of professional judgment whether the communications contemplated by that sentence are necessary.

(2) Comment by the Board on Professional Responsibility (BPR)

The BPR comment raises three concerns related to the February 2019 proposed Comments [6] and [7]:

1) The BPR recognizes that there are different categories of contract lawyers: those who provide substantive services (whether primarily to the client or to the lawyer) and those who perform document review or other similar services such as translation. The BPR notes that Legal Ethics Opinion 284 reasons that "lawyers whose work does not require the substantial exercise of judgement and is closely supervised by the client's lawyer need not be disclosed to the client." The BPR states it would be unnecessarily burdensome to both the lawyer and client (with no discernible benefit to the client) to require disclosures of such lawyers to clients.

2) The BPR expresses concern that the proposed language of Comment [6] ("should inform") is inconsistent with Rule 1.5(e)(2) which requires the client provide informed consent to the hiring of and fees for outside lawyers where there will be a division of fees; and

3) The BPR recommends proposed Comments [6] and [7] should be moved to Rule 5.1 because such Comments have more to do with supervisory lawyers' responsibilities than with their competence.

(3) Committee's Analysis of Public Comments

The Committee agrees with the comments of the Bar member and the BPR that when lawyers retain other lawyers not associated in a firm for certain types of legal work, particularly when such work is going to be supervised by firm lawyers, it seems overly burdensome and unnecessary for a lawyer to be required to inform clients about the *identities* of outside lawyers which are often subject to frequent change over the course of a particular matter. The Committee concluded that there are certain types of outside contract lawyer activities that should not therefore automatically

trigger a duty to communicate the identities of the contract lawyers performing the services. For example, such activities include document review, translation, and creating deposition digests.

With respect to the second concern raised by BPR, the Committee did not agree that proposed Comment [6] and Rule 1.5(e) are inconsistent and therefore confusing to lawyers. Not all or even most uses of outside lawyers involve the division of fees. However, the Committee also agreed that a clarifying sentence regarding Rule 1.5(e) would avoid any possible confusion to lawyers by reminding them that if in fact a lawyer is dividing a fee with a lawyer not associated in his or her firm, the stricter requirement of Rule 1.5(e) would apply to that circumstance.

As for the BPR's final recommendation to move Comments [6] and [7] to Rule 5.1, the Committee did not have a strong preference. Comments [6] and [7] are similar to ABA Model Rule 1.1, Comments [6] and [7], and for that reason they were similarly placed as Comments to D.C. Rule 1.1. For the sole reason that a lawyer looking for such Comments and who is familiar with the ABA Model Rules might look to Rule 1.1, the Committee recommends that such Comments remain in D.C. Rule 1.1.

(a) Revised Comment [6] to Rule 1.1

In light of the foregoing analysis, the Committee now proposes the following Comment [6]:

> **[6]** Except when directed by a client, before a lawyer retains or contracts with other lawyers not associated with the lawyer's own firm to provide or assist in the provision of legal services to a particular client or on a particular matter, the lawyer should inform the client or clients of 1) the use and nature of the other lawyers' services; and 2) the identity of the lawyers who will participate in the representation. However, the lawyer generally need not inform the client of the identity of other lawyers who are hired to conduct document review, digest depositions, provide translations, or perform similar services. The lawyer must reasonably believe that retaining other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1. 4, 1.5, 1.6, and 5.5. The reasonableness of the decision to retain or contract with other lawyers not associated with the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections and professional conduct rules of the jurisdictions in which the services will be performed, particularly relating to confidential information. A division of a fee between lawyers who are not in the same firm is subject to the requirements of Rule 1.5(e).

(b) Proposed Comment [7]

> **[7]** When the client directs that other lawyers not associated with the lawyer's firm assist in the provision of legal services to the client, the lawyer ordinarily should reach agreement with the client about the identity of the lawyers who will participate in the representation and about the contemplated division of responsibility among them. See Rules 1.2, 1.5. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the

competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

(c) New Proposed Comments [3] and [4] to Rule 5.3

Nonlawyers Not Associated With the Firm

[3] A lawyer may use nonlawyers not associated with the lawyer's own firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing and scanning, and using an internet-based service to store client information. Unless directed by the client to use specified nonlawyers not associated with the firm, in using such services a lawyer must make reasonable efforts and communicate appropriate directions to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the service involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4, and 5.5.

[4] When the client directs the selection of a nonlawyer service provider not associated with the lawyer's firm, the lawyer ordinarily should reach agreement with the client about the scope of the lawyer's representation and the division of responsibility among the lawyer, the client, and the service provider. When making such a division of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

IV. PROPOSED AMENDMENTS TO RULE 3.8 (SPECIAL RESPONSIBILITIES OF A PROSECUTOR)

A. Background

In 2012, the D.C. Bar submitted a proposal to the Court of Appeals, asking the Court to approve a new Rule of Professional Conduct, D.C. Rule 8.6, that would impose a duty on *all* D.C. lawyers – not just prosecutors -- to disclose exculpatory information about convicted persons (subject to Rule 1.6 (Confidentiality of Information)). The Bar's recommendation resulted from the Rules Review Committee's study of the 2010 amendments to ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor) that added paragraphs (g) and (h) to the Model Rule, thereby imposing a duty on prosecutors to disclose certain post-conviction exculpatory information.

In May 2015, the Court of Appeals informed the Bar that it was declining to adopt the Bar's proposal on the grounds that: (1) no evidence suggests that lawyers, as a group, had but were failing to disclose exculpatory information about convicted persons; and (2) non-prosecutors might not understand their duties under the proposed rule. The Court did, however, ask the Bar to reconsider paragraphs (g) and (h) of ABA Model Rule 3.8 to determine whether the District of Columbia should adopt similar provisions.

The Court's request coincided, approximately, with its disciplinary decision in *In re Kline*, 113 A.3d 202 (D.C. 2015), a matter in which the Court was asked to determine whether a federal prosecutor had improperly withheld potentially exculpatory evidence *during* the prosecution of a criminal matter and should be disciplined under D.C. Rule. 3.8(e) for failing to disclose the information. Attorney Kline argued that he did not violate Rule 3.8(e) because his ethical duties are co-extensive with the duties imposed under *Brady v. Maryland, 373, U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)*. However, the Court explicitly rejected the suggestion in Comment [1] to Rule 3.8 that Rule 3.8(e) is coextensive with and bounded by constitutional principles applicable in the criminal context.

In light of the Court's specific request to revisit ABA Model Rules 3.8(g) and (h) and its opinion interpreting D.C. Rule 3.8, Comment [1], the Rules Review Committee: 1) began to study and draft revisions to revise Comment 1 to Rule 3.8 to make it consistent with the Court's holding in *In Re Kline*; and 2) considered whether to recommend changes to D.C. Rule 3.8 to impose a duty on prosecutors to disclose post-conviction exculpatory information similar to those duties arising under the ABA Model Rules 3.8(g) and (h). A summary of the Committee's analysis and proposed recommendations for revisions to Rule 3.8 and Comments are detailed below.

B. Proposed Changes to Rule 3.8, Comment [1], in Light of *In Re Kline*

The Committee recommends amendments to Comment [1] to Rule 3.8 to make it consistent with the Court's holding in *In Re Kline*, 113 A.3d 202 (DCCA 2015).

As noted above, in April 2015, the D.C. Court of Appeals held in *In Re Kline* that a federal prosecutor had improperly withheld potentially exculpatory evidence during the prosecution of a criminal matter and should be disciplined under D.C. Rule 3.8(e). Significantly, the Court rejected

the suggestion in existing Comment [1] to D.C. Rule 3.8 that Rule 3.8(e) is coextensive with and bounded by constitutional principles applicable in the criminal context.

For purposes of the Committee's first undertaking, the pertinent part of existing D.C. Rule 3.8 and Comment [1] is:

> The prosecutor in a criminal case shall not:
>
> …
>
> (e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
> …
>
> **Comment 1 (Existing)**
>
> [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

1. Committee Analysis

The Committee's intent in proposing revisions to Comment [1] is: 1) to remove language from the existing comment that is inconsistent with the Court's holding in *In Re Kline*; and 2) to provide prosecutors with guidance to assist them in complying with the chief teaching and holding of the Court's opinion; namely, that D.C. Rule 3.8 may impose different requirements than the rules of criminal procedure or the requirements of due process and that a prosecutor needs to turn over potentially exculpatory evidence that is in his or her possession and about which the prosecutor has actual knowledge, regardless of the prosecutor's belief about whether the information would prove material to the outcome of the case.

The primary issues raised and debated within the Committee were about the specific proposed language addressing the requirement of a prosecutor's *actual knowledge* of exculpatory evidence versus imputation of knowledge of exculpatory evidence by other government actors (e.g., detectives); the character of potentially exculpatory evidence that is subject to Rule 3.8(e) (e.g.,

information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense); and whether to include a reminder in the Comment that willful ignorance (e.g. intentionally avoiding pursuit of evidence or information) is itself a violation of Rule 3.8(d).

The Committee acknowledges that assessing whether a particular piece of information *is* in fact "potentially exculpatory" may be difficult, but that is already the prosecutor's challenge under the existing language of Rule 3.8(e). The exculpatory value of a piece of information can only be assessed in the context of the particular case. For example, a particular piece of information might tend to negate guilt in a murder case but have no such tendency, indeed be completely irrelevant, in a case involving the passing of bad checks. Paragraph (e) is clear, however, that the prosecutor will only be held responsible for disclosing information that she knew or reasonably should have known tended to negate the guilt of the accused or to mitigate the offense as reflected in the language of the proposed Comment.

Finally, the Committee deemed it appropriate to include specific language at the end of the proposed comment reflecting the holding of the case -- that paragraph (e) requires a prosecutor to disclose potentially exculpatory information in his or her possession "regardless of whether that information might later be deemed immaterial to the outcome of the case" -- and referring prosecutors to *In Re Kline* for further guidance.[12]

The Committee recommends amending Comment [1] to reflect the Court of Appeals' decision in *In re Kline* as follows:

> **Comment 1 (Revised)**
>
> [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. ~~Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.~~ The constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context. While this rule may overlap with what constitutional due process requires, it is a rule to govern professional conduct; its requirements are not co-extensive with due process or with statutory obligations or court procedural rules. Paragraph (e) requires disclosure of information that the prosecutor knows

[12] *See Kline*, 113 A.3d at 213.

or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. However, because the failure to disclose must be intentional, the rule only requires disclosure of such information when its existence is known to the prosecutor. Although another government actor's knowledge will not be imputed to the prosecutor, a prosecutor's knowledge may be inferred from circumstances under Rule 1.0(f). Moreover, paragraph (d) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (e) exists regardless of whether that information might later be deemed immaterial to the outcome of the case and regardless of the prosecutor's assessment of how the information might be explained away or discredited at trial or ultimately rejected by the fact-finder. For further guidance, see *In re Kline*, 113 A.3d 202 (D.C. 2015).

Comment 1 (Clean Version)

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. The constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context. While this rule may overlap with what constitutional due process requires, it is a rule to govern professional conduct; its requirements are not co-extensive with due process or with statutory obligations or court procedural rules. Paragraph (e) requires disclosure of information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. However, because the failure to disclose must be intentional, the rule only requires disclosure of such information when its existence is known to the prosecutor. Although another government actor's knowledge will not be imputed to the prosecutor, a prosecutor's knowledge may be inferred from circumstances under Rule 1.0(f). Moreover, paragraph (d) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (e) exists regardless of whether that information might later be deemed immaterial to the outcome of the case and regardless of the prosecutor's assessment of how the information might be explained away or discredited at trial or ultimately rejected by the fact-finder. For further guidance, see *In re Kline*, 113 A.3d 202 (D.C. 2015).

C. Proposed Additions to D.C. Rule 3.8 and Comments [4], [5], [6] and [7]

Following the Committee's determination to recommend revisions to Comment [1] as described above, the Committee focused its efforts on the development of proposed rules for prosecutors regarding post-conviction exculpatory evidence. The Committee recommends amendments to Rule 3.8 and Comments that are aligned to Model Rules 3.8(g) and (h), but with some important differences.[13]

[13] Model Rule 3.8 provides:

Significantly, since the 2012 adoption of ABA Model Rules 3.8(g) and (h), only three jurisdictions have adopted Model Rules 3.8(g) and (h) without amendments. Fourteen jurisdictions have adopted various modified versions of Model Rule 3.8(g). Six of the fourteen jurisdictions also adopted modified versions of Model Rule 3.8(h). The remaining eight rejected adoption of Model Rule 3.8(h) in any form. Most adopted variations concern the standards for required reporting, the persons or entities to whom a prosecutor is required to report and also the specific actions prosecutors are required to take, and under which circumstances.[14] A majority of the Rules Review Committee supported proposing additions to the D.C. Rules in the same vein as Model Rules 3.8(g) and (h); however, like many other jurisdictions, the strong consensus was that significant improvements needed to be made to the standards for reporting, reporting obligations, and other language of Model Rules 3.8(g) and (h) prior to recommendation.[15] A summary of the differences between the Committee's proposed D.C. Rules 3.8(h), (i) and (j) and Model Rules 3.8(g) and (h) follows.

1. Analysis: Comparing Model Rules 3.8(g) and (h) and the Committee's Recommendations

The Committee followed the ABA language regarding the initial trigger to a potential action by the prosecutor: The prosecutor must "know" of "information." Neither the ABA nor the Committee adopted a standard under which a prosecutor's obligations regarding post-conviction exculpatory evidence could be triggered by negligence, i.e., a "should know" or "should have known" standard as to the substantive information relating to the conviction. With respect to the relevance or importance of the information to the conviction, the Committee did not follow the Model Rule's language ("new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense . . ."). The Committee noted that the ABA did not include a scienter requirement for the prosecutor's evaluation of the importance of the evidence, phrasing the Model Rule in the passive voice, "evidence creating a reasonable likelihood." The Committee believed that the Model Rule left significant questions about the requisite state of mind as to the impact of the evidence unanswered. Therefore, the Committee proposed a clearer standard: the prosecutor must act (as provided thereafter in the proposed Rule)

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

[14] A chart comparing various jurisdictions versions of 3.8(g) and/or (h) can be found here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.pdf

[15] The Committee benefited from the expertise of several members who have significant experience as either prosecutors or criminal defense attorneys in the District of Columbia.

if the prosecutor "knows or reasonably should know" that the evidence "raises a substantial question . . . ."

The Committee then addressed what the prosecutor must know or should reasonably know in order to be required to act under the Rule. The ABA standard is that the evidence must "create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." The Committee believed that this standard is too stringent to serve as a trigger for further action by the prosecutor and recommends a lower standard: "raises a substantial question about whether a person was convicted of an offense that the person did not commit."

The ABA Model Rule requires disclosure to the "appropriate court or authority" in all instances where the prerequisites of the Rule are met. If the conviction occurred in the prosecutor's jurisdiction, the ABA Model Rule requires additional disclosure to the defendant (except if a delay is authorized by the court) and requires the prosecutor to conduct or cause to be conducted a reasonable further investigation. The Committee found the ABA disclosure requirements inadequate. For both in and out-of-jurisdiction matters, the Committee believed that the chief prosecutor, the defendant and the defendant's lawyer in addition to a court should be notified. The Committee retained the ABA provision authorizing delay in notifying the defendant and the defendant's lawyer if such delay were approved by the court.

In instances where there is clear and convincing evidence that a person was convicted of an offense in the prosecutor's jurisdiction that the person did not commit, both the ABA and Committee proposal require that the prosecutor "seek to remedy the conviction." The ABA language requires that the prosecutor "know" of the evidence but does not specify the level of knowledge required as to the effect of the evidence, again using the passive construction "evidence establishing." The Committee recommends that the level of knowledge be specified and believes that because of the heightened obligation, the prosecutor must know that the information constitutes "clear and convincing evidence" that a person did not commit an offense.

2. New Proposed D.C. Rule 3.8(j)

Section (j) in the Committee's proposed rule is new language not found in the ABA Model Rule. It establishes that a prosecutor's judgment that the evidence is not of such a nature to trigger an obligation under the other sections, if later determined to be incorrect, is not a violation of the rule provided that the prosecutor's determination was "reasonable, considered and made in good faith." The Committee believes that this standard requires thought and deliberation by the prosecutor and does not protect decisions made in haste, even if reasonable and made in good faith.

3. New Proposed Comments [4], [5], [6] and [7] to D.C. Rule 3.8

New Comment [4] makes it clear that a prosecutor can consult for a reasonable time with the chief prosecutor before making disclosures to the court and others as per the language of the Rule. The Committee recommended this provision because an out-of-jurisdiction prosecutor may not be aware of what evidence is new and may not be aware of all of the circumstances and other evidence already known to the chief prosecutor of the other jurisdiction. Making disclosures to courts and defendants of evidence that has already been disclosed or determined not to raise issues about a

conviction is not in the interests of justice and will ultimately make prosecutors more hesitant to act in cases where there is evidence. New Comment [4] also allows the prosecutor some flexibility in terms of who constitutes the "chief prosecutor" for notice purposes and relieves the prosecutor of the obligation to notify individuals or entities that the prosecutor cannot locate after reasonable diligence.

New Comment [5] provides guidance concerning how to apply the "should know or should have known" standard and to define what constitutes a "substantial question" as the term is used in the Rule. The Comment also makes clear that a prosecutor does not have to disclose evidence that has already been disclosed and need not undertake an investigation when the prosecutor knows that another prosecutor is already doing so.

New Comment [6] allows a prosecutor to make a disclosure even when the prosecutor has not yet determined that the evidence in fact raises a substantial question about whether a person was convicted of an offense that the person did not commit. It is sufficient that the prosecutor believes that the evidence "could" raise such a question.

New Comment [7] includes a request for appointment of counsel as an appropriate remedial step by the prosecutor where there is clear and convincing evidence of a conviction of a person of an offense that the person did not commit and an injustice may have occurred. In addition, a prosecutor need not seek to remedy a conviction where the prosecutor knows that another prosecutor is already doing so.

The Committee recommends new proposed D.C. Rules 3.8(h), (i) and (j) and explanatory Comments as follows.[16]

a. New Proposed Sections (h), (i) and (j) to D.C. Rule 3.8

> **(h)** When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, the prosecutor shall
>
> > **(1)** promptly disclose that information to: (i) the chief prosecutor of the jurisdiction where the conviction was obtained; (ii) the court in which the conviction was obtained; and, unless the court authorizes a delay, (iii) the convicted person and (iv) if known, the person's lawyer; and
> > **(2)** if the prosecution occurred in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the person was convicted of an offense that the person did not commit.

[16] Proposed D.C. Rule 3.8(h) and (i) address similar duties as Model Rules 3.8(g) and (h) respectively. Proposed D.C. Rule 3.8(j) provides a safe-harbor provision. A safe-harbor provision also exists in ABA Model Rule 3.8 in Comment [9]; however, the Rules Review Committee believes such provision is more appropriately placed in the black letter ethics rule.

(i) When a prosecutor is aware of information that the prosecutor knows constitutes clear and convincing evidence establishing that a person was convicted in the prosecutor's jurisdiction of an offense that the person did not commit, the prosecutor shall seek to remedy the conviction.

(j) A prosecutor's determination that the information is not of such nature as to trigger the obligations of either paragraph (h) or (i), though subsequently determined to have been erroneous, does not constitute a violation of this rule if that determination was reasonable, considered, and made in good faith. A prosecutor does not violate subparagraph (h) by failing to notify a person or persons or court whose identity or location remains unknown to the prosecutor after undertaking reasonable efforts.

b. New Proposed Comments [4], [5], [6] and [7] to D.C. Rule 3.8

[4] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, paragraph (h) requires prompt disclosure to the chief prosecutor of the jurisdiction where the conviction occurred as well as the court in which the conviction was obtained. Prompt disclosure under paragraph (h)(1) does not preclude a reasonable period of time for consultation with the chief prosecutor of the jurisdiction where the conviction was obtained. A disclosure made to a convicted person pursuant to paragraph (h) does not violate Rule 4.2(a) of these Rules. As used in this Rule, the "chief prosecutor" includes the head of the organization or any managerial lawyer in the chief prosecutor's office. The notification obligations in paragraph (h) assume that the prosecutor knows, or through reasonable efforts can ascertain, the identity and location (i.e., mailing address, email address, or telephone number) of the persons and court to be notified.

[5] Not every piece of information raising a question about whether a person was convicted of an offense that the person did not commit need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause a reasonable lawyer to believe there is substantial question about whether a person was convicted of an offense that the person did not commit. See Rule 1.0(j) for the definition of "reasonable." The phrase "substantial question" refers to the degree of concern the particular information triggers about whether the person was convicted of an offense that the person did not commit, and not the quantum of information of which the lawyer is aware. See Rule 1.0(m) for the definition of "substantial." In order to comply with paragraph (h), a prosecutor need not disclose information that the prosecutor knows was previously disclosed, and a prosecutor need not undertake an investigation or take steps to initiate an investigation when the prosecutor knows another prosecutor is already doing so.

[6] A prosecutor who knows of information that could raise a substantial question about whether a person was convicted of an offense that the person did not commit may, but is not required to, disclose that information as directed in paragraph (h) without further

inquiry into whether the information actually raises such a question. A prosecutor's disclosure of information pursuant to this Rule is not an admission or concession that such information raises a substantial question about whether a person was convicted of an offense that he or she did not commit and should not be considered as such in any subsequent litigation.

[7] Under paragraph (i), remedial steps may include requesting that the court appoint counsel for an unrepresented defendant. In order to comply with paragraph (i), a prosecutor need not seek to remedy a conviction where the prosecutor knows another prosecutor is already doing so.

EXHIBIT A

District of Columbia Rules of Professional Conduct

Rule 1.1 (Competence): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 1.1 (Competence)

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

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

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

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

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

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods**, procedures, and technology** meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lessor consequences

Retaining or Contracting with Other Lawyers

[6] Except when directed by a client, before a lawyer retains or contracts with other lawyers not associated with the lawyer's own firm to provide or assist in the provision of legal services to a particular client or on a particular matter, the lawyer should inform the client or clients of 1) the use and nature of the other lawyers' services; and 2) the identity of the lawyers who will participate in the representation. However, the lawyer generally need not inform the client of the identity of other lawyers who are hired to conduct document review, digest depositions, provide translations, or perform similar services. The lawyer must reasonably believe that retaining other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1. 4, 1.5, 1.6, and 5.5. The reasonableness of the decision to retain or contract with other lawyers not associated with the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections and professional conduct rules of the jurisdictions in which the services will be performed, particularly relating to confidential information. A division of a fee between lawyers who are not in the same firm is subject to the requirements of Rule 1.5(e).

[7] When the client directs that other lawyers not associated with the lawyer's firm assist in the provision of legal services to the client, the lawyer ordinarily should reach agreement with the client about the identity of the lawyers who will participate in the representation and about the contemplated division of responsibility among them. See Rules 1.2, 1.5. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

Maintaining Competence

~~[6]~~ **[8]** To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

District of Columbia Rules of Professional Conduct

Rule 1.1 (Competence): Clean Version

D.C. Rule 1.1 (Competence)

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

(b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

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

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

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

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods, procedures, and technology meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lessor consequences

Retaining or Contracting with Other Lawyers

[6] Except when directed by a client, before a lawyer retains or contracts with other lawyers not associated with the lawyer's own firm to provide or assist in the provision of legal services to a particular client or on a particular matter, the lawyer should inform the client or clients of 1) the use and nature of the other lawyers' services; and 2) the identity of the lawyers who will participate in the representation. However, the lawyer generally need not inform the client of the identity of other lawyers who are hired to conduct document review, digest depositions, provide translations, or perform similar services. The lawyer must reasonably believe that retaining other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1. 4, 1.5, 1.6, and 5.5. The reasonableness of the decision to retain or contract with other lawyers not associated with the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections and professional conduct rules of the jurisdictions in which the services will be performed, particularly relating to confidential information. A division of a fee between lawyers who are not in the same firm is subject to the requirements of Rule 1.5(e).

[7] When the client directs that other lawyers not associated with the lawyer's firm assist in the provision of legal services to the client, the lawyer ordinarily should reach agreement with the client about the identity of the lawyers who will participate in the representation and about the contemplated division of responsibility among them. See Rules 1.2, 1.5. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

EXHIBIT B

District of Columbia Rules of Professional Conduct

Rule 1.6 (Confidentiality of Information): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 1.6 (Confidentiality of Information)

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client;

(2) use a confidence or secret of the lawyer's client to the disadvantage of the client;

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or

(2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client;

(2) (A) when permitted by these Rules or required by law or court order; and

(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation;
(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or
(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

(f) A lawyer shall exercise reasonable care to prevent:
(1) ~~A lawyer shall exercise reasonable care to prevent~~ the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e); and
(2) the unauthorized access to confidences or secrets of a client.

(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

(h) The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.

(i) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee, or in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule.

(j) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Practice Management Service Committee, formerly known as the Lawyer Practice Assistance Committee[17], or a staff assistant, mentor, monitor or other consultant for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Communications between the counselor and the lawyer being counseled under the auspices of the committee, or made in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule. However, during the period in which the lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, such information shall be subject to disclosure in accordance with the order.

(k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

[17] On May 10, 2005, the D.C. Bar Board of Governors approved a name change for the Lawyer Practice Assistance Committee. Effective July 1, 2005, the Committee will be known as the Practice Management Service Committee.

Comment

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

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

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

[4] A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] This rule prohibits a lawyer from revealing the confidences and secrets of a client except as provided in this rule or elsewhere in the Rules. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Relationship Between Rule 1.6 and Attorney-Client Evidentiary Privilege and Work Product Doctrine

[6] The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. This rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine. The privilege and doctrine were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.

[7] The attorney-client privilege is that of the client and not of the lawyer. As a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product doctrine.

[8] The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it applies not merely

to matters communicated in confidence by the client (i.e., confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (*i.e.*, secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

The Commencement of the Client-Lawyer Relationship

[9] Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Other duties of a lawyer to a prospective client are set forth in Rule 1.18.

Exploitation of Confidences and Secrets

[10] In addition to prohibiting the disclosure of a client's confidences and secrets, subparagraph (a)(2) provides that a lawyer may not use the client's confidences and secrets to the disadvantage of the client. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Similarly, information acquired by the lawyer in the course of representing a client may not be used to the disadvantage of that client even after the termination of the lawyer's representation of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the former client when later representing another client. Under subparagraphs (a)(3) and (e)(1), a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the lawyer has obtained the client's informed consent to the use in question.

Authorized Disclosure

[11] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[12] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client gives informed consent, when necessary to perform the professional employment, when permitted by these Rules, or when required by law. For the definition of "informed consent," *see* Rule 1.0(e). Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of the lawyer's firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that

the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship.

[13] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibilities to comply with these Rules. In most situations disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when disclosure is not impliedly authorized, paragraph (e)(6) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct and other law.

[14] Unless the client otherwise directs, it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

[15] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.

[16] Rule 1.6(c) describes situations presenting a sufficiently serious threat such that a client's confidences and secrets may be revealed to the extent reasonably necessary to prevent the harm described. Thus, a lawyer may reveal confidences and secrets to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure and to prevent bribery or intimidation of witnesses, jurors, court officials, or other persons involved in proceedings before a tribunal.

[17] Rule 1.6(d) describes situations in which the client's usual expectation of confidentiality is not warranted because the client has abused the lawyer-client relationship by using the lawyer's services to further a crime or fraud. In these circumstances, Rule 1.6(d)(1) provides a limited exception to the rule of confidentiality, which permits the lawyer to reveal information to the extent reasonably necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), if such crime or fraud is reasonably certain to result in substantial injury to the financial or property interests of another. The D.C. Court of Appeals has held that the crime-fraud exception to the attorney-client privilege requires that a lawyer's services were actually used to further a crime or fraud that occurred, not merely that the client sought to do so. *See In re Public Defender Service,* 831 A.2d 890 (D.C. 2003). The Rule 1.6(d) exception to the ethical duty of confidentiality also requires that the lawyer's services actually were used to further a crime or fraud. A client can prevent disclosure by refraining from the wrongful conduct or by not using the lawyer's services to further a crime or fraud. Although Rule 1.6(d)(1) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(e). Rule 1.16 addresses the lawyer's obligation or right to withdraw from the representation of the

client in such circumstances if withdrawal is necessary to prevent the client from misusing the lawyer's services or if withdrawal would otherwise prevent, mitigate, or rectify substantial injury caused by the client who misused the lawyer's services. Rules 3.3(a)(1), 3.3(d) and 4.1(b) address circumstances in which disclosure may be mandatory. Rules 3.4(a), 8.1, and 8.3 do not require disclosure of information otherwise protected by Rule 1.6; disclosure that is permissive in the limited situations specified in Rule 1.6 is not mandatory under Rules 3.4(a), 8.1 or 8.3. Rule 1.6(d) applies to organizations as well as to individuals.

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. In these circumstances, there may be situations in which the loss suffered by an affected person can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply to disclosure with regard to a crime or fraud committed prior to retaining the lawyer for representation concerning that offense.

[19] Rule 1.2, Comment [7] and Rule 4.1, Comment [3] acknowledge that, to avoid assisting in a client crime or fraud, a lawyer in some instances may be required to withdraw from representation, give notice of the fact of withdrawal, or disaffirm an opinion, document, affirmation or the like. In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client. Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client. Thus, a lawyer is not warranted under Rule 1.6(d) in providing legal advice or assistance to a victim as the victim's lawyer or voluntarily serving as a witness or otherwise cooperating in a proceeding brought by the victim or anyone else seeking compensation for the victim. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be reasonably necessary to prevent, rectify, or mitigate the victim's loss.

[20] This rule permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified. In exercising the discretion conferred by this rule by paragraphs (c) and (d), the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. The lawyer's exercise of discretion in determining whether to make disclosures that are reasonably likely to prevent the death or substantial bodily injury of another requires consideration of such factors as the client's tendency to commit violent acts or, conversely, to make idle threats. When a lawyer is given discretion to disclose under this rule, the lawyer's decision not to disclose as

permitted by the Rule does not violate Rule 1.6. Other Rules may impose disclosure obligations. *See* Rules 1.2(e), 2.3, 3.3, 3.4(a), 4.1(b), 8.1, and 8.3 regarding the reconciliation of the confidentiality protections of this rule with disclosure provisions of those Rules.

[21] Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. The "reasonably believes" standard is applied because it is difficult for a lawyer to "know" when acts with such potentially serious consequences will actually be carried out, for the client may have a change of mind. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[22] Other law may require that a lawyer disclose information otherwise protected by Rule 1.6. Whether a law requires such disclosure is a question of law beyond the scope of these Rules. When such disclosure appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law requires disclosure, paragraph (e)(2)(A) permits the lawyer to make such disclosure as is necessary to comply with the law.

Dispute Concerning Lawyer's Conduct

[23] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Charges, in defense of which a lawyer may disclose client confidences and secrets, can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.

[24] The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense.

[25] If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this

situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Fee Collection Actions

[26] Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.

[27] If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of *in camera* proceedings.

Disclosures Otherwise Required or Authorized

[28] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subparagraph (e)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

Former Client

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

Services Rendered in Assisting Another Lawyer Before Becoming a Member of the Bar

[30] There are circumstances in which a person who ultimately becomes a lawyer provides assistance to a lawyer while serving in a nonlawyer capacity. The typical situation is that of the law clerk or summer associate in a law firm or government agency. Paragraph (h) addresses the confidentiality obligations of such a person after becoming a member of the Bar; the same confidentiality obligations are imposed as would apply if the person had been a member of the Bar at the time confidences or secrets were received. This resolution of the confidentiality obligation is consistent with the reasoning employed in D.C. Bar Legal Ethics Committee Opinion 84. For a related provision dealing with the imputation of disqualifications arising from prior participation as a summer associate or in a similar position, see Rule 1.10(b). For a provision addressing the imputation of disqualifications arising from prior participation as a law clerk, *see* Rule 1.11.

Bar Sponsored Counseling Programs

[31] Paragraph (i) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counselees who have sought assistance from the counseling programs offered by the committee. It is in the interest of the public to encourage lawyers who have alcohol or other substance abuse problems to seek counseling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to Disciplinary Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

[32] It is similarly in the interest of the public to encourage lawyers to seek the assistance of the D.C. Bar's Practice Management Service Committee to address management problems in their practices. In order for those who are providing counseling services through the Practice Management Service Committee to evaluate properly the lawyer-counselee's problems and enhance the prospects for self-improvement by the counselee, paragraph (j) adds a provision addressing the confidentiality obligations of lawyers who are assisting in the counseling programs of the Practice Management Service Committee.

[33] These considerations make it appropriate to treat the lawyer-counselee relationship as a lawyer-client relationship, and to create an additional limited class of information treated as secrets or confidences subject to the protection of Rule 1.6. The scope of that information is set forth in paragraph (i) and (j). The lawyer-client relationship is deemed to exist only with respect to the obligation of confidentiality created under Rule 1.6, and not to obligations created elsewhere in these Rules, including the obligation of zealous representation under Rule 1.3 and the obligation to avoid conflicts of interest set forth in Rules 1.7 and 1.9. The obligation of confidentiality extends to non-lawyer assistants of lawyers serving the committee. See Rule 5.1

[34] Notwithstanding the obligation of confidentiality under paragraph (j), during the period in which a lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, communications between the counselor and the lawyer being counseled under the auspices of the Practice Management Service Committee shall be subject to disclosure in accordance with an Order of the Court or the Board, since the participation of the lawyer-counselee in the programs of the committee in such circumstances is not voluntary.

[35] Ethical rules established by the District of Columbia Court of Appeals with respect to the kinds of information protected from compelled disclosure may not be accepted by other forums or jurisdictions. Therefore, the protections afforded to lawyer-counselees by paragraphs (i) and (j) may not be available to preclude disclosure in all circumstances. Furthermore, lawyers who are members of the bar of other jurisdictions may not be entitled, under the ethics rules applicable to members of the bar in such other jurisdictions, to forgo reporting violations to disciplinary authorities pursuant to the other jurisdictions' counterparts to Rule 8.3.

Government Lawyers

[36] Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government.

[37] Subparagraph (e)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (e)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(e)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (e)(2)(B) governs.

[38] The term "agency" in paragraph (j) includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (*e.g.*, staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.

[39] Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. It is, of course, acceptable in this circumstance for a government lawyer to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency's representation program. *See, e.g.*,28 C.F.R. § 50.15 and 50.16. The relevant circumstances, including the agreement to represent the individual, may also indicate whether the individual client to whom the government lawyer is assigned will be deemed to have granted or denied informed consent to disclosures to

the lawyer's employing agency. Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, and a military lawyer representing a court-martial defendant.

Acting Competently to Preserve Confidences

[40] When ~~transmitting a communication that includes information relating to the representation of a client~~ **transmitting or storing confidences or secrets of a client**, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication or storage affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. **Among the** f~~F~~actors to be considered in determining reasonableness of the lawyer's ~~expectation of privacy~~ **conduct in transmitting or storing that information are:** ~~include~~ the sensitivity of the information; ~~and~~ the extent to which the privacy of the client information is protected by law or by a confidentiality agreement**; the cost of the security measures; and, difficulty in implementing the safeguards**. **A client and a lawyer may agree that the lawyer will implement special security measures beyond those required by this rule. A client may give informed consent to forgo security measures that would otherwise be required by this rule.** ~~A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.~~ **For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].**

District of Columbia Rules of Professional Conduct

Rule 1.6 (Confidentiality of Information): Clean Version

D.C. Rule 1.6 (Confidentiality of Information)

(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client;

(2) use a confidence or secret of the lawyer's client to the disadvantage of the client;

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

(c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or

(2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

(d) When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:

(1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

(e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client;

(2) (A) when permitted by these Rules or required by law or court order; and

(B) if a government lawyer, when permitted or authorized by law;

(3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client;

(4) when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation;

(5) to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee; or

(6) to the extent reasonably necessary to secure legal advice about the lawyer's compliance with law, including these Rules.

(f) A lawyer shall exercise reasonable care to prevent:

(1) the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that such persons may reveal information permitted to be disclosed by paragraphs (c), (d), or (e); and

(2) the unauthorized access to confidences or secrets of a client.

(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

(h) The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer.

(i) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Lawyer Counseling Committee, or as a trained intervenor for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Information obtained from another lawyer being counseled under the auspices of the committee, or in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule.

(j) For purposes of this rule, a lawyer who serves as a member of the D.C. Bar Practice Management Service Committee, formerly known as the Lawyer Practice Assistance Committee[1], or a staff assistant, mentor, monitor or other consultant for that committee, shall be deemed to have a lawyer-client relationship with respect to any lawyer-counselee being counseled under programs conducted by or on behalf of the committee. Communications between the counselor and the lawyer being counseled under the auspices of the committee, or made in the course of and associated with such counseling, shall be treated as a confidence or secret within the terms of paragraph (b). Such information may be disclosed only to the extent permitted by this rule. However, during the period in which the lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, such information shall be subject to disclosure in accordance with the order.

(k) The client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

[1] On May 10, 2005, the D.C. Bar Board of Governors approved a name change for the Lawyer Practice Assistance Committee. Effective July 1, 2005, the Committee will be known as the Practice Management Service Committee.

Comment

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

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

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

[4] A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] This rule prohibits a lawyer from revealing the confidences and secrets of a client except as provided in this rule or elsewhere in the Rules. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Relationship Between Rule 1.6 and Attorney-Client Evidentiary Privilege and Work Product Doctrine

[6] The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. This rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine. The privilege and doctrine were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.

[7] The attorney-client privilege is that of the client and not of the lawyer. As a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work product doctrine.

[8] The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it applies not merely

to matters communicated in confidence by the client (i.e., confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (*i.e.*, secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

The Commencement of the Client-Lawyer Relationship

[9] Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Other duties of a lawyer to a prospective client are set forth in Rule 1.18.

Exploitation of Confidences and Secrets

[10] In addition to prohibiting the disclosure of a client's confidences and secrets, subparagraph (a)(2) provides that a lawyer may not use the client's confidences and secrets to the disadvantage of the client. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Similarly, information acquired by the lawyer in the course of representing a client may not be used to the disadvantage of that client even after the termination of the lawyer's representation of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the former client when later representing another client. Under subparagraphs (a)(3) and (e)(1), a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the lawyer has obtained the client's informed consent to the use in question.

Authorized Disclosure

[11] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[12] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client gives informed consent, when necessary to perform the professional employment, when permitted by these Rules, or when required by law. For the definition of "informed consent," *see* Rule 1.0(e). Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of the lawyer's firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that

the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship.

[13] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibilities to comply with these Rules. In most situations disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when disclosure is not impliedly authorized, paragraph (e)(6) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct and other law.

[14] Unless the client otherwise directs, it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

[15] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions.

[16] Rule 1.6(c) describes situations presenting a sufficiently serious threat such that a client's confidences and secrets may be revealed to the extent reasonably necessary to prevent the harm described. Thus, a lawyer may reveal confidences and secrets to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure and to prevent bribery or intimidation of witnesses, jurors, court officials, or other persons involved in proceedings before a tribunal.

[17] Rule 1.6(d) describes situations in which the client's usual expectation of confidentiality is not warranted because the client has abused the lawyer-client relationship by using the lawyer's services to further a crime or fraud. In these circumstances, Rule 1.6(d)(1) provides a limited exception to the rule of confidentiality, which permits the lawyer to reveal information to the extent reasonably necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), if such crime or fraud is reasonably certain to result in substantial injury to the financial or property interests of another. The D.C. Court of Appeals has held that the crime-fraud exception to the attorney-client privilege requires that a lawyer's services were actually used to further a crime or fraud that occurred, not merely that the client sought to do so. *See In re Public Defender Service,* 831 A.2d 890 (D.C. 2003). The Rule 1.6(d) exception to the ethical duty of confidentiality also requires that the lawyer's services actually were used to further a crime or fraud. A client can prevent disclosure by refraining from the wrongful conduct or by not using the lawyer's services to further a crime or fraud. Although Rule 1.6(d)(1) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(e). Rule 1.16 addresses the lawyer's obligation or right to withdraw from the representation of the

client in such circumstances if withdrawal is necessary to prevent the client from misusing the lawyer's services or if withdrawal would otherwise prevent, mitigate, or rectify substantial injury caused by the client who misused the lawyer's services. Rules 3.3(a)(1), 3.3(d) and 4.1(b) address circumstances in which disclosure may be mandatory. Rules 3.4(a), 8.1, and 8.3 do not require disclosure of information otherwise protected by Rule 1.6; disclosure that is permissive in the limited situations specified in Rule 1.6 is not mandatory under Rules 3.4(a), 8.1 or 8.3. Rule 1.6(d) applies to organizations as well as to individuals.

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. In these circumstances, there may be situations in which the loss suffered by an affected person can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply to disclosure with regard to a crime or fraud committed prior to retaining the lawyer for representation concerning that offense.

[19] Rule 1.2, Comment [7] and Rule 4.1, Comment [3] acknowledge that, to avoid assisting in a client crime or fraud, a lawyer in some instances may be required to withdraw from representation, give notice of the fact of withdrawal, or disaffirm an opinion, document, affirmation or the like. In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client. Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client. Thus, a lawyer is not warranted under Rule 1.6(d) in providing legal advice or assistance to a victim as the victim's lawyer or voluntarily serving as a witness or otherwise cooperating in a proceeding brought by the victim or anyone else seeking compensation for the victim. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be reasonably necessary to prevent, rectify, or mitigate the victim's loss.

[20] This rule permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified. In exercising the discretion conferred by this rule by paragraphs (c) and (d), the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. The lawyer's exercise of discretion in determining whether to make disclosures that are reasonably likely to prevent the death or substantial bodily injury of another requires consideration of such factors as the client's tendency to commit violent acts or, conversely, to make idle threats. When a lawyer is given discretion to disclose under this rule, the lawyer's decision not to disclose as

permitted by the Rule does not violate Rule 1.6. Other Rules may impose disclosure obligations. *See* Rules 1.2(e), 2.3, 3.3, 3.4(a), 4.1(b), 8.1, and 8.3 regarding the reconciliation of the confidentiality protections of this rule with disclosure provisions of those Rules.

[21] Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. The "reasonably believes" standard is applied because it is difficult for a lawyer to "know" when acts with such potentially serious consequences will actually be carried out, for the client may have a change of mind. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[22] Other law may require that a lawyer disclose information otherwise protected by Rule 1.6. Whether a law requires such disclosure is a question of law beyond the scope of these Rules. When such disclosure appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law requires disclosure, paragraph (e)(2)(A) permits the lawyer to make such disclosure as is necessary to comply with the law.

Dispute Concerning Lawyer's Conduct

[23] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Charges, in defense of which a lawyer may disclose client confidences and secrets, can arise in a civil, criminal, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together.

[24] The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense.

[25] If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this

situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Fee Collection Actions

[26] Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.

[27] If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of *in camera* proceedings.

Disclosures Otherwise Required or Authorized

[28] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subparagraph (e)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

Former Client

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

Services Rendered in Assisting Another Lawyer Before Becoming a Member of the Bar

[30] There are circumstances in which a person who ultimately becomes a lawyer provides assistance to a lawyer while serving in a nonlawyer capacity. The typical situation is that of the law clerk or summer associate in a law firm or government agency. Paragraph (h) addresses the confidentiality obligations of such a person after becoming a member of the Bar; the same confidentiality obligations are imposed as would apply if the person had been a member of the Bar at the time confidences or secrets were received. This resolution of the confidentiality obligation is consistent with the reasoning employed in D.C. Bar Legal Ethics Committee Opinion 84. For a related provision dealing with the imputation of disqualifications arising from prior participation as a summer associate or in a similar position, see Rule 1.10(b). For a provision addressing the imputation of disqualifications arising from prior participation as a law clerk, *see* Rule 1.11.

Bar Sponsored Counseling Programs

[31] Paragraph (i) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counselees who have sought assistance from the counseling programs offered by the committee. It is in the interest of the public to encourage lawyers who have alcohol or other substance abuse problems to seek counseling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to Disciplinary Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

[32] It is similarly in the interest of the public to encourage lawyers to seek the assistance of the D.C. Bar's Practice Management Service Committee to address management problems in their practices. In order for those who are providing counseling services through the Practice Management Service Committee to evaluate properly the lawyer-counselee's problems and enhance the prospects for self-improvement by the counselee, paragraph (j) adds a provision addressing the confidentiality obligations of lawyers who are assisting in the counseling programs of the Practice Management Service Committee.

[33] These considerations make it appropriate to treat the lawyer-counselee relationship as a lawyer-client relationship, and to create an additional limited class of information treated as secrets or confidences subject to the protection of Rule 1.6. The scope of that information is set forth in paragraph (i) and (j). The lawyer-client relationship is deemed to exist only with respect to the obligation of confidentiality created under Rule 1.6, and not to obligations created elsewhere in these Rules, including the obligation of zealous representation under Rule 1.3 and the obligation to avoid conflicts of interest set forth in Rules 1.7 and 1.9. The obligation of confidentiality extends

to non-lawyer assistants of lawyers serving the committee. See Rule 5.1

[34] Notwithstanding the obligation of confidentiality under paragraph (j), during the period in which a lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, communications between the counselor and the lawyer being counseled under the auspices of the Practice Management Service Committee shall be subject to disclosure in accordance with an Order of the Court or the Board, since the participation of the lawyer-counselee in the programs of the committee in such circumstances is not voluntary.

[35] Ethical rules established by the District of Columbia Court of Appeals with respect to the kinds of information protected from compelled disclosure may not be accepted by other forums or jurisdictions. Therefore, the protections afforded to lawyer-counselees by paragraphs (i) and (j) may not be available to preclude disclosure in all circumstances. Furthermore, lawyers who are members of the bar of other jurisdictions may not be entitled, under the ethics rules applicable to members of the bar in such other jurisdictions, to forgo reporting violations to disciplinary authorities pursuant to the other jurisdictions' counterparts to Rule 8.3.

Government Lawyers

[36] Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government.

[37] Subparagraph (e)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (e)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(e)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (e)(2)(B) governs.

[38] The term "agency" in paragraph (j) includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (*e.g.*, staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.

[39] Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. It is, of course, acceptable in this circumstance for a government lawyer to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency's representation program. *See, e.g.,*28 C.F.R. § 50.15 and 50.16. The relevant circumstances, including the agreement to

represent the individual, may also indicate whether the individual client to whom the government lawyer is assigned will be deemed to have granted or denied informed consent to disclosures to the lawyer's employing agency. Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, and a military lawyer representing a court-martial defendant.

Acting Competently to Preserve Confidences

[40] When transmitting or storing confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication or storage affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Among the factors to be considered in determining reasonableness of the lawyer's conduct in transmitting or storing that information are: the sensitivity of the information; the extent to which the privacy of the client information is protected by law or by a confidentiality agreement; the cost of the security measures; and, difficulty in implementing the safeguards**.** A client and a lawyer may agree that the lawyer will implement special security measures beyond those required by this rule. A client may give informed consent to forgo security measures that would otherwise be required by this rule. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

EXHIBIT C

District of Columbia Rules of Professional Conduct

Rule 4.4 (Respect for Rights of Third Persons): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. 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 knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of ~~a~~ **the lawyer's** client and knows, before examining the writing, that it has been inadvertently sent shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

Comment

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

[2] Paragraph (b) addresses, **for example**, the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an adversary lawyer and who knows that the sending lawyer inadvertently included these writings. As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is "an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient." Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in **these** circumstances, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of D.C. Rule 4.4 requires the receiving lawyer to do more.

[3] ~~On the other hand, w~~**W**here writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. See D.C. Legal Ethics Committee Opinion 256 **(addressing writings containing client secrets or confidences). See also D.C. Legal Ethics Committee Opinion 341 (applying paragraph (b) to the receipt of inadvertently disclosed metadata imbedded in electronic files).** ~~Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not~~

~~address the legal duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.~~

[4] Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the ~~legal~~ duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. But see D.C. Bar Legal Ethics Committee Opinion 318 **(analyzing a lawyer's ethical obligations when receiving privileged documents that may have been taken without authorization from an opposing party) and Rules 1.1, 1.3, 1.6, 1.15 and 8.4.**

District of Columbia Rules of Professional Conduct

Rule 4.4 (Respect for Rights of Third Persons): Clean Version

D.C. 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 knowingly use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows, before examining the writing, that it has been inadvertently sent shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

Comment

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

[2] Paragraph (b) addresses, for example, the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an adversary lawyer and who knows that the sending lawyer inadvertently included these writings. As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is "an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient." Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in these circumstances, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of D.C. Rule 4.4 requires the receiving lawyer to do more.

[3] Where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. See D.C. Legal Ethics Committee Opinion 256 (addressing writings containing client secrets or confidences). See also D.C. Legal Ethics Committee Opinion 341 (applying paragraph (b) to the receipt of inadvertently disclosed metadata imbedded in electronic files).

[4] Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by

the sending person. But see D.C. Bar Legal Ethics Committee Opinion 318 (analyzing a lawyer's ethical obligations when receiving privileged documents that may have been taken without authorization from an opposing party) and Rules 1.1, 1.3, 1.6, 1.15 and 8.4.

EXHIBIT D

District of Columbia Rules of Professional Conduct

Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

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

(a) A partner or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or agency 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 requests or, with knowledge of the specific conduct, ratifies the conduct involved; or

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

Comment

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

[2] Just as lawyers in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other government lawyers may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have,

strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other government lawyers have a responsibility with respect to police or investigative personnel, whose conduct they effectively direct, equivalent to that of private lawyers with respect to investigators whom they retain. *See also* Comments [4], [5], and [6] to Rule 5.1, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm. Comments [4], [5], and [6] of Rule 5.1 apply as well to Rule 5.3.

Nonlawyers Not Associated With the Firm

[3] A lawyer may use nonlawyers not associated with the lawyer's own firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing and scanning, and using an internet-based service to store client information. Unless directed by the client to use specified nonlawyers not associated with the firm, in using such services a lawyer must make reasonable efforts and communicate appropriate directions to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the service involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4, and 5.5.

[4] When the client directs the selection of a nonlawyer service provider not associated with the lawyer's firm, the lawyer ordinarily should reach agreement with the client about the scope of the lawyer's representation and the division of responsibility among the lawyer, the client, and the service provider. When making such a division of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

District of Columbia Rules of Professional Conduct

Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants): Clean Version

D.C. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

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

(a) A partner or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or agency 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 requests or, with knowledge of the specific conduct, ratifies the conduct involved; or

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

Comment

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

[2] Just as lawyers in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other government lawyers may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other government lawyers have a responsibility with respect to police or investigative personnel, whose conduct they effectively direct, equivalent to that of private lawyers with respect to investigators whom they retain. *See also* Comments [4], [5], and [6] to Rule 5.1, in particular, the concept of what constitutes

direct supervisory authority, and the significance of holding certain positions in a firm. Comments [4], [5], and [6] of Rule 5.1 apply as well to Rule 5.3.

Nonlawyers Not Associated With the Firm

[3] A lawyer may use nonlawyers not associated with the lawyer's own firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing and scanning, and using an internet-based service to store client information. Unless directed by the client to use specified nonlawyers not associated with the firm, in using such services a lawyer must make reasonable efforts and communicate appropriate directions to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the service involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4, and 5.5.

[4] When the client directs the selection of a nonlawyer service provider not associated with the lawyer's firm, the lawyer ordinarily should reach agreement with the client about the scope of the lawyer's representation and the division of responsibility among the lawyer, the client, and the service provider. When making such a division of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

EXHIBIT E

District of Columbia Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored;** proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 3.8 (Special Responsibilities of a Prosecutor)

The prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

(h) When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, the prosecutor shall

(3) promptly disclose that information to: (i) the chief prosecutor of the jurisdiction where the conviction was obtained; (ii) the court in which the conviction was

obtained; and, unless the court authorizes a delay, (iii) the convicted person and (iv) if known, the person's lawyer; and

(4) if the prosecution occurred in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the person was convicted of an offense that the person did not commit.

(i) When a prosecutor is aware of information that the prosecutor knows constitutes clear and convincing evidence establishing that a person was convicted in the prosecutor's jurisdiction of an offense that the person did not commit, the prosecutor shall seek to remedy the conviction.

(j) A prosecutor's determination that the information is not of such nature as to trigger the obligations of either paragraph (h) or (i), though subsequently determined to have been erroneous, does not constitute a violation of this rule if that determination was reasonable, considered, and made in good faith. A prosecutor does not violate subparagraph (h) by failing to notify a person or persons or court whose identity or location remains unknown to the prosecutor after undertaking reasonable efforts.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. ~~Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.~~ **The constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context. While this rule may overlap with what constitutional due process requires, it is a rule to govern professional conduct; its requirements are not co-extensive with due process or with statutory obligations or court procedural rules. Paragraph (e) requires disclosure of information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. However, because the failure to disclose must be intentional, the rule only requires disclosure of such information when its existence is known to the prosecutor. Although another government actor's knowledge will not be imputed to the prosecutor, a prosecutor's knowledge may be inferred from circumstances under Rule 1.0(f). Moreover, paragraph (d) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (e) exists regardless of whether that information might later be deemed immaterial to the outcome of the case and regardless of the prosecutor's assessment of how**

the information might be explained away or discredited at trial or ultimately rejected by the fact-finder. For further guidance, see *In re Kline*, 113 A.3d 202 (D.C. 2015).

[2] Apart from the special responsibilities of a prosecutor under this rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 3.4 prohibiting the discriminatory use of peremptory strikes, and Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

[4] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, paragraph (h) requires prompt disclosure to the chief prosecutor of the jurisdiction where the conviction occurred as well as the court in which the conviction was obtained. Prompt disclosure under paragraph (h)(1) does not preclude a reasonable period of time for consultation with the chief prosecutor of the jurisdiction where the conviction was obtained. A disclosure made to a convicted person pursuant to paragraph (h) does not violate Rule 4.2(a) of these Rules. As used in this Rule, the "chief prosecutor" includes the head of the organization or any managerial lawyer in the chief prosecutor's office. The notification obligations in paragraph (h) assume that the prosecutor knows, or through reasonable efforts can ascertain, the identity and location (i.e., mailing address, email address, or telephone number) of the persons and court to be notified.

[5] Not every piece of information raising a question about whether a person was convicted of an offense that the person did not commit need be disclosed. Rather, this rule

limits the disclosure requirement to information that is sufficient to cause a reasonable lawyer to believe there is substantial question about whether a person was convicted of an offense that the person did not commit. See Rule 1.0(j) for the definition of "reasonable." The phrase "substantial question" refers to the degree of concern the particular information triggers about whether the person was convicted of an offense that the person did not commit, and not the quantum of information of which the lawyer is aware. See Rule 1.0(m) for the definition of "substantial." In order to comply with paragraph (h), a prosecutor need not disclose information that the prosecutor knows was previously disclosed, and a prosecutor need not undertake an investigation or take steps to initiate an investigation when the prosecutor knows another prosecutor is already doing so.

[6] A prosecutor who knows of information that could raise a substantial question about whether a person was convicted of an offense that the person did not commit may, but is not required to, disclose that information as directed in paragraph (h) without further inquiry into whether the information actually raises such a question. A prosecutor's disclosure of information pursuant to this Rule is not an admission or concession that such information raises a substantial question about whether a person was convicted of an offense that he or she did not commit and should not be considered as such in any subsequent litigation.

[7] Under paragraph (i), remedial steps may include requesting that the court appoint counsel for an unrepresented defendant. In order to comply with paragraph (i), a prosecutor need not seek to remedy a conviction where the prosecutor knows another prosecutor is already doing so.

District of Columbia Rules of Professional Conduct

Rule 3.8 (Special Responsibilities of a Prosecutor): Clean Version

D.C. Rule 3.8 (Special Responsibilities of a Prosecutor)

The prosecutor in a criminal case shall not:

(a) In exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person;

(b) File in court or maintain a charge that the prosecutor knows is not supported by probable cause;

(c) Prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt;

(d) Intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;

(e) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(f) Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused; or

(g) In presenting a case to a grand jury, intentionally interfere with the independence of the grand jury, preempt a function of the grand jury, abuse the processes of the grand jury, or fail to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause.

(h) When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, the prosecutor shall

> (3) promptly disclose that information to: (i) the chief prosecutor of the jurisdiction where the conviction was obtained; (ii) the court in which the conviction was obtained; and, unless the court authorizes a delay, (iii) the convicted person and (iv) if known, the person's lawyer; and
>
> (4) if the prosecution occurred in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the person was convicted of an offense that the person did not commit.

(i) When a prosecutor is aware of information that the prosecutor knows constitutes clear and convincing evidence establishing that a person was convicted in the prosecutor's jurisdiction of an offense that the person did not commit, the prosecutor shall seek to remedy the conviction.

(j) A prosecutor's determination that the information is not of such nature as to trigger the obligations of either paragraph (h) or (i), though subsequently determined to have been erroneous, does not constitute a violation of this rule if that determination was reasonable, considered, and made in good faith. A prosecutor does not violate subparagraph (h) by failing to notify a person or persons or court whose identity or location remains unknown to the prosecutor after undertaking reasonable efforts.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

[2] Apart from the special responsibilities of a prosecutor under this rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 3.4 prohibiting the discriminatory use of peremptory strikes, and Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

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[6] A prosecutor who knows of information that could raise a substantial question about whether a person was convicted of an offense that the person did not commit may, but is not required to, disclose that information as directed in paragraph (h) without further inquiry into whether the information actually raises such a question. A prosecutor's disclosure of information pursuant to this Rule is not an admission or concession that such information raises a substantial question about whether a person was convicted of an offense that he or she did not commit and should not be considered as such in any subsequent litigation.

[7] Under paragraph (i), remedial steps may include requesting that the court appoint counsel for an unrepresented defendant. In order to comply with paragraph (i), a prosecutor need not seek to remedy a conviction where the prosecutor knows another prosecutor is already doing so.