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Rules of Professional Conduct: 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 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).
- (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 **11 (#n1)**, 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.

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, 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 affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. 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.

[1] (#note1) 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.

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