WHEREAS, it is the charge of the PBA Legal Ethics and Professional Responsibility Committee to review and recommend for adoption proposed amendments to the Pennsylvania Rules of Professional Conduct governing lawyers.

WHEREAS, the Legal Ethics and Professional Responsibility Committee has historically supported adoption of the ABA Model Rule amendments to promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction, except where controlling Pennsylvania precedent or other important policy considerations justify a deviation from Model Rule language.

WHEREAS, in August 2012, the ABA House of Delegates approved changes to the Model Rules of Professional Conduct by adopting resolutions proposed by the ABA Commission on Ethics 20/20.

WHEREAS, on September 21, 2012, the Legal Ethics and Professional Responsibility Committee approved a motion to present a resolution to the Board of Governors and the House of Delegates requesting that a recommendation be made to the Supreme Court of Pennsylvania to provide guidance regarding lawyers’ use of technology and confidentiality. Attached to this resolution is a report in support of the recommendation.

RESOLVED, that the Pennsylvania Bar Association recommends that the Pennsylvania Supreme Court amend the Pennsylvania Rules of Professional Conduct to provide guidance regarding lawyers’ use of technology and confidentiality as follows (insertions underlined, deletions struck through):

(a) the black letter and Comments to Rule 1.0 (Terminology);
(b) the Comments to Rule 1.1 (Competence);
(c) the Comments to Rule 1.4 (Communication);
(d) the black letter and Comments to Rule 1.6 (Confidentiality of Information); and
(e) the black letter and Comments to Rule 4.4 (Respect for Rights of Third Parties).
Rule 1.0 Terminology

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

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

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

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. (e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

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

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

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

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

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

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

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and e-mail, electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

Rule 1.1 Competence

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

Comment:

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted
by the Rules of Professional Conduct or other law.

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

(c) A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer’s professional liability insurance drops below either of those amounts or the lawyer’s professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Comment:
...

Communicating with Client
...

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged. A lawyer should promptly respond to or acknowledge client communications.
...

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;
3. to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or
4. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
5. to secure legal advice about the lawyer’s compliance with these Rules; or
6. to effectuate the sale of a law practice consistent with Rule 1.17.
(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(ge) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Comment:
...

Acting Competently to Preserve Confidentiality
[23 25] Paragraph (d) requires a lawyer must to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer’s duties when sharing information with nonlawyers outside the lawyer’s own firm, see Rule 5.3, Comments [3]-[4].

[24 26] 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, however, 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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client
[25 27] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.
Lobbyists

[26 28] A lawyer who acts as a lobbyist on behalf of a client may disclose information relating to the representation in order to comply with any legal obligation imposed on the lawyer-lobbyist by the Legislature, the Executive Branch or an agency of the Commonwealth, or a local government unit which are consistent with the Rules of Professional Conduct. Such disclosure is explicitly authorized to carry out the representation. The Disciplinary Board of the Supreme Court shall retain jurisdiction over any violation of this Rule.

Rule 4.4 Respect for Rights of Third Persons

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

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

Comment:

[2] Paragraph (b) recognizes that lawyers sometimes receive a document, including electronically stored information, that were was mistakenly sent or produced by opposing parties or their lawyers. A document, including electronically stored information, is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, including electronically stored information, is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document, including electronically stored information, was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document, including electronically stored information, original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document, including electronically stored information, has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document, including electronically stored information, that the lawyer knows or reasonably should know may have been wrongfully inappropriately obtained by the sending person. For purposes of this Rule, “document, including electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.
Respectfully submitted,

*Timothy W. Callahan, II*

Timothy W. Callahan, II  
Committee Chair  
September 21, 2012
REPORT ON TECHNOLOGY AND CONFIDENTIALITY PROPOSED AMENDMENTS

Introduction

Advances in technology have enabled lawyers in all practice settings to provide more efficient and effective legal services. Some forms of technology, however, present certain risks, particularly with regard to clients’ confidential information. One of the objectives of the PBA Legal Ethics and Professional Responsibility Committee (“Ethics Committee”) has been to develop guidance for lawyers regarding their ethical obligations to protect this information when using technology, and to update the Pennsylvania Rules of Professional Conduct to reflect the realities of a digital age.

The Ethics Committee is proposing to amend several Rules of Professional Conduct and their Comments. The Ethics Committee identified six areas that would benefit from this guidance. First, the Ethics Committee concluded that technology has raised new issues for law firms that employ screens pursuant to Rules 1.10, 1.11, 1.12, and 1.18. The Ethics Committee determined that it is important to make clear that a screen must necessarily include protections against the sharing of both tangible as well as electronic information. Thus, the Ethics Committee is proposing an amendment to address this point in Comment [9] of Rule 1.0 (Terminology), which concerns the definition of a screen under Rule 1.0(k).

Second, the Ethics Committee determined that the definition of a “writing” in Rule 1.0(n) does not reflect the full range of ways in which lawyers use technology to memorialize an understanding. Thus, the Ethics Committee is recommending that the word “e-mail” be replaced by “electronic communications.”

Third, the Ethics Committee concluded that competent lawyers must have some awareness of basic features of technology. To make this point, the Ethics Committee is recommending an amendment to Comment [6] of Rule 1.1 (Competence) that would emphasize that, in order to stay abreast of changes in the law and its practice, lawyers need to have a basic understanding of the benefits and risks of relevant technology.

Fourth, the Ethics Committee is proposing a change to the last sentence of Comment [4] to Rule 1.4, which currently says that, “[c]lient telephone calls should be promptly returned or acknowledged.” The Ethics Committee proposes to replace that admonition with the following language: “A lawyer should promptly respond to or acknowledge client communications.” Although not related to a lawyer’s confidentiality obligations, the Ethics Committee nevertheless concluded that this language more accurately describes a lawyer’s obligations in light of the increasing number of ways in which clients use technology to communicate with lawyers, such as by email.

Fifth, the Ethics Committee is proposing to add a new paragraph to Rule 1.6 (Confidentiality of Information). Proposed new Rule 1.6(d) would make clear that a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from

* This Report adopts the Report of the ABA Commission on Ethics 20/20 with modifications to conform to the numbering of the Pennsylvania Rules of Professional Conduct and some deletions.
inadvertent or unauthorized disclosures as well as from unauthorized access. This duty is already described in several existing Comments, but the Ethics Committee concluded that, in light of the pervasive use of technology to store and transmit confidential client information, this existing obligation should be stated explicitly in the black letter of Rule 1.6. The Ethics Committee also concluded that the Comments should be amended to offer lawyers more guidance about how to comply with this obligation.

Finally, the Ethics Committee is proposing new language to clarify the scope of Rule 4.4(b), which concerns a lawyer’s obligations upon receiving inadvertently sent confidential information. The current provision describes the receipt of “documents” containing such information, but confidential information can also take the form of electronically stored information. Thus, the Ethics Committee is proposing to amend Rule 4.4(b) to make clear that the Rule governs both paper documents as well as electronically stored information. Moreover, the Ethics Committee is proposing to define the phrase “inadvertently sent” in Comment [2] to give lawyers more guidance as to when notification requirement of Rule 4.4(b) is triggered.

The Ethics Committee concluded that these amendments are necessary to make lawyers more aware of their confidentiality-related obligations when taking advantage of technology’s many benefits. The proposals also update the language of the Rules to ensure that they reflect the realities of 21st century law practice. These proposals are set out in the Resolutions that accompany this Report and are described in more detail below.

I. **Rule 1.0(k) (Terminology; Screening)**

Rule 1.0 is the Terminology Section of the Rules. Rule 1.0(k) describes the procedures for an effective screen to avoid the imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, and 1.18. Comment [9] elaborates on this definition and notes that one important feature of a screen is to limit the screened lawyer’s access to any information that relates to the matter giving rise to the conflict.

Advances in technology have made client information more accessible to the whole firm, so the process of limiting access to this information should require more than placing relevant physical documents in an inaccessible location; it should require appropriate treatment of electronic information as well. Although this requirement is arguably encompassed within the existing version of Rule 1.0(k) and Comment [9], the Ethics Committee concluded and heard that greater clarity and specificity is needed. To that end, the Ethics Committee is proposing that Comment [9] explicitly note that, when a screen is put in place, it should apply to information that is in electronic, as well as tangible, form.

II. **Rule 1.0(n) (Terminology; Writing)**

The word “writing” is another defined term that should be updated in light of changes in technology. Currently, Rule 1.0(n) defines “writing” or “written” as “a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail.” The Ethics Committee concluded that this definition is not sufficiently expansive given the wide range of methods that lawyers now use (or are likely to use in the near future) when memorializing an agreement, such
as written consents to conflicts of interest. The Ethics Committee, therefore, proposes to replace the word “e-mail” with “electronic communications.”

III. Rule 1.1 (Competence)

Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] specifies that, to remain competent, lawyers need to “keep abreast of changes in the law and its practice.” The Ethics Committee concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today’s environment without knowing how to use email or create an electronic document.

Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Ethics Committee concluded that making this explicit, by addition of the phrase “including the benefits and risks associated with relevant technology,” would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer’s general ethical duty to remain competent.

IV. Rule 1.4 (Communication)

Rule 1.4 describes a lawyer’s duty to communicate with clients, and the last sentence of Comment [4] to Rule 1.4 currently instructs lawyers that “[c]lient telephone calls should be promptly returned or acknowledged.” Clients, however, now communicate with lawyers in an increasing number of ways, including by email and other forms of electronic communication, and a lawyer’s obligation to respond should exist regardless of the medium that is used. Accordingly, the Ethics Committee proposes to replace the last sentence of Comment [4] with the following language: “A lawyer should promptly respond to or acknowledge client communications.” The Ethics Committee concluded that this language more accurately describes a lawyer’s obligations in light of changes in technology and evolving methods of communication.

V. Rule 1.6 (Duty of Confidentiality)

Currently, Rule 1.6(a) states that a lawyer has a duty not to reveal a client’s confidential information, except for the circumstances described in Rule 1.6(c). The Rule, however, does not indicate what ethical obligations lawyers have to prevent such a revelation. Although this obligation is described in Comments [23] and [24], the Ethics Committee concluded that technology has made this duty sufficiently important that it should be elevated to black letter status in the form of the proposed Rule 1.6(d).

The idea of explaining a lawyer’s duty to safeguard information within the black letter of the Rule is not new. The proposed Rule 1.6(d) builds on a similar provision in New York, which itself has its roots in DR 4-101(D) of the old Model Code of Professional Responsibility. DR 4-101(D) had provided as follows:
(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The Ethics Committee concluded that a similar provision should appear in Rule 1.6 given the various confidentiality concerns associated with electronically stored information.

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party “hacks” into a law firm’s network or a lawyer’s email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(d) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

To be clear, paragraph (d) does not mean that a lawyer engages in professional misconduct any time a client’s confidences are subject to unauthorized access or disclosed inadvertently without authority. A sentence in Comment [25] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Ethics Committee, however, believes that it is important to state in the black letter of Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances.

In addition to setting out the factors that lawyers need to consider when securing their clients’ confidences, the proposed Comment language recognizes that some clients might require the lawyer to implement special security measures not required by the Rule or may give informed consent to the use of security measures that would otherwise be prohibited by the Rule. A nearly identical observation appears in Comment [26] in the context of security measures that lawyers might have to employ when transmitting confidential information. The Ethics Committee concluded that a similar thought should be expressed in the context of Comment [23], which pertains to the storage of such information.

Finally, the Ethics Committee was advised that there has been a dramatic growth in federal, state, and international laws and regulations relating to data privacy. The Ethics Committee was advised that this body of law increasingly applies to lawyers and law firms and that lawyers need to be aware of these additional obligations. Thus, the Ethics Committee is proposing to add a sentence to the end of Comment [25] and Comment [26] that would remind lawyers that other laws and regulations impose confidentiality-related obligations beyond those that are identified in the Rules of Professional Conduct. Other Comments in the Rules instruct lawyers to consult law outside of the ethics rules, and the Ethics Committee concluded that a lawyer’s duty of confidentiality is another area where other legal obligations have become sufficiently important and common that lawyer should be expressly reminded to consider those
obligations, both when storing confidential information (Comment [25]) and when transmitting it (Comment [26]).

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

Technology has increased the risk that confidential information will be inadvertently disclosed, and Rule 4.4(b) addresses one particular ethics issue associated with this risk. Namely, it provides that, if lawyers receive documents that they know or reasonably should know were inadvertently sent to them, they must notify the sender.

The Ethics Committee concluded that the word “document” is inadequate to express the various kinds of information that can be inadvertently sent in a digital age. For example, confidential information can now be disclosed in emails, flash drives, and data embedded in electronic documents (i.e., metadata). To make clear that the Rule applies to those situations, the Ethics Committee is proposing that the word “document” be replaced with a phrase that is commonly used in the context of discovery – “document or electronically stored information.”

In addition to clarifying that Rule 4.4(b) extends to various forms of electronic information, the last sentence of Comment [2] addresses the issue of metadata. The Comment states that the receipt of metadata (i.e., data embedded in electronic information, such as the date an electronic document was created) triggers the notification duties of the Rule, but only when the receiving lawyer knows or has reason to believe that the metadata was inadvertently sent.

The new language about metadata does not resolve a more controversial question: whether a lawyer should be permitted to look at metadata in the absence of consent or court authority to do so. Several ethics opinions, including ABA Formal Opinion 06-442, have concluded that Rule 4.4 does not prohibit a lawyer from reviewing metadata under those circumstances but other ethics opinions have reached the opposite conclusion and have said that lawyers should typically not be permitted to look at an opposing party’s metadata in the absence of consent or a court order. The Ethics Committee’s proposal does not resolve this issue, but merely recognizes that lawyers will, in fact, be permitted to look at metadata, at least under certain circumstances (e.g., with the opponent’s or a court’s permission). The Ethics Committee’s proposal makes clear that, under those circumstances, if a lawyer uncovers metadata that the lawyer knows the sending lawyer did not intend to include, Rule 4.4(b)’s notification requirement is triggered.

The Ethics Committee is also proposing to define the phrase “inadvertently sent.” The phrase is ambiguous and potentially misleading, because, for example, it could be read to exclude information that is intentionally sent, but to the wrong person. To ensure that the purpose of the Rule is clear, the Ethics Committee proposes to add the following sentence: “A

---


document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.”

VII. Conclusion

Technology can increase the quality of legal services, reduce the cost of legal services to existing clients, and enable lawyers to represent clients who might not otherwise have been able to afford those services. Lawyers, however, need to understand that technology can pose certain risks to clients’ confidential information and that reasonable safeguards are ethically required. The Ethics Committee’s proposals are designed to help lawyers understand these risks so that they can take appropriate and reasonable measures when taking advantage of technology’s many benefits. The proposals also update the language of the Rules so that it reflects the way that law is practiced in the 21st century. Accordingly, the Ethics Committee respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.