District of Columbia Court of Appeals

No. M284-24

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker, Associate Judges.

O R D E R
(FILED – April 7, 2025)

In October 2024, the Court sent out for public comment a set of amendments to the D.C. Rules of Professional Conduct proposed by the D.C. Bar, including: (1) an amendment to Comment 5 to Rule 1.1 (Competency), to address the duty to stay abreast of technological changes; (2) amendments to Rule 1.6 (Confidentiality) and its comments, to address the duty to protect client information; (3) amendments to Rule 4.4 (Rights of Third Parties) and its comments, to address a lawyer's obligations after receiving inadvertently sent information; (4) amendments to the comments to Rule 1.1 and to Rule 5.3 (Duties Regarding Non-lawyer Assistants) and its comments, to address outsourcing of legal work; and (5) amendments making substantial revisions to Rule 3.8 (Special Duties of Prosecutors) and its comments.

The Court also invited on three questions related to Rule 3.8(e): (1) In Rule 3.8(e), should the words "upon request" be retained or deleted?; (2) Should Rule 3.8(e) and the related comment specifically discuss (a) impeachment evidence and/or (b) evidence that tends to support a motion to suppress evidence? (3) Should Rule 3.8(e) and the related comment more fully explain the relationship between prosecutors' constitutional due-process obligations of disclosure and the ethical obligations imposed under this Rule?

The comment period has closed, and the court received a number of comments. In general, except as noted infra, the commenters favored adoption of the Bar's proposed amendments. The court has decided to largely adopt those proposed amendments, with some changes as noted. Clean and redlined versions of the rules as amended are attached to this order.

1. Proposed amendment to Comment 5 to D.C. R. Prof. Conduct 1.1 (Competency) (duty to stay abreast of technological changes). The court received a comment from one member of the Board on Professional Responsibility (BPR) suggesting a rather minor change in the wording of the proposed amendment.

The court has determined to promulgate the comment as proposed by the Bar.

2. Proposed amendments to R. 1.6 (Confidentiality) and its comments (duty to protect client information). The court did not receive any negative comments on these proposed amendments. The court has determined to promulgate these amendments as proposed by the Bar.

3. **Proposed amendments to R. 4.4 (Rights of Third Parties) (obligations after receiving inadvertently sent information) and its comments.** The proposed amendments address the obligation of a lawyer who receives a communication that is inadvertently sent to the lawyer and that contains information about client secrets or confidences. The Bar proposed to clarify the current rule by explicitly imposing a duty to return such communications only if the communication relates to the lawyer's representation of one of the lawyer's clients. BPR opposed that proposed amendment, arguing that (a) the current rule should be read as not so limited; and (b) in any event, the better approach is to require return of all inadvertently sent communications that contain client secrets or confidences. BPR suggests that the language of the rule remain unchanged, and that "an adversary" in Comment 2 to the rule be changed to "another lawyer."

The court has determined to promulgate the rule as proposed by BPR. On balance, the court concludes that the better view is that lawyers should be required to return all inadvertently sent communications revealing client secrets or confidences. The court also does not believe that such an obligation would be unreasonably burdensome.

The court also determined to add the following language to the rule, to address situations in which the recipient begins reading a writing without knowing that it is subject to the rule but then reaches that realization while reading the writing:

New Rule 4.4(c): A lawyer who begins to examine a writing relating to the representation of a client and only then realizes that the writing relates to the representation of a client and has been inadvertently sent to the lawyer shall stop examining the writing, shall notify the sending party, and shall abide by the instructions of the sending party regarding the return or destruction of the writing.

4. **Proposed amendments to the comments to R. 1.1. and R. 5.3 (Duties Regarding Non-lawyer Assistants) (outsourcing of legal work).** The court did not receive any negative comments on these proposed amendments. The court has determined to promulgate these amendments as proposed by the Bar.

5. **Proposed amendments making substantial revisions to R. 3.8 (Special**

Duties of Prosecutors) and its comments. With respect to the proposed amendments to Rule 3.8, the court received comments from BPR, the United States Department of Justice (DOJ), the Office of the Attorney General for the District of Columbia (OAG), the Public Defender Service for the District of Columbia (PDS), and the D.C. Bar Rules of Professional Conduct the Review Committee. Those comments raise a number of issues.

a. **Rule 3.8(e) (duties of disclosure)**. With certain exceptions that will be discussed infra, the commenters generally supported the changes to Rule 3.8(e) proposed by the Bar. The court has determined to promulgate the rule as proposed by the Bar, with certain revisions all of which relate to the three questions the court posed in the order sending the proposal out for public comment: (1) In Rule 3.8(e), should the words "upon request" be retained or deleted?; (2) Should Rule 3.8(e) and the related comment specifically discuss (a) impeachment evidence and/or (b) evidence that tends to support a motion to suppress evidence? (3) Should Rule 3.8(e) and the related comment more fully explain the relationship between prosecutors' constitutional due-process obligations of disclosure and the ethical obligations imposed under this Rule?

i. **"Upon request."** In current Rule 3.8(e), the prosecutor's ethical duty to disclose is tied to a request from the defense. All of the commentators agree that this language should be deleted from the rule. The court has determined to delete that language.

ii. **Impeachment/suppression information.** Rule 3.8(e) requires disclosure of "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." BPR and PDS favor adding language clarifying that this obligation extends to impeachment information and to information that tends to support a motion to suppress. DOJ, OAG, and the D.C. Bar Rules Review Committee oppose adding such language. The court has determined to add the following highlighted language to Rule 3.8(e) : ". . . any evidence or information, which can include impeachment information or information tending to support a motion to suppress evidence, that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense."

iii. **Further discussion of the relationship between prosecutors' constitutional due-process obligations of disclosure and the ethical obligations imposed under R. 3.8.** All commenters

except PDS oppose adding such language. PDS advocates adding language (i) stating that the disclosure obligation with respect to impeachment information is precisely the same as the obligation with respect to directly exculpatory evidence; and (ii) requiring disclosure of all information favorable to the defense "at the earliest feasible opportunity and as soon as practicable following the filing of charges." The court has determined not to add the specific language proposed by PDS. Among other things, the court was concerned about the workability of an ethical rule requiring near-immediate disclosure of any material that could be viewed as impeaching of any potential government witness. The court also notes that no other jurisdiction appears to impose a comparable ethical requirement.

The court, however, understands the concerns expressed by PDS about unreasonably delayed disclosure. The court has determined to address that concern to a degree in a different way. Specifically, the court has determined to flip the order of what are now Rule 3.8(e) and Rule 3.8(d) and to add language to what would be become Rule 3.8(e). That provision currently prohibits prosecutors from "[i]ntentionally avoid[ing] pursuit of information or evidence because [the evidence or information] may damage the prosecution's case or aid the defense." The court has determined to add the highlighted language in the following: prosecutors may not "[i]ntentionally avoid pursuit of information or evidence, or unreasonably delay the disclosure of information or evidence that tends to negate the guilt of the accused or to mitigate the offense, because [the evidence or information] may damage the prosecution's case or aid the defense."

b. **R. 3.8(h) and (i) (post-conviction disclosures and remedies).**

Except as noted infra, all commentators generally supported adoption of proposed Rules 3.8(h) and (i).

i. **Knowledge vs. awareness in R. 3.8(h) and (i).** Proposed Rule 3.8(h) and proposed Rule 3.8(i) require post-conviction disclosure and efforts at post-conviction remedies in certain circumstances. Pointing out that Rule 3.8(h) uses "knows" but Rule 3.8(i) uses "is aware," OAG suggests that the wording should be consistent. The court agrees with OAG's suggestion and therefore has determined to change "is aware" in Rule 3.8(i) to "knows."

ii. **Know vs. Reasonably should know in R. 3.8(h).** The proposed rule requires disclosure if the prosecutor knows or reasonably should know that the information at issue creates a substantial question of innocence. DOJ suggests that knowledge should be required, and PDS opposes that suggestion. The court has determined to promulgate the rule as proposed by the Bar on this point. The Model Rule is ambiguous as to the required mental state of the prosecutor, and the court has concluded that it is desirable to be explicit on the issue. The court also concludes that the rule as proposed by the Bar sets a reasonable standard that should not be unreasonably burdensome.

iii. **Credibility under R. 3.8(h).** DOJ suggests that Rule 3.8(h) should require prosecutors to act only if the information at issue is "credible." PDS opposes that suggestion. The court has determined to adopt an intermediate position, by adding the following language at the end of proposed Comment 5: "A prosecutor may not decline to disclose information under Rule 3.8(h) merely because the prosecutor subjectively believes that the information is not credible. On the other hand, whether the information is objectively plausible or could reasonably be credited can appropriately be taken into account when determining whether information 'raises a substantial question' of innocence."

iv. **Discretionary disclosure under R. 3.8(h).** Proposed Rule 3.8(h) requires post-conviction disclosure in certain circumstances. Proposed Comment 6 explains that prosecutors have the discretion to make post-conviction disclosures even when those requirements have not been met. OAG raises a question whether Comment 6 is unclear on this point. The court views the comment as sufficiently clear and therefore has determined to promulgate the comment as proposed by the Bar, with one further change: deleting "and should not be considered as such in any subsequent litigation" from the last sentence, to avoid making it seem as though the Rules of Professional Conduct are directing judges about how to rule in litigation.

v. **Disclosure beyond the appropriate court or authority in R. 3.8(h).** Rule 3.8(h) requires that post-conviction disclosures be made to the chief prosecutor of jurisdiction where the conviction was obtained, the court in which the conviction was obtained, the convicted person, and (if known) the convicted person's lawyer. OAG raises the question whether instead the disclosures should be limited to the

"appropriate court or authority," which is the language in the model rule. The court has determined that the broader language in proposed Rule 3.8(h) is warranted and not unduly burdensome. The court therefore decided to promulgate the rule as proposed by the Bar on this point.

vi. **Multiple prosecutors in a single jurisdiction.** OAG points out that in D.C. there are two different "chief prosecutors": the United States Attorney's Office (USAO) and OAG. Without proposing specific language, OAG asks whether language should be added to address that complexity. The court agrees with that general suggestion and has determined to add the following specific language: first, new Rule 3.8(h)(3) ("If there are multiple prosecutorial authorities in the jurisdiction, the disclosure should be made to the prosecutorial authority responsible for the conviction at issue."); and second, in Rule 3.8(h)(2) and (i), add "and under the authority of the prosecutor's office" after "in the prosecutor's jurisdiction . . . ." The latter change would avoid imposing duties on attorneys for OAG to attempt themselves to remedy a conviction in a case prosecuted by the USAO, and vice versa.

vii. **"Clear and convincing" v. "more likely than not" in R. 3.8(i).** Proposed Rule 3.8(i) requires prosecutors to take affirmative steps to remedy a conviction if the prosecutor knows that there is clear and convincing evidence that a convicted person is innocent. PDS suggests that a "more likely than not" standard should instead apply. PDS's argument in support of that position has some force, but the court has determined to adopt the rule as proposed by the Bar. No other jurisdiction has adopted a "more likely than not" standard. Moreover, the disclosures required under R. 3.8(h) (to the court, the convicted person, and defense counsel) should ordinarily permit others to take appropriate steps. A relatively high threshold does not seem inappropriate before requiring the prosecutor to take affirmative action to undo a conviction.

viii. **Good-faith safe harbor in R. 3.8(j)**. The first sentence of proposed Rule 3.8(j) creates an ethical safe harbor for prosecutorial decisions under proposed Rules 3.8(h) and (i), even if those decisions are incorrect, as long as the decisions are "reasonable, considered, and made in good faith." DOJ suggests that (a) the words "considered" and "reasonable" be deleted and (b) that language be added to make explicit

that the safe harbor insulates even negligent decisions. PDS opposes the latter change and suggests that the safe harbor is confusing and unnecessary. The court has determined to omit the first sentence of proposed Rule 3.8(j). There is no similar safe harbor for the general disclosure obligation under current Rule 3.8(e). Also, proposed Rules 3.8(h) and (i) are only triggered by what prosecutors know or, in some instances, should have known, so that reasonable conduct would not violate those rules.

Proposed Rule 3.8(j) has a second sentence stating that a prosecutor does not violate proposed Rule 3.8(h) if the prosecutor makes reasonable efforts but cannot locate a person who should be notified under that rule. The court agrees that this sentence should be included, but has determined to move it into a separate subsection R. 3.8(h)(4).

District of Columbia Rules of Professional Conduct

Rule 1.1 (Competence): Red line 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

~~[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.

District of Columbia Rules of Professional Conduct

Rule 1.6 (Confidentiality of Information): Red line 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) ~~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.

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[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.

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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.

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[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. 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 4.4 (Respect for Rights of Third Persons): Red line 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 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.

(c) **A lawyer who begins to examine a writing relating to the representation of a client and only then realizes that the writing relates to the representation of a client and has been inadvertently sent to the lawyer shall stop examining the writing, shall notify the sending party, and shall 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~~ **another** 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 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.

(c) A lawyer who begins to examine a writing relating to the representation of a client and only then realizes that the writing relates to the representation of a client and has been inadvertently sent to the lawyer shall stop examining the writing, shall notify the sending party, and shall 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 another 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.

District of Columbia Rules of Professional Conduct

Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants): Red line 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.

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)

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(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.

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[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 3.8 (Special Responsibilities of a Prosecutor): Red line 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 fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information, **which can include impeachment information or information tending to support a motion to suppress evidence,** 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;

(e) Intentionally avoid pursuit of evidence or information, **or unreasonably delay the disclosure of information or evidence that tends to negate the guilt of the accused or to mitigate the offense,** because it may damage the prosecution's case or aid the defense;

(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

(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 and under the authority of the prosecutor's office, 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.

(3) If there are multiple prosecutorial authorities in the jurisdiction, the disclosure should be made to the prosecutorial authority responsible for the conviction at issue.

(4) 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.

(i) When a prosecutor knows of information that the prosecutor knows constitutes clear and convincing evidence establishing that a person was convicted in the prosecutor's jurisdiction and under the authority of the prosecutor's office 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.~~

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 (d) 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 (e) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (d) 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 howthe 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. A prosecutor may not decline to disclose information under Rule 3.8(h) merely because the prosecutor subjectively believes that the information is not credible. On the other hand, whether the information is objectively plausible or could reasonably be credited can appropriately be taken into account when determining whether information 'raises a substantial question' of innocence.

[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.

[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 fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information, which can include impeachment information or information tending to support a motion to suppress evidence, 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 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;

(e) Intentionally avoid pursuit of evidence or information, or unreasonably delay the disclosure of information or evidence that tends to negate the guilt of the accused or to mitigate the offense, because it may damage the prosecution's case or aid the defense;

(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

(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 and under the authority of the prosecutor's office, 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.

(3) If there are multiple prosecutorial authorities in the jurisdiction, the disclosure should be made to the prosecutorial authority responsible for the conviction at issue.

(4) 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.

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

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. 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 (d) 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 (e) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (d) 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. A prosecutor may not decline to disclose information under Rule 3.8(h) merely because the prosecutor subjectively believes that the information is not credible. On the other hand, whether the information is objectively plausible or could reasonably be credited can appropriately be taken into account when determining whether information 'raises a substantial question' of innocence.

[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.

[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.