

AMERICAN BAR ASSOCIATION
TASK FORCE ON CORPORATE RESPONSIBILITY
SECTION OF BUSINESS LAW
SECTION OF TAXATION
SECTION OF TORT TRIAL AND INSURANCE PRACTICE
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
YOUNG LAWYERS DIVISION
SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW
TASK FORCE ON IMPLEMENTATION OF SECTION 307 OF
SARBANES-OXLEY ACT OF 2002
LAW PRACTICE MANAGEMENT SECTION
SECTION OF FAMILY LAW

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, that Rule 1.6 of the Model Rules of Professional Conduct and its
2 Comment be amended as follows:

3
4 **RULE 1.6: CONFIDENTIALITY OF INFORMATION**¹
5

- 6 (a) A lawyer shall not reveal information relating to the representation of a
7 client unless the client gives informed consent, the disclosure is impliedly
8 authorized in order to carry out the representation or the disclosure is
9 permitted by paragraph (b).
10
- 11 (b) A lawyer may reveal information relating to the representation of a client to
12 the extent the lawyer reasonably believes necessary:
13
- 14 (1) to prevent reasonably certain death or substantial bodily harm;
15
- 16 (2) to prevent the client from committing a crime or
17 fraud that is reasonably certain to result in
18 substantial injury to the financial interests or
19 property of another and in furtherance of which the
20 client has used or is using the lawyer's services;
21

¹ Proposed additions are underlined; stricken text indicates proposed deletions.

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

27 (42) to secure legal advice about the lawyer's compliance with
28 these Rules;

29
30 (53) to establish a claim or defense on behalf of the lawyer in a
31 controversy between the lawyer and the client, to establish a defense
32 to a criminal charge or civil claim against the lawyer based upon
33 conduct in which the client was involved, or to respond to allegations in
34 any proceeding concerning the lawyer's representation of the client; or
35

36 (64) to comply with other law or a court order.
37

38 **Commentary**

39
40 [1] This Rule governs the disclosure by a lawyer of information relating to the
41 representation of a client during the lawyer's representation of the client. See Rule 1.18
42 for the lawyer's duties with respect to information provided to the lawyer by a
43 prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating
44 to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for
45 the lawyer's duties with respect to the use of such information to the disadvantage of
46 clients and former clients.
47

48 [2] A fundamental principle in the client-lawyer relationship is that, in the
49 absence of the client's informed consent, the lawyer must not reveal information relating
50 to the representation. See Rule 1.0(e) for the definition of informed consent. This
51 contributes to the trust that is the hallmark of the client-lawyer relationship. The client is
52 thereby encouraged to seek legal assistance and to communicate fully and frankly with
53 the lawyer even as to embarrassing or legally damaging subject matter. The lawyer
54 needs this information to represent the client effectively and, if necessary, to advise the
55 client to refrain from wrongful conduct. Almost without exception, clients come to
56 lawyers in order to determine their rights and what is, in the complex of laws and
57 regulations, deemed to be legal and correct. Based upon experience, lawyers know that
58 almost all clients follow the advice given, and the law is upheld.
59

60 [3] The principle of client-lawyer confidentiality is given effect by related bodies
61 of law: the attorney-client privilege, the work product doctrine and the rule of
62 confidentiality established in professional ethics. The attorney-client privilege and work-
63 product doctrine apply in judicial and other proceedings in which a lawyer may be called
64 as a witness or otherwise required to produce evidence concerning a client. The rule of
65 client-lawyer confidentiality applies in situations other than those where evidence is
66 sought from the lawyer through compulsion of law. The confidentiality rule, for example,
67 applies not only to matters communicated in confidence by the client but also to all
68 information relating to the representation, whatever its source. A lawyer may not
69 disclose such information except as authorized or required by the Rules of Professional
70 Conduct or other law. See also Scope.
71

72 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
73 representation of a client. This prohibition also applies to disclosures by a lawyer that do
74 not in themselves reveal protected information but could reasonably lead to the
75 discovery of such information by a third person. A lawyer's use of a hypothetical to
76 discuss issues relating to the representation is permissible so long as there is no
77 reasonable likelihood that the listener will be able to ascertain the identity of the client or
78 the situation involved.

79 80 **Authorized Disclosure**

81
82 [5] Except to the extent that the client's instructions or special circumstances limit
83 that authority, a lawyer is impliedly authorized to make disclosures about a client
84 when appropriate in carrying out the representation. In some situations, for example, a
85 lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to
86 make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm
87 may, in the course of the firm's practice, disclose to each other information relating to a
88 client of the firm, unless the client has instructed that particular information be confined
89 to specified lawyers.

90 91 **Disclosure Adverse to Client**

92
93 [6] Although the public interest is usually best served by a strict rule requiring
94 lawyers to preserve the confidentiality of information relating to the representation of
95 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)
96 recognizes the overriding value of life and physical integrity and permits disclosure
97 reasonably necessary to prevent reasonably certain death or substantial bodily harm.
98 Such harm is reasonably certain to occur if it will be suffered imminently or if there is a
99 present and substantial threat that a person will suffer such harm at a later date if the
100 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
101 that a client has accidentally discharged toxic waste into a town's water supply may
102 reveal this information to the authorities if there is a present and substantial risk that a
103 person who drinks the water will contract a life-threatening or debilitating disease and
104 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of
105 victims.

106
107 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that
108 permits the lawyer to reveal information to the extent necessary to enable affected
109 persons or appropriate authorities to prevent the client from committing a crime or fraud,
110 as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the
111 financial or property interests of another and in furtherance of which the client has used
112 or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship
113 by the client forfeits the protection of this Rule. The client can, of course, prevent such
114 disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not
115 require the lawyer to reveal the client's misconduct, the lawyer may not counsel or
116 assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d).
117 See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the

118 representation of the client in such circumstances, and Rule 1.13(c) which permits the
119 lawyer, where the client is an organization, to reveal information relating to the
120 representation in limited circumstances.

121
122 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn
123 of the client's crime or fraud until after it has been consummated. Although the client no
124 longer has the option of preventing disclosure by refraining from the wrongful conduct,
125 there will be situations in which the loss suffered by the affected person can be
126 prevented, rectified or mitigated. In such situations, the lawyer may disclose information
127 relating to the representation to the extent necessary to enable the affected persons to
128 prevent or mitigate reasonably certain losses or to attempt to recoup their losses.
129 Paragraph (b)(3) does not apply when a person who has committed a crime or fraud
130 thereafter employs a lawyer for representation concerning that offense.

131
132 [97] A lawyer's confidentiality obligations do not preclude a lawyer from securing
133 confidential legal advice about the lawyer's personal responsibility to comply with these
134 Rules. In most situations, disclosing information to secure such advice will be impliedly
135 authorized for the lawyer to carry out the representation. Even when the disclosure is
136 not impliedly authorized, paragraph (b)(2) permits such disclosure because of the
137 importance of a lawyer's compliance with the Rules of Professional Conduct.

138
139 [108] Where a legal claim or disciplinary charge alleges complicity of the lawyer
140 in a client's conduct or other misconduct of the lawyer involving representation of the
141 client, the lawyer may respond to the extent the lawyer reasonably believes necessary
142 to establish a defense. The same is true with respect to a claim involving the conduct or
143 representation of a former client. Such a charge can arise in a civil, criminal, disciplinary
144 or other proceeding and can be based on a wrong allegedly committed by the lawyer
145 against the client or on a wrong alleged by a third person, for example, a person
146 claiming to have been defrauded by the lawyer and client acting together. The lawyer's
147 right to respond arises when an assertion of such complicity has been made. Paragraph
148 (b)(53) does not require the lawyer to await the commencement of an action or
149 proceeding that charges such complicity, so that the defense may be established by
150 responding directly to a third party who has made such an assertion. The right to defend
151 also applies, of course, where a proceeding has been commenced.

152
153 [119] A lawyer entitled to a fee is permitted by paragraph (b)(53) to prove the
154 services rendered in an action to collect it. This aspect of the rule expresses the
155 principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment
156 of the fiduciary.

157
158 [1240] Other law may require that a lawyer disclose information about a client.
159 Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of
160 these Rules. When disclosure of information relating to the representation appears to be
161 required by other law, the lawyer must discuss the matter with the client to the extent
162 required by Rule 1.4. If, however, the other law supersedes this Rule and requires

163 disclosure, paragraph (b)(64) permits the lawyer to make such disclosures as are
164 necessary to comply with the law.

165
166 [1311] A lawyer may be ordered to reveal information relating to the
167 representation of a client by a court or by another tribunal or governmental entity
168 claiming authority pursuant to other law to compel the disclosure. Absent informed
169 consent of the client to do otherwise, the lawyer should assert on behalf of the client all
170 nonfrivolous claims that the order is not authorized by other law or that the information
171 sought is protected against disclosure by the attorney-client privilege or other applicable
172 law. In the event of an adverse ruling, the lawyer must consult with the client about the
173 possibility of appeal to the extent required by Rule 1.4. Unless review is sought,
174 however, paragraph (b)(64) permits the lawyer to comply with the court's order.

175
176 [1412] Paragraph (b) permits disclosure only to the extent the lawyer reasonably
177 believes the disclosure is necessary to accomplish one of the purposes specified.
178 Where practicable, the lawyer should first seek to persuade the client to take suitable
179 action to obviate the need for disclosure. In any case, a disclosure adverse to the
180 client's interest should be no greater than the lawyer reasonably believes necessary to
181 accomplish the purpose. If the disclosure will be made in connection with a judicial
182 proceeding, the disclosure should be made in a manner that limits access to the
183 information to the tribunal or other persons having a need to know it and appropriate
184 protective orders or other arrangements should be sought by the lawyer to the fullest
185 extent practicable.

186
187 [1513] Paragraph (b) permits but does not require the disclosure of information
188 relating to a client's representation to accomplish the purposes specified in paragraphs
189 (b)(1) through (b)(64). In exercising the discretion conferred by this Rule, the lawyer
190 may consider such factors as the nature of the lawyer's relationship with the client and
191 with those who might be injured by the client, the lawyer's own involvement in the
192 transaction and factors that may extenuate the conduct in question. A lawyer's decision
193 not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may
194 be required, however, by other Rules. Some Rules require disclosure only if such
195 disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3.
196 Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
197 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

198 **Withdrawal**

199
200
201 ~~[14] If the lawyer's services will be used by the client in materially furthering a~~
202 ~~course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule~~
203 ~~1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of~~
204 ~~the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule~~
205 ~~nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of~~
206 ~~withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document,~~
207 ~~affirmation, or the like. Where the client is an organization, the lawyer may be in doubt~~
208 ~~whether contemplated conduct will actually be carried out by the organization. Where~~

209 ~~necessary to guide conduct in connection with this Rule, the lawyer may make inquiry~~
210 ~~within the organization as indicated in Rule 1.13(b).~~

211

212 **Acting Competently to Preserve Confidentiality**

213

214 [1645] A lawyer must act competently to safeguard information relating to the
215 representation of a client against inadvertent or unauthorized disclosure by the lawyer
216 or other persons who are participating in the representation of the client or who are
217 subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

218

219 [1746] When transmitting a communication that includes information relating to
220 the representation of a client, the lawyer must take reasonable precautions to prevent
221 the information from coming into the hands of unintended recipients. This duty,
222 however, does not require that the lawyer use special security measures if the method
223 of communication affords a reasonable expectation of privacy. Special circumstances,
224 however, may warrant special precautions. Factors to be considered in determining the
225 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of
226 the information and the extent to which the privacy of the communication is protected by
227 law or by a confidentiality agreement. A client may require the lawyer to implement
228 special security measures not required by this Rule or may give informed consent to the
229 use of a means of communication that would otherwise be prohibited by this Rule.

230

231 **Former Client**

232

233 [1847] The duty of confidentiality continues after the client-lawyer relationship has
234 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
235 information to the disadvantage of the former client.

236