

Ethics 2000 Commission
Proposed Rule 1.6 - Public Discussion Draft
March 23, 1999

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 or a
2 former client unless the client ~~consents after consultation, except for disclosures that are~~ gives
3 informed consent, the disclosure is impliedly authorized in order to carry out the representation,
4 ~~and except as stated in~~ or the disclosure is permitted by paragraph (b) or required by paragraph
5 (c).

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

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

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

17
18 (3) to rectify or mitigate substantial injury to the financial interests or
19 property of another resulting from the client's commission of a crime or fraud in
20 furtherance of which the client has used the lawyer's services;

21
22 (4) to secure legal advice about the lawyer's compliance with these Rules; or

23
24 ~~(2)~~ (5) to establish a claim or defense on behalf of the lawyer in a controversy
25 between the lawyer and the client, to establish a defense to a criminal charge or civil
26 claim against the lawyer based upon conduct in which the client was involved, or to
27 respond to allegations in any proceeding concerning the lawyer's representation of the
28 client.

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

33
34
35 **Comment**

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

5
6 ~~[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential~~
7 ~~information of the client not only facilitates the full development of facts essential to proper~~
8 ~~representation of the 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~~
11 ~~their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct.~~
12 ~~The common law recognizes that the client's confidences must be protected from disclosure.~~
13 ~~Based upon experience, lawyers know that almost all clients follow the advice given, and the law~~
14 ~~is upheld.~~

15
16 [1] This Rule governs the disclosure by a lawyer of information relating to the
17 representation of a client both during and after the lawyer's representation of the client. See
18 Rules 1.8(b) and 1.9(c) with respect to the use of such information to the disadvantage of clients
19 and former clients.

20
21 ~~[4]~~ [2] A fundamental principle in the client-lawyer relationship is that, in the absence of
22 the client's informed consent, the lawyer maintain confidentiality of must not reveal information
23 relating to the representation. This contributes to the trust that is the hallmark of the client-
24 lawyer relationship. The client is thereby encouraged to seek legal assistance and to
25 communicate fully and frankly with the lawyer even as to embarrassing or legally damaging
26 subject matter. The lawyer needs this information to represent the client effectively and, if
27 necessary, to advise the client to refrain from wrongful conduct. Almost without exception,
28 clients come to lawyers in order to determine their rights and what is, in the complex of laws and
29 regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost
30 all clients follow the advice given, and the law is upheld.

31
32 ~~[5]~~ [3] The principle of client-lawyer confidentiality is given effect in two by related
33 bodies of law, the attorney-client privilege, (which includes the work product doctrine) in the
34 law of evidence, and the rule of confidentiality established in professional ethics. The
35 attorney-client privilege applies in judicial and other proceedings in which a lawyer may be
36 called as a witness or otherwise required to produce evidence concerning a client. The rule of
37 client-lawyer confidentiality applies in situations other than those where evidence is sought from
38 the lawyer through compulsion of law. The confidentiality rule, for example, applies not merely
39 only to matters communicated in confidence by the client but also to all information relating to
40 the representation, whatever its source. A lawyer may not disclose such information except as
41 authorized or required by the Rules of Professional Conduct or other law. See also Scope.

42
43 ~~[6] The requirement of maintaining confidentiality of information relating to~~
44 ~~representation applies to government lawyers who may disagree with the policy goals that their~~

1 representation is designed to advance.
2

3 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
4 representation of a client. This prohibition also applies to disclosures by a lawyer that do not in
5 themselves reveal protected information but could reasonably lead to the discovery of such
6 information by a third person. A lawyer's use of hypotheticals to discuss issues relating to the
7 representation is permissible so long as there is no reasonable likelihood that the listener will be
8 able to ascertain the identity of the client or the situation involved.
9

10 **Authorized Disclosure**

11
12 ~~[7] [5] A~~ Except to the extent that the client's instructions or special circumstances limit
13 that authority, a lawyer is impliedly authorized to make disclosures about a client when
14 appropriate in carrying out the representation, except to the extent that the client's instructions or
15 special circumstances limit that authority. In litigation some situations, for example, a lawyer
16 may disclose information by admitting be impliedly authorized to admit a fact that cannot
17 properly be disputed or, in negotiation by making to make a disclosure that facilitates a
18 satisfactory conclusion to a matter. [8] Lawyers in a firm may, in the course of the firm's
19 practice, disclose to each other information relating to a client of the firm, unless the client has
20 instructed that particular information be confined to specified lawyers.
21

22 **Disclosure Adverse to Client**

23
24 ~~[9] [6] The~~ Although the public interest is usually best served by a strict rule requiring
25 lawyers to preserve the confidentiality of information relating to the representation of their
26 clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information
27 about a client, a lawyer may foresee that the client intends serious harm to another person.
28 However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client
29 will be inhibited from revealing facts which would enable the lawyer to counsel against a
30 wrongful course of action. The public is better protected if full and open communication by the
31 client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of
32 life and physical integrity and permits disclosure reasonably necessary to prevent reasonably
33 certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or
34 debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is
35 reasonably certain to occur if it will be suffered imminently or if there is a present and
36 substantial threat that a person will suffer such harm at a later date if the lawyer fails to take
37 action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally
38 discharged toxic waste into a town's water supply may reveal this information to the authorities
39 if there is a present and substantial risk that a person who drinks the water will contract a life-
40 threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat
41 or reduce the number of victims.

42 [10] Several situations must be distinguished.
43

44 [11] First, the lawyer may not counsel or assist a client in conduct that is criminal or

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

5 [12] Second, the lawyer may have been innocently involved in past conduct by the
6 client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d),
7 because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct
8 is of that character.
9

10 [13] Third, the lawyer may learn that a client intends prospective conduct that is
11 criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph
12 (b)(1), the lawyer has professional discretion to reveal information in order to prevent such
13 consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily
14 injury which the lawyer reasonably believes is intended by a client. It is very difficult for a
15 lawyer to "know" when such a heinous purpose will actually be carried out, for the client may
16 have a change of mind.
17

18 [14] The lawyer's exercise of discretion requires consideration of such factors as the
19 nature of the lawyer's relationship with the client and with those who might be injured by the
20 client, the lawyer's own involvement in the transaction and factors that may extenuate the
21 conduct in question. Where practical, the lawyer should seek to persuade the client to take
22 suitable action. In any case, a disclosure adverse to the client's interest should be no greater than
23 the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take
24 preventive action permitted by paragraph (b)(1) does not violate this Rule.
25

26 **Withdrawal**

27
28 [15] If the lawyer's services will be used by the client in materially furthering a course
29 of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).
30

31 [16] After withdrawal the lawyer is required to refrain from making disclosure of the
32 client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b)
33 nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer
34 may also withdraw or disaffirm any opinion, document, affirmation, or the like.
35

36 [17] [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that enables
37 the lawyer to reveal information to the extent necessary to prevent the client from committing a
38 crime or fraud that is likely to result in substantial injury to the financial or property interests of
39 another and in furtherance of which the client has used or is using the lawyer's services. Such a
40 serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule.
41 The client can, of course, prevent such disclosure by refraining from the wrongful conduct.
42 Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the
43 lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent.
44 See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw

1 from the representation of the client in such circumstances. Where the client is an organization,
2 the lawyer may be in doubt whether contemplated conduct will actually be carried out by the
3 organization. Where necessary to guide conduct in connection with this Rule, the lawyer may
4 make inquiry within the organization as indicated in Rule 1.13(b).
5

6 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the
7 client's crime or fraud until after it has been consummated and substantial loss has been suffered
8 by the victim. Although the client no longer has the option of preventing disclosure by refraining
9 from the wrongful conduct, there will be situations in which the loss suffered by the affected
10 person can be rectified or mitigated. In such situations, the lawyer may disclose information
11 relating to the representation to the extent necessary to enable the affected persons to attempt to
12 recoup their losses.
13

14 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
15 confidential legal advice about the lawyer's personal responsibility to comply with these Rules.
16 In most situations, disclosing information to secure such advice will be impliedly authorized for
17 the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized,
18 paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance
19 with the Rules of Professional Conduct.
20

21 **Dispute Concerning a Lawyer's Conduct**

22

23 ~~[18] [10]~~ Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
24 client's conduct or other misconduct of the lawyer involving representation of the client, the
25 lawyer may respond to the extent the lawyer reasonably believes necessary to establish a
26 defense. The same is true with respect to a claim involving the conduct or representation of a
27 former client. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding
28 and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong
29 alleged by a third person; for example, a person claiming to have been defrauded by the lawyer
30 and client acting together. The lawyer's right to respond arises when an assertion of such
31 complicity has been made. Paragraph (b)(2)(5) does not require the lawyer to await the
32 commencement of an action or proceeding that charges such complicity, so that the defense may
33 be established by responding directly to a third party who has made such an assertion. The right
34 to defend, of course, applies where a proceeding has been commenced. ~~Where practicable and~~
35 ~~not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client~~
36 ~~of the third party's assertion and request that the client respond appropriately. In any event,~~
37 ~~disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate~~
38 ~~innocence, the disclosure should be made in a manner which limits access to the information to~~
39 ~~the tribunal or other persons having a need to know it, and appropriate protective orders or other~~
40 ~~arrangements should be sought by the lawyer to the fullest extent practicable.~~
41

42 ~~[19] [11]~~ If the lawyer is charged with wrongdoing in which the client's conduct is
43 implicated, the rule of confidentiality should not prevent the lawyer from defending against the
44 charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and

1 can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong
2 alleged by a third person; for example, a person claiming to have been defrauded by the lawyer
3 and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2)(5) to prove
4 the services rendered in an action to collect it. This aspect of the Rule expresses the principle
5 that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.
6 As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure
7 of information relating to a representation, to limit disclosure to those having the need to know
8 it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.
9

10 [12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes
11 the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the
12 lawyer should first seek to persuade the client to take suitable action. In any case, a disclosure
13 adverse to the client's interest should be no greater than the lawyer reasonably believes necessary
14 to accomplish the purpose. If the disclosure will be made in connection with a judicial
15 proceeding, the disclosure should be made in a manner that limits access to the information to
16 the tribunal or other persons having a need to know it and appropriate protective orders or other
17 arrangements should be sought by the lawyer to the fullest extent practicable.
18

19 [13] Paragraph (b) permits but does not require the disclosure of information relating
20 to a client's representation to accomplish the purposes specified in paragraphs (b)(1) - (5). In
21 exercising the discretion conferred by this Rule, the lawyer may consider such factors as the
22 nature of the lawyer's relationship with the client and with those who might be injured by the
23 client, the lawyer's own involvement in the transaction, and factors that may extenuate the
24 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not
25 violate this Rule.
26

27 **Disclosure Otherwise Required or Authorized**

28
29 [20] The attorney-client privilege is differently defined in various jurisdictions. If a
30 lawyer is called as a witness to give testimony concerning a client, absent waiver by the client,
31 paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must
32 comply with the final orders of a court or other tribunal of competent jurisdiction requiring the
33 lawyer to give information about the client.
34

35 [21] [14] The Rules of Professional Conduct in various circumstances permit or require a
36 lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3, and 4.1. In
37 addition to these provisions, a lawyer may be obligated or permitted by other provisions of law
38 to give information about a client. Whether another provision of law supersedes Rule 1.6 is a
39 matter of interpretation beyond the scope of these Rules, but a presumption should exist against
40 such a supersession.
41

42 [15] A lawyer must also comply with lawful orders of a tribunal, an administrative or
43 executive agency, or a legislative body. If a lawyer is called as a witness to give testimony
44 concerning a client or is otherwise ordered to reveal information relating to the client's

1 representation, the lawyer must, absent informed consent of the client to do otherwise, assert on
2 behalf of the client all non-frivolous claims that the information sought is protected against
3 disclosure by the attorney-client privilege or other applicable law. In the event of an adverse
4 ruling, the lawyer should consult with the client about the possibility of appeal. See Rule 1.4.
5 Unless an appeal is taken, the lawyer must comply with the order.

6 7 **Acting Competently to Preserve Confidentiality**

8
9 [16] A lawyer must act competently to safeguard information relating to the
10 representation of a client against inadvertent or unauthorized disclosure by the lawyer or by
11 other persons who are participating in the representation of the client or who are subject to the
12 lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

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

25 26 **Former Clients**

27
28 [22] [18] The duty of confidentiality continues after the client-lawyer relationship has
29 terminated. Thus, Rule 1.6(a) prohibits the disclosure of information relating to the
30 representation of a former client. See Rule 1.9(c) for the prohibition against using such
31 information to the disadvantage of the former client.