

**PROPOSED REVISIONS TO MARCH 2005 PROPOSED ORDER
AMENDING THE VERMONT RULES OF PROFESSIONAL CONDUCT**

DECEMBER 28, 2006

INTRODUCTORY REPORTER'S NOTE

The Advisory Committee on Rules of Civil Procedure has recommended to the Supreme Court that the proposed amendments to the Vermont Rules of Professional Conduct circulated for comment on March 4, 2005, with comments due by April 15, 2005 (<http://www.vermontjudiciary.org/Library/PDF/resources/VRPC-030205.pdf>) [Comment Draft] be promulgated with the proposed revisions set forth following this Introductory Note. These revisions were proposed by the Civil Rules Committee after careful review of the comments received on the Comment Draft. The Court has requested that the proposed revisions be circulated for further comment. After the comment period, these revisions, with any changes suggested by the comments, will be incorporated in the text of the Comment Draft with any further necessary editorial changes. The full package will then be transmitted to the Court to consider for promulgation.

The Vermont Rules of Professional Conduct as adopted in 1999 generally incorporated the language and form of the American Bar Association's Model Rules of Professional Conduct. The basic purpose was to provide standards of conduct for Vermont lawyers that reflected current national trends and offered substantial uniformity with most other states as well as ready access to ABA and state opinions on key issues. The Vermont Rules differed from the Model Rules in a few instances, however, in order to preserve existing Vermont practice or to reject an ABA rule that had proven unsatisfactory in other jurisdictions.

The ABA in 2001-2003 adopted comprehensive and significant changes to the Model Rules intended to modernize those rules to reflect changing conditions in the practice of law. In 2003, the Supreme Court asked the Civil Rules Committee to undertake a full review of the 2001-2003 Model Rules amendments and to make recommendations concerning their adoption for Vermont. As a result of its review, the Committee believes that uniformity with the national model remains an essential goal and recognizes the substantial modernization reflected in the ABA amendments. Accordingly, the Committee now recommends for promulgation a comprehensive revision of the Vermont Rules that incorporates virtually all of the ABA amendments while retaining most of the distinctive Vermont variations adopted in 1999 and adding a few specific variations from the new provisions of the Model Rules. The Reporter's Notes to the recommended amendments point out and explain these variations.

To conduct its review, the Civil Rules Committee appointed a subcommittee consisting of Committee Chair William E. Griffin; Committee members Joe Frank and Jean Giddings; and the following distinguished members of the Vermont bar: American Bar Association delegate Richard Cassidy, Judicial Conduct Board Chair Christopher Davis, and Vermont Bar Association Professional Responsibility Committee Chair Sheila

Ware. The subcommittee had the advice and assistance of Wendy Collins, Bar Counsel to the Professional Responsibility Program, and Professor L. Kinvin Wroth, Reporter to the Civil Rules Committee. In a series of meetings between February 2003 and September 2004, the subcommittee undertook a thorough review of the Model Rules amendments. The subcommittee's recommended draft of amendments, without Reporter's Notes, was reviewed by the full Committee and presented for comment at an open session held at the annual meeting of the Vermont Bar Association on October 1, 2004. After the Comment Draft, with Reporter's Notes, was circulated, it was discussed at a two-hour special session at the VBA's mid-year meeting on March 18, 2005.

A total of 14 comments were received in writing or orally. On the basis of these comments, the Committee has proposed revisions of eleven of the originally proposed amendments or existing rules and associated Comments or Reporter's Notes. The 14 comments received and the Committee's disposition of them are summarized in this Introductory Note. The eleven proposed revisions are set forth in full following the Note. To see the revisions in context, it is necessary to consult the full text of the March 2005 Comment Draft at <http://www.vermontjudiciary.org/Library/PDF/resources/VRPC-030205.pdf>.

1. Rule 1.0(c). Questions raised about the scope of the term "firm" were deemed adequately covered by Comments [2]-[4] to the rule, so no revision was proposed.
2. Rule 1.0(e). A question as to the information "adequate" to sustain informed consent was addressed by an addition to Comment [6] to the rule, set forth below.
3. Rule 1.6(b)(1), c)(1). The question was raised whether the duty to disclose extends to the client's announced intention to commit suicide. A revision of the original proposed amendment of Rule 1.6(b)(1) and (c)(1), the Comments, and the Reporter's Notes intended to address this and related questions was approved by the majority of the Committee for the reasons summarized in proposed revisions of Comments [6] and [10] and the Reporter's Notes, set forth below. One member of the Committee dissented on the grounds that the revision was unnecessarily complicated and that it would be preferable to adhere more closely to the ABA Model Rule in the interests of uniformity.
4. Rule 1.8(j). It was proposed that the bright-line prohibition of proposed Rule 1.8(j) and Comment [17] against sexual relations with a client be eliminated. The majority of the Committee agreed to recommend the elimination of the provision for reasons summarized in the proposed revision to Comment [17] and the Reporter's Notes, set forth below. Two members of the Committee dissented from this recommendation, essentially for the reasons set forth in the deleted portion of Comments [17]-[19] and the ABA Reporter's Explanation, also set forth below.
5. Rule 1.10. It was proposed to adopt a provision for screening for private conflicts that had been rejected by the ABA House of Delegates in August 2001. The Committee decided not to recommend this proposal. Even with screening, there is a potential

appearance of impropriety. Parties are free to agree on a screening mechanism as part of a consent agreement.

6. Rule 1.11. In answer to the question, how do the limitations on representation by former government lawyers apply to lobbying, the Committee concluded that Rules 3.9, 1.11(e), as amended, and Vt. Exec. Order No. 3-45, sec. III.B, adequately cover the question, so no revision was recommended to address this point.

7. Rule 1.15(c). In answer to the question whether amended Rule 1.15(c) would require deposit in a lawyer's trust account of fees paid in advance, the Committee recommended no change in the amendment as proposed but proposed the addition of clarifying language to the Reporter's Notes concerning the "pure" retainer, set forth below.

8. Rule 1.15B. It was proposed that Rule 1.15B require that, to be eligible for IOLTA funds, a bank account must pay the highest rate generally paid on non-IOLTA accounts. The Committee supported this proposal but determined that it was a matter to be considered by the Court's Access to Justice Coalition and the Vermont Bar Foundation Board in the larger context of IOLTA funding.

9. Rule 1.15C. A question was raised concerning the applicability of the overdraft reporting provisions of Rule 1.15C to funds held by a lawyer other than for a client. The Committee addressed this issue by a series of proposed additional amendments to Rules 1.15, 1.15A-1.15C, set forth below, intended to make clear that the client trust fund rules apply only to funds or property held by a lawyer as a result of a representation or a fiduciary relationship that arises from a representation or court appointment, and that the rules applicable to overdraft reporting apply only to pooled interest-bearing accounts.

10. Rule 1.18. The question of how to protect a lawyer against a prospective client whose bad-faith purpose is to disqualify the lawyer from representing others was addressed by adding "in good faith" to proposed Rule 1.18(a), with explanations in Comment [2] and the Reporter's Notes, set forth below.

11. Rule 3.9. A typographical error in the Reporter's Notes was corrected, as set forth below.

12. Rule 4.2. The Committee reviewed the following provisions of the proposed amendments concerning the government as client: Scope, par. [18]; 1.0(c), Comment [3]; 1.6, Comment [3]; 1.7, Comment [23]; 1.13, Comment [9]; 4.2, Comment [5]; 5.1, Comment [1]. It was agreed that all were satisfactory, with the addition of language in the Reporter's Notes to Rule 4.2, set forth below.

13. Rule 5.5(c). A comment supporting the multi-jurisdictional practice provisions of Rule 5.5(c) was received. The Committee continues to recommend adoption of this rule.

14. ABA Model Rule on Insurance Disclosure. It was proposed that the Model Rule on Insurance Disclosure adopted by the ABA House of Delegates in August 2004 be added

to the Vermont Rules of Professional Conduct. The ABA rule is intended to be a rule governing licensure, rather than part of the Model Rules of Professional Conduct. It would be enforced through the suspension process, except that a false statement would be subject to discipline as a violation of Model Rule 8.4(c). See Report of the ABA Standing Committee on Client Protection (August 2004, No. 108). The Civil Rules Committee has proposed that the Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage. The Committee determined that it would not recommend a provision in the Rules of Professional Conduct requiring disclosure directly to each client.

TEXT OF PROPOSED REVISIONS

Below are the texts of the revisions recommended by the Advisory Committee on Civil Rules to the March 4, 2005 Comment Draft of proposed amendments to the Vermont Rules of Professional Conduct (<http://www.vermontjudiciary.org/Library/PDF/resources/VRPC-030205.pdf>).

In these revisions, language proposed to be added to the March 2005 Comment Draft is shown in ***bold italics***. Language that would be deleted from the March 2005 draft is shown by ~~double strike through~~.

III. RULE 1.0. TERMINOLOGY

(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.

Comment

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain

circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent. ***Of course, the information and explanation adequate to establish informed consent by a non--client may be confidential information of a client that is protected by Rule 1.6. In such a case, the consent of the non-client cannot be obtained unless the affected client gives informed consent to disclosure of the necessary information and explanation, or the nature of that information and explanation can be conveyed to the non-client in a way that protects the client's confidential information. ALL, Restatement Third: The Law Governing Lawyers, § 122, comment c(i). Cf. Rule 1.9, Comment [3].***

Reporter's Notes--2007 Amendment

V.R.P.C. 1.0 is adopted to conform to the Model Rules amendments in moving *former* preliminary section III, "Terminology," to a new Rule 1.0. See Reporter's Notes to simultaneous amendments of Preamble and Scope. "The purpose of this change is to give the defined terms greater prominence and to permit the use of Comments to further explicate some of the provisions." ABA Reporter's Explanation of Model Rule 1.0. ***Language has been added to ABA Comment [6] clarifying the application of the definition of "informed consent" in Rule 1.0(e) when disclosure of confidential client information may be necessary to obtain the consent.***

RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, ~~and except as stated in~~ or the disclosure is required by paragraphs (b) or permitted by paragraph (c).

(b) A lawyer must reveal ~~such~~ information relating to the representation of a client when required by other provisions of these rules or ~~when~~ to the extent the lawyer reasonably believes necessary:

(1) ~~the lawyer reasonably believes that disclosure is necessary to prevent the client~~ *or another person* from committing a *an act that is* criminal act *or tortious, or otherwise in violation of law, and* that the lawyer *reasonably* believes is likely to result in ~~imminent~~ reasonably certain *the death of, or substantial bodily harm to, a person other than the client or other person committing the act;* or

(2) ~~the lawyer reasonably believes that failure to disclose a material fact to a third person will assist a criminal or fraudulent act by a client to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;~~ or

(3) 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 a crime or fraud in furtherance of which the client has used the lawyer's services.

(c) A lawyer may reveal ~~such~~ information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

(1) ~~to reveal the intention of a client to commit a crime not likely to result in death or substantial bodily harm and the information necessary to prevent the crime~~ prevent the client from committing a crime ~~when disclosure is not required by~~ *in circumstances other than those in which disclosure is required by* paragraph (b) *or from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the client or another person;* or

(2) to secure legal advice about the lawyer's compliance with these Rules;

or

~~(2)~~ (3) 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 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.

Comment

Disclosure Adverse to Client

[6] ~~The~~ 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 important exceptions. The provisions of Rule 1.6 (b) set forth exceptions designed to bring the mandates of the Rules of Professional Conduct into line with those of the common or statutory law of torts and crimes. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain ***a criminal, tortious, or otherwise illegal act that is likely to cause*** death or substantial bodily harm. Such harm is ~~reasonably certain~~ ***likely*** to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims. ***There is an exception to the disclosure requirement when the likelihood of death or harm is only to the person (whether the client or another) threatening the act. While the lawyer may disclose such information pursuant to paragraph (c)(1), disclosure is not required under paragraph (b)(1) as a matter of respect for personal autonomy and privacy.***

~~Several situations must be distinguished.~~

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

~~Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.~~

~~Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.~~

~~Fourth, the lawyer may learn of a client's intention to commit a crime that will not result in imminent death or substantial bodily harm. Pursuant to paragraph (c)(1), the lawyer has professional discretion to reveal information to prevent the crime if the lawyer reasonably believes that disclosure is necessary.~~

~~The lawyer's exercise of the duty or discretion to disclose requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. While failure to make a disclosure required by paragraph (b) may subject a lawyer to discipline, a lawyer's decision not to take preventive action permitted by paragraph (c)(1) does not violate this rule.~~

[7] Paragraph (b)(2) requires disclosure of information relating to the representation to the extent 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), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct, and the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), concerning the lawyer's responsibilities when the client is an organization.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or

mitigated. In such situations, the lawyer must 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 (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] Paragraph (c) permits, but does not require, disclosures not required by paragraph (b) when these rules permit it, or when another provision of law or a court order requires it. Whether another provision of law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation 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 supersedes this Rule and requires disclosure, paragraph (c) permits the lawyer to make such disclosures as are necessary to comply with the law. When a lawyer is ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure, the lawyer, absent informed consent from the client to do otherwise, should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (c) permits the lawyer to comply with the court's order. Both provisions are permissive, however, allowing a lawyer to follow the dictates of conscience in cases where disclosure is not required by paragraph (b) by suffering the consequences of nondisclosure.

[10] Paragraph (c)(1) permits a lawyer to reveal information relating to the representation as necessary to permit the client from committing any crime even though the conduct is not such as to require disclosure under paragraph (b), **and to reveal information, disclosure of which is not required by paragraph (b)(1), when, in the lawyer's judgment, the client or another person should be prevented from committing a suicidal or other act harmful to the actor. Cf. Rule 1.14(c).**

Reporter's Notes--2007 Amendment

V.R.P.C. 1.6 is amended to blend unique features of the Vermont rule as adopted in 1999 with the language and format of the changes to Model Rule 1.6.

The original Vermont rule differed significantly from Model Rule 1.6 in a number of respects. The Vermont rule required disclosure of client information when required by other rules, when necessary to prevent a crime that involved the risk of death or substantial bodily harm, and when necessary to avoid assisting a criminal or fraudulent act by a

client. The rule permitted disclosure when permitted under other rules, when required by law or court order, or when necessary to reveal the client's intention to commit a crime not involving death or bodily injury or to defend against claims or charges arising out of the representation. *See* Reporter's Notes to V.R.P.C. 1.6 (1999). Model Rules 1.6(b) and 4.1(b) made disclosures to prevent death or bodily harm, or for defense of the lawyer's interests, permissive only and prohibited other disclosures. Model Rule 1.6, as amended in 2002 and again, on the recommendation of the Task Force on Corporate Responsibility and the Standing Committee on Ethics and Professional Responsibility, in 2003, makes language changes and adds to the list of permissive disclosures those necessary to prevent or rectify substantial financial injury caused by the client's fraud in which the lawyer's services were used, to secure legal advice about compliance with the rules, and to comply with other law or court order.

The present amendments retain the mandatory disclosure requirements of the prior Vermont rule with changes in language and structure intended to incorporate the form of the amended ABA rule and to address confusion that had arisen concerning the meaning of the prior Vermont Rule. ~~See S. McGee, _____~~ The ABA Comments have been adapted to the Vermont changes.

Amended V.R.P.C. 1.6(a), like other amendments, substitutes "gives informed consent" for "consents after consultation." See amended Rule 1.0(e) and Reporter's Notes. The amendment also makes clear that both required and permitted disclosures are exceptions to the basic rule of confidentiality set forth in the paragraph.

Amended V.R.P.C. 1.6(b) continues the Vermont requirement of disclosure but adopts *in modified form* the language of the permissive provisions of amended Model Rule 1.6(b)(1)-(3) to describe the three key situations in which disclosure is required by the Vermont rule. ***Cf. Proposed Fla. Rule 4-1.6(b); N.J. Rule 1.6(b), (c). The rule has been further modified, in view of its mandatory character, to confine the required disclosure to criminal, tortious, or otherwise illegal acts and, as the Vermont modifications to Comment [6] state, to create an exception for disclosure of the intention of a client or another person to commit suicide or otherwise engage in behavior harmful to her- or himself. The lawyer is permitted to disclose such an intention pursuant to Rule 1.6(c)(1), however, when in the lawyer's judgment the best interests of the person involved require it. (The exception for the intention of another person covers the situation in which the information comes to the lawyer through the confidential communication of a client other than that person—for example, a treating psychologist or guardian.)***

The ABA Reporter's Explanation of the amendments to Model

Rules 1.6(b)(1)-(3) is as follows *in pertinent part*:

“Paragraph (b)(1): Modify to permit [require in the Vermont rule] disclosure to ‘prevent ~~reasonably certain~~ [likely] death or substantial bodily harm’

... This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces ‘imminent’ with ~~‘reasonably certain,’~~ [‘likely’] to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.

“Paragraph (b)(2): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services

“The Commission recommends that a lawyer be permitted [required in the Vermont rule] to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are being used in furtherance of the crime or fraud. Use of the lawyer's services for such improper ends constitutes a serious abuse of the client-lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

“Support for the Commission's proposal can be found in the eight jurisdictions that permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission's proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

“Paragraph (b)(3): Add paragraph permitting [requiring in the Vermont rule] disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services

“The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent

disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client-lawyer relationship. Support for the Commission's proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.”

Amended V.R.P.C. 1.6(c), like the original Vermont rule, lists permissive disclosures, making clear that the provision applies to information other than that for which disclosure is required under V.R.P.C. 1.6(b). The provision in the first sentence permitting disclosure when required by law or court order is carried forward from the original rule and has been added to the Model Rules as Rule 1.6(b)(6). The disclosure continues to be permissive in the amended Vermont rule so that “A lawyer willing to take the risk of contempt or other legal penalties on behalf of a client should not also be subject to professional discipline for nondisclosure.” Reporter’s Notes to V.R.P.C. 1.6(c) (1999). Amended V.R.P.C. 1.6(c)(1) makes clear that a lawyer may, but is not required to, disclose client information to prevent a crime other than one threatening ~~imminent~~ *likely* death or substantial bodily harm. *There is no general permission to disclose merely tortious conduct. As the Vermont additions to Comment [10] explain, however, there is such an exception where the non-criminal conduct is a threat of suicide or other serious harm to the potential actor. Cf. Rule 1.14(c).*

**RULE 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS
CURRENT CLIENTS: SPECIFIC RULES**

~~(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.~~

~~(j)~~ While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. ~~Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.~~ ***For all of these reasons, lawyers are cautioned that sexual relations with a current client could give rise to claims of incompetence under Rule 1.1, of lack of diligence under Rule 1.3, of a conflict with the lawyer's personal interests under Rule 1.7(a)(2), of using client information to the client's disadvantage under Rule 1.8(b), of conduct involving dishonesty or the like under Rule 8.4(c), or of conduct prejudicial to the administration of justice under Rule 8.4(d).***

~~[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).~~

~~[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.~~

Imputation of Prohibitions

~~[18]~~ Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with

paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Reporter's Notes–2007 Amendment

V.R.P.C. 1.8 is amended to conform to changes in Model Rule 1.8. Two variations in V.R.P.C. 1.8(e) as originally adopted have been retained, *and ABA Model Rule 1.8(j) has been omitted from the amendments to the Vermont rule. This omission is based on the grounds that an absolute prohibition of lawyer-client sexual relations is both an invasion of privacy and a duplication of the effect of other rules requiring loyal and competent representation, as noted in the revised text of Comment [17]. Model Rule 1.8(k) has been renumbered as VRPC 1.8(j) and Comment [20] has been renumbered as [18] to reflect the omission of Model Rule 1.8(j).*

The ABA Reporter's Explanation of the revised rule and Comment is as follows:

“Rule 1.8(j): Client-Lawyer Sexual Relationships

~~“TEXT:~~

~~—————“Adopt new per se Rule prohibiting most client-lawyer sexual relationships~~

~~—————“The Commission recommends following the lead of a number of jurisdictions that have adopted Rules explicitly regulating client-lawyer sexual conduct. Although recognizing that most egregious behavior of lawyers can be addressed through other Rules, the Commission believes that such Rules may not be sufficient. Given the number of complaints of lawyer sexual misconduct that have been filed, the Commission believes that having a specific Rule has the advantage not only of alerting lawyers more effectively to the dangers of sexual relationships with clients but also of alerting clients that the lawyer may have violated ethical obligations in engaging in such conduct.~~

~~—————“The Commission further recommends a total, rather than a partial, ban on client-lawyer relationships, except for those pre-dating the formation of the client-lawyer relationship. Partial bans, i.e., those that prohibit relationships only when they involve coercion or cause the lawyer to act incompetently, do not effectively address the problem of conflicts of~~

~~interest, particularly the difficulty of obtaining an adequately informed consent from the client. Moreover, they do little to prevent problems from arising in the first place.~~

~~“COMMENT:~~

~~“Caption The caption has been added to set off the new Comments.~~

~~“[17] This new Comment states the rationale for the Rule.~~

~~“[18] This new Comment states the rationale for the Rule's exception for pre-existing relationships, noting that even though the Rule does not apply, such relationships may give rise to conflicts of interest under Rule 1.7.~~

~~“[19] This new Comment was added to explain how the Rule is applied in the case of an organizational client.~~

Note that, as discussed above, Model Rule 1.8(j) and related Comments have not been adopted.

“Paragraph (k): Imputation of Prohibitions

Note that, as discussed above, Model Rule 1.8(k) has been renumbered as VRPC 1.8(j) and Comment [20] has been renumbered as [18].

RULE 1.15. SAFEKEEPING PROPERTY

(a) **(1)** A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in accordance with Rules 1.15A, B and C. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

(2) For purposes of these rules, property held “in connection with a representation” means funds or property of a client or third party that is in the lawyer’s possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. “Fiduciary relationship” includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Reporter's Notes--2007 Amendment

V.R.P.C. 1.15 is amended *in part* to conform to changes in Model Rule 1.15, retaining a reference in V.R.P.C. 1.15(a) to V.R.P.C. 1.15A-1.15C, for which there is no Model Rules equivalent and incorporating as V.R.P.C. 1.15(f)-(h) the 2004 amendment adding V.R.P.C. 1.15(d)-(f) concerning client trust funds against which checks may be drawn. See Reporter's Notes to V.R.P.C. 1.15 (1999); Reporter's Notes to 2004 amendment of V.R.P.C. 1.15. *Note that new Rule 1.15(c) requires deposit in a lawyer's trust account of any fees or expenses paid in advance, no matter how designated, if the funds are to be applied as compensation for services subsequently rendered or reimbursement for expenses subsequently incurred. The rule does not require deposit in the trust account of a "pure" retainer, a flat fee paid to assure the lawyer's availability and not for performing services. If services are also to be performed, an additional agreement at a specified rate for those services is required, and any advance payment under that agreement must be deposited in the trust account. Either form of agreement is, of course, subject to the overriding requirement of Rule 1.5(a) that fees must be reasonable.*

Rule 1.15(a)(2) is also added as part of a group of amendments to Rules 1.15A-1.15C intended to clarify the applicability of the client trust fund rules to funds held by a lawyer other than in a professional capacity. "Property held in connection with a representation," the key phrase in what is now Rule 1.15(a)(1) that determines the applicability of those rules, is now limited to property held in connection with a representation in a lawyer-client relationship or a fiduciary relationship that arises out of a lawyer-client relationship or a court appointment.

RULE 1.15A. TRUST ACCOUNTING SYSTEM

(a) Every attorney lawyer or law firm in private practice ~~or who otherwise receives client funds or the firm organization holding funds of clients or third persons,~~ either in connection with a representation as defined in Rule 1.15(a)(2) or in any other fiduciary capacity, shall hold such funds in a trust account and shall maintain a trust

accounting system that shall include, at a minimum, the following features:

Reporter's Notes—2007 Amendment

Rule 1.15A(a) is amended to make clear that the lawyer or law firm must maintain a separate trust account and to make clear that the

obligation imposed by these rules ~~extends to all funds held in a fiduciary capacity~~ *incorporates the definition of “in connection with a representation” in new Rule 1.15(a)(2) as the basis for the requirement.* Subparagraphs (1)-(4) are amended for consistency with this broader practice and to eliminate specific references to systems for maintaining accounts that may be obsolete.

RULE 1.15B. POOLED INTEREST-BEARING TRUST ACCOUNTS

(a) ~~A Every lawyer or law firm which receives client funds receiving or holding funds in a trust account in accordance with Rule 1.15A(a) shall create and maintain a pooled interest-bearing trust account for deposit of client funds in an institution approved by the Professional Responsibility Board. Funds received in accordance with Rule 1.15A(a) that are not reasonably expected to earn a substantial amount of interest for the client, individually or in combination with other client funds held by the lawyer or law firm. No earnings of the account shall be made available to the lawyer or law firm or other person for whom they are held shall be deposited in that account. The interest accruing on this the account, net of any transaction costs, shall be paid over to the Vermont Bar Foundation. No lawyer may be disciplined for placing client funds in the pooled interest-bearing account if the lawyer made a good faith determination that the funds fit the provisions of this rule.~~

Reporter's Notes—2007 Amendment

[No changes]

RULE 1.15C. TRUST ACCOUNT OVERDRAFT NOTIFICATION

~~(a) Clearly Identified Trust Accounts Required. Attorneys who practice law in Vermont shall deposit all funds held in trust in Vermont in accordance with Rule 1.15 Lawyers and law firms holding funds *in a pooled trust account* as defined in accordance with Rule 1.15. ^{AB}(a) shall deposit the funds in a financial institution in Vermont that has been approved by the Professional Responsibility Board in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository financial institution of the purpose and identity of such accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Attorney trust accounts shall be maintained only in financial institutions approved by the Professional Conduct Board.~~

Reporter's Notes—2007 Amendment

[No changes]

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who, *in good faith*, discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.6 would require or permit or as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably

necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, ***such as through an unsolicited e-mail or other communication***, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). ***A person who participates in an initial consultation, or communicates information, with the intent to disqualify a lawyer from representing a client with materially adverse interests is not acting in good faith and is not "a prospective client" entitled to the protections of paragraph (b) or (c) of this Rule. A person's intent to disqualify may be inferred from the circumstances.***

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Reporter's Notes

V.R.P.C. 1.18 is a new provision in the Vermont Rules of Professional Conduct. It adopts Model Rule 1.18, also a new provision, *with the addition of "in good faith" in Rule 1.18(a) and language in Comment [2] taken from Pa. R.P.C. 1.18, Comment [2], to address the problem of the individual whose intent is to disqualify the lawyer from representing others in a matter.*

The ABA Reporter's Explanation is as follows:

"Rule 1.18 is a proposed new Rule in response to the Commission's concern that important events occur in the period during which a lawyer and prospective client are considering whether to form a client-lawyer relationship. For the most part, the current Model Rules do

not address that pre-retention period.

“TEXT:

“1. Paragraph (a): Define prospective client

“Paragraph (a) defines the limited circumstances to which this Rule applies by defining who qualifies as a ‘prospective client’ *[adding a Vermont requirement of good faith in seeking representation]*.

“2. Paragraph (b): Duty of confidentiality owed prospective client

“Paragraph (b) identifies the duty to treat all communications with a prospective client as confidential. This obligation is a well-settled matter under the law of attorney-client privilege, and the fact that Model Rule 1.9 does not now technically cover these communications is an omission that this proposal corrects.

“3. Paragraph (c): Prohibit later representation adverse to prospective client

“Paragraph (c) extends the application of Rule 1.9 to prohibit representation adverse to the prospective client in the same or a substantially related matter. Unlike Rule 1.9, however, this Rule does so only if the lawyer received information from the prospective client that could be ‘significantly harmful’ to that person in the later representation.

“The prospective client situation justifies that different treatment because, prior to the representation decision, there is an inevitable period in which it is in the interest of the prospective client to share enough information with the lawyer to determine whether there is a conflict of interest or simple incompatibility. The lawyer may learn very early in the consultation, for example, that the party adverse to the prospective client is a client of the lawyer's firm. If the discussion stops before ‘significantly harmful’ information is shared, it seems that the law firm's regular client should not be denied counsel of its choice if a substantially related matter arises.

“Paragraph (c) also extends the prohibition of this Rule to associated lawyers, except as provided in paragraph (d).

“4. Paragraph (d)(1): Representation permitted with client consent

“Paragraph (d)(1) makes clear that the prohibition imposed by this Rule can be waived with the informed consent, confirmed in writing, of

both the former prospective client and the client on whose behalf the lawyer later plans to take action adverse to the former prospective client. The expression of this requirement is parallel to that in Rules 1.7 and 1.9.

“5. Paragraph (d)(2): Screening lawyer who conferred with prospective client

“In the event that ‘significantly harmful’ information is revealed, paragraph (d)(2) provides that the lawyer who received the information may be screened from any involvement in the subsequent matter, and others in the law firm may represent the adverse party, but only if the personally disqualified lawyer acted reasonably in attempting to limit that lawyer's exposure to potentially harmful information.

“COMMENT:

“[1] This Comment highlights three ways in which lawyers may assume obligations to prospective clients: disclosure of information, taking possession of documents or property and giving legal advice. It also explains the inevitably tentative quality of the initial consultation and suggests the reason for giving prospective clients somewhat less than the protection offered former clients by Rule 1.9.

“[2] This Comment explains that lawyers are not disqualified when a person unilaterally communicates information to the lawyer without any reasonable expectation that the lawyer will agree to discuss the possibility of forming a client-lawyer relationship *[or approaches the lawyer with the intent to disqualify her or him from representing others]*.

“[3] This Comment explains the lawyer's obligation to preserve confidences of the prospective client, no matter what right the lawyer or law firm may have to undertake later adverse representation.

“[4] This Comment first explains that a lawyer should obtain only the information required to determine whether to undertake the representation. If a conflict of interest is found to exist, the lawyer should decline the representation or obtain the required consent from all affected clients.

“[5] This Comment identifies consent in advance of the consultation as one way to avoid later concerns about adverse use of the information obtained. Such an option was expressly approved in ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 90-358.

“[6] This Comment reiterates the right of a lawyer to undertake representation adverse to a prospective client from whom no ‘significantly

harmful' information was obtained.

“[7] This Comment describes how the imputation otherwise required by paragraph (c) may be avoided by either obtaining the informed consent of the prospective and affected clients under paragraph (d)(1) or by screening under the conditions stated in paragraph (d)(2).

“[8] This Comment addresses the requirements of paragraph (d)(2)(i) and (ii).

“[9] This Comment is a cross-reference to existing Rules that deal with two of the three issues identified in Comment [1]. Any advice a lawyer gives must be competent under Rule 1.1, and Rule 1.15 requires a lawyer to care for property of "third persons," which would include prospective clients.”

RULE 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative ~~tribunal~~ agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Reporter's Notes—2007 Amendment

V.R.P.C. 3.9 is amended to conform to the changes in the Model Rule. The ABA Reporter's Explanation is as follows:

RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law ~~to do so~~ or a court order.

Comment

[5] Communications authorized by law may include communications by a

lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include ~~constitutionally permissible~~ investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, ~~when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable.~~ ~~However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.~~ When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Reporter's Notes—2007 Amendment

V.R.P.C. 4.2 is amended to conform to the changes in Model Rule 4.2. The ABA Reporter's Explanation is as follows:

“[Comment [5]] addresses when communications to or by the government may be within the Rule's ‘authorized by law’ exception. The first sentence revises the final sentence of [former] Comment [1] and alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decisionmakers may create an exception to this Rule. *[See, however, ABA Formal Opn. 97-408 (before communication on a matter in controversy with government agency, lawyer must give notice that will allow government lawyer to consult with agency.)]* The remainder of the Comment substantially revises [former] Comment [2] on the applicability of the ‘authorized by law’ exception to communications by government lawyers, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in [former] Comment [2] to judicial precedent has been deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that ‘go beyond’ those imposed by constitutional provisions, the Comment explains that the fact that a communication does not violate the constitution ‘is insufficient to establish’ that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest ‘is insufficient to establish’ the ethical propriety of an ex parte communication by the government with that individual if the individual's lawyer has not agreed

to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.