

April 17-18, 1998

**PROPOSED RULE 1.6 - 2d Draft**

Protecting Confidentiality of Information Relating to the Representation of a Client

(a) Before or within a reasonable time after agreeing to represent a client in a matter, a lawyer who has not previously represented the client shall consult with the client about the lawyer's obligations to protect information relating to the representation and the circumstances in which the lawyer will be required or permitted to reveal or use such information to the disadvantage of client.

(b) (a) Unless the client gives informed consent, or the disclosure or use is permitted by paragraph (c) or required by paragraph (d), a lawyer shall not

(1) reveal information relating to the representation of a client, except for disclosures that are impliedly authorized in order to carry out the representation; or

(2) use such information relating to representation of a client to the disadvantage of a client; or

(3) use such information for the advantage of the lawyer or another person, unless the information is generally known.

(c) Unless prohibited by other law, a lawyer may reveal information relating to the representation of a client as permitted by Rules \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ or if and when, but only to the extent that, the lawyer reasonably believes, after reasonable inquiry, that the disclosure of such information is necessary

(1) to prevent the client from committing a criminal act, loss of life, or serious illness or bodily harm, or criminal sexual abuse, that the lawyer believes, after reasonable inquiry, is likely to result in imminent death or substantial bodily harm be suffered by a person; or

(2) to prevent or rectify what the lawyer [knows] [has reason to believe] to be the wrongful imprisonment of a person for a felony; or

(3) to prevent substantial injury to the financial or property interests of a person [or a class of similarly situated persons] if the lawyer reasonably believes, after reasonable inquiry, that there is a significant likelihood that such injury will result from past, continuing, or intended conduct of the client [or a third person] that the lawyer knows is criminal or fraudulent.

(4) to rectify or mitigate substantial injury to the financial or property interests of a person [or a class of similarly situated persons] that the lawyer [knows] [has reason to believe] has been caused by the criminal or fraudulent conduct of the client in a matter in which [the lawyer represented the client] [the lawyer's services were utilized by the client in furtherance of the crime or fraud]; or

(5) (B)(2) to establish

- (i) a reasonable claim or defense on behalf of the lawyer, or the lawyer's firm, in a controversy between the client and the lawyer or the lawyer's firm; or
- (ii) a reasonable defense to a formally instituted criminal charge or civil claim against the lawyer, or another person participating in the representation of the client, that is based upon conduct in which the client was involved; or
- (iii) a reasonable defense to a complaint against the lawyer, or another lawyer participating in the representation of the client, that is submitted to or instituted by a disciplinary authority and relates to the representation of the client; or
- (iv) a reasonable response to a specific allegation that is made against the lawyer, or another person participating in the representation of the client, in any other proceeding and relates to the representation of the client.

(6) to enable the lawyer to

- (i) respond candidly and completely to a request for information about the lawyer's representation of a former client in a matter if the request comes from from another lawyer who is currently representing the former client in the same or a substantially related matter; or
- (ii) secure confidential legal advice from another lawyer about the lawyer's compliance with these Rules or other law in connection with the representation of the client; or
- (iii) identify conflicts of interest that may arise because of the lawyer's current or proposed association with a law firm; or
- (iv) advise persons with whom the lawyer has previously communicated on behalf of the client that the lawyer is no longer representing the client; or
- (v) disaffirm a communication the lawyer has previously made on behalf of the client that the lawyer [knows][has reason to believe] is false or misleading.

(d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to comply with Rules \_\_\_\_\_; and

(2) to comply with an order of a tribunal, administrative agency or a legislative body requiring

disclosure but only to the extent finally ordered to do so by the tribunal, agency or body after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal or agency is protected against disclosure by the attorney-client privilege or other applicable law [and has exhausted the client's rights to appeal adverse rulings on the client's claims]; and

(3) to comply with other law, provided, however, that a lawyer may refrain from making such disclosure if the lawyer [has a non-frivolous reason to believe][has reason to believe], after reasonable inquiry, that the law in question does not legally obligate the lawyer to make the disclosure in question; and

(e) Prior to disclosing such information as permitted by paragraph (c), or as required by paragraph (d), a lawyer shall, if reasonably feasible,

(1) advise the client to take such action, or refrain from taking such action, as the lawyer reasonably believes is necessary to accomplish the purpose for which the lawyer would otherwise be permitted to disclose information relating to the representation of the client; and

(2) consult with the client about the consequences of the client's failure to do so, including whether and to what extent the lawyer is required or permitted by these Rules to disclose or use information relating to the representation to prevent or rectify the harmful consequences of the act; and

(3) provide the client with reasonable advance notice of the lawyer's determination to make the disclosure in question.

(f) A lawyer shall act with reasonable care to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client and who are subject to the lawyer's supervision, [or by any other person to whom the lawyer has provided such information.]

## Comments

### Guidelines for Interpretation and Application

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

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

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

[1] 4 A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer will not reveal information relating to the representation and also will not use such information to the disadvantage of the client or for the improper advantage of the lawyer or a third person. This contributes to the trust and confidence that is a hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter so that the lawyer will have all the information the lawyer needs to effectively represent the client and, if necessary, to advise the client to refrain from wrongful conduct. This protection also recognizes that the right to prevent and control the dissemination of information about one's affairs is an important individual right that a person in need of legal representation should not be required to surrender just because he or she must share private information with the lawyer in order to secure effective legal assistance. The protections afforded the client by this Rule, then, demonstrate respect for the autonomy of the client as an individual. In connection with the use by the lawyer of information related to the representation of a client, this rule also reinforces the lawyer's duties to be loyal to the client and to respect the client's proprietary interests in such information.

### **Information Related to the Representation of a Client**

[2] This Rule governs the disclosure or use by a lawyer of information relating to the representation of a client during the course of the lawyer's representation of the client. See Rule 1.0 for the duties a lawyer owes to a prospective client. See Rule 1.9 for the lawyer's duties to former clients.

[3] "Information relating to the representation of a client" includes any information related to the subject matter of the representation without regard to its source and the timing of its acquisition by the lawyer. Information relating to the representation of a client also includes any information about the client or the client's affairs provided to the lawyer by the client or that the lawyer acquires during or by virtue of the lawyer's representation of the client. If a lawyer possesses information about a client that is unrelated to the matter in which the lawyer is representing the client, was acquired from sources other than the client prior to the lawyer's representation of the client, and was not otherwise acquired by virtue of the representation, such information would not be protected by this Rule.

[4] In most cases it will be easy for a lawyer who is representing a client to determine whether information about the client is protected by this Rule. If the client is the source of the information, for example, it is protected whether or not it relates to the subject matter of the representation. Similarly, if the information is the result of the lawyer's efforts to marshal

information needed for the representation of the client, it is protected even though some of the information acquired might not relate to the subject matter of the representation. With respect to information about the client that is neither provided to the lawyer by the client nor acquired by the lawyer as a result of the lawyer's representation of client, however, the breadth of the lawyer's duty to protect such information will depend on the scope of the lawyer's representation of the client as determined by the lawyer and client in accordance with Rule 1.2. In some cases the representation will be quite limited, such as the representation of a seller in a specific real estate transaction or a plaintiff in a specific lawsuit. In other cases, the scope of the lawyer's representation of a client may embrace all legal matters arising in the course of the client's business. The lawyer handling a single sale of real estate for a client, for example, will have to comply with this Rule to protect information that relates to that transaction, that was provided to the lawyer by the client, or that was gathered through the initiative of the lawyer. But if a third person who did not know the lawyer was representing the client informed the lawyer that the client was engaged in another unrelated transaction, such information would not be information related to the lawyer's representation of the client and would not be protected by this Rule. If, on the other hand, the same person alerted the lawyer to a defect in the title to the property that was the subject matter of the lawyer's representation, the information about the title defect would be protected by this Rule because it relates to the subject matter of the representation. The lawyer with a general retainer, however, will have to comply with this Rule with respect to any information the lawyer receives about the client. Similarly, a lawyer employed in a corporation's legal department must treat all information about the organization as protected by this Rule.

5. The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) 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. The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[5] Information related to the representation of a client includes but is not limited to information that is protected against discovery by the attorney-client privilege or the work product rule. Although not protected by either the attorney-client privilege or the work-product rule, for example, an unsolicited letter sent to a lawyer by a third person is protected by this Rule if the information in the letter relates to the lawyer's representation of a client. Similarly, the client's identity, and information about fee arrangements between the lawyer and client (or a third person) are protected as information relating to the representation of the client.

The same is true for what the lawyer may observe while representing the client. Information related to the representation may consist of facts, opinions about facts and law, and information about the law, as well as communications about such facts, opinions, and information.

[6] This Rule, unlike the attorney-client privilege, does not differentiate between information provided to the lawyer in his or her capacity as a lawyer rather than in some other capacity in which the lawyer may simultaneously be serving the client. If the information is related to a matter in which the lawyer is representing an organization as a lawyer or is provided to the lawyer by an organizational constituent during the lawyer's legal representation of the organization, it does not matter for purposes of this Rule that the lawyer is provided or acquires the information in the lawyer's dual capacity as a director or non-legal officer of the organization. Because the availability of the attorney-client privilege may depend on whether the client is communicating to the lawyer as lawyer or in some other capacity, a lawyer simultaneously serving a client both as a lawyer and in some other capacity must act reasonably to prevent inadvertent loss of the attorney-client privilege because of uncertainty about the role the lawyer was playing at the time the information in question was acquired.

[7] Organizational clients, including governmental agencies, are entitled to the protection of the Rule. When an organizational constituent communicates with the organization's lawyer about a matter affecting the organization, the communication is protected by Rule 1.6 as information related to the representation of the organizational client. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. The lawyer's duty to protect this information, however, is a duty owed exclusively to the organizational client. With respect to disclosure of such information to persons not associated with the organization, or the use of such information to the disadvantage of the organization or the advantage of persons not associated with the organization, the lawyer must secure the informed consent of a duly authorized organizational constituent. See Rule 1.13 for the lawyer's duties to the organizational client with respect to disclosure within the organization of information relating to the organization's representation.

[8] If a lawyer is representing multiple clients in a matter in accordance with the requirements of Rule 1.7, each client is, in the absence of informed consent to the contrary, entitled to the full protection of this Rule. Information related to the joint representation will be deemed related to the representation of each client even if the source of the information was another client. See Comment [17] for the extent to which the lawyer is impliedly authorized to share information provided by one of the jointly represented clients with the other clients. See Comment [ ] to Rule 1.7 and Rule 2.2 for guidance with respect to the resolution of conflicts of interest that may arise if one jointly-represented client refuses to permit the lawyer to disclose to the other jointly-represented clients information relating to the joint representation that the other clients need to know in order make informed decisions about the representation. Unless permitted or required by this Rule to disclose information without consent of the clients, a lawyer who is jointly representing multiple clients or serving multiple clients as an intermediary

must consult with and obtain the consent of each of the clients before disclosing protected information to third persons.

[9] Occasionally, in connection with the representation of a client, the lawyer will be provided information by a third person on the express or implied condition that, absent the informed consent of the third person, such information will not be disclosed by the lawyer, used to the disadvantage of the third person, or used for the advantage of persons other than the lawyer's client. This is common, for example, in connection with a joint defense consortium in which several clients, each represented by separate counsel, agree to share information in connection with a matter in which they have a common interest. Even though the information may be about the third person, such information is information related to the representation of the client and the client is entitled to the full protection of this Rule with respect to the lawyer's disclosure or use of the information. [See Rule [4.5] for the duties of the lawyer to the person who provided the information to the lawyer.]

[10] [Alternative A] A client may be represented by a law firm and in the course of that representation some lawyers associated with the law firm will acquire information related to the client's representation. This knowledge is not imputed to other lawyers associated with the law firm. When a client is represented by a law firm, however, all lawyers associated with the firm who know or have reason to believe that the firm is representing the client and who actually possess information relating to the representation of that client must comply with this Rule even though they are not participating in the firm's representation of the client. This is because the client's retention of the firm entitles the client to expect loyalty and confidentiality from all persons associated with the firm who know the firm is representing the client. It would not be reasonable, however, for a client to expect that the firm notify all of its lawyers and employees that the firm has undertaken the representation of the client. Indeed many clients might prefer such information not be shared beyond those lawyers who are participating in the client's representation or who need to know of the representation for the purpose of monitoring for conflicts of interest. In rare cases, then, a lawyer associated with a firm who does not know or have reason to believe that the firm is representing a particular client might nonetheless possess information related to the firm's representation of that client. In such a case, the lawyer's disclosure or use of such information without the informed consent of the client would not violate this rule.]

or

[10][Alternative B] A client may be represented by a law firm and in the course of that representation some lawyers associated with the law firm will acquire information related to the client's representation. The knowledge of these lawyers is not imputed to other lawyers associated with the law firm. When a client is represented by a law firm, however, all lawyers associated with the firm who actually possess information relating to the representation of that client must comply with this Rule even though they are not participating in the firm's representation of the client. This is because the client's retention of the firm entitles the client to

expect loyalty and confidentiality from all persons associated with the firm. To guard against inadvertent violations of this rule, lawyers associated with law firms need to know the identity of all clients being represented by the firm, and law firm partners must act reasonably to provide this information to all lawyers associated with firm.]

[11] In some cases, lawyers who are neither partners nor full-time employees of a law firm will enter into a working relationship with the law firm in connection with the representation of one or more of the firm's clients. Such a lawyer or law firm might be a co-counsel in a single matter or be an "of counsel" lawyer who frequently assists in the representation of a significant number of the firm's clients. A law firm may also hire a lawyer to work with them on a temporary basis. These lawyers are, of course, obligated by this rule to protect information relating to the representation of a client in whose representation they are participating. They must also comply with this Rule with respect to any information related to the representation of another client of the firm if they [know that the client is represented by the firm and] have acquired the information by virtue of their relationship with the firm. Lawyers who are not partners or full-time employees of a law firm, however, will not be deemed associated with the firm for the purpose of this Rule if they do not have general access to information about clients of the firm on whose matters they are not working. This would typically be the case when a lawyer works with a law firm as co-counsel or as a temporary lawyer in a single matter. A lawyer who has an "of counsel" relationship with a law firm, on the other hand, will normally be deemed associated with the firm because of the close, ongoing personal relationship that is hallmark of the typical "of counsel relationship." Whether a temporary lawyer will be deemed associated with a firm will depend on the nature of the temporary relationship as it affects the likelihood that the temporary lawyer will have access to information about clients of the firm on whose matters the temporary lawyer is not working. Lack of access to information about firm clients may be established by the utilization of screening procedures that would satisfy the requirements of Rule [ ].

### **Protecting Information Related to the Representation of the Client**

[12] There are three distinct, yet sometimes overlapping, situations in which paragraph (b) requires that a lawyer protect information related to the representation of a client. There is the duty in paragraph (b)(1) not to reveal such information without the informed consent or implied authorization of the client. This duty applies without regard to the effect of the disclosure on client, the lawyer, or third persons. It also applies to statements by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. Using information related to the representation of a client as the basis for a "hypothetical" discussion of a matter, for example, will constitute a disclosure of information related to the representation of the client if there is a reasonable likelihood that the hypothetical would permit detection of the client's identity or the discovery of any other information related to the client's representation that otherwise would not have been discovered. This broad duty not to reveal information related to the representation comports with the client's legitimate expectation that the lawyer will not contribute to the public's

awareness of client affairs without client consent.

[13] Paragraph (b)(2) extends the lawyer's duty to protect information related to the representation of the client to situations in which the lawyer does not reveal such information but silently uses it in a way that disadvantages the client. Such use of the client's information violates the lawyer's duty of loyalty to the client. Learning by virtue of the representation of a client that the client intends to purchase and develop several parcels of land, for example, a lawyer may not seek to purchase one of the parcels in competition with the client. Similarly, in cases in which a lawyer may be permitted by Rule 1.7 to represent two clients who have directly adverse interests in separate matters, the lawyer would be prohibited by paragraph (b)(1) from using information related to the representation of one of the clients to that client's disadvantage in the matter in which the lawyer is representing the opposing party. That the lawyer may be permitted to represent two clients with directly adverse interests does not exempt the lawyer from the duty the lawyer owes to each not to use information relating to their representation to their disadvantage.

[14] In some situations a lawyer may be able to use information related to the representation of a client for the advantage of the lawyer or a third person without any foreseeable disadvantage to the client and without revealing the information to others. Paragraph (b)(3) permits such use without client consent if the information is generally known. Information relating to the representation of a former client is "generally known" if a reasonable lawyer who had not represented the former client and was in need of such information could, without substantial difficulty or expense, acquire the information from sources other than the former client. If the information related to the representation was gathered by the lawyer from a variety of little known sources at considerable expense to the client, the lawyer cannot regard such information as generally known. Similarly if a reasonable lawyer could make a non-frivolous argument that the information is protected by the attorney-client privilege or the work-product rule, the lawyer must treat such information as information that is not generally known.

If, however, a lawyer possesses valuable information relating to the representation that is not generally known wishes to use such information for the lawyer's advantage, the lawyer must first obtain the informed consent of the client. This would be the case, for example, if a lawyer who was representing the client in connection with a shopping center development used information about the client's plans that was not generally known to purchase outparcels of land that were not included in the client's development plans but were likely to increase in value once the plans for the development were announced. Lawyers must, of course, refrain from buying or selling publicly-traded securities based on non-public information related to the representation of a client. Such "insider trading" is criminal conduct that reflects adversely on the lawyer's fitness to practice law. See Rule 8.4 (b).

### **Informed Consent and Impliedly Authorized Disclosures**

[15] A client's consent to the disclosure or use of information protected by this rule

must be informed and secured by the lawyer in advance of the disclosure or use in question. See the definition of “informed consent” in Rule [ ]. For a consent to the disclosure of information relating to the representation of a client to be informed, the client must be aware of the effect of the disclosure of such information on the ability of the client to invoke the attorney-client privilege and work-product rule in subsequent discovery proceedings. The lawyer must also advise the client of any material respect in which the lawyer’s personal interests would be furthered by the disclosure or use of the information in question. A lawyer may seek advance consent from a client to a possible future use or disclosure of information relating to the lawyer’s representation the client, but such consent will not be informed unless the circumstances present at the time the lawyer subsequently discloses or uses the information were specifically within the contemplation at the client at the time the client’s consent was obtained. A lawyer may not seek a client’s consent to a disclosure or use of information related to the client’s representation if so doing would be inconsistent with the lawyer’s duty to provide competent representation to the client. See rule 1.1.

[16] (5): 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. If a client has agreed that the lawyer will be paid by a third person, the client will have impliedly authorized the lawyer to disclose to the fee-payer such information relating to the representation as is necessary for the lawyer to reasonably account for the services rendered or costs incurred while representing the client. In the absence of instructions to the contrary, a lawyer jointly representing multiple clients in a matter of common interest has implied authority to share information relating to the representation provided to the lawyer by one of the jointly represented clients with the other jointly represented clients. Implied authority, however, does not extend to disclosures that present a significant risk that the client might be materially disadvantaged by the disclosure in question. Such disclosures require the informed consent of the client. See Rule 1.14 for the extent to which a lawyer who is representing an impaired client is impliedly authorized to make disclosures the lawyer reasonably believes necessary to protect the client’s interests.

[17] 6: Lawyers associated in a firm may, in the course of the firm’s practice, are impliedly authorized to disclose to each other information relating to a client of the firm to the extent necessary for the representation of the client, unless the client has instructed that particular information be confined to specified lawyers. This implied authorization extends to disclosures on a need-to-know basis to lawyers who are not associated with the firm but who are participating in the representation of the client in the matter either as a co-counsel who has been associated in the matter with consent of the client or as a temporary lawyer who has been assigned to the matter by the lawyer responsible for the matter. See comment [ ] to Rule [ ] with respect to the need for the lawyer to secure client consent prior to permitting a temporary lawyer to participate in the client’s representation. A lawyer who is representing a client who has agreed to cooperate with a person who is represented by another lawyer in a matter in

which they have a common interest is also impliedly authorized to disclose to the other lawyer such information as is appropriate to accomplish the common objectives of the clients. .