

**WORKING DRAFT
FOR USE BY ETHICS 2000 COMMISSION ONLY**

1/11/1999

PROPOSED RULE 1.6 - 7th Draft

(for final review by Commission prior to release to public)

Confidentiality of Information

1 ~~(a) A lawyer shall not reveal information relating to representation of a client unless the client consents~~
2 ~~after consultation, except for disclosures that are impliedly authorized in order to carry out the~~
3 ~~representation, and except as stated in paragraph (b):~~

4
5 (a) A lawyer shall not reveal information relating to the representation of a client or a former client
6 unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the
7 representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

8
9 (b) A lawyer may reveal information relating to the representation of a client or a former client to the
10 extent the lawyer reasonably believes necessary:

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

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

18
19 (3) to rectify or mitigate substantial injury to the financial interests or property of another
20 that has resulted resulting from the client's commission of a crime or fraud in the
21 furtherance of which the 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) to establish a claim or defense on behalf of the lawyer in a controversy between the client
26 and the lawyer, to establish a defense to a criminal charge or civil claim against the lawyer that
27 is based upon conduct in which the client was involved, or to respond in any proceeding to
28 allegations concerning the lawyer's representation of the client.

29
30 ~~(c) A lawyer shall reveal information relating to the representation of a client or a former client to the~~
31 ~~extent required by law or court order, or when necessary to comply with Rules 3.3, _____, _____, or~~
32 ~~_____.~~

33
34 **COMMENT**
35

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

4
1 [1] This Rule governs the disclosure by a lawyer of information relating to the representation of
2 a client both during and after the lawyer's representation of the client. See Rules 1.8(b) and 1.9(c) with
3 respect to the use of such information to the disadvantage of clients and former clients. [Also see Rule [

4] with respect to lawyer's confidentiality duty to prospective clients.]
5
6 [2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information
7 of the client not only facilitates the full development of facts essential to proper representation of the
8 client but also encourages people to seek early legal assistance.

9
10 [3] Almost without exception, clients come to lawyers in order to determine what their rights
11 are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law
12 recognizes that the client's confidences must be protected from disclosure. Based upon experience,
13 lawyers know that almost all clients follow the advice given, and the law is upheld.

14
15 [4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain
16 confidentiality of information relating to the representation. This contributes to the trust that is the
17 hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and
18 frankly with the lawyer even as to embarrassing or legally damaging subject matter.

19
20 [5] The principle of lawyer-client confidentiality is given effect by related bodies of law, the
21 attorney-client privilege (which includes the work product doctrine) in the law of evidence; the work-
22 product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client
23 privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or
24 otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality
25 applies in situations other than those where evidence is sought from the lawyer through compulsion of
26 law. The confidentiality rule, for example, applies not only to matters communicated in confidence by
27 the client but also to all information relating to the representation, whatever its source. A lawyer may not
28 disclose such information except as authorized or required by the Rules of Professional Conduct or
29 other law. See also Scope.

30
31 [6] The requirement of maintaining confidentiality of information relating to representation
32 applies to government lawyers who may disagree with the policy goals that their representation is
33 designed to advance.

34
35 [7] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of
36 a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal
37 protected information but could reasonably lead to the discovery of such information by a third person.

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1 A lawyer's use of hypotheticals to discuss issues relating to the representation is permissible so long as
2 there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the
3 situation involved.

Authorized Disclosure

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6
7 [8] ~~[7]~~ A lawyer is impliedly authorized to make disclosures about a client when appropriate in
8 carrying out the representation, except to the extent that the client's instructions or special circumstances
9 limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that
10 cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory
11 conclusion.

12
13 [9] ~~[8]~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other
14 information relating to a client of the firm, unless the client has instructed that particular information be
15 confined to specified lawyers.

Disclosure Adverse to Client

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17
18
19 [10] ~~[9]~~ Although the public interest is usually best served by a strict rule requiring lawyers to
20 preserve the confidentiality of information relating to the representation of their clients, the confidentiality
21 rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may
22 foresee that the client intends serious harm to another person. However, to the extent a lawyer is
23 required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts
24 which would enable the lawyer to counsel against a wrongful course of action. The public is better
25 protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph
26 (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably
27 necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm
28 includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such
29 injuries are reasonably certain to occur if they will be suffered imminently or if there is a present and
30 substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action
31 necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged
32 toxic waste into a town's water supply may reveal this information to the authorities if there is a present
33 and substantial risk that a person who drinks the water will contract a life-threatening or debilitating
34 disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

35 ...
36
37 ~~[10]~~ Several situations must be distinguished:

38
39 ~~[11]~~ First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent.
40 See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty
41 is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal

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1 or fraudulent conduct.

2
3 [12] Second, the lawyer may have been innocently involved in past conduct by the client that
4 was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to
5 "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

6
7 [13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and
8 likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer
9 has professional discretion to reveal information in order to prevent such consequences. The lawyer
10 may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer
11 reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a
12 heinous purpose will actually be carried out, for the client may have a change of mind.

13
14 [15] If the lawyer's services will be used by the client in materially furthering a course of
15 criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

16
17 [16] After withdrawal, the lawyer is required to refrain from making disclosure of the client's
18 confidences, except as otherwise provided in Rule 1.6. Neither this rule, Rule 1.9(c), nor Rule 1.16(d)
19 prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or
20 disaffirm any opinion, document, affirmation, or the like.

21
22 [11] ~~[17] Paragraph (b)(2) is a limited exception to the rule of confidentiality principle that~~
23 ~~enables the lawyer to reveal information relating to the representation of a client to the extent necessary~~
24 ~~to prevent the client from committing a crime or fraud that is likely to result in substantial injury to the~~
25 ~~financial or property interests of another and in furtherance of which the client has used or is using the~~
26 ~~lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the~~
27 ~~protection of this Rule, and frees the lawyer to protect the victims of the client's misconduct. The client~~
28 ~~can, of course, prevent such disclosure by refraining from the wrongful conduct. Although Paragraph~~
29 ~~(B)(2) does not require that the lawyer reveal the client's misconduct, the lawyer may not in any way~~
30 ~~counsel the client to engage, or assist the client, in conduct that the lawyer knows is criminal or~~
31 ~~fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to~~
32 ~~withdraw from the representation of the client in such circumstances. Where the client is an~~
33 ~~organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by~~
34 ~~the organization's constituents. Where necessary to guide conduct in connection with this Rule, the~~
35 ~~lawyer may make inquiry within the organization as indicated in Rule 1.13(b).~~

36
37 [12] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's
38 crime or fraud until after it has been consummated and substantial loss has been suffered by the victim.
39 Although the client no longer has the option of preventing disclosure by refraining from the wrongful
40 conduct, there will be situations in which the loss suffered by the affected person ~~victim~~ can be rectified
41 or mitigated. In such situations, the lawyer may disclose information relating to representation ~~as is to~~

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1 ~~the extent necessary to secure substantial relief for the victim to assist the affected persons recoup their~~
2 ~~losses. This properly enables the lawyer to help those who have been victimized by wrongful conduct in~~
3 ~~which the lawyer was implicated because of the client's abuse of the client-lawyer relationship.~~

4
5 ~~[13] A lawyer's services further a client's commission of a crime or fraud if the lawyer~~
6 ~~represents the client in dealings with the affected persons or the client provides the affected persons~~
7 ~~with work product prepared by the lawyer. A lawyer does not further a client's crime or fraud;~~
8 ~~however, if the lawyer's participation in the matter is limited to giving advice to the client about the~~
9 ~~legality of the client's conduct. See Rule 1.2(d). Also see Rule 1.16 with respect to the lawyer's~~
10 ~~obligation or right to withdraw from the representation of the client in such circumstances.~~

11
12 ~~[14] A lawyer's confidentiality obligations do not preclude a lawyer from securing legal advice~~
13 ~~about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing~~
14 ~~information to secure such advice will be impliedly authorized for the lawyer to carry out the~~
15 ~~representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such~~
16 ~~disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.~~
17 ~~For the protection of the client, such disclosures may be made only if they will be protected by the~~
18 ~~attorney-client privilege.~~

19
20 ~~[15] [18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a~~
21 ~~client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may~~
22 ~~respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true~~
23 ~~with respect to a claim involving the conduct or representation of a former client. Such a charge can~~
24 ~~arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly~~
25 ~~committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a~~
26 ~~person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to~~
27 ~~respond arises when an assertion of such complicity has been made. Paragraph (b)(2)(5) does not~~
28 ~~require the lawyer to await the commencement of an action or proceeding that charges such complicity,~~
29 ~~so that the defense may be established by responding directly to a third party who has made such an~~
30 ~~assertion. The right to defend, of course, applies where a proceeding has been commenced. Where~~
31 ~~practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise~~
32 ~~the client of the third party's assertion and request that the client respond appropriately. In any event,~~
33 ~~disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence,~~
34 ~~the disclosure should be made in a manner which limits access to the information to the tribunal or other~~
35 ~~persons having a need to know it, and appropriate protective orders or other arrangements should be~~
36 ~~sought by the lawyer to the fullest extent practicable.~~

37
38 ~~[16] [19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated,~~
39 ~~the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a~~
40 ~~charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a~~
41 ~~wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for~~

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1 ~~example, a person claiming to have been defrauded by the lawyer and client acting together.~~ A lawyer
2 entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect
3 it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not
4 exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort
5 practicable to avoid unnecessary disclosure of information relating to a representation, to limit
6 disclosure to those having the need to know it, and to obtain protective orders or make other
7 arrangements minimizing the risk of disclosure.

8
9 ~~[17] [14] Paragraph (b) permits but does not require the disclosure or use of information~~
10 ~~relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1)-(5). In~~
11 ~~exercising the discretion conferred by this Rule, The lawyer's exercise of discretion requires~~
12 ~~consideration of the lawyer may consider such factors as the nature of the lawyer's relationship with the~~
13 ~~client and with those who might be injured by the client, the lawyer's own involvement in the transaction~~
14 ~~and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to~~
15 ~~persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest~~
16 ~~should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's~~
17 ~~decision not to take preventive action permitted by paragraph (b) does not violate this Rule.~~

Disclosure Otherwise Required or Authorized

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19
20
21 ~~[18] [21] The Rules of Professional Conduct in various circumstances permit or require a~~
22 ~~lawyer to disclose information relating to the representation. See Rules 2-2, 2.3, 3.3 and 4.1. In~~
23 ~~addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give~~
24 ~~information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of~~
25 ~~interpretation beyond the scope of these Rules, but a presumption should exist against such a~~
26 ~~supersession.~~

27
28 ~~[19] [20] A lawyer must also comply with lawful orders of a tribunal, an administrative or~~
29 ~~executive agency, or a legislative body. The attorney-client privilege is differently defined in various~~
30 ~~jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, or is otherwise~~
31 ~~ordered to reveal information relating to the client's representation, the lawyer must, absent waiver by~~
32 ~~informed consent of the client to do otherwise, paragraph (a) requires the lawyer to invoke the privilege~~
33 ~~when it is applicable. assert on behalf of the client all non-frivolous claims that the information sought is~~
34 ~~protected against disclosure by the attorney-client privilege or other applicable law. In the event of an~~
35 ~~adverse ruling, the lawyer should consult with the client about the possibility of appealing the adverse~~
36 ~~ruling. See Rule 1.4. Unless an appeal is taken, the lawyer must comply with the order. The lawyer~~
37 ~~must, however, comply with the final order of a court or other tribunal of competent jurisdiction~~
38 ~~requiring the lawyer to provide information about the client.~~

Acting Competently to Preserve Confidentiality

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1 [20] A lawyer must act competently to safeguard information relating to the representation of a
2 client against inadvertent or unauthorized disclosure by the lawyer or by other persons who are
3 participating in the representation of the client or who are subject to the lawyer's supervision. See Rules
4 1.1, 5.1, and 5.3.

5
6 [21] When transmitting a communication that includes information relating to the representation
7 of a client, the lawyer must take reasonable precautions to prevent the information from coming into the
8 hands of unintended recipients. This duty, however, does not require that the lawyer utilize special
9 security measures if the method of communication affords a reasonable expectation of privacy. Special
10 circumstances, however, may warrant special precautions. Factors to be considered in determining the
11 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information
12 and the extent to which the privacy of the communication is protected by law or by a confidentiality
13 agreement. A client may require the lawyer to implement special security measures not required by this
14 Rule or may give informed consent to the use of a means of communication that would otherwise be
15 prohibited by this Rule.
16

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Former Clients

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[22] The duty of confidentiality continues after the client-lawyer relationship has been terminated. Thus, Rule 1.6(a) prohibits the disclosure of information relating to the representation of a former client. See Rule 1.9(c) for the prohibition against using such information to the disadvantage of the former client.

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Reporter's Observations

A. Rule Text

The text was approved by the Commission in Philadelphia.

B. Comments

Except as noted below, the Comments were approved by the Commission in Philadelphia.

Comment [10]: "Prevent reasonably certain death or substantial bodily harm"

After considerable discussion, the Commission left to the Reporter's discretion whether to include the toxic discharge example in Comment [10]. We have left the example in the Comment because it brings into sharp focus the significance of the Commission's decision to permit disclosure to prevent "reasonably certain" death or substantial bodily harm.

Comment [11]: Disclosure to Prevent Client Crimes Resulting in Substantial Financial Loss

In response to suggestions made in Philadelphia, the Reporter has deleted the reference to the lawyer being "freed to protect to the victims of the client's misconduct." As requested, I have also added the cross-reference to Rules 1.2(d) and 1.16.

Comment [12]: Rectification and Mitigation of Substantial Financial Loss.

The changes are intended to eliminate some unnecessary hyperbole in the statement of the rationale for the exception in paragraph (b)(3).

Deletion of Comment [13] from Draft No. 6:

In Philadelphia, the Commission voted to delete Comment [13] that was included in Draft No. 6. The Comment provided two examples of ways in which a client may use a lawyer's services in connection with the commission of a crime or fraud. This issue will be revisited in connection with our discussion of Rule 1.2(d)'s prohibition against assisting a client to engage in conduct the lawyer knows to be criminal or fraudulent. Upon final approval of this deletion, the remaining Comments have been renumbered.

Comment [19]: Disclosure Mandated by Order of Tribunal

Comment [18] has been revised in response to the Commission's concern about the reference to the lawyer's obligation to obey a "final" order of a tribunal.

Comment [22]: Confidentiality After Termination of Representation

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The Reporter recommends a slight modification of Model Rule Comment [22] to account for the new reference in the Rule text to former clients.