

**Ethics 2000 Commission**  
**Proposed Rule 1.6 - Revised Public Discussion Draft #2**  
**April 25, 2000**

Material added to the current Model Rule has been underlined; deletions from the current Model Rule have been ~~struck through~~.

CONFIDENTIALITY OF INFORMATION

1           (a)     A lawyer shall not reveal information relating to the representation of a client  
2 unless the client ~~consents after consultation, except for disclosures that are~~ gives informed  
3 consent, the disclosure is impliedly authorized in order to carry out the representation, ~~and~~  
4 ~~except as stated in~~ or the disclosure is permitted by paragraph (b) or required by paragraph (c).  
5

6           (b)     A lawyer may reveal ~~such~~ information relating to the representation of a client to  
7 the extent the lawyer reasonably believes necessary  
8

9                   (1)     to prevent ~~the client from committing a criminal act that the lawyer~~  
10 ~~believes is likely to result in imminent~~ reasonably certain death or substantial bodily  
11 harm;  
12

13                   (2)     to prevent the client from committing a crime or fraud that is  
14 reasonably certain to result in substantial injury to the financial interests or  
15 property of another and in furtherance of which the client has used or is using the  
16 lawyer's services;  
17

18                   (3)     to prevent, mitigate, or rectify substantial injury to the financial  
19 interests or property of another that is reasonably certain to result or has resulted  
20 from the client's commission of a crime or fraud in furtherance of which the  
21 client has used the lawyer's services;  
22

23                   (4)     to secure legal advice about the lawyer's compliance with these Rules; or  
24

25                   (5) ~~(2)~~ to establish a claim or defense on behalf of the lawyer in a controversy  
26 between the lawyer and the client, to establish a defense to a criminal charge or civil  
27 claim against the lawyer based upon conduct in which the client was involved, or to  
28 respond to allegations in any proceeding concerning the lawyer's representation of the  
29 client.  
30

31                   ~~(6) to comply with law or [a court order] [an order of a tribunal].—~~  
32

33           (c)     A lawyer shall reveal information relating to the representation of a client to  
34 the extent reasonably necessary for the lawyer to comply with these Rules or with other  
35 law or a court order.  
36  
37

1 **Comment**

2  
3 ~~[1] The lawyer is part of a judicial system charged with upholding the law.~~  
4 ~~One of the lawyer's functions is to advise clients so that they avoid any violation of the~~  
5 ~~law in the proper exercise of their rights.~~

6  
7 ~~[2] The observance of the ethical obligation of a lawyer to hold inviolate~~  
8 ~~confidential information of the client not only facilitates the full development of facts~~  
9 ~~essential to proper representation of the client but also encourages people to seek early~~  
10 ~~legal assistance.~~

11  
12 ~~[3] Almost without exception, clients come to lawyers in order to determine~~  
13 ~~what their rights are and what is, in the maze of laws and regulations, deemed to be legal~~  
14 ~~and correct. The common law recognizes that the client's confidences must be protected~~  
15 ~~from disclosure. Based upon experience, lawyers know that almost all clients follow the~~  
16 ~~advice given, and the law is upheld.~~

17  
18 [1] This Rule governs the disclosure by a lawyer of information relating to the  
19 representation of a client during the lawyer's representation of the client. See Rule 1.18  
20 for the lawyer's duties with respect to information provided to the lawyer by a  
21 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating  
22 to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for  
23 the lawyer's duties with respect to the use of such information to the disadvantage of  
24 clients and former clients.

25  
26 ~~[4] [2] A fundamental principle in the client-lawyer relationship is that, in the~~  
27 ~~absence of the client's informed consent, the lawyer maintain confidentiality of must not~~  
28 ~~reveal information relating to the representation. This contributes to the trust that is the~~  
29 ~~hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal~~  
30 ~~assistance and to communicate fully and frankly with the lawyer even as to embarrassing~~  
31 ~~or legally damaging subject matter. The lawyer needs this information to represent the~~  
32 ~~client effectively and, if necessary, to advise the client to refrain from wrongful conduct.~~  
33 ~~Almost without exception, clients come to lawyers in order to determine their rights and~~  
34 ~~what is, in the complex of laws and regulations, deemed to be legal and correct. Based~~  
35 ~~upon experience, lawyers know that almost all clients follow the advice given, and the~~  
36 ~~law is upheld.~~

37  
38 ~~[5] [3] The principle of client-lawyer confidentiality is given effect in two by~~  
39 ~~related bodies of law, the attorney-client privilege, (which includes the work product~~  
40 ~~doctrine) in the law of evidence, and the rule of confidentiality established in professional~~  
41 ~~ethics. The attorney-client privilege applies in judicial and other proceedings in which a~~  
42 ~~lawyer may be called as a witness or otherwise required to produce evidence concerning~~  
43 ~~a client. The rule of client-lawyer confidentiality applies in situations other than those~~  
44 ~~where evidence is sought from the lawyer through compulsion of law. The confidentiality~~  
45 ~~rule, for example, applies not merely only to matters communicated in confidence by the~~  
46 ~~client but also to all information relating to the representation, whatever its source. A~~

1 lawyer may not disclose such information except as authorized or required by the Rules  
2 of Professional Conduct or other law. See also Scope.

3  
4 ~~[6] The requirement of maintaining confidentiality of information relating to~~  
5 ~~representation applies to government lawyers who may disagree with the policy goals~~  
6 ~~that their representation is designed to advance.~~

7  
8 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the  
9 representation of a client. This prohibition also applies to disclosures by a lawyer that do  
10 not in themselves reveal protected information but could reasonably lead to the discovery  
11 of such information by a third person. A lawyer's use of hypotheticals to discuss issues  
12 relating to the representation is permissible so long as there is no reasonable likelihood  
13 that the listener will be able to ascertain the identity of the client or the situation  
14 involved.

### 15 16 **Authorized Disclosure**

17  
18 ~~[7] [5] A~~ Except to the extent that the client's instructions or special  
19 circumstances limit that authority, a lawyer is impliedly authorized to make disclosures  
20 about a client when appropriate in carrying out the representation, except to the extent  
21 that the client's instructions or special circumstances limit that authority. In litigation  
22 some situations, for example, a lawyer may disclose information by admitting be  
23 impliedly authorized to admit a fact that cannot properly be disputed or, in negotiation by  
24 making to make a disclosure that facilitates a satisfactory conclusion to a matter. [8]  
25 Lawyers in a firm may, in the course of the firm's practice, disclose to each other  
26 information relating to a client of the firm, unless the client has instructed that particular  
27 information be confined to specified lawyers.

### 28 29 **Disclosure Adverse to Client**

30  
31 ~~[9] [6] The~~ Although the public interest is usually best served by a strict rule  
32 requiring lawyers to preserve the confidentiality of information relating to the  
33 representation of their clients, the confidentiality rule is subject to limited exceptions. In  
34 becoming privy to information about a client, a lawyer may foresee that the client intends  
35 serious harm to another person. However, to the extent a lawyer is required or permitted  
36 to disclose a client's purposes, the client will be inhibited from revealing facts which  
37 would enable the lawyer to counsel against a wrongful course of action. The public is  
38 better protected if full and open communication by the client is encouraged than if it is  
39 inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity  
40 and permits disclosure reasonably necessary to prevent reasonably certain death or  
41 substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered  
42 imminently or if there is a present and substantial threat that a person will suffer such  
43 harm at a later date if the lawyer fails to take action necessary to eliminate the threat.  
44 Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a  
45 town's water supply may reveal this information to the authorities if there is a present  
46 and substantial risk that a person who drinks the water will contract a life-threatening or

1 debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or  
2 reduce the number of victims.

3  
4 ~~[10] Several situations must be distinguished:~~

5  
6 ~~[11] First, the lawyer may not counsel or assist a client in conduct that is~~  
7 ~~criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule~~  
8 ~~3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty~~  
9 ~~prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.~~

10  
11 ~~[12] Second, the lawyer may have been innocently involved in past conduct by~~  
12 ~~the client that was criminal or fraudulent. In such a situation the lawyer has not violated~~  
13 ~~Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires~~  
14 ~~knowing that the conduct is of that character.~~

15  
16 ~~[13] Third, the lawyer may learn that a client intends prospective conduct that~~  
17 ~~is criminal and likely to result in imminent death or substantial bodily harm. As stated in~~  
18 ~~paragraph (b)(1), the lawyer has professional discretion to reveal information in order to~~  
19 ~~prevent such consequences. The lawyer may make a disclosure in order to prevent~~  
20 ~~homicide or serious bodily injury which the lawyer reasonably believes is intended by a~~  
21 ~~client. It is very difficult for a lawyer to "know" when such a heinous purpose will~~  
22 ~~actually be carried out, for the client may have a change of mind.~~

23  
24 ~~[14] The lawyer's exercise of discretion requires consideration of such factors~~  
25 ~~as the nature of the lawyer's relationship with the client and with those who might be~~  
26 ~~injured by the client, the lawyer's own involvement in the transaction and factors that~~  
27 ~~may extenuate the conduct in question. Where practical, the lawyer should seek to~~  
28 ~~persuade the client to take suitable action. In any case, a disclosure adverse to the client's~~  
29 ~~interest should be no greater than the lawyer reasonably believes necessary to the~~  
30 ~~purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1)~~  
31 ~~does not violate this Rule.~~

### 32 **Withdrawal**

33  
34  
35 ~~[15] If the lawyer's services will be used by the client in materially furthering a~~  
36 ~~course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule~~  
37 ~~1.16(a)(1).~~

38  
39 ~~[16] After withdrawal the lawyer is required to refrain from making disclosure~~  
40 ~~of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor~~  
41 ~~Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of~~  
42 ~~withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document,~~  
43 ~~affirmation, or the like.~~

44  
45 ~~[17] [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that~~  
46 ~~enables the lawyer to reveal information to the extent necessary to prevent the client from~~

1 committing a crime or a fraud, as defined in Rule 1.0(c), that is reasonably certain to  
2 result in substantial injury to the financial or property interests of another and in  
3 furtherance of which the client has used or is using the lawyer's services. Such a serious  
4 abuse of the client-lawyer relationship by the client forfeits the protection of this Rule.  
5 The client can, of course, prevent such disclosure by refraining from the wrongful  
6 conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's  
7 misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows  
8 is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's  
9 obligation or right to withdraw from the representation of the client in such  
10 circumstances. Where the client is an organization, the lawyer may be in doubt whether  
11 contemplated conduct will actually be carried out by the organization. Where necessary  
12 to guide conduct in connection with this Rule, the lawyer may make inquiry within the  
13 organization as indicated in Rule 1.13(b).

14  
15 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn  
16 of the client's crime or fraud until after it has been consummated. Although the client no  
17 longer has the option of preventing disclosure by refraining from the wrongful conduct,  
18 there will be situations in which the loss suffered by the affected person can be  
19 prevented, rectified or mitigated. In such situations, the lawyer may disclose information  
20 relating to the representation to the extent necessary to enable the affected persons to  
21 prevent or mitigate reasonably certain loss or to attempt to recoup their losses.

22  
23 [9] A lawyer's confidentiality obligations do not preclude a lawyer from  
24 securing confidential legal advice about the lawyer's personal responsibility to comply  
25 with these Rules. In most situations, disclosing information to secure such advice will be  
26 impliedly authorized for the lawyer to carry out the representation. Even when the  
27 disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because  
28 of the importance of a lawyer's compliance with the Rules of Professional Conduct.

### 29 **Dispute Concerning a Lawyer's Conduct**

30  
31  
32 [18] [10] Where a legal claim or disciplinary charge alleges complicity of the  
33 lawyer in a client's conduct or other misconduct of the lawyer involving representation of  
34 the client, the lawyer may respond to the extent the lawyer reasonably believes necessary  
35 to establish a defense. The same is true with respect to a claim involving the conduct or  
36 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary,  
37 or other proceeding and can be based on a wrong allegedly committed by the lawyer  
38 against the client or on a wrong alleged by a third person; for example, a person claiming  
39 to have been defrauded by the lawyer and client acting together. The lawyer's right to  
40 respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(5)  
41 does not require the lawyer to await the commencement of an action or proceeding that  
42 charges such complicity, so that the defense may be established by responding directly to  
43 a third party who has made such an assertion. The right to defend also applies, of course,  
44 where a proceeding has been commenced. ~~Where practicable and not prejudicial to the~~  
45 ~~lawyer's ability to establish the defense, the lawyer should advise the client of the third~~  
46 ~~party's assertion and request that the client respond appropriately. In any event,~~

1 disclosure should be no greater than the lawyer reasonably believes is necessary to  
2 vindicate innocence, the disclosure should be made in a manner which limits access to  
3 the information to the tribunal or other persons having a need to know it, and appropriate  
4 protective orders or other arrangements should be sought by the lawyer to the fullest  
5 extent practicable.  
6

7 ~~[19]~~ [11] If the lawyer is charged with wrongdoing in which the client's conduct  
8 is implicated, the rule of confidentiality should not prevent the lawyer from defending  
9 against the charge. Such a charge can arise in a civil, criminal or professional disciplinary  
10 proceeding, and can be based on a wrong allegedly committed by the lawyer against the  
11 client, or on a wrong alleged by a third person; for example, a person claiming to have  
12 been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is  
13 permitted by paragraph (b)(2)(5) to prove the services rendered in an action to collect it.  
14 This aspect of the Rule expresses the principle that the beneficiary of a fiduciary  
15 relationship may not exploit it to the detriment of the fiduciary. ~~As stated above, the~~  
16 ~~lawyer must make every effort practicable to avoid unnecessary disclosure of information~~  
17 ~~relating to a representation, to limit disclosure to those having the need to know it, and to~~  
18 ~~obtain protective orders or make other arrangements minimizing the risk of disclosure.~~  
19

20 ~~*[21] [12] [14] The Rules of Professional Conduct in various circumstances*~~  
21 ~~*permit or require a lawyer to disclose information relating to the representation. See*~~  
22 ~~*Rules 2.2, 2.3, 3.3, and 4.1. In addition to these provisions, a lawyer may be obligated*~~  
23 ~~*or permitted by other provisions of Other law or an order of a tribunal may require a*~~  
24 ~~*lawyer to provide give information about a client. Whether another provision of law or*~~  
25 ~~*the order of a tribunal supersedes Rule 1.6 is a matter of interpretation beyond the*~~  
26 ~~*scope of these Rules, but a presumption should exist against such a supersession. The*~~  
27 ~~*lawyer must discuss with the client the possibility of challenging the law or order. See*~~  
28 ~~*Rule 1.4. If another provision of law or the order of a tribunal supersedes these Rules,*~~  
29 ~~*however, paragraph (b)(6) permits disclosure to the extent reasonably necessary for the*~~  
30 ~~*lawyer to comply with the law or the order. Disclosure is only permitted if it would be*~~  
31 ~~*unreasonable under the circumstances for the lawyer to challenge the validity or*~~  
32 ~~*applicability of the law or the lawfulness of the order, such as would be the case if*~~  
33 ~~*there were no non-frivolous basis for the challenge.*~~  
34

35 ~~[12]~~ [13] Paragraph (b) permits disclosure only to the extent the lawyer  
36 reasonably believes the disclosure is necessary to accomplish one of the purposes  
37 specified. Where practicable, the lawyer should first seek to persuade the client to take  
38 suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the  
39 client's interest should be no greater than the lawyer reasonably believes necessary to  
40 accomplish the purpose. If the disclosure will be made in connection with a judicial  
41 proceeding, the disclosure should be made in a manner that limits access to the  
42 information to the tribunal or other persons having a need to know it and appropriate  
43 protective orders or other arrangements should be sought by the lawyer to the fullest  
44 extent practicable.  
45

46 ~~[13]~~ [14] Paragraph (b) permits but does not require the disclosure of information

1 relating to a client's representation to accomplish the purposes specified in paragraphs  
2 (b)(1) - (5) . In exercising the discretion conferred by this Rule, the lawyer may consider  
3 such factors as the nature of the lawyer's relationship with the client and with those who  
4 might be injured by the client, the lawyer's own involvement in the transaction, and  
5 factors that may extenuate the conduct in question. A lawyer's decision not to disclose as  
6 permitted by paragraph (b) does not violate this Rule. In some circumstances, however, **a**  
7 **lawyer may be required by these Rules, other law, or a court order may require the**  
8 **lawyer** to reveal information relating to the client's representation. See paragraph (c) and  
9 Comments **[14 ]-[16]**.

10  
11 **Required Disclosure Otherwise Required by the Rules of Professional Conduct, Other**  
12 **Law or a Court Order or Authorized**

13  
14 [20] The attorney-client privilege is differently defined in various jurisdictions.  
15 If a lawyer is called as a witness to give testimony concerning a client, absent waiver by  
16 the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable.  
17 The lawyer must comply with the final orders of a court or other tribunal of competent  
18 jurisdiction requiring the lawyer to give information about the client.

19  
20 [14] [21] *The Rules of Professional Conduct in various circumstances permit or*  
21 *require a lawyer to disclose information relating to the representation. See e.g. Rules 2.2,*  
22 *2.3, 3.3 and 4.1. Such Rules take precedence over Rule 1.6. In addition to these*  
23 *provisions, a lawyer may be obligated or permitted by other provisions of law give*  
24 *information about a client. Whether another provision of law supersedes Rule 1.6 is a*  
25 *matter of interpretation beyond the scope of these Rules, but a presumption should exist*  
26 *against such a supersession.*

27  
28 [15] *Other law may provide that a lawyer must disclose information about a*  
29 *client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of*  
30 *these Rules. When it is unclear that the law in question requires disclosure or*  
31 *supercedes the lawyer's confidentiality obligations, the lawyer must discuss with the*  
32 *client the possibility of contesting the disclosure requirement. See Rule 1.4. If,*  
33 *however, other law clearly supersedes this Rule and requires disclosure, paragraph (c)*  
34 *requires that the lawyer comply with the law.*

35  
36 [16] [15] *Paragraph (c) recognizes that compliance with Rules 3.3, 3.4(c) and*  
37 *4.1 may require disclosure of information relating to a client's representation and*  
38 *provides that the lawyer's compliance with such duties take precedence over this Rule. A*  
39 *lawyer must also comply with lawful orders of a tribunal, an administrative or executive*  
40 *agency, or a legislative body. Paragraph (c) mandates compliance with a court order*  
41 *requiring a lawyer to disclose information relating to a client's representation. If, for*  
42 *example, a lawyer is called as a witness to give testimony concerning a client or is*  
43 *otherwise ordered to reveal information relating to the client's representation, however,*  
44 *the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of*  
45 *the client all non-frivolous claims that the information sought is protected against*  
46 *disclosure by the attorney-client privilege or other applicable law. In the event of an*

1 adverse ruling, the lawyer must consult with the client about the possibility of appeal. See  
2 Rule 1.4. Unless an appeal is taken, however, the lawyer must comply with the court's  
3 order. See Rule 3.4 (c).

### 4 **Acting Competently to Preserve Confidentiality**

5 [16] A lawyer must act competently to safeguard information relating to the  
6 representation of a client against inadvertent or unauthorized disclosure by the lawyer or  
7 by other persons who are participating in the representation of the client or who are  
8 subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

9 [17] When transmitting a communication that includes information relating to  
10 the representation of a client, the lawyer must take reasonable precautions to prevent the  
11 information from coming into the hands of unintended recipients. This duty, however,  
12 does not require that the lawyer use special security measures if the method of  
13 communication affords a reasonable expectation of privacy. Special circumstances,  
14 however, may warrant special precautions. Factors to be considered in determining the  
15 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the  
16 information and the extent to which the privacy of the communication is protected by law  
17 or by a confidentiality agreement. A client may require the lawyer to implement special  
18 security measures not required by this Rule or may give informed consent to the use of a  
19 means of communication that would otherwise be prohibited by this Rule.

### 20 **Former Clients**

21 [22] [18] The duty of confidentiality continues after the client-lawyer  
22 relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition  
23 against using such information to the disadvantage of the former client.

## 24 **Reporter's Observations**

### 25 **Delete Paragraph (b)(6) and add paragraph (c):**

26 The Commission voted to delete paragraph (b)(6) and add paragraph (c) making disclosure  
27 mandatory to the extent necessary for the lawyer to require with the Rules of Professional Conduct or law  
28 or a court order requiring the lawyer to do so. This change would be coupled with modifications of the  
Comments to clarify the lawyer's duty consult with the client about resisting disclosure when there is any  
uncertainty about the validity of the law or the order requiring disclosure. Paragraph (c) has been  
formulated to make clear that the law or court must specifically require that the lawyer make the  
disclosure in question.

### **Comment [7]:**

The Reporter was asked to add a cross-reference to the definition of fraud in Rule 1.0(c).

**Delete Comment [12]:**

This Comment has been deleted because of the deletion of paragraph (b)(6). The comments about resisting disclosure and consulting with the client have been incorporated into Comments [14] - [16] that have been added to explain paragraph (c).

**Comment [13]:**

The last sentence has been modified to provide a transition between the Comments that discuss permissive disclosure and those that discuss mandatory disclosure.

**Comment [14]:**

Comment [14] has been added to confirm the point in paragraph (c) that other Rules of Professional Conduct, such as Rules 3.3 and 4.1, may require disclosure of information relating to a client's representation and that such rules trump Rule 1.6. I have mentioned Rules 3.3 and 4.1 as examples because there may be situations in which disclosure would be required for the lawyer to comply with Rule 1.2(d), Rule 3.4(c), or even Rules 8.4 (a), (b), (c) or (d).

**Comment [15]:**

Comment [15] addresses the requirement in paragraph (c) that a lawyer disclose information relating to a client's representation to the extent necessary to comply with law requiring the lawyer to do so. The basic point of the Comment is that the lawyer must consider and is required by Rule 1.4 to consult with the client about the possibility of challenging the disclosure requirement if there is there is a non-frivolous basis for doing so.

**Comment [16]:**

Comment [16] addresses the situation in which a court orders a lawyer to disclose information relating to a client's representation.. Again the basic point is that the lawyer must consider and consult with the client about the possibility of challenging the order if there is a non-frivolous basis for doing so.