

required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

**Division of Fee.** A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

**Disputes over Fees.** If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

### Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections (a), (b), (c), and (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

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

(1) Prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

(2) Rectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer may reveal such information 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.

(P.B. 1978-1997, Rule 1.6.)

COMMENTARY: A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of

information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege in the law of evidence and the Rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The Rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality Rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

**Authorized Disclosure.** A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specific lawyers.

**Disclosure Adverse to Client.** The confidentiality Rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm to another person. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's confidences even though the client's purpose is criminal. To the extent a lawyer is required to disclose a client's purposes, the client may be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. A rule governing disclosure of threatened harm thus involves balancing the interests of one group of potential victims against those of another. On the assumption that lawyers fulfill their duty to advise against the commission of deliberately wrongful acts, the public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Generally speaking, information relating to the representation must be kept confidential, as stated in subsection (a). However, when the client is or will be engaged in criminal conduct, where the client has used the lawyer to perpetuate a fraud, or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question, and the seriousness of that conduct. 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). As noted in the Commentary to that Rule, there can be situations where the lawyer may have to reveal information relating to the representation to avoid assisting a client's criminal or fraudulent conduct. The same is true of compliance with Rule 4.1 concerning truthfulness of a lawyer's own representations.

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. Even

if the involvement was innocent, however, the fact remains that the lawyer's professional services were made the instrument of the client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to rectify the consequences of such conduct, and has the professional right, although not a professional duty, to rectify the situation. Exercising that right may require revealing information relating to the representation. Subsection (c) (2) gives the lawyer professional discretion to reveal such information to the extent necessary to accomplish rectification.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. Inaction by the lawyer is not in violation of Rule 1.2 (d) except in the limited circumstances where failure to act constitutes assisting the client. See Commentary to Rule 1.2 (d). However, the lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime. If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When threatened injury is grave, such as homicide or serious bodily injury, the lawyer may have an obligation under tort or criminal law to take reasonable measures. Subsection (b) requires a lawyer to reveal confidences when reasonably necessary to prevent a client from committing a criminal act that is likely to cause death or serious injury to the person of another. In determining whether disclosure of confidences is required, the lawyer should consider the proximity and likelihood of the client's committing the criminal act, and the nature of the lawyer's relationship with the client. Where practical, the lawyer should seek to persuade the client to take suitable action. Disclosure adverse to the client should be no greater than the lawyer reasonably believes necessary to the purpose.

Subsection (c) (1) permits a lawyer to reveal a client's intent to commit a criminal act that is likely to cause substantial injury to the financial interests or property of another. The lawyer's exercise of discretion requires consideration of factors discussed above, and the magnitude of the effect of the act on the prospective victim, if within the lawyer's knowledge. Disclosure adverse to the client should be no greater than the lawyer reasonably believes necessary to the purpose, and, if practical, should follow an attempt by the lawyer to persuade the client to follow a lawful course. A lawyer's decision not to take preventive action under subsection (c) does not violate this Rule.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. When necessary to guide conduct in connection with this Rule, the lawyer should make inquiry within the organization as indicated in Rule 1.13 (b). The term "another" in subsection (c) (1) includes a person, organization and government.

Subsection (c) does not apply where a lawyer is employed after a crime or fraud has been committed to represent the client in matters ensuing therefrom.

**Withdrawal.** If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16 (a) (1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8 (b) nor Rule 1.16 (d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

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in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13 (b).

**Dispute concerning Lawyer's Conduct.** Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subsection (d) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the Rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subsection (d) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

**Disclosures Otherwise Required or Authorized.** The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subsection (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

**Former Client.** The duty of confidentiality continues after the client-lawyer relationship has terminated.

### **Rule 1.7. Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: