

UNITED STATES DEPARTMENT OF LABOR  
ADMINISTRATIVE REVIEW BOARD

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JACK R. T. JORDAN ,  
Complainant,  
v.

ARB Case No. 06-105  
ALJ CASE No. 2006-SOX-0041

SPRINT NEXTEL CORPORATION  
Respondent.

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REDACTED BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,  
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## Introduction

Pursuant to 29 C.F.R. 1980.108(b), the Securities and Exchange Commission ("SEC" or "Commission") submits this brief as *amicus curiae*, to address the issue of whether an attorney for a public company who reports evidence of a material violation of the federal securities laws "up the ladder" within that company, as required by the Commission's rules promulgated under Section 307 of the Sarbanes-Oxley Act ("SOX"), may introduce into evidence that report and any responses to it, when they are material to establishing a claim of illegal retaliation under SOX Section 806. The Commission respectfully urges the Board to conclude that an attorney-whistleblower may introduce such evidence because, among other reasons, it is permitted by Commission rules promulgated pursuant to SOX.

## INTEREST OF THE SECURITIES AND EXCHANGE COMMISSION

The Commission is the agency responsible for the administration and enforcement of the federal securities laws, including those provisions establishing the registration, disclosure and periodic-reporting obligations of public companies. See 15 U.S.C. 77g; 15 U.S.C. 78m(a), (b). Attorneys employed by public companies play a significant role in assisting those companies in complying with these important obligations, which are designed to protect investors and the capital markets. As the Commission has observed, "[a]ttorneys [] play an important and

expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws."<sup>1/</sup> The Commission has a strong interest in ensuring that issuers do not retaliate against attorney-whistleblowers who report to management evidence of material violations of the securities laws.

Congress, in Section 307 of SOX, directed the Commission to promulgate "minimum standards of professional conduct for attorneys appearing and practicing before the agency" in representing issuers, "including a rule" requiring them to report material violations "up the ladder" within the issuer, so long as those rules are "in the public interest and for the protection of investors."<sup>2/</sup> In response to this Congressional mandate, the

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<sup>1/</sup> See Securities and Exchange Commission, Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6325 (Feb. 6, 2003); see also Cong. Rec. S6551 (Jul. 10, 2002) (remarks of Sen. Edwards) ("wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder"); Cong. Rec. S6555 (Jul. 10, 2002) (remarks of Sen. Enzi) ("attorneys are hired to aid the corporation and its accountants in adhering to Federal securities law"); Cong. Rec. S6556 (Jul. 10, 2002) (remarks of Sen. Corzine) ("The bottom line is this. Lawyers can and should play an important role in preventing and addressing corporate fraud."); "The Preliminary Report of the American Bar Association Task Force on Corporate Responsibility," (Jul. 16, 2002) ("our system of corporate governance has long relied upon the active oversight and advice of independent participants in the corporate governance process, such as . . . outside counsel.").

<sup>2/</sup> 15 U.S.C. 7245.

Commission promulgated its Part 205 Attorney-Conduct Rules,<sup>3/</sup> which require an attorney representing an issuer before the Commission to report material violations "up the ladder" within that issuer. Specifically, Section 205.3(b) of the Attorney-Conduct Rules requires an attorney to report evidence of a material violation (to make a "Part 205 report")<sup>4/</sup> first to the issuer's chief legal officer. If the attorney does not receive an "appropriate response"<sup>5/</sup> from the chief legal officer, the attorney must continue reporting up the chain of command, even to the board of directors, until an appropriate response is received.<sup>6/</sup>

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<sup>3/</sup> 17 C.F.R. Part 205. See 68 Fed. Reg. 6296 et seq.

<sup>4/</sup> The Attorney-Conduct Rules define "material violation" to encompass a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation. 17 C.F.R. 205.2(i).

<sup>5/</sup> An "appropriate response" is "a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

- (1) ... no material violation ... has occurred, is ongoing, or is about to occur;
- (2) ... the issuer ... has adopted appropriate remedial measures ...; or
- (3) ... the issuer ... has retained or directed an attorney to review the reported evidence of a material violation."

17 C.F.R. 205.2(b).

<sup>6/</sup> 17 C.F.R. 205.3(b). An alternate "reporting up" process is available where the issuer has established a qualified legal compliance committee ("QLCC"). See 17 C.F.R. 205.3(c). In that case, an attorney who reports evidence of a material violation to the QLCC satisfies the attorney's reporting obligation and is not required to assess whether the

When an attorney-whistleblower makes a Part 205 report, and believes he or she has been retaliated against for having made that report, one recourse is to file a claim against his or her employer under SOX Section 806, which prohibits an issuer from retaliating against an employee who reports potential material violations of the federal securities laws.

A central issue in a Section 806 whistleblower proceeding brought by an attorney, including this one, is whether the attorney may introduce his or her Part 205 report--which may constitute an attorney-client communication, contain client confidences, or both--in establishing that he or she is a bona fide whistleblower under SOX. In promulgating the Part 205 rules, the Commission specifically addressed whether attorneys may use Part 205 reports in proceedings where their compliance with Part 205 is in issue. Section 205.3(d)(1) states that any Part 205 report, or the response thereto, "may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue." This provision is entirely consistent with the rule--established by the vast majority of state bars, the ABA's Model Rules of Professional Conduct ("Model Rules"), as well as the federal common law--that an attorney may use client confidences in support of "claims or defenses" in litigation against a client. Were the Commission's

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issuer's response is appropriate. 17 C.F.R. 205.3(c)(1).

Part 205 rules interpreted as not permitting attorneys to use their Part 205 reports to substantiate retaliation or discrimination claims, Congress's interest in protecting whistleblowers, and the Commission's interest in encouraging attorneys to comply with its Part 205 rules, would be seriously undermined.

We understand that public companies may have concerns about the use of client confidences in attorney-whistleblower proceedings because of the risk that they may be disclosed publicly. Accordingly, as we address below (pp. 26-29), we respectfully urge the Board to encourage Administrative Law Judges ("ALJs"), as permitted under the Department of Labor's Rules of Practice, 29 C.F.R. 18.46, to issue "protective or other orders," when appropriate, to minimize public disclosure of client confidences and to narrow their use in Section 806 proceedings, consistent with the practice of safeguarding client confidences observed in attorney-client disputes in federal and state courts.

STATEMENT OF THE CASE

Jack R. T. Jordan ("Jordan") alleges in this proceeding that he was terminated from his employment as an in-house attorney in Sprint-Nextel Corp.'s ("Sprint") Corporate Secretary and Corporate Governance group

**REDACTED**



[REDACTED]. Jordan specifically alleged that he made his reports pursuant to the Commission's Part 205 rules. See, e.g., Jordan's Motion for Summary Decision at 2-3. Sprint moved to dismiss the complaint, arguing that because Jordan's claims are entirely dependent on the disclosure of privileged communications (i.e., his Part 205 report), and no legally cognizable exception permits the disclosure of such communications, he has no admissible evidence to support his claim of having engaged in protected whistleblowing.

On March 14, 2006, the ALJ, relying on federal common law and the Model Rules, and without any reference to Section 205.3(d)(1) of the Commission's rules, denied Sprint's motion, explaining that Jordan is entitled to use attorney-client communications to support his SOX retaliation claim. The ALJ explained that Model Rule 1.6(b)(5), which was adopted in 1983, "expanded the instances in which an attorney might rely on otherwise confidential information to include his . . . affirmative use of such information in a claim of retaliatory discharge against a former employer." ALJ Decision at 13 (emphasis added). The ALJ further noted that Jordan's allegation that he was terminated for reporting evidence of material violations of federal securities laws as required under Part 205 amounted to conduct that "falls squarely within the parameters" of the Model Rule.

Sprint petitioned the Board for interlocutory review. On June 19, 2008, the Board granted Sprint's petition, concluding that the

issue of whether attorneys may use client confidences to establish claims of retaliatory discharge was sufficiently "important" to warrant interlocutory review. On appeal, Sprint maintains that nothing in Part 205 speaks to whether an attorney can use client confidences to support his or her SOX whistleblower claim, and argues that the federal common law bars the use of privileged communications to support such a claim. In his answering brief, Jordan argues, *inter alia*, that because his compliance with the Commission's Part 205 rules is "in issue" in this litigation, Section 205.3(d)(1) of the Commission's rules permits him to use his Part 205 report, and any response thereto, in support of his Section 806 claim.

#### ARGUMENT

##### **I. AN EXPRESS PROVISION OF FEDERAL LAW GOVERNS THE PRIVILEGE ISSUES IN THIS WHISTLEBLOWER PROCEEDING.**

The issue of whether the attorney-client privilege may be asserted to bar the introduction of evidence in a federal whistleblower action between an attorney and his former issuer client "is an evidentiary matter that should be resolved as a question of federal law."<sup>2/</sup> Federal law is governed primarily by

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<sup>2/</sup> *Willy v. Coastal Corp.*, 2004 DOL Ad. Rev. Bd. LEXIS 19 (ARB Feb. 27, 2004) (internal citations omitted), *rev'd on other grounds sub nom Willy v. ARB*, 324 F.3d 483 (5th Cir. 2005).

express provisions in statutes or regulations.<sup>8/</sup> In the absence of such express provisions, "we look to the federal common law for resolution."<sup>9/</sup> Here, however, an express federal law provision - Section 205.3(d)(1) - directly addresses the privilege question. Even if Section 205.3(d)(1) conflicted with federal common law, Section 205.3(d)(1) would trump.<sup>10/</sup> As we discuss below, however,

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<sup>8/</sup> See *Milwaukee v. Ill.*, 451 U.S. 304, 314 (1981); *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) ("[P]roperly promulgated, substantive agency regulations have the force and effect of law.") (internal quotation marks omitted); *Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (recognizing that regulations "issued by an agency pursuant to statutory authority and which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission . . . have the force and effect of law.") (quoting U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedures Act 30 n. 3 (1947)).

<sup>9/</sup> *Willy*, 2004 DOL Ad. Rev. Bd. LEXIS 19; see also, e.g., *Milwaukee*, 451 U.S. at 314 (federal common law is "resorted to in the absence" of substantive federal law) (internal quotation marks omitted); *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54, 74 (2d Cir. 2006) (federal common law "only applies in the absence of a relevant statute.").

<sup>10/</sup> See *Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 237 (1985) (federal common law is preempted where specific federal law has spoken to the particular issue); *Botsford v. Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 399 (9th Cir. 2002) (where federal law preempts claim, court need not look to federal common law); *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773, 777 (7th Cir. 2000) (when a federal agency empowered by Congress to establish rules under a statute "has promulgated such regulations, federal common law . . . on these issues [is] necessarily displaced"); *Kupiec v. Republic Fed. Sav. & Loan Ass'n*, 512 F.2d 147, 152 (7th Cir. 1975) (because relevant federal agency had "fleshed out" its regulations, "federal common law is, therefore, no longer applicable in this area"); cf. *Illinois v. Milwaukee*, 406 U.S. 91, 107

no such conflict exists here, as Section 205.3(d)(1) is entirely consistent with the current federal common law on this issue.<sup>11/</sup>

In promulgating Section 205.3(d)(1), the Commission acted well within its authority. Federal agencies have "the power to adopt regulations to carry into effect the will of Congress as expressed by [a] statute." *Dixon v. United States*, 381 U.S. 68, 74 (1965). The clear language of SOX Section 307 demonstrates that the Commission's promulgation of Section 205.3(d)(1) is consistent with that Congressional mandate. Congress, by statute, explicitly

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(1972) ("new federal regulations may in time preempt the field of federal common law").

<sup>11/</sup> Sprint initially argued before the ALJ that Kansas law applied because it is "the jurisdiction where Jordan was practicing." See, e.g., Respondent's Supp. Brief in Support of its Motion for a Protective Order (Feb. 13, 2006) at p. 12, Ex. 8 at p. 1; see Attachment B to Respondent's Motion for a Protective Order (Jan. 17, 2006) at 2; Respondent's Reply in Support of its Motion to Dismiss (Mar. 3, 2006) at 4 n. 2, 12. Now, Sprint suggests that New York law applies because Jordan is a member of the New York bar. Sprint's Opening Brief at 12-13. As an initial matter, Jordan's New York bar membership is irrelevant. The question at issue here is solely one of federal law. See Sprint's Opening Brief at 9 ("Evidentiary issues, such as the application of the attorney-client privilege, are governed by federal law in cases that arise under 'federal question' jurisdiction"). Furthermore, to the extent this issue is governed by state law, which it is not, Kansas law would govern (1) as the facts at issue in this litigation occurred in Kansas, where Sprint was headquartered, and where Jordan resided and worked during the relevant period, and (2) Jordan acquired the relevant client confidences in Kansas. See *Allstate Ins. v. Hague*, 449 U.S. 302, 312-13 (1981). Kansas's state bar rule, as noted below, is consistent with both Model Rule 1.6(b)(5) and Section 205.3(d)(1) of the Commission's Attorney-Conduct Rules. See FN 25.

instructed the Commission to issue an "up the ladder" reporting requirement for an issuer's lawyer who believes a material violation of the federal securities laws to have occurred.<sup>12/</sup> At the same time, and in the same statute, Congress provided that employees reporting to an issuer information about a suspected violation of the federal securities laws should be protected from retaliation.<sup>13/</sup> Congress further empowered the Commission to promulgate minimum standards of professional conduct in the "public interest and for the protection of investors."<sup>14/</sup> Section 205.3(d)(1) furthers the intent and goals of Congress as expressed in these statutory provisions. Permitting the use of Part 205 reports when they are "in issue" protects genuine "up the ladder" reporting. Furthermore, permitting the use of such communications in Section 806 proceedings protects attorney-whistleblowers aggrieved by any purported retaliation by their employers.<sup>15/</sup>

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<sup>12/</sup> 107 P.L. 204, Title III, sec. 307(1) ("the Commission shall issue rules. . . including a rule--requiring an attorney to report evidence of a material violation of securities law").

<sup>13/</sup> 107 P.L. 204, Title VIII, sec. 806.

<sup>14/</sup> 107 P.L. 204, Title III, sec. 307 ("the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.").

<sup>15/</sup> Indeed, in the underlying proceedings, the ALJ commented: "Congress created a statute which *requires attorneys* to report conduct the attorney reasonably believes constitutes a violation of federal securities laws . . . . At the same time, Congress provided that individuals who report such

Finally, permitting attorney-whistleblowers to use such communications is well accepted as consistent with the minimum standards of attorney conduct.<sup>16/</sup>

**II. THE ATTORNEY-CONDUCT RULES ARE AN EXPRESS PROVISION OF FEDERAL LAW THAT PERMIT USE OF PART 205 REPORTS CONTAINING CLIENT CONFIDENCES IN SOX SECTION 806 PROCEEDINGS.**

**A. ATTORNEYS MAY USE PART 205 REPORTS WHENEVER THEIR COMPLIANCE WITH PART 205 IS "IN ISSUE," INCLUDING TO ESTABLISH A WHISTLEBLOWER CLAIM.**

The Commission's Part 205 Attorney-Conduct Rules explicitly permit attorney-whistleblowers to rely on their Part 205 reports in circumstances where their compliance with Part 205 is "in issue." See 17 C.F.R. 205.3(d)(1). Specifically, Section 205.3(d)(1) provides that:

Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with [Part 205] is in issue.

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violations are to be protected from retaliation. . . . Congress could not have intended that attorneys employed by publicly-traded corporations be required to report suspected wrongdoing, but that they then be denied the whistleblower protections of [SOX] because the wrongdoing they reported was discovered while performing legal work for their employer." *Jordan v. Sprint Nextel*, 2006-SOX-00041 at 16 (ALJ Mar. 14, 2006).

<sup>16/</sup> Rule 205.3(d)(1) merely allows the same use of client confidences that is permitted under the ABA Model Rules, and the federal common law, as well as the laws of 45 states. See Section II(A)(2).

17 C.F.R. 205.3(d)(1). The plain language of this provision supports its application to whistleblower claims where the report made by an attorney pursuant to his Part 205 obligations is relevant to the claim against the attorney's issuer-employer. In addition, the Commission's comments in promulgating Section 205.3(d)(1) also support this interpretation.

**1. THE PLAIN MEANING OF THE REGULATION.**

In construing Section 205.3(d)(1), we "must begin with the words in the regulation and their plain language."<sup>17/</sup> The natural reading of its language is that an attorney may use his or her Part 205 report in a Section 806 proceeding so long as the report is "in issue." In other words, so long as the Part 205 report is probative and material to the attorney-whistleblower's claims, allegations, or replies to defenses, the plain meaning of Section 205.3(d)(1) explicitly authorizes an attorney to use his or her Part 205 report and any responses thereto in support of a Section 806 retaliation claim.

Sprint, however, contends (albeit without any reference to Section 205.3(d)(1)) that nothing in the Commission's Attorney-

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<sup>17/</sup> *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984); see also, e.g., *Forest Watch v. U.S. Forest Serv.*, 410 F.3d 115, 117 (2d Cir. 2005) (a rule's plain meaning controls unless it leads to absurd result); *United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004) ("To interpret a regulation, we look first to its plain language."); *In re Laurain*, 113 F.3d 595, 597 (6th Cir. 1997) (declining to look beyond the obvious meaning of the language).

Conduct Rules authorizes the disclosure of client confidences, and that attorneys are *per se* barred from disclosing such communications unless their clients have accused them of a breach of trust. (Sprint's Opening Brief at 18, 10-12). This is incorrect. The clear language of Section 205.3(d)(1), as noted above, explicitly contemplates an attorney's use of such communications whenever his or her compliance is "in issue," regardless of whether it pertains to a claim or a defense. Nothing in the rule (or the Commission's comments in promulgating the rule) limits disclosure to a response to an allegation of breach of trust by the lawyer. Sprint's unduly narrow construction of the Commission's Attorney-Conduct Rules would require the Board to unnecessarily and improperly read non-existent limitations into the clear language of Section 205.3(d)(1) without any textual basis for doing so.<sup>18/</sup> The plain language of the Part 205 Rules is broader

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<sup>18/</sup> See *United Cigar Whelan Stores Corp. v. United States*, 113 F.2d 340, 345 (9th Cir. 1940) ("we are not at liberty" to "read into the regulation words not therein contained"); *Spang v. United States*, 791 F.2d 906, 912 (Fed. Cir. 1986) (rejecting an interpretation of a regulation because it "requires reading into the regulation a requirement that simply is not there") (internal quotation marks omitted); *Kappler v. Shalala*, 840 F. Supp. 582, 586 (N. D. Ill. 1994) ("But it is not for [plaintiff] (or this Court) to read into existence punctuation that does not exist, [or] to read words into and out of the unambiguous text that [the] Secretary has promulgated"); *Griffin Indus. v. United States*, 27 Fed. Cl. 183, 1992 US Claims LEXIS 137 at \*27 (Fed. Cl. 1992) (rejecting a regulatory interpretation because it was "reading into the regulation something that is not there").



than what Sprint claims and in no way contains any of the limitations that Sprint would have the Board read into its unambiguous text. Nothing in the plain language of Section 205.3(d)(1) can be construed reasonably as barring an attorney's use of his or her Part 205 report *offensively*, as a "sword," or alternatively limiting an attorney's use of such communications to *defensive* measures, as a "shield."

Beyond this, Sprint's attempt to characterize SOX Section 806 retaliation proceedings as purely "offensive" in nature is unpersuasive. A SOX whistleblower complaint is quintessentially a defensive reaction to an employer's allegedly improper adverse action, not a purely "offensive" action by the attorney-whistleblower. To be eligible to file a SOX Section 806 whistleblower action, an attorney must have been discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against "in the terms and conditions of employment."<sup>19/</sup> The whistleblower action is merely the employee's response to the employer's potentially wrongful action in impairing the whistleblower's employment status. Because the issuer has already taken adverse employment action against the employee, and the employee is attempting allegedly to restore (rather than preserve) the *status quo*, it is reasonable to view the employee as acting in self-defense. Put differently, if an issuer had to file

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<sup>19/</sup> 18 U.S.C. 1514A(a).

suit to terminate an employee, and if the employee countered by responding that the issuer was illegally retaliating against him, no one would doubt that the employee was employing a "whistleblower defense" to protect himself.<sup>20/</sup> Indeed, in both situations, the attorney and client have become adversaries, and "[o]nce an adversarial relationship has developed, simple fairness demands that the lawyer be able to present her claim or defense without handicap."<sup>21/</sup>

Accordingly, Sprint's narrow interpretation of the scope of the Commission's Attorney-Conduct Rules is neither self-evident nor plain. If anything, because it runs contrary to the broad remedial purpose of the Part 205 regulations,<sup>22/</sup> Sprint's misinterpretation of the Commission's rules should not be adopted. It is well

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<sup>20/</sup> See, e.g., *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 891 (9th Cir. 2004) (referring to "whistleblower defense").

<sup>21/</sup> 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* §9.23 at 9-100.

<sup>22/</sup> The Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983) (quoting *SEC v. Capital Gains Res. Bureau*, 375 U.S. 180, 195 (1963)); see also *Lowe v. SEC*, 472 U.S. 181, 225 (1985) (White, J., concurring) (noting "our longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly in order to effectuate their remedial purposes"); *SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("Congress had broad remedial goals in enacting securities laws.") (internal quotation marks omitted); *SEC v. Ralston-Purina*, 346 U.S. 119, 126 (1953); *Tello v. Dean Witter Reynolds*, 410 F.3d 1275, 1287 (11th Cir. 2005).

established that whistleblower protection provisions, such as SOX Section 806 and Section 205.3(d)(1), should be construed broadly in their scope and applicability.<sup>23/</sup>

2. THE COMMISSION'S COMMENTS IN ADOPTING THE REGULATION SUPPORT THE ATTORNEY-WHISTLEBLOWER'S USE OF PART 205 REPORTS.

Even if the Board were to look beyond the plain language of Section 205.3(d)(1), the Commission's comments when it promulgated Section 205.3(d)(1) firmly establish its intent that attorneys be able to use their Part 205 reports whenever they are material and probative of the attorney-whistleblower's allegations or defenses.

The Commission stated:

**Paragraph (d)(1) makes clear that an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct. It is effectively equivalent to the**

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<sup>23/</sup> *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998); see also, e.g., *Bechtel Constr. Co. v. Sec. of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws"); *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996) ("The overarching purpose of the statute--the protection of whistleblowers--militates against an interpretation that would make anti-retaliation actions more difficult to maintain."); *Haley v. Fiechter*, 953 F. Supp. 1085, 1092 (E.D. Mo. 1997) ("Courts which have been called upon to interpret different federal whistleblower statutes have uniformly held that such statutes should be broadly construed."); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 270 (N.D. Ill. 1993); *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 595 (N.D. Cal. 1994) ("Whistleblower statutes have traditionally been broadly construed").

**ABA's [Model Rule 1.6(b)(5)]<sup>24/</sup> and corresponding "self-defense" exceptions to client-confidentiality rules in every state.** The Commission believes that it is important to make clear in the rule that attorneys can use any records they may have prepared in complying with the rule to protect themselves.<sup>25/</sup>

ABA Model Rule 1.6(b)(5) and the "corresponding 'self-defense' exceptions to client confidentiality rules in every state" explicitly referenced in the Commission's comments entitle attorneys to use client confidences in litigating *claims or defenses* against their clients, including whistleblower proceedings. Indeed, the Commission emphasized the similarity of Section 205.3(d)(1) to ABA Model Rule 1.6(b)(5). That rule provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client[.]

Under rules patterned after ABA Model Rule 1.6(b)(5) that have

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<sup>24/</sup> The Commission's comments originally cited to then-Model Rule 1.6(b)(3). In August 2003, however, the ABA reformatted its rules and re-numbered various provisions, including then-Model Rule 1.6(b)(3), which was renumbered as Model Rule 1.6(b)(5). The text and substance of the rule is identical to its prior version. Thus, for purposes of this brief, we refer to both versions of this rule as "Model Rule 1.6(b)(5)."

<sup>25/</sup> See 68 Fed. Reg. at 6310 (emphasis added).

been adopted by the overwhelming majority of states, the "self-defense" exception - perhaps better termed the "claim or defense" exception - expressly applies to any *claim* by the attorney, not just to defensive use of client confidences.<sup>26/</sup> This exception is notably broad, and numerous courts (beyond the Fifth Circuit in *Willy v. ARB*, 423 F.3d 483, 496 (5th Cir. 2005) (looking to the Model Rule in applying federal common law)), both before and after the Commission adopted Section 205.3(d)(1), have held that the rule allows attorneys to use client confidences to prove wrongful-discharge or whistleblower claims.<sup>27/</sup> Indeed, the ABA has noted

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<sup>26/</sup> Model Rule 1.6(b)(5), or its functional equivalent, is now followed by at least 45 states. See Ala. Rule 1.6(b)(2); Alaska Rule 1.6(b)(2); Ariz. ER 1.6(d)(4); Ark. Rule 1.6(b)(5); Colo. Rule 1.6(c); Conn. Rule 1.6(d); Del. Rule 1.6(b)(5); Fla. Rule 4-1.6(c)(2); Ga. Rule 1.6(b)(1)(iii); Haw. Rule 1.6(c)(3); Idaho Rule 1.6(b)(5); Ind. Rule 1.6(b)(5); Ia. Rule 32:1.6(b)(5); Kan. Rule 1.6(b)(3); Ky. Rule 1.6(b)(2); La. Rule 1.6(b)(2); Md. Rule 1.6(b)(5); Mass. Rule 1.6(b)(2); Minn. Rule 1.6(b)(8); Miss. Rule 1.6(b)(2); Mo. S. Ct. Rule 4-1.6(b)(2); Mont. Rule 1.6(b)(3); Neb. Rule 1.6(b)(3); Nev. Rule 156(3)(b); N.H. Rule 1.6(b)(2); N.J. Rule 1.6(d)(2); N.M. Rule 16-106(D); N. Car. Rule 1.6(b)(6); N. Dak. Rule 1.6(e); Ohio Rule 1.6(b)(5); Okla. Rule 1.6(b)(3); Ore. Rule 1.6(b)(4); Pa. Rule 1.6(b)(4); R.I. Rule 1.6(b)(2); S. Car. Rule 1.6(b)(2); S. Dak. Rule 1.6(b)(3); Tenn. Rule 1.6(b)(3); Tex. Rule 1.6(c)(5); Utah Rule 1.6(b)(3); Vt. Rule 1.6(c)(2); Va. Rule 1.6(b)(2); Wash. Rule 1.6(b)(2); W. Va. Rule 1.6(b)(2); Wisc. Rule 1.6(c)(2); Wy. Rule 1.6(b)(2). See Attachment A.

<sup>27/</sup> See *Schaefer v. GE Co.*, 2008 U.S. Dist. LEXIS 5552, \*23(D. Conn. Jan. 22, 2008) ("The plain language of Model Rule 1.6 is quite broad, allowing a lawyer to use the claim . . . exception in a controversy between the lawyer and the client" in an action for sex discrimination); *Van Asdale v. Int'l Game, Tech.*, 498 F.Supp.2d 1321, 1329 (D. Nev. 2007) (allowing plaintiff to use confidential client information in SOX whistleblower action, explaining that "The Model

that a wrongful-discharge action is a "claim" under ABA Model Rule 1.6(b)(5).<sup>28/</sup> Thus, under Model Rule 1.6(b)(5) and state rules that the Commission expressly referenced in promulgating its Attorney-

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Rules permit a lawyer to reveal confidential information relating to the representation in order to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client"); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1042 (Mont. 2000) (discharged in-house counsel could use client confidences as reasonably necessary to prove wrongful-discharge claim); *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So.2d 607, 610-12 (Fla. App. 2004) (allowing employer's former general counsel to use client confidences to support claim under Florida's Whistleblower Act); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603, 608 (Utah 2003) (former in-house counsel could use client confidences to prosecute wrongful-discharge claim); see also *Crews v. Buckman Labs Int'l, Inc.*, 78 S.W.3d 852, 863-64 (Tenn. 2002) (adopting a new provision to its conduct rules that follows Rule 1.6 and "permit[s] in-house counsel to reveal the confidences and secrets of a client when the lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"); Oregon Formal Ethics Op. 136 (1994) (permitting the use of client confidences by attorney in wrongful-termination case after analyzing Oregon's rule that, like Rule 1.6(b)(5), expressly applies to either a "claim or defense"). See Attachment C. See also Hazard and Hodes, *The Law of Lawyering* at 9-99 (Rule 1.6(b)(5) "permits a lawyer to reveal client confidences when needed to 'establish a claim,' which is a matter of offense rather than defense").

<sup>28/</sup> The ABA's Standing Committee on Ethics and Professional Responsibility explained that "[r]etaliatory discharge actions provide relief to employees fired for reasons contradicting public policy," and that in-house attorneys who are so discharged may rely on the exceptions contemplated in this Model Rule to utilize confidential client information to pursue "a retaliatory discharge claim or similar claim" against their former employers. ABA Formal Op. 01-424 at 3-4 (Sept. 22, 2001) (noting that an attorney cannot divulge client confidences "except . . . as permitted by Rule 1.6" and identifying now-Rule 1.6(b)(5) as such an exception). See Attachment B.

Conduct Rules, there can be no question that the Commission authorized attorney-whistleblowers to use their Part 205 reports as either a "shield" or a "sword" in proceedings and litigation where their compliance with Part 205 is in issue.

Although the Commission's comment in promulgating Section 205.3(d)(1) notes that an attorney may use his or her Part 205 report "to defend himself or herself," and also references the "'self-defense' exception" in the Model Rules and state bar rules, this should not be construed as meaning that the Commission intended to limit Section 205.3(d)(1)'s scope exclusively to purely defensive uses by attorneys. To the contrary, it bears repeating that the Commission expressly stated in its comments that Section 205.3(d)(1) is to be "effectively equivalent" to Model Rule 1.6(b)(5)--a rule that authorizes the use of client confidences to establish a claim or defense in a controversy between the attorney and client.

Sprint's warning that allowing attorneys to use client confidences in SOX whistleblower proceedings will seriously undermine the attorney-client privilege is not well-founded. Section 205.3(d)(1)'s permissible use of client confidences is no broader than that under the federal common law and the law of at least 45 states. Thus, its application to SOX whistleblower claims represents no erosion of client confidentiality.<sup>29/</sup>

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<sup>29/</sup> Sprint may also argue that interpreting Section 205.3(d)(1) as permitting the offensive use of client confidences in



While we believe it to be unambiguous, Should the Board find any ambiguity in the plain language of Section 205.3(d)(1), the Commission's comments on and interpretation of these regulations are unambiguous and deserve full consideration. An "agency's interpretation [of its own regulations] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."<sup>30/</sup> Thus, when an agency, like the SEC, that is

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Section 806 proceedings is inconsistent with the Commission's decision not to promulgate in its Part 205 rules a "noisy withdrawal" provision, requiring lawyers to notify the Commission of their withdrawal from the representation of a client that did not remedy reported violations. See Release No. 33-8150 (Feb. 6, 2003), 68 Fed. Reg. 6296, 6297; Release 33-8150 (Nov. 21, 2002), 67 Fed. Reg. 71669. This argument would be both inaccurate and beside the point. First, the Commission's decision not to include a "noisy withdrawal" provision in its Rules at that time in no way can be construed to mean that the Commission sought to bar any disclosure of client confidences outside of an issuer. To the contrary, Section 205.3(d)(2) explicitly *permits* attorneys to disclose client confidences outside the issuer in certain circumstances, including: (i) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the issuer or investors; (ii) to prevent the issuer from committing perjury, suborning perjury, or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or (iii) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the issuer or investors. 17 C.F.R. 205.3(d)(2). Moreover, whether the Commission expressly permitted or required attorneys to disclose client confidences in the first instance has no bearing on whether attorneys who are retaliated against for making Part 205 reports may use those reports in subsequent whistleblower proceedings where their compliance with Part 205 is in issue. That is a different situation, which Section 205.3(d)(1) squarely addresses.

<sup>30/</sup> *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("we must defer to the [Commission's] interpretation unless



charged with implementing a statute, interprets this statute and/or its own rules, its interpretation is entitled to deference. This deference should extend to the Commission's position explaining Section 205.3(d)(1) as *amicus* in this matter.<sup>31/</sup>

**B. EVEN IF FEDERAL COMMON LAW APPLIED, SPRINT'S ARGUMENT IS UNAVAILING.**

While the Commission submits that federal common law permits the use of client confidences in federal whistleblower proceedings brought by attorneys under SOX Section 806, the Board need not even

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an alternative reading is compelled by the regulation's plain language or by other indications of the [Commission's] intent at the time of the regulation's promulgation" (internal quotation marks omitted); see also *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 672-78 (2007); *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 170-72 (2007); *Martin v. OSHA*, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

<sup>31/</sup> As the Second Circuit wrote in adopting the Commission's interpretations of its regulations in *Roth v. Perseus, LLC*, 522 F.3d 242, 247 (2d Cir. 2008):

we defer to the SEC's interpretation of the Rule, including one articulated in its *amicus* brief, so long as the interpretation is not plainly erroneous or inconsistent with the law.

See also *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (agency interpretation of its own regulation is controlling even if presented in *amicus* brief); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000) ("We are bound by the SEC's interpretations of its regulations in its *amicus* brief, unless they are plainly erroneous or inconsistent with the regulation[s]").

reach this issue. As set forth above, the Commission's Part 205 rules contain an express provision of federal law explicitly authorizing the use of Part 205 reports and the responses thereto in SOX whistleblower proceedings.

Nonetheless, the federal common law may be relevant here because it underscores the soundness of the Commission's promulgation of Section 205.3(d)(1). That is, it was eminently reasonable for the Commission to promulgate Section 205.3(d)(1) because it allows the use of client confidences in a manner that is consistent with the federal common law. In arguing incorrectly that the federal common law bars such use, Sprint relies heavily on the Board's *Willy* decision,<sup>32/</sup> and argues that the Fifth Circuit's reversal of that decision should be confined to the Fifth Circuit.<sup>33/</sup> In that case, brought under the whistleblower provisions of federal environmental laws rather than SOX, the Board - relying upon Supreme Court Standard 503(d)(2),<sup>34/</sup> which limits an

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<sup>32/</sup> *Willy v. Coastal Corp.*, ARB Case No. 98-060, 2004 DOL Ad. Rev. Bd. 19 (ARB 2004).

<sup>33/</sup> *Willy v. ARB*, 423 F.3d 483, 496 (5th Cir. 2005) (reversing ARB decision in *Willy v. Coastal Corp.*).

<sup>34/</sup> Supreme Court Standard 503 is the proposed Federal Rule of Evidence 503. It was proposed by the Supreme Court in 1972, see *Rules of Evidence for the United States Courts and Magistrates*, 56 F.R.D. 183, 235-36 (1972), but never adopted by Congress. Nonetheless, it is often cited as a restatement of the common law of attorney-client privilege applied in the federal courts at that time. See e.g., *United States v. Moscony*, 927 F.2d 742, 751 (3d Cir. 1991).

attorney's unconsented use of client confidences to situations where they are "relevant to an issue of breach of duty by the lawyer to his client or the client to his lawyer" - held that the federal common law does not allow attorneys to make "offensive use" of reports containing client confidences in whistleblower proceedings brought by the attorney against his former client.<sup>35/</sup> This decision was reversed by the Fifth Circuit, which held that federal common law allows the use of client confidences whenever they are relevant to a claim or defense in litigation between attorney and client.<sup>36/</sup>

The Fifth Circuit's reading of federal common law in *Willy v. ARB* is correct for two reasons. First, as the Fifth Circuit held, Standard 503 explicitly authorizes a whistleblowing attorney to use client confidences where such communications are relevant to a claim of "breach of duty . . . by the lawyer to his client or by the client to his lawyer."<sup>37/</sup> Certainly Section 806 can be read to impose a duty on client-issuers not to take adverse action against their lawyer-employees for reporting potential material violations of federal law as required by Part 205. Even under Disciplinary Rule 4-101-C of New York's Code of Professional Responsibility, which Sprint suggests is the applicable state law in this case, an

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<sup>35/</sup> *Willy v. Coastal Corp.*, 2004 DOL Ad. Rev. Bd. 19.

<sup>36/</sup> *Willy v. ARB*, 423 F.3d 483, 496 (5th Cir. 2005).

<sup>37/</sup> 423 F.3d at 496.

attorney is permitted to use client confidences "to defend himself . . . against an accusation of wrongful conduct." It is typical in whistleblower cases for the employer to allege that any supposed retaliation was instead a response to the employee's misconduct; indeed, Sprint makes such claims here.<sup>38/</sup>

Second, even assuming Standard 503 should be interpreted narrowly as Sprint urges, that standard merely reflects a static picture of the federal common law at the time of its proposal (i.e., 1972) and no longer reflects the current state of federal common law.<sup>39/</sup> Federal common law on privilege is meant to reflect "well-established [state law] exceptions" to the attorney-client privilege.<sup>40/</sup> Standard 503(d)(2)'s limitation of the use of client confidences to "breach of duty" claims drew from the old Code of Professional Responsibility. Since 1972, however, that Code provision has been replaced by ABA Model Rule 1.6(b)(5), which (as discussed above) broadly allows the use of client confidences if relevant to the attorney's "claim or defense" against the client. This Model Rule has been adopted by nearly all of the individual states, and thus now is the "well established exception" in state

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<sup>38/</sup> See Sprint's Motion to Dismiss or, Alternatively, for Summary Decision, at pp. 7-12.

<sup>39/</sup> See, e.g., *Moscony*, 927 F.2d at 751.

<sup>40/</sup> See Advisory Committee Notes to Standard 503, 56 F.R.D. at 239-40 (noting that Standard 503 was drafted with reference to established state rules).

law from which the federal common law must derive.<sup>41/</sup> Cf. *United States v. Valentine*, 401 F.3d 609, 615 (5th Cir. 2005) ("we may reference, and find persuasive, state law in crafting federal common law").

**C. IN SOX WHISTLEBLOWER PROCEEDINGS, CLIENT CONFIDENCES SHOULD BE REVIEWED IN CAMERA AND PRODUCED SUBJECT TO APPROPRIATE PROTECTIVE ORDERS.**

In SOX whistleblower proceedings involving attorney-whistleblowers, ALJs have the authority to minimize the public disclosure of client confidences and ensure that any use of client confidences is handled in an appropriate and circumspect manner. Indeed, Section 18.46 of Subpart A of the Rules of Practice and Procedure for Administrative Hearings Before the Office of ALJs,

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<sup>41/</sup> *Siedle v. Putnam Inv.*, 147 F.3d 7 (1st Cir. 1998), the primary case upon which Sprint relies other than the Board's decision in *Willy*, is thus distinguishable because it applies Massachusetts state law (as opposed to federal common law), which was based upon Disciplinary Rule 4-101(C). Also, as the Fifth Circuit noted in *Willy v. ARB*, to the extent that the *Siedle* court read Disciplinary Rule 4-101(C) as prohibiting the "offensive" use of client confidences, it misinterpreted the caselaw applying that provision. 423 F.3d at 496. The Fifth Circuit also observed that *Siedle* "neither explicitly nor implicitly held that the attorney could never use confidential information against his employer. It merely reversed the district court's order that the seal should be lifted" to make the privileged materials available to the press. *Id.* at 497-98. Furthermore, the *Siedle* court relied on the ABA Disciplinary Rules adopted in 1970 as part of the ABA's Code of Professional Responsibility. However, in 1983, the ABA introduced the Model Rules, of which Model Rule 1.6(b)(5) is a part. Since then, nearly every state has adopted the Model Rules or most of them, although some continue to rely on limited portions of the Code of Professional Responsibility and its Disciplinary Rules.

29 C.F.R. 18.46 ("In camera and protective orders"), explicitly contemplates that ALJs should, when appropriate, "limit discovery or [the] introduction of evidence or issue such protective or other orders . . . consistent with the objective of protecting privileged communications."

ALJs may, for instance, elect to determine whether the complainant has successfully alleged a claim upon which relief can be granted before even permitting an attorney to introduce into evidence client confidences in support of his or her claim.<sup>42/</sup> Even after such a determination is made, and the attorney-whistleblower is permitted to use his or her Part 205 report (and response thereto) in support of his or her retaliation claim, ALJs are authorized under Section 18.46 to take appropriate steps to safeguard the confidentiality of client confidences by, among other things, reviewing relevant documents *in camera* and/or issuing protective orders, including orders to seal certain documents and to keep such documents confidential.

This would be entirely consistent with courts' practices in managing cases involving attorney-client disputes. In *Kachmar v. Sunguard Data Systems, Inc.*, 109 F.3d 173, 181 (3d Cir. 1997), the Third Circuit explained that courts seeking to limit the disclosure of client confidences in disputes between attorneys and their

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<sup>42/</sup> Under 29 C.F.R. 18.1(a), a claim may be dismissed if the complainant fails to allege a legal claim upon which relief can be granted, such as if the complainant is not a covered employee under SOX. See Fed. R. Civ. P. 12(b)(6).

former clients may issue, among other orders, "sealing and protective orders, [orders] limit[ing] admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings" to limit the release and disclosure of sensitive client information.<sup>43/</sup>

By implementing such measures, at least until a SOX whistleblower claim by an attorney-whistleblower is deemed sufficiently meritorious as to warrant a trial, the disclosure of client confidences can effectively be limited to the parties and the ALJ.<sup>44/</sup> Using a protective order in a whistleblower case also does not present the issue frequently raised when an attorney-client document is produced in civil discovery pursuant to a protective order--i.e., that an adversary is obtaining access to privileged information it would not otherwise be entitled to see--because in whistleblower cases the attorney already has access to his or her Part 205 report. Thus, if the ALJ's examination of the

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<sup>43/</sup> 109 F.3d at 182; see also *Schaefer*, 2008 U.S. Dist. LEXIS 5552 at \*49 ("A protective order may provide ample ways of protecting privileged information and guarding GE's confidences during this lawsuit."); *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606, 611 (D. Kan. 2007) ("Courts which permit retaliatory discharge claims by in-counsel have recognized the importance of equitable measures, including protective orders").

<sup>44/</sup> See Comment 14 to ABA Model Rule 1.6 ("If the disclosure will be made in connection with a judicial proceeding the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable").

purported Part 205 report and any response reveals no facts that a reasonable attorney could believe demonstrated a material violation of the federal securities law, or no evidence that the alleged retaliation was a response to the Part 205 report (e.g., if those with knowledge of the Part 205 report were not involved in the adverse action), or if there was indisputable evidence that the adverse action was based on unrelated events, the claim should be dismissed pursuant to 29 C.F.R. 18.41 without disclosure of the client confidences beyond the parties and the ALJ.<sup>45/</sup>

#### CONCLUSION

The Commission has a strong interest in ensuring that attorney-whistleblowers who may have suffered retaliation for having reported material violations as required by the Commission's Attorney-Conduct Rules may use their Part 205 reports, and the responses thereto, to establish their retaliation claims, even if those documents contain client confidences. Accordingly, we respectfully urge the Board to hold that when an attorney brings a whistleblower action under SOX Section 806, he or she may introduce his or her Part 205 reports, and any responses thereto, when such

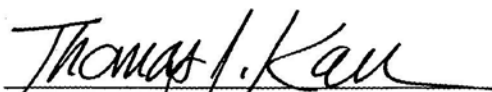
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<sup>45/</sup> Documents used by parties moving for, or opposing, summary judgment "may be kept under seal if countervailing factors in the common law framework or 'higher values' in the First Amendment framework so demand." *Lugosch v. Pyramid Co.*, 435 F.3d 110, 121, 125 (2d Cir. 2006) (internal quotation marks omitted). Among other things, the Second Circuit noted that the protection of attorney-client privilege "might well be such a compelling reason" in some situations. *Id.* at 125.



reports are probative and material to his or her claim of illegal retaliation or to refute a defense thereto.

Respectfully submitted,



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August 3, 2009

Certificate of Service

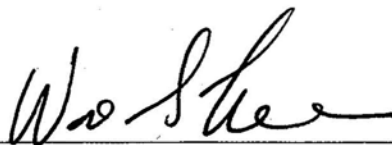
I certify that copies of this Brief of the Securities and Exchange Commission, *Amicus Curiae* have been served on the following individuals by deposit in the United States Mail this 3rd day of August, 2009:

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# Attachment A



LEXSTAT ALA. RULES OF PROF'L CONDUCT 1.6

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\*\*\* Local federal district and bankruptcy court rules are current with amendments received through May 1, 2009 \*\*\*

ALABAMA RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Ala. Rules of Prof. Conduct Rule 1.6 (2009)*

Review Court Orders which may amend this Rule.

**Rule 1.6. Confidentiality of information.**

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

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

**NOTES:**

**Comment**

A lawyer, as an officer of the court and as a part of the judicial system, is 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.

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.

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.

services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### **Prohibited Contingent Fees**

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

### **Division of Fee**

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### **Disputes over Fees**

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

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## **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal a client's confidence or secret unless the client gives informed

consent, except for disclosures that are impliedly authorized in order to carry out the representation and disclosures permitted by paragraph (b) below or Rule 3.3. For purposes of this rule, "confidence" means information protected by the attorney-client privilege under applicable law, and "secret" means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another;

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

(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;

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

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



(6) to comply with other law or a court order.


(c) A lawyer must act competently to safeguard a client's confidences and secrets against inadvertent or unauthorized disclosure by the lawyer, by other persons who are participating in the representation of the client, or by any other persons who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. When transmitting a communication that includes a client's confidence or secret, the lawyer must take reasonable precautions to prevent this information from coming into the hands of unintended recipients.

(SCO 1123 effective July 15, 1993; amended by SCO 1332 effective January 15, 1999; and rescinded and repromulgated by SCO 1680 effective April 15, 2009)

#### **ALASKA COMMENT**

The Court decided to continue Alaska's amendment to this rule to tie the lawyer's confidentiality obligation to a "confidence" or "secret" of the client. The Committee concluded


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## Arizona Ethics Rules

**ER 1.6. Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3 (a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (2) to 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;
- (3) to secure legal advice about the lawyer's compliance with these Rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

**Comment**

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of



LEXSTAT ARK.PROFESSIONAL CONDUCT RULE 1.6

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BY THE ARKANSAS SUPREME COURT AND ARKANSAS COURT OF APPEALS  
\*\*\* Annotations current through February 26, 2009 \*\*\*

ARKANSAS RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Ark. R. Prof. Conduct 1.6 (2009)*

Review Court Orders which may amend this Rule.

Rule 1.6. Confidentiality of information

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

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

(3) to prevent, mitigate or rectify injury to the financial interest 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;

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

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

(6) to comply with other law or a court order.

(c) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

**HISTORY:** (Amended March 14, 1988)

**NOTES:** COMMENT





LEXSTAT COLO. RPC 1.6

COLORADO COURT RULES

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COLORADO RULES OF PROFESSIONAL CONDUCT  
APPENDIX TO CHAPTERS 18 TO 20  
CLIENT-LAWYER RELATIONSHIP

*Colo. RPC 1.6 (2009)*

Rule 1.6. Confidentiality of Information.

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

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

(4) 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;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

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

(7) to comply with other law or a court order.

**HISTORY:** Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment 16, 17, and 18 added and effective November 6, 2008.

**NOTES:**



LEXSTAT CONN. RULES OF PROF'L CONDUCT 1.6

CONNECTICUT RULES OF COURT

\* THIS DOCUMENT IS CURRENT THROUGH CHANGES RECEIVED AS OF 1/1/2008 \*

RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIPS

*Conn. Rules of Prof'l Conduct 1.6 (2008)*

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to:

(1) Prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

(2) Prevent, mitigate or rectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) Secure legal advice about the lawyer's compliance with these rules;

(4) Comply with other law or a court order.

(d) A lawyer may reveal such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

# Delaware Rules of Professional Conduct

## Rule 1.6. Confidentiality of information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

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

(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;

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

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

(6) to comply with other law or a court order.

### COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the



LEXSTAT FLA. R. REGULATING THE BAR 4- 1.6

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Rules Regulating The Florida Bar  
Chapter 4. Rules of Professional Conduct  
4-1. CLIENT-LAWYER RELATIONSHIP

*Fla. Bar Reg. R. 4-1.6 (2009)*

Review Court Orders which may amend this Rule.

Rule 4-1.6. Confidentiality of Information

(a) *Consent Required to Reveal Information.* --A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) *When Lawyer Must Reveal Information.* --A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) *When Lawyer May Reveal Information.* --A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

(d) *Exhaustion of Appellate Remedies.* --When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) *Limitation on Amount of Disclosure.* --When disclosure is mandated or permitted, the lawyer shall disclose no

more information than is required to meet the requirements or accomplish the purposes of this rule.

**HISTORY:** *Amended eff. March 23, 2006 (933 So.2d 417)*

**NOTES:**

**COMMENT**

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.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(b) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 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 by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. 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.

*Authorized disclosure*

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.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

*Disclosure adverse to client*

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent.



# State Bar of Georgia

## Lawyers Serving the Public and the Justice System

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[Conduct](#) » [RULE 1.6 CONFIDENTIALITY OF INFORMATION](#)

### **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

---

(a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

(b) (1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

(i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;

(ii) to prevent serious injury or death not otherwise covered by subparagraph (i) above;

(iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(2) In a situation described in Subsection (1), if the client has acted at the time the lawyer learns of the threat of harm or loss to a victim, use or disclosure is permissible only if the harm or loss has not yet occurred.

(3) Before using or disclosing information pursuant to Subsection (1), if feasible, the lawyer must make a good faith effort to persuade the client either not to act or, if the client has already acted, to warn the victim.

(c) The lawyer may, where the law does not otherwise require, reveal information to which the duty of confidentiality does not apply under paragraph (b) without being subjected to disciplinary proceedings.

(d) The lawyer shall reveal information under paragraph (b) as the applicable law requires.

(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The maximum penalty for a violation of this Rule is disbarment.

#### Comment

[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.



1 of 100 DOCUMENTS

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\*\*\* RULES CURRENT THROUGH MAY 15, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH MAY 1, 2009 \*\*\*

Exhibit A Hawai'i Rules of Professional Conduct  
Adopted December 6, 1993; effective January 1, 1994.  
HAWAII RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Haw. Rules of Prof'l Conduct Rule 1.6 (2009)*

Review Court Orders which may amend this Rule.

**Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal information which clearly establishes a criminal or fraudulent act of the client in the furtherance of which the lawyer's services had been used, to the extent reasonably necessary to rectify the consequences of such act, where the act has resulted in substantial injury to the financial interests or property of another.

(c) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's act which the lawyer reasonably believes to have been criminal or fraudulent and in the furtherance of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good;

(5) to rectify the consequences of a public official's or a public agency's act which the government lawyer

## Haw. Rules of Prof'l Conduct Rule 1.6

reasonably believes to have been criminal or illegal and harmful to the public good; or

(6) to comply with other law or court order.

**NOTES:****COMMENT:**

[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.

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

[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.

[6] 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.

**Authorized Disclosure**

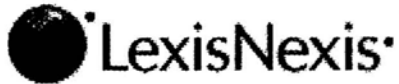
[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a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

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

**Disclosure Adverse to Client**

[9] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may realize that the client has used or intends to use the lawyer's services in the furtherance of criminal or fraudulent conduct. Several situations are addressed by other rules. The lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use





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IOWA COURT RULES

CURRENT THROUGH THE APRIL 2009 SUPPLEMENT

CHAPTER 32. IOWA RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Iowa R of Prof'l Conduct 32:1.6 (2009)*

Review Court Orders which may amend this rule.

RULE 32:1.6 Confidentiality of information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

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

(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;

(4) to secure legal advice about the lawyer's compliance with these rules;

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

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent imminent death or substantial bodily harm.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 32:1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 32:1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's



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Idaho Court Rules

\*\*\* THIS DOCUMENT REFLECTS ALL RULE CHANGES RECEIVED THROUGH APRIL 16, 2009 \*\*\*

IDAHO RULES OF PROFESSIONAL CONDUCT  
CLIENT LAWYER RELATIONSHIP

*Idaho Rules of Prof'l Conduct 1.6 (2009)*

Review Court Orders which may amend this Rule

**RULE 1.6: CONFIDENTIALITY OF INFORMATION**

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

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

- (1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;
- (2) to prevent reasonably certain death or substantial bodily harm;
- (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 in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client; or
- (6) to comply with other law or a court order.

**HISTORY:** Revised effective July 1, 2004

**NOTES:** Commentary

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

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### **Prohibited Contingent Fees**

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a dissolution or obtaining custody of a child or upon the amount of maintenance or support or property settlement to be obtained.

### **Division of Fee**

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive; and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### **Disputes over Fees**

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

*Adopted Sep. 30, 2004, effective Jan. 1, 2005.*

### **Rule 1.6. Confidentiality of Information**

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (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;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's name and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.

*Amended Oct. 30, 1992, effective Jan. 1, 1993; amended Sep. 30, 2004, effective Jan. 1, 2005.*

### Comment

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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



LEXSTAT KRPC 1.6

KANSAS COURT RULES

\*\*\* THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH JULY 1, 2009 \*\*\*

KANSAS SUPREME COURT RULES  
RULES RELATING TO DISCIPLINE OF ATTORNEYS  
RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP

*KRPC 1.6 (2009)*

Review court orders which may amend this rule.

RULE 1.6 Confidentiality of Information

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) To prevent the client from committing a crime; or
- (2) to comply with requirements of law or orders of any tribunal; or
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment

[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.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of

# Kentucky Rules of Professional Conduct

(9) If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

## **Advance Fee Arrangements**

(10) If a lawyer collects an advance deposit on a fee or for expenses, or a flat fee for services to be performed, the lawyer must deposit the funds in the lawyer's trust account until the fee is earned or the expense incurred, at which time the funds shall be promptly distributed. In the event the full amount that is held is not ultimately earned, or due to other factors, such as termination of the attorney-client relationship, is not reasonable, the funds must be returned to the client as provided in Rule 1.16(d).

## **Non-refundable Retainers**

(11) A lawyer may designate a fee arrangement as a non-refundable retainer and upon receipt deposit such funds in the lawyer's operating account. The amount of a non-refundable retainer fee must be reasonable in amount and comply with Rule 1.5.

## **VIII. SCR 3.130(1.6) Confidentiality of information**

SCR 3.130(1.6) shall read:

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding,



including a disciplinary proceeding, concerning the lawyer's representation of the client; or

- (4) to comply with other law or a court order.

### **Comment**

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

(2) A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(3) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only 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.

(4) Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no



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Louisiana Court Rules Annotated  
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\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH May 21, 2009. \*\*\*  
\*\*\* Annotations current through May 12, 2009. \*\*\*

ARTICLES OF INCORPORATION OF THE LOUISIANA STATE BAR ASSOCIATION  
RULES OF PROFESSIONAL CONDUCT  
*CLIENT-LAWYER RELATIONSHIP*

*La. St. Bar Ass'n. Art. XVI § 1.6 (2009)*

Rule 1.6. Confidentiality of information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

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

(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.

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

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

(6) to comply with other law or a court order.





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MASSACHUSETTS COURT RULES

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED AS OF APRIL 15, 2009 \*\*\*

SUPREME JUDICIAL COURT  
A. RULES OF THE SUPREME JUDICIAL COURT  
CHAPTER THREE. ETHICAL REQUIREMENTS AND RULES CONCERNING THE PRACTICE OF LAW  
Massachusetts Rules of Professional Conduct  
CLIENT-LAWYER RELATIONSHIP

*ALM Sup. Jud. Ct. Rule 3:07, RPC 1.6 (2008)*

Review Court Orders which may amend this rule.

Rule 1.6 Confidentiality of Information

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

(b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3, must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3 (e);

(4) when permitted under these rules or required by law or court order.

(c) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a

lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (c) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this rule.

**HISTORY:** Amended, effective March 1, 1998

**NOTES: EDITORIAL NOTE --**

The 1997 court order, in the opening sentence of paragraph (b) of Rule 1.6, substituted "Rule 3.3, Rule 4.1(b), or Rule 8.3" for "Rule 3.3 and Rule 4.1(b)".

**COMMENT**

[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.

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

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (and the related 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 virtually all information relating to the representation, whatever its source. The term "confidential information" relating to representation of a client therefore includes information described as "confidences" and "secrets" in former DR 4-101(A) but without the limitation in the prior rules that the information be "embarrassing" or "detrimental" to the client. Former DR 4-101(A) provided: "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client." See also Scope.

[5A] The word "virtually" appears in the fourth sentence of paragraph 5 above to reflect the common sense understanding that not every piece of information that a lawyer obtains relating to a representation is protected confidential information. While this understanding may be difficult to apply in some cases, some information is so widely available or generally known that it need not be treated as confidential. The lawyer's discovery that there was dense fog at the airport at a particular time does not fall within the rule. Such information is readily available. While a client's disclosure of the fact of infidelity to a spouse is protected information, it normally would not be after the client publicly discloses such information on television and in newspaper interviews. On the other hand, the mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule. A client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not generally known.



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Michie's Annotated Code of Maryland  
Maryland Rules  
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\*\*\* This document reflects changes received through May 1, 2009 \*\*\*  
\*\*\* Annotations current through April 17, 2009 \*\*\*

MARYLAND RULES  
APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Md. Lawyer's R. Prof'l Conduct 1.6 (2009)*

Review Court Orders which may amend this Rule.

Rule 1.6. Confidentiality of Information.

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

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

(1) to prevent reasonably certain death or substantial bodily harm.

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

(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.

(4) to secure legal advice about the lawyer's compliance with these Rules, a court order or other law.

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or.

(6) to comply with these Rules, a court order or other law.

NOTES: COMMENT



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MINNESOTA STATUTES -- COURT RULES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH DECEMBER 1, 2008 \*\*\*

MINNESOTA RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Minn. Rules of Prof'l Conduct 1.6 (2008)*

Review Court Orders which may amend this Rule.

1.6 Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or nt has used or is using the lawyer's services or to prevent the commission of a crime;

(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;

(7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;

(8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;

(9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order; or

(10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3.

**HISTORY:** (Amended effective January 1, 1990; amended April 14, 1992, effective June 1, 1992; amended effective October 1, 2005.)

**NOTES:**

Comment--1991

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

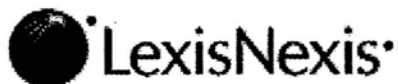
A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of client-lawyer confidentiality is given effect by related bodies of law; the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only 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.

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose



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MISSOURI RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL CHANGES RECEIVED THROUGH JULY 1, 2007 \*\*\*

SUPREME COURT RULES  
RULES GOVERNING THE MISSOURI BAR AND THE JUDICIARY  
RULE 4. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Mo. Sup. Ct. R. 4-1.6 (2007)*

Review Court Orders which may amend this Rule

4-1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).

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

(1) to prevent death or substantial bodily harm that is reasonably certain to occur;

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

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

(4) to comply with other law or a court order.

**COMMENT**

[1] This Rule 4-1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 4-1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 4-1.8(b) and 4-3 31.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 4-1.0(e) for the definition of "informed consent." This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to



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MISSISSIPPI RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Miss. RPC Rule 1.6*  
(2009)

Review Court Orders which may amend this Rule

Rule 1.6. Confidentiality of information.

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

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

(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;

(4) to secure legal advice about the lawyer's compliance with these rules;

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

(6) to comply with other law or a court order.

(c) A lawyer who participates in an intervention on a lawyer, judge or law student by the Lawyers and Judges Assistance Committee shall not reveal any information learned through the intervention from or relating to the lawyer, judge or law student on whom the intervention is conducted except as may be permitted by the Rules of Discipline of the Mississippi Bar or required by law or court order.



## Miss. RPC Rule 1.6

(d) A lawyer shall reveal information to the Lawyers and Judges Assistance Committee in accordance with approved monitoring procedures of the Lawyers and Judges Assistance Committee relating to the status of compliance of a lawyer, judge or law student with the terms and conditions imposed upon the lawyer, judge or law student by the Lawyers and Judges Assistance Committee.

(e) A lawyer may reveal such information to the extent required by law or court order.

**HISTORY:** Amended June 23, 1994; amended April 18, 2002; amended effective November 3, 2005 to add circumstances under which disclosure of otherwise confidential information is permitted

**NOTES:**  
**COMMENT**

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.

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.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Terminology for definition of "informed consent." This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client and the work product doctrine apply 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, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever the 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.

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure.** -- Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.





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MONTANA RULES OF COURT

\*\*\* THIS DOCUMENT REFLECTS ALL RULES IN EFFECT AS OF DECEMBER 31, 2007 \*\*\*

RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*MT Prof. Conduct R. 1.6 (2007)*

Review Court Orders which may amend this Rule

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.



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\*\*\* COURT RULES CURRENT THROUGH APRIL 1, 2009 AND ANNOTATIONS CURRENT THROUGH  
MARCH 1, 2009. \*\*\*

CHAPTER 3. ATTORNEYS AND THE PRACTICE OF LAW  
ARTICLE 5. NEBRASKA RULES OF PROFESSIONAL CONDUCT

*Neb. Ct. R. of Prof. Cond. § 3-501.6 (2009)*

Review Court Orders which may amend this Rule.

§ 3-501.6. Confidentiality of information

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

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

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm;

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

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

(4) to comply with other law or a court order.

(c) The relationship between a member of the Nebraska State Bar Association Committee on the Nebraska Lawyers Assistance Program or an employee of the Nebraska Lawyers Assistance Program and a lawyer who seeks or receives assistance through that committee or that program shall be the same as that of lawyer and client for the purposes of the application of Rule 1.6.

NOTES: COMMENT.

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



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\*\*\* CURRENT THROUGH UPDATES RECEIVED BY APRIL 27, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH MAY 8, 2009 \*\*\*

NEVADA RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Nev. Rules of Prof'l Conduct 1.6 (2009)*

Review court orders which may amend this Rule.

RULE 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c).

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

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;

(3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;

(4) To secure legal advice about the lawyer's compliance with these Rules;

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) To comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.



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\*\*\* RULES CURRENT WITH AMENDMENTS RECEIVED THROUGH MAY 6, 2009 \*\*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH CASES DECIDED MARCH 19, 2009 \*\*\*\*

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*N.H. Rules of Prof'l Conduct Rule 1.6 (2009)*

**Rule 1.6. Confidentiality of Information**

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

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

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

(4) to comply with other law or a court order.--Adopted July 25, 2007, eff. January 1, 2008.

**NOTES:**

**Ethics Committee Comment**

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer's individual conscience may dictate.



LEXSTAT N.J. RPC 1.6

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\*\*\* ANNOTATIONS CURRENT THROUGH MAY 20, 2009 \*\*\*

RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY  
PART I. RULES OF GENERAL APPLICATION  
APPENDIX TO PART I RULES OF PROFESSIONAL CONDUCT  
RULE 1.6. CONFIDENTIALITY OF INFORMATION

*N.J. Court Rules, RPC 1.6 (2009)*

Review Court Orders which may amend this Rule

RPC 1.6. Confidentiality of information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to *RPC 1.6(b)*, the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

(e) Reasonable belief for purposes of *RPC 1.6* is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

**HISTORY:** Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004.

LexisNexis (R) Notes:

#### CASE NOTES

1. Where an attorney had formerly jointly represented the Chapter 7 debtor and an alleged patent infringer in a patent infringement case, the patent infringer's subsequent malpractice suit against the attorney did not waive the Chapter 7 debtor's attorney-client privilege, so as to permit the patent owner to obtain discovery from the attorney in its proceeding against the Chapter 7 debtor seeking to deny the debtor a bankruptcy discharge; permitting discovery in these circumstances would abrade both the attorney-client privilege and the intent of the *Rules of Professional Conduct*. *Fuji Photo Film Co. v. Benun (In re Benun)*, 339 B.R. 115, 2006 Bankr. LEXIS 368, 46 Bankr. Ct. Dec. (LRP) 52 (Bankr. D.N.J. 2006).

2. Attorney who represented defendant in prior bail proceedings was erroneously permitted to defend his co-defendant at their joint trial for possession of cocaine, in which their defenses were mutually antagonistic, because the attorney's appearance on behalf of defendant with respect to the bail motion constituted representation under the prohibition of N.J. R. Prof. Conduct 1.9, and an attorney's appearance on behalf of an accused at pretrial release hearings constitutes a significant part of his representation of the client. *State v. Sanders*, 260 N.J. Super. 491, 616 A.2d 1345, 1992 N.J. Super. LEXIS 401 (App.Div. 1992).

3. Where an attorney had formerly jointly represented the Chapter 7 debtor and an alleged patent infringer in a patent infringement case, the patent infringer's subsequent malpractice suit against the attorney did not waive the Chapter 7 debtor's attorney-client privilege, so as to permit the patent owner to obtain discovery from the attorney in its proceeding against the Chapter 7 debtor seeking to deny the debtor a bankruptcy discharge; permitting discovery in these circumstances would abrade both the attorney-client privilege and the intent of the *Rules of Professional Conduct*. *Fuji Photo Film Co. v. Benun (In re Benun)*, 339 B.R. 115, 2006 Bankr. LEXIS 368, 46 Bankr. Ct. Dec. (LRP) 52 (Bankr. D.N.J. 2006).

4. Attorney who represented defendant in prior bail proceedings was erroneously permitted to defend his co-defendant at their joint trial for possession of cocaine, in which their defenses were mutually antagonistic, because the attorney's appearance on behalf of defendant with respect to the bail motion constituted representation under the prohibition of N.J. R. Prof. Conduct 1.9, and an attorney's appearance on behalf of an accused at pretrial release hearings constitutes a significant part of his representation of the client. *State v. Sanders*, 260 N.J. Super. 491, 616 A.2d 1345, 1992 N.J. Super. LEXIS 401 (App.Div. 1992).

5. Attorney who represented defendant in prior bail proceedings was erroneously permitted to defend his



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\*\*\* FEDERAL RULES CURRENT THROUGH APRIL 1, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH 2009-NMCA-035 AND 2009-NMSC-010 \*\*\*

RULES OF PROFESSIONAL CONDUCT  
ARTICLE 1. CLIENT-LAWYER RELATIONSHIP

*N.M. R. Prof. Conduct 16-106 (2009)*

Review court orders that may amend this rule.

16-106 Confidentiality of information

A. Disclosure of information generally. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph B of this rule.

B. Disclosure of information; specific circumstances. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (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;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order. [As amended, effective November 3, 2008.]

NOTES: OFFICIAL COMMENT

COMMITTEE COMMENTARY



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\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 12, 2009 \*\*\*

THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR  
CLIENT-LAWYER RELATIONSHIP

*N.C. Prof. Cond. Rule 1.6 (2009)*

Review Court Orders that may amend this rule

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

- (1) to comply with the Rules of Professional Conduct the law or court order;
- (2) to prevent the commission of a crime by the client;
- (3) to prevent reasonably certain death or bodily harm;
- (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
- (5) to secure legal advice about the lawyer's compliance with these Rules;
- (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

(c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina



## N.C. Prof. Cond. Rule 1.6

Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

**NOTES: COMMENT**

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information acquired during the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during 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.

[4] Paragraph (a) prohibits a lawyer from revealing information acquired during the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

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

**Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information acquired during the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime. Paragraph (b)(2) recognizes that a lawyer should be allowed to make a disclosure to avoid sacrificing the interests of the potential victim in favor of preserving the client's confidences when the client's purpose is wrongful. Similarly, paragraph (b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and



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\*\*\* AMENDMENTS TO RULES CURRENT THROUGH 6/5/2009 AND EFFECTIVE 7/1/2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH MAY 29, 2009 \*\*\*

Local Rules of the United States District Court for the District of North Dakota

*D. N.D. General Rule 1.6 (2009)*

Review Court Orders which may amend this Rule.

**General Rule 1.6. Decorum.**

**(A) Inspection**

Persons may only enter an area of a courthouse building if they have submitted to inspection of their person or any items in their possession, if requested by a United States Marshal or a court security officer.

**(B) Courtrooms**

All persons must take a seat immediately upon entering the courtroom while the court is in session and must conduct themselves in a quiet, orderly, and respectful manner. Persons must be fully clothed in attire suitable to the maintenance of the dignity of the court. Persons may not chew gum or bring food into the courtroom while court is in session. Persons may not enter or leave the courtroom while the court is charging a jury, except in an emergency. Spectators leaving a courtroom while court is in session or at any recess may not loiter in the halls and must abide by the provisions of this rule to gain readmittance.

**(C) Photographs And Recordings**

The taking of photographs and operation of recording equipment in the courtroom or its surrounding areas and radio and television broadcasting from the courtroom or its surrounding areas during the progress of or in connection with judicial proceedings is prohibited whether or not court is actually in session. A judicial officer may, however, permit (a) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record and (b) the broadcasting, televising, recording, or photographing of ceremonial or naturalization proceedings.

**(D) Laptop Computers**

Laptop computers are allowed and may be used in all areas of the courthouse, including courtrooms. All laptop computers must be rendered silent before entering a courtroom. Laptop computers may not be used to photograph, record, televise, or otherwise transmit any images or sounds in a courtroom, judge's chambers, jury room, or corridor of the building on the floor on which a courtroom or jury room is located.

**(E) Wireless Communication Devices**

Wireless communication devices are not allowed in a courthouse with the following exceptions:

(1) Employees of the courthouse tenants may bring wireless communication devices into the courthouse with no limitations except those imposed by their employer;

(2) Law enforcement officers may bring wireless communication devices into the courthouse upon presenting proper identification to the United States Marshal Service or court security officers; and

(3) Attorneys and their support staff may bring wireless communication devices into a courthouse upon presenting proper identification to the United States Marshal Service or court security officer.

Wireless communication devices must be turned off or rendered silent before entering a courtroom. Wireless communication devices must not be used for voice communication in a courtroom during judicial proceedings without the express permission of the presiding judge. Wireless communication devices may not be used to photograph, record, televise, or otherwise transmit any images or sounds in a courtroom, judge's chambers, jury room, or corridor of the building on the floor on which a courtroom or jury room is located.

**HISTORY:** Adopted effective September 1, 2008.



1 of 100 DOCUMENTS

OHIO RULES OF COURT SERVICE

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\*\*\* RULES CURRENT THROUGH MAY 1, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 \*\*\*

Ohio Rules of Professional Conduct  
I CLIENT-LAWYER RELATIONSHIP

*Ohio Prof. Cond. Rule 1.6 (2009)*

Review Court Orders which may amend this Rule.

**Rule 1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably* believes necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

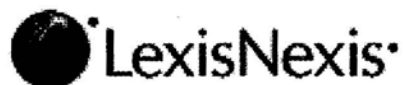
(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.



3 of 100 DOCUMENTS

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)

\*\*\* This document is current with Emergency Legislation through Chapter 2 \*\*\*  
\*\*\* of the First Regular Session of the 52nd Legislature \*\*\*  
\*\*\* June 24, 2008 Annotation Service \*\*\*

TITLE 5. ATTORNEYS AND STATE BAR  
CHAPTER 1.  
APPENDIX 3-A. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

**Go to the Oklahoma Code Archive Directory**

*5 Okl. St. Chap. 1, Appx. 3-A, Rule 1.6 (2009)*

Rule 1.6. Confidentiality of information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing:

(i) a crime; or

(ii) a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(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, provided that the lawyer has first made reasonable efforts to contact the client so that the client can rectify such criminal or fraudulent act, but the lawyer has been unable to do so, or the lawyer has contacted the client and called upon the client to rectify such criminal or fraudulent act and the client has refused or has been unable to do so;

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

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

(6) as permitted or required to comply with these Rules, other law or a court order.

LexisNexis (R) Notes:

#### CASE NOTES

1. In a dispute involving a retention lien, a trial court improperly granted summary judgment in favor of a firm because the court should have balanced the firm's need for a lien against the prejudice to the client; the firm was required to mitigate consequences to the client at the termination of the attorney-client relationship. *Britton & Gray, P.C. v. Shelton*, 2003 OK CIV APP 40, 69 P.3d 1210, 2003 Okla. Civ. App. LEXIS 17, 74 Okla. B.J. 1758 (Okla. Ct. App. Feb. 6 2003).

2. In a dispute involving a retention lien, a trial court improperly granted summary judgment in favor of a firm because the court should have balanced the firm's need for a lien against the prejudice to the client; the firm was required to mitigate consequences to the client at the termination of the attorney-client relationship. *Britton & Gray, P.C. v. Shelton*, 2003 OK CIV APP 40, 69 P.3d 1210, 2003 Okla. Civ. App. LEXIS 17, 74 Okla. B.J. 1758 (Okla. Ct. App. Feb. 6 2003).

3. The Supreme Court of Oklahoma has defined three levels of applicable culpability when evaluating the mishandling of client funds: 1) commingling; 2) simple conversion; and 3) misappropriation, i.e., theft by conversion or otherwise. Commingling, when client monies were combined with the attorney's personal funds, occurs when an attorney placed client funds that were not subject to a lien with personal funds, but did not rise to the level of misappropriation since the client was not deprived of monies; however, the attorney was guilty of mishandling funds by commingling the funds and converting them by using them for office expenses while the client was told that the initial check received for back support owed from a former spouse had bounced. *State ex rel. Okla. Bar Ass'n v. Meek*, 1994 Okla. LEXIS 134, 1994 OK 118, 895 P.2d 692, 65 Okla. B.J. 3693 (Okla. Oct. 25, 1994).

4. Attorney violated Okla. R. Prof. Conduct 1.6, Okla. Stat. tit. 5, ch. 1, app. 3-A when she referred to criminal charges against her former client in correspondence and motions by which the attorney sought to recover attorney fees; the attorney had learned of the unrelated criminal charges through the client while the attorney was representing her on a



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OREGON COURT RULES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH FEBRUARY 1, 2006 \*\*\*

OREGON STATE BAR RULES  
OREGON RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*ORPC 1.6 (2008)*

Review Court Orders which may amend this Rule.

Rule 1.6 Confidentiality of Information

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

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

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

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

**HISTORY:** Adopted and Effective January 1, 2005.



1 of 100 DOCUMENTS

PENNSYLVANIA RULES OF COURT, ANNOTATED BY LEXISNEXIS(R)

\* THIS DOCUMENT IS CURRENT THROUGH AMENDMENTS RECEIVED JULY 6, 2009 \*

\*\*\* June 8, 2009 ANNOTATION SERVICE \*\*\*

RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Pa. RPC 1.6 (2009)*

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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

(6) to effectuate the sale of a law practice consistent with Rule 1.17.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

LexisNexis (R) Notes:

CASE NOTES





1 of 1 DOCUMENT

RHODE ISLAND COURT RULES ANNOTATED  
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\*\*\* THIS FILE INCLUDES AMENDMENTS RECEIVED THROUGH MARCH 4, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 5, 2009 \*\*\*

STATE RULES  
SUPREME COURT RULES  
ARTICLE V. RULES OF PROFESSIONAL CONDUCT  
PREAMBLE AND SCOPE

*RI Sup. Ct. Art. V, Rule 1.6 (2009)*

Review Court Orders which may amend this Rule

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

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

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

(4) to comply with other law or a court order.

**HISTORY:** As adopted by the court on February 16, 2007, eff. April 15, 2007

**NOTES:** Commentary.

Fundamental Principles

[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.

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



1 of 1 DOCUMENT

CODE OF LAWS OF SOUTH CAROLINA ANNOTATED  
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\*\*\* THIS DOCUMENT IS CURRENT THROUGH OCTOBER 15, 2008 \*\*\*

SOUTH CAROLINA APPELLATE COURT RULES  
IV. RULES GOVERNING THE PRACTICE OF LAW  
RULE 407. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

**GO TO SOUTH CAROLINA ARCHIVE DIRECTORY**

*Rule 407, Rule 1.6, SCACR (2008)*

Review Court Orders which may amend this Rule.

**RULE 1.6. CONFIDENTIALITY OF INFORMATION**

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

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

(1) to prevent the client from committing a criminal act;

(2) to prevent reasonably certain death or substantial bodily harm;

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

(4) 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;

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

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

(7) to comply with other law or a court order.

Comment



1 of 1 DOCUMENT

LexisNexis (R) South Dakota Statutes Annotated  
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\*\*\* THIS DOCUMENT IS CURRENT THROUGH ALL 2009 LEGISLATION PASSED \*\*\*  
\*\*\* AT THE 84TH REGULAR SESSION INCLUDING SUPREME COURT RULE 09-01 THROUGH 09-06. \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 15, 2009 \*\*\*

TITLE 16. COURTS AND JUDICIARY  
CHAPTER 16-18. POWERS AND DUTIES OF ATTORNEYS  
**GO TO SOUTH DAKOTA STATUTES ARCHIVE DIRECTORY**

*S.D. Codified Laws § 16-18-appx-1.6 (2009)*

§ 16-18-appx-1.6. Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent except for disclosures that are impliedly authorized in order to carry out the representation or the disclosure is permitted by, and except as stated in paragraph (b).

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

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

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

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

(4) to the extent that revelation appears to be necessary to rectify the consequences of a client's criminal or fraudulent act in which the lawyer's services had been used; or

(5) to comply with other law or a court order.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's



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TENNESSEE COURT RULES ANNOTATED  
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\*\*\* Current through Rules received through June 22, 2009 \*\*\*  
\*\*\* Annotations current through June 5, 2009 \*\*\*

RULES OF THE SUPREME COURT OF THE STATE OF TENNESSEE  
[EFFECTIVE JANUARY 28, 1981]  
Rule 8. Rules of Professional Conduct.  
Chapter 1. The Client-Lawyer Relationship

*Tenn. Sup. Ct. R. 8, Rule 1.6 (2009)*

Review Court Orders which may amend this Rule

**Rule 1.6. Confidentiality.**

(a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

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

(1) To prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;

(2) To secure legal advice about the lawyer's compliance with these rules; or

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

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

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) To comply with RPC 3.3, 4.1, or other law.



1 of 1 DOCUMENT

Texas Rules  
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\*\*\* This document is current through July 1, 2009 \*\*\*  
\*\*\* Federal case annotations: March 29, 2009 postings on Lexis.com \*\*\*  
\*\*\* State case annotations: April 14, 2009 postings on Lexis.com \*\*\*

STATE RULES  
TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT  
I. CLIENT-LAWYER RELATIONSHIP

*Tex. R. Prof Conduct 1.05 (2009)*

Review Court Orders which may amend this Rule

Rule 1.05 Confidentiality of Information

(a) Confidential information includes both privileged information and unprivileged client information. Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to:

(i) a person that the client has instructed is not to receive the information; or

(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultations.

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client

## Tex. R. Prof Conduct 1.05

consents after consultation.

(c) A lawyer may reveal confidential information:

- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
- (2) When the client consents after consultation.
- (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
- (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
- (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
- (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
- (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
- (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

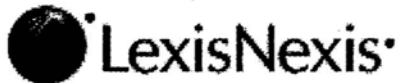
(d) A lawyer also may reveal unprivileged client information:

- (1) When impliedly authorized to do so in order to carry out the representation.
- (2) When the lawyer has reason to believe it is necessary to do so in order to:
  - (i) carry out the representation effectively;
  - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
  - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
  - (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

**NOTES:**



LEXSTAT UTAH RULES OF PROF'L CONDUCT 1.6

UTAH COURT RULES ANNOTATED.

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\*\*\* THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH JULY 1, 2009 \*\*\*

UTAH CODE OF JUDICIAL ADMINISTRATION  
PART II. SUPREME COURT RULES OF PROFESSIONAL PRACTICE  
CHAPTER 13. RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

*Utah Rules of Prof'l Conduct Rule 1.6 (2009)*

Rule 1.6. Confidentiality of Information.

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

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

(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 and in furtherance of which the client has used the lawyer's services;

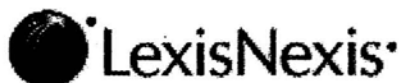
(4) to secure legal advice about the lawyer's compliance with these Rules;

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

(6) to comply with other law or a court order.

(c) For purposes of this rule, representation of a client includes counseling a lawyer about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on an Utah State Bar endorsed lawyer assistance program.

**HISTORY:** Amended effective October 10, 1990; November 1, 1998; November 1, 2005



1 of 1 DOCUMENT

VIRGINIA RULES ANNOTATED

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\*\*\* THIS DOCUMENT IS CURRENT THROUGH CHANGES RECEIVED JUNE 15, 2009 \*\*\*

RULES OF SUPREME COURT OF VIRGINIA  
PART SIX INTEGRATION OF THE STATE BAR  
SECTION II. VIRGINIA RULES OF PROFESSIONAL CONDUCT  
CLIENT-LAWYER RELATIONSHIP

**GO TO CODE OF VIRGINIA ARCHIVE DIRECTORY**

*Va. Sup. Ct. R. pt. 6, sec. II, 1.6*

Review Court Orders which may amend this Rule

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept



confidential.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel;

(2) information which clearly establishes that the client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that the client advise the tribunal of the fraud. For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud; or

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

**NOTES:** [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 common law recognizes that the client's confidences must be protected from disclosure. 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.

[2a] 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. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] 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 protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[3a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[4] The requirement of maintaining confidentiality of information relating to representation applies to government



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VERMONT COURT RULES ANNOTATED  
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\*\*\* RULE AMENDMENTS CURRENT AS AMENDED THROUGH JANUARY 13, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 10, 2008 AND THE APPROPRIATE FEDERAL COURTS  
THROUGH NOVEMBER 21, 2008 \*\*\*

VERMONT RULES OF PROFESSIONAL CONDUCT  
3. TERMINOLOGY  
CLIENT-LAWYER RELATIONSHIP

*Vt. Prof. Cond. Rule 1.6 (2009)*

Review Court Orders which may amend this rule.

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer must reveal such information when required by these rules or when:

(1) the lawyer reasonably believes that disclosure is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) the lawyer reasonably believes that failure to disclose a material fact to a third person will assist a criminal or fraudulent act by a client.

(c) A lawyer may reveal such information when permitted under these rules or required by law or court order or when the lawyer reasonably believes that disclosure is necessary:

(1) to reveal the intention of the client to commit a crime not likely to result in imminent death or substantial bodily harm and the information necessary to prevent the crime; or

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

NOTES: PREAMBLE, SCOPE AND TERMINOLOGY

History

These rules replace the Vermont Code of Professional Responsibility, adopted by the Court on February 10, 1971, and amended thereafter. These rules apply to lawyer conduct after September 1, 1999. The Code of Professional



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WASHINGTON COURT RULES ANNOTATED  
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\*\*\* RULES CURRENT THROUGH MARCH 13, 2009 \*\*\*  
\*\*\* Annotations current through February 26, 2009 \*\*\*

STATE RULES  
PART I. RULES OF GENERAL APPLICATION  
RULES OF PROFESSIONAL CONDUCT (RPC)  
TITLE 1. CLIENT-LAWYER RELATIONSHIP

*Wash. RPC 1.6 (2009)*

Review Court Orders which may amend this Rule.

Rule 1.6. Confidentiality of information

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

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client 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;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal

representative, or receiver.

**HISTORY:** Adopted June 25, 1985, effective Sept. 1, 1985; amended May 10, 1990, effective Sept. 1, 1990; amended, effective September 1, 2006.

**NOTES: COMMENT**

See also Washington Comment [19].

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only 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.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

**Authorized Disclosure**

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

**Disclosure Adverse to Client**

[6] [Washington revision] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is



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Michie's West Virginia Code Annotated Court Rules  
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\*\*\* Text current through May 29, 2009 \*\*\*  
\*\*\* Annotations current through May 1, 2009 \*\*\*

**RULES OF PROFESSIONAL CONDUCT**  
Client-Lawyer Relationship

*W. Va. Prof. Cond., Rule 1.6 (2009)*

Review Court Orders which may amend this Rule

**Rule 1.6. Confidentiality of information.**

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

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act; or

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

**NOTES:**

**COMMENT**

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.

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.

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.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information



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WISCONSIN COURT RULES

\*\*\* THIS DOCUMENT IS CURRENT THROUGH DECEMBER 31, 2008 \*\*\*

SUPREME COURT RULES  
CHAPTER 20. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS  
SUBCHAPTER I. CLIENT-LAWYER RELATIONSHIP

*Wis. SCR 20:1.6 (2008)*

Review Court Orders which may amend this Rule

SCR 20:1.6 Confidentiality.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

(2) 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 clients commission of a crime or fraud in furtherance of which the client has used the lawyers services;

(3) to secure legal advice about the lawyers conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyers representation of the client; or

(5) to comply with other law or a court order.

**HISTORY:** History: *Sup. Ct. Order No. 04-07, 2007 WI 4, 293 Wis. 2d xv.*

**NOTES:**

Wisconsin Committee Comment: The rule retains in paragraph (b) the mandatory disclosure requirements that have been a part of the Wisconsin Supreme Court Rules since their initial adoption. Paragraph (c) differs from its counterpart,



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\*\*\* THIS DOCUMENT REFLECTS CHANGES RECEIVED THROUGH MAY 15, 2009 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH MARCH 1, 2009 \*\*\*

RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW  
CLIENT-LAWYER RELATIONSHIP

*Wyo. Prof. Conduct Rule 1.6 (2009)*

Review Court Orders which may amend this Rule

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client makes an informed decision, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;

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

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

(4) to comply with other law or a court order; or

(5) to protect the best interests of an individual when the lawyer has been appointed to act as a guardian ad litem or as an attorney for the best interests of that individual. Comment. -- [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.



## Wyo. Prof. Conduct Rule 1.6

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

[5] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed decision, the lawyer must not reveal confidential information relating to the representation. See Rule 1.0(b) for the definition of confidential information and Rule 1.0(f) for the definition of informed decision. This contributes to the trust that is the 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. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[6] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in these rules. The attorney-client privilege and work-product doctrine apply 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, for example, applies not only 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.

[7] Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to disclosures 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. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure. [8] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client. [9] Several situations must be distinguished.

[10] First, the lawyer may not counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

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

[12] Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such criminal acts. The lawyer may make a disclosure in order to prevent the criminal act which the lawyer reasonably believes is intended by the



## Wyo. Prof. Conduct Rule 1.6

client. It is very difficult for a lawyer to "know" when such a purpose will actually be carried out for the client may have a change of mind.

[13] Fourth, a lawyer appointed to act as a guardian ad litem represents the best interests of that individual, not the individual. As stated in paragraph (b)(3), the lawyer has professional discretion to reveal information in order to protect the individual's best interests. Any such disclosure should be no greater than that which the lawyer reasonably believes necessary to protect the individual's best interests.

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

[15] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[16] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[17] Other law may require that a lawyer disclose information about a client. See *Wyoming Statute Sections 14-3-205 and 35-20-103*. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[18] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent an informed decision of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

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

## Wyo. Prof. Conduct Rule 1.6

[20] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, conversely, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

**Withdrawal.** [21] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

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

**Acting Competently to Preserve Confidentiality.** [23] A lawyer must act competently to safeguard confidential information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

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

**Former Client.** [25] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

**HISTORY:** Amended February 14, 2002, effective April 1, 2002; amended April 11, 2006, effective July 1, 2006 .

**When lawyer-client conversations not confidential . --** The confidentiality of conversations with counsel is not protected where the statements or communications made to the lawyer are made in the furtherance of criminal endeavor, as, for example, when the lawyer is a victim of threats against his family and property. *Hopkinson v. State*, 664 P.2d 43 (Wyo. ), cert. denied, 464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983) .

**Fee not barred when client also discloses information . --** While an attorney may not disclose confidences and

# Attachment B

**A Former In-House Lawyer May Pursue a Wrongful Discharge Claim Against Her Former Employer and Client As Long As Client Information Properly Is Protected**

*The Model Rules do not prohibit a lawyer from suing her former client and employer for retaliatory discharge. In pursuing such a claim, however, the lawyer must take care not to disclose client information beyond that information the lawyer reasonably believes is necessary to establish her claim.*

**Retaliatory Discharge Claims**

In this opinion, we address the constraints that may be imposed on retaliatory or wrongful discharge claims by in-house lawyers against their former employers and clients under the Model Rules of Professional Conduct. We note at the outset that the Committee does not address the legal question of whether the discharge of an in-house lawyer – even one that alleges that the employer has “retaliated” for the lawyer’s proper adherence to her ethical obligations – gives rise to an enforceable claim.<sup>1</sup> The Committee only addresses the ethical considerations that arise under the Model Rules when such an action is permitted under applicable state law.<sup>2</sup>

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<sup>1</sup>This opinion also does not address a retaliatory discharge claim by a lawyer against the law firm by which she is employed. A retaliatory discharge claim by a former in-house lawyer may be distinguished from a wrongful discharge suit by a lawyer against a law firm. A law firm and lawyer are bound to conduct their practices in accordance with prevailing ethical obligations. *Wieder v. Skala*, 80 N.Y.2d 628, 636, 609 N.E.2d 105, 108, 593 N.Y.S.2d 752, 755 (N.Y. 1992). The employer of an in-house lawyer necessarily is not bound by legal ethical rules. See *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395, 400 (Mich. Ct. App. 1991). In *Wieder*, an associate sued a law firm claiming he was fired for insisting that the firm comply with governing disciplinary rules and that it report the misconduct of another associate. 80 N.Y.2d at 631, 609 N.E.2d at 106, 593 N.Y.S.2d at 753. The New York Court of Appeals held there was an implied obligation that both the firm and the associate would carry out the employment contract in compliance with ethical obligations, meaning the firm could not require an associate to violate ethical obligations in order to keep his job. , 80 N.Y.2d at 636, 609 N.E.2d at 108, 593 N.Y.S.2d at 755.

<sup>2</sup>Courts permit retaliatory discharge claims by former employees as an exception to the employment-at-will doctrine, which avows that when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for “good cause, bad cause, or no cause at all.” See generally *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 319-21, 171 Cal. Rptr. 917, 920-22 (1st Dist. 1981); Brian F. Berger, Note, *Defining Public Policy Torts In At-Will Dismissals*, 37 STANFORD L. REV. 153, 153 (1981). The exception provides relief to employees discharged for reasons contrary to public policy, such as for exercising statutory or constitutional rights or for whistleblowing when an employee refuses to violate the law and reports an employer’s wrongdoing. *E.g.*, *Parker v. M & T Chemicals*, 236 N.J.Super. 451, 460, 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989) (court construed state whistleblower act as compelling a retaliating employer to pay damages to an employee-lawyer who is discharged wrongfully or mistreated for refusing to join a scheme to cheat a competitor or for any reason that is violative of law, fraudulent, criminal, or incompatible with a clear mandate of the state’s public policy concerning public health, safety or welfare); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363, 1365-66 (3d. Cir. 1979) (Pennsylvania statute forbidding employer from requiring polygraph test as condition for employment or continuation of employment embodies a recognized facet of public policy). In addition, certain states have enacted legislation in this area. For example, in Louisiana, an employment contract in restraint of membership in labor organizations is contrary to public policy. La. Rev. Stat. Ann § 823 (West 2001).

Employers faced with retaliatory discharge suits from former in-house lawyers assert an absolute right to discharge their lawyer at any time and for any reason because no client should be forced into representation by a lawyer in whom that “confidence and trust lying at the heart of a fiduciary relationship has been lost.” *General Dynamics Corp. v. Superior Court*, 7 Cal.4th 1164, 1174, 876 P.2d 487, 493, 32 Cal.Rptr.2d 1, 7 (Cal. 1994); *Parker v. M & T Chemicals*, 236 N.J.Super. at 458, 566 A.2d at 219. The absolute right to terminate an in-house lawyer under any circumstances without consequence has been limited, however, by a number of courts in recent years that have noted that the in-house lawyer uniquely is bound to her client. Where outside counsel face dilemma with clients, the in-house lawyer faces “a virtually complete dependence on the good will and confidence of a single employer to provide livelihood and career success.” *General Dynamics*, 7 Cal.4th at 1182, 876 P.2d at 498. 32 Cal.Rptr.2d at 12. Thus, some courts have permitted the retaliatory discharge claim by the former in-house lawyer. These courts find there are compelling reasons of public policy that make it appropriate to impose legal

### The Model Rules and Retaliatory Discharge Claims

There is nothing in the Model Rules that precludes a lawyer from suing her former client and, in fact, the Rules contemplate that such actions may occur.<sup>3</sup>

The principal obligations of a lawyer to her former client are to continue to maintain the confidentiality of the client information learned during the course of the representation and to neither "use information relating to the representation to the disadvantage of the former client" nor "reveal information relating to the representation"<sup>4</sup> except, in both cases, as permitted by Rule 1.6 or Rule 3.3.<sup>5</sup> Under Rule 1.6(b)(2), a lawyer may reveal information

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consequences for dismissing an in-house lawyer. Specifically, they conclude that the public has an interest in insuring that lawyers abide by their ethical obligations.

Courts also have recognized state-adopted codes of ethics for lawyers as a reflection of public policy. *E.g.*, *Mourad v. Automobile Club*, 465 N.W.2d 395 at 400 (court refused to address in-house lawyer's retaliatory discharge claim but held that lawyer could maintain action for breach of contract based on retaliatory demotion and constructive discharge resulting from his refusal to violate code of professional conduct). In addition to *Mourad*, other courts that have provided relief to an in-house lawyer dismissed in retaliation for either insisting on adhering to mandatory ethical norms of the profession or for refusing to violate them include *GTE Products Corp. v. Stewart*, 421 Mass. 22, 29, 653 N.E.2d 161, 165 (Mass. 1995) (public interest is better served if in-house counsel's resolve to comply with ethical and statutorily mandated duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties) and *General Dynamics Corp.*, 7 Cal.4th at 1186, 876 P.2d at 501, 32 Cal.Rptr.2d at 15 (in-house counsel should be permitted to pursue a claim for wrongful discharge if the claim is "founded on allegations that an in-house attorney was terminated for refusing to violate a mandatory ethical duty embodied in [the state's code of professional conduct]"). See also *Willy v. Coastal Corp.*, 647 F. Supp. 116, 118 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988) (implying that code of ethics reflected public policy, but holding other remedies, such as withdrawal from representation, sufficient to avoid violating public policy); *Herbster v. North American Co.*, 501 N.E.2d 343, 346-48 (Ill. App. Ct. 1986), *appeal dismissed*, 114 Ill.2d 545, 108 Ill. Dec. 417, 508 N.E.2d 728 (1987) (stating that code of ethics reflected public policy despite disallowing vice-president in charge of legal department's retaliatory discharge claim). On the other hand, the Illinois Supreme Court rejected a lawyer retaliatory discharge claim in *Balla v. Gambro*, 145 Ill.2d 492, 501-02, 584 N.E.2d 104, 108-09, 164 Ill. Dec. 892, 896-97 (Ill. 1991), on the grounds that public policy adequately is safeguarded without extending the tort of retaliatory discharge to in-house counsel and that permitting such suits would have an undesirable effect on the lawyer-client relationship.

<sup>3</sup>See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2001). Rule 1.6 states:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
  - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

<sup>4</sup> Rule 1.9 states in part:

- (c) A lawyer who has formerly represented a client in a matter of whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

<sup>5</sup> Rule 3.3 states in pertinent part:

- (a) A lawyer shall not knowingly:
  - (1) make a false statement of material fact or law to a tribunal;



relating to the representation of the client "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . ."

The term "claim" is not defined under the Model Rules. In the predecessor Code of Professional Responsibility, DR 4-101 (C) allowed a lawyer to reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."<sup>6</sup> When the Model Rules were adopted in 1983, the Comments explained: "With regard to paragraph (b)(2), DR 4-101 (c)(4) provided that a lawyer may reveal 'confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct.' Paragraph (b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee--for example, recovery of property from the client."<sup>7</sup> Recently, the Montana Supreme Court concluded that Rule 1.6 of the Montana Rules of Professional Conduct, which is identical to Model Rule 1.6, contemplates revealing confidential client information by a former in-house lawyer pursuing a retaliatory discharge claim against her former employer.<sup>8</sup> We conclude that a retaliatory discharge or similar claim by an in-house lawyer against her employer is a "claim" under Rule 1.6(b)(2).

#### Only Necessary Information May Be Disclosed

In pursuing a retaliatory discharge claim, however, the lawyer must limit disclosure of confidential client information to the extent reasonably possible. A comment to Rule 1.6 provides that "[a] lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements limiting the risk of disclosure."<sup>9</sup>

The measures necessary to protect information that may be disclosed will be unique to each situation. For example, a lawyer should consider the protections offered by *in camera* review at a pre-trial evidentiary hearing. To prevent unnecessary disclosure of confidential information, a lawyer should consider requesting that a court seal the record of the proceedings<sup>10</sup> and consider in an appropriate case whether the action should go forward without disclosing even the names of the parties.<sup>11</sup>

#### Conclusion

Retaliatory discharge actions provide relief to employees fired for reasons contradicting public policy. The Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in-house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client and may reveal information to the extent necessary to establish her claim against her employer. The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed./

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- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client,
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

<sup>6</sup>MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1978).

<sup>7</sup>ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 68 (4<sup>th</sup> ed. 1999).

<sup>8</sup>*Burkhart v. Semitool, Inc.*, 300 Mont. 480, 497, 5 P.3d 1031, 1041 (Mont. 2000).

<sup>9</sup>Rule 1.6 cmt. 19.

<sup>10</sup>*See, e.g., Doe v. A. Corp.*, 709 F.2d 1043, 1045, n.1, *reh'g denied*, 717 F.2d 1399 (5th Cir. 1983).

<sup>11</sup>*Id.*

**Attachment C**

## FORMAL OPINION NO. 2005-136

### Information Relating to the Representation of a Client: Lawyer's Wrongful Termination Claim

#### Facts:

Lawyer is in-house counsel and general manager of Company. In the course of applying for a patent on behalf of Company, Lawyer learned that the product was not invented by Company, but was in fact invented by Company's customer. The patent application required Lawyer to swear on behalf of Company that Company was the "original and first inventor." A person who makes a misrepresentation on a patent application is subject to criminal prosecution. Lawyer refused to make the representation that Company was the original and first inventor, and was fired. Lawyer wishes to pursue a civil action for wrongful termination in which it will be necessary to disclose information about these events.

#### Question:

May Lawyer bring a civil action for wrongful termination if bringing the action requires disclosure of information relating to Lawyer's representation of Company?

#### Conclusion:

Yes, qualified.

#### Discussion:

Relying on the general rule that "a client may terminate the relationship between himself and his lawyer with or without cause,"<sup>1</sup> some courts decline to recognize the tort of wrongful discharge in the case of in-house counsel. Some courts reach that conclusion, in part, because recognizing the claim would permit lawyers to disclose client confidences and secrets. *Balla v. Gambro, Inc.*, 585 NE2d 104, 109, 145 Ill2d 492 (1991); *Eckhous v. Alfa-Laval, Inc.*, 764 F Supp 34, 37 (SDNY). There are presently no dispositive Oregon Supreme Court cases on this issue.

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<sup>1</sup> *Herbster v. North American Co. For Life & Health Insurance*, 501 NE2d 343 (Ill 1986). See generally D. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO J LEGAL ETHICS 553 (1988).



A discussion of whether, or under what circumstances, a former in-house counsel can state a claim for wrongful termination is a matter of substantive law, and beyond the scope of this opinion. For purposes of discussion, however, we assume that such a claim can be stated.

In asserting such a claim, Lawyer is bound by Oregon RPC 1.6, which provides:

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

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

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

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

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

(5) to comply with other law, court order, or as permitted by these Rules; or

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

*See also* ORS 9.460(3). Lawyer is bound to protect information relating to the representation of Company even after termination of employment. OSB Formal Ethics Op No 2005-23.

Because the information at issue here is protected from disclosure by Oregon RPC 1.6, Lawyer may not use it in the claim for wrongful termination unless one of the applicable exceptions is satisfied. Oregon RPC 1.6(b)(4) applies to a "claim or defense on behalf of a lawyer in a

controversy between the lawyer and the client.” If a legally viable and nonfrivolous claim exists, disclosure may be made. Nevertheless, there are limits on how much Lawyer may reveal and the circumstances of the revelation. The information that Lawyer seeks to disclose must be reasonably necessary to establish the claim asserted. *See* OSB Formal Ethics Op No 2005-104. Lawyer must ensure that any confidential information is revealed in the least public manner, including insistence on an appropriate protective order. *Cf. In re Huffman*, 328 Or 567, 983 P2d 534 (1999) (lawyer disciplined for making disclosures of confidential information that were not required for lawyer to assert viable defense).

**Approved by Board of Governors, August 2005.**

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COMMENT: For additional information on this general topic and other related subjects, see THE ETHICAL OREGON LAWYER §§4.3, 6.13 (Oregon CLE 2003); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§59–60, 64–65 (2003); and ABA Model Rule 1.6.