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TWO STEPS AWAY FROM ETHICAL: SIMPLE STEPS LAWYERS AND
FIRMS CAN TAKE TO INCREASE LIKELIHOOD OF COMPLIANCE WITH
MODEL RULE 1.6(B)(7)

David Phan*

I. INTRODUCTION

A recent change to the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") recognizes the need of lawyers and law firms to disclose limited client information for conflict checks before lawyers move to new employment or law firms merge.¹ The House of Delegates approved Resolution 105F, which amended Rule 1.6 of the Model Rules, in a manner which does not require informed client consent be obtained prior to the disclosure.² While the commentary to the amended rule provides some guidance regarding the condition and scope of disclosure, it is insufficient to enable attorneys and firms to determine how to disclose information in a way that would not "otherwise prejudice the client."³ This comment aims to provide additional guidance by discussing in detail the findings that led to the resolution, opponents' concerns with not requiring informed client consent, and finally it highlights additional steps attorneys and firms should take to avoid potential ethical problems under the amended Model Rules.

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¹ See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2012). The Model Rules serve as models for the ethical rules of most states, rules which lawyers must comply with. See MODEL RULES OF PROF'L CONDUCT Scope (2012). Some states adopt the Model Rules as they are, without modifications, while others may make changes prior to adopting. See CPR POLICY IMPLEMENTATION COMM., ABA, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (May 23, 2011), <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>.

² The enacted amendment adds Rule 1.6(b)(7), which was previously not a part of the Model Rules. ABA Comm. on Ethics 20/20, Revised Resolution 105F (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120802_revised_resolution_105f.authcheckdam.pdf. The language of the addition states "to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client." ER 1.6(b)(7).

³ ER 1.6(b)(7).

II. COMMISSION ON ETHICS 20/20

In August 2009 the Commission on Ethics 20/20 was created to “tackle the ethical and regulatory challenges and opportunities arising from these 21st century realities.”⁴ The Commission, following the principles of “protecting the public; preserving the core professional values of the American legal profession; and maintaining a strong, independent and self-regulated profession” was charged with “conducting a plenary assessment” of the Model Rules and related ABA policies.⁵ Some observers hoped that the Commission’s study on the impact of technology and globalization on the legal profession would lead to proposed “revolutionary changes in professional conduct rules for lawyers.”⁶ However, no revolution took place.⁷ Instead, in its first set of proposals the Commission aimed to revise various provisions of the Model Rules.⁸ One such rule was Model Rule 1.6, which dealt with the client-lawyer relationship and confidentiality of information.⁹

As part of its revision scheme, the Commission looked at Model Rule 1.6 to address circumstances in which it may be necessary for lawyers and firms to reveal information relating to the representation of clients without obtaining informed client consent.¹⁰ “When a lawyer explores the possibility of joining a different firm or organization or when firms consider a merger . . .” it is crucial that lawyers be able to identify possible conflicts of interest.¹¹ The Commission recognized that the Model Rules did not provide sufficient guidance as to how lawyers and firms, which have developed practices that “varied widely,” can do so “in a manner consistent with a lawyer’s duty of confidentiality.”¹² Accordingly, the Commission proposed amendments to Model Rule 1.6 (Confidentiality of Information) that were consistent with ABA Formal Opinion 09-455 and the ethics opinions of other states.¹³ The amendments, now resolved and part of the Model Rules, give lawyers and firms “limited authority to disclose discrete categories of information to another firm to ensure that conflicts of interest are detected before the lawyer is hired or two

⁴ ABA COMM. ON ETHICS 20/20, INTRODUCTION AND OVERVIEW 1 (2012) [hereinafter INTRODUCTION AND OVERVIEW], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

⁵ *Id.*

⁶ James Podgers, *Come the Evolution: Ethics 20/20 Proposals Seek to Adapt Existing Professional Conduct Rules*, A.B.A. J., July 2012, at 26.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 27.

¹⁰ See INTRODUCTION AND OVERVIEW, *supra* note 4, at 11.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

firms merge.”¹⁴ Informed client consent is not necessary for such disclosure because the amendment was added under 1.6(b), which gives lawyers discretion regarding such disclosures.¹⁵ However, an exception to Rule 1.6 that did not require informed client consent was not added without opposition.

III. WHY NOT REQUIRE INFORMED CONSENT?

Obtaining a client’s consent in compliance with Model Rule 1.0(e) could resolve the difficulties between conforming to Rule 1.6(a) and exercising the need to disclose information for a conflicts check.¹⁶ However, the ABA did not include such a requirement when adding Rule 1.6(b)(7) because “there are serious practical difficulties in doing so.”¹⁷ In response to opponents’ concerns about the amendment’s lack of an “informed consent” requirement, the ABA addressed several scenarios that would give rise to difficulties.

First, “[m]any contemplated moves are never consummated.”¹⁸ According to the ABA, if informed consent was a requirement, then common situations, such as a lawyer interviewing with more than one prospective new firm, would require multiple consents.¹⁹ Absent an exception, consent of all current and former clients would be necessary to comply with the current Rules.²⁰ Second, “seeking prior informed consent likely would involve giving notice to the lawyer’s current firm,” which could lead to unpredictable and potentially adverse consequences for the lawyer.²¹ Finally, a system that routinely requires prior informed consent “would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or for-

¹⁴ *Id.*

¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.6(b) (2012) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary[.]”).

¹⁶ See ER 1.0 (regarding informed consent); Joan C. Rogers, *Ethics 20/20 Rule Changes Approved by ABA Delegates With Little Opposition*, BLOOMBERG BNA (Aug. 15, 2012), <http://www.bna.com/ethics-2020-rule-n12884911245/> (supporters of requiring client consent prior to disclosure wished to include such requirement in the language, however the amendment ultimately passed without such requirement).

¹⁷ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 90-455 (2009) [hereinafter Formal Op. 90-455] (discussing “[d]isclosure of conflicts information when lawyers move between law firms”).

¹⁸ *Id.* at 2 (such moves include a lawyer moving to another firm or two firms merging).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 2-3 (consequences can include clients not giving consent, even if the information does not prejudice the client, the costly expenses of contacting and obtaining such consent, and the time constraint of negotiating a move while trying to obtain the necessary consent).

mer client to give such consent unless the client plans to follow the lawyer to the new firm.”²²

The resulting amendment to Rule 1.6 added another exception to the Rule, and the accompanying additional comments show it is a compromise. In a changing market in which lawyer mobility is essential, the amendment balances the need to disclose information for a conflicts check with the need to preserve the confidentiality between the lawyers, firms, and their clients.²³ The amendment places limitations on disclosure, targeting the scope and timing of such disclosure. However, the language found in the new exception and accompanying comments, while helpful and providing some guidance, may not always be clear or applicable.

IV. ADDITIONAL STEPS TO AVOID POTENTIAL VIOLATIONS

When attempting to determine whether a specific situation qualifies for an exception under Rule 1.6, lawyers and firms depend greatly on the language of the Rules themselves and the comments which clarify the Rules. Here, the text of Rule 1.6(b)(7) allows for disclosure of information for the purposes of detecting and resolving conflicts of interest arising from the “lawyer’s change of employment or from changes in the composition or ownership of a firm”²⁴ However, such disclosure is only permitted “if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”²⁵

“Prejudice” is explained in the accompanying comments to the new exception, which describe scenarios in which disclosure would otherwise prejudice the client.²⁶ Missing from the comments, however, are steps that lawyers and law firms can take to comply with the newly amended Rule 1.6. Fortunately, there are simple steps which can protect attorneys from violating the rule.

For example, lawyers should maintain logs that describe matters they worked on in their current firm because “determination by the new firm of whether there was a conflict of interest with the former employer require[s] ‘an

²² *Id.* at 3.

²³ Model Rule 1.6(b)(7) is accompanied by Comment 13 to Model Rule 1.6, which discusses the need for limited disclosure to “detect and resolve conflicts of interest” MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 13 (2012). The Comment provides that “lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred” and “only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.” *Id.* The amount is based upon the circumstance, and is “prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client” *Id.*

²⁴ *Id.* R. 1.6(b)(7) (2012).

²⁵ *Id.*

²⁶ *Id.* R. 1.6 cmt. 13 (2012).

inquiry into the responsibilities of the lawyer' during the former employment."²⁷ Stripped of all but the most basic information, such a log would provide a readily available answer to this inquiry.

Additionally, the moving lawyer, the prospective new firm, or the firms seeking merger, can retain an "independent or intermediary lawyer to receive and analyze conflicts information in confidence."²⁸ Such conduct would conform to pre-existing Rule 1.6(b)(4), which permits disclosure to secure legal advice about a lawyer's compliance with the Model Rules.²⁹ An independent attorney adds a protective layer to the proposed transition, and keeps client information within a privileged relationship.

In conjunction with the text of Model Rule 1.6(b)(7) and the comments addressing the newly amended exception, maintaining logs and retaining an independent lawyer will help lawyers and firms effectively disclose information necessary for conflicts check and abide by the Model Rules.

V. CONCLUSION

The process of conforming to the recently amended Rule 1.6 can be less complicated if lawyers and firms understand the findings that led to the amendment, acknowledge concerns and rationale for not requiring informed consent prior to disclosure, and know the steps that can be taken to avoid potential ethical problems arising from the new exception. The amended rule allows for lawyers to transition without violating ethical duties, and will encourage a more fluid marketplace as firms continue to adapt to the current economic climes.

²⁷ Formal Op. 90-455, *supra* note 17, at 3 (citing ABA Formal Opinion 99-415).

²⁸ *Id.* at 5.

²⁹ *Id.*