

PROPOSED AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT BASED ON
ETHICS 20/20 AMENDMENTS TO ABA MODEL RULES

RULE 1.1 Competence

* * * *

Comment

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including but not limited to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

[7] Competency requires that the lawyer acquire or possess the skills reasonably necessary to effectively represent a client. For example, a lawyer must keep current and abreast of changes and developments in the area(s) of law in which the lawyer practices, which may include for some lawyers the development of research skills and the ability to interview potential clients and witnesses, carry out discovery in civil litigation matters, negotiate effectively, and, if necessary, pursue a case through trial.

[8] Competency also requires that lawyers employ reasonable steps to protect the confidentiality of client files and communications, including employment of relevant law office technologies. This rule does not necessarily require that a lawyer personally acquire training, skill and expertise in technology reasonably necessary to practice law if the lawyer employs others who are competent and familiar with the relevant technology and who can implement the use of that technology to protect the confidentiality of client files and communications.

RULE 1.6 CONFIDENTIALITY

* * * *

(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.

Comment

Acting Competently to Preserve Confidentiality

[19] Paragraph (d) requires a lawyer 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 lawyer shall either (1) comply with a client's request to implement special security measures to protect the confidentiality of information or forego the representation; or (2) obtain the client's informed consent to forego security measures that would otherwise be appropriate under 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.