

1 Rule 1.6. Confidentiality of Information.

2 (a) A lawyer shall not reveal information relating to the representation of a client
3 ~~except as stated in paragraph (b), unless the client consents after consultation unless~~
4 the client gives informed consent, the disclosure is impliedly authorized in order to carry
5 out the representation or the disclosure is permitted by paragraph (b).

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

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

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

14 ~~(b)(3) To to prevent, mitigate or rectify the consequences of a client's criminal or~~
15 ~~fraudulent act in the commission of which the lawyer's services had been used~~
16 ~~substantial injury to the financial interests or property of another that is reasonably~~
17 ~~certain to result or has resulted from the client's commission of a crime or fraud and in~~
18 ~~furtherance of which the client has used the lawyer's services;~~

19 ~~(b)(3)-(4) to secure legal advice about the lawyer's compliance with these Rules;~~

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

25 ~~(b)(6)(4) To to~~ comply with other the Rules of Professional Conduct or other law
26 or a court order.

27 (c) For purposes of this rule, Rrepresentation of a client includes counseling a
28 lawyer~~(s)~~ about the need for or availability of treatment for substance abuse or
29 psychological or emotional problems by members of the Utah State Bar serving on an
30 Utah State Bar endorsed lawyer assistance program~~the Lawyers Helping Lawyers~~
31 Committee.

32 Comment

33 [1] A fundamental principle in the client-lawyer relationship is that the lawyer
34 maintain confidentiality. This Rule governs the disclosure by a lawyer of information
35 relating to the representation of a client during the lawyer's representation of the client.
36 See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer
37 by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information
38 relating to the lawyer's prior representation of a former client and Rules 1.8(b) and
39 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the
40 disadvantage of clients and former clients.

41 [2] A fundamental principle in the client-lawyer relationship is that, in the absence of
42 the client's informed consent, the lawyer must not reveal information relating to the
43 representation. See Rule 1.0(e) for the definition of informed consent. This contributes
44 to the trust that is the hallmark of the client-lawyer relationship. The client is thereby
45 encouraged to seek legal assistance and to communicate fully and frankly with the
46 lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs
47 this information to represent the client effectively and, if necessary, to advise the client
48 to refrain from wrongful conduct. Almost without exception, clients come to lawyers in
49 order to determine their rights and what is, in the complex of laws and regulations,
50 deemed to be legal and correct. Based upon experience, lawyers know that almost all
51 clients follow the advice given, and the law is upheld.

52 [3] The principle of client-lawyer of confidentiality is given effect in two by related
53 bodies of law; the attorney-client privilege in the law of evidence, the work-product
54 doctrine and the rule of confidentiality established in professional ethics. The attorney-
55 client privilege applies and work-product doctrine apply in judicial and other proceedings
56 in which a lawyer may be called as a witness or otherwise required to produce evidence
57 concerning a client. The rule of client-lawyer confidentiality applies in situations other
58 than those where evidence is sought from the lawyer through compulsion of law. The
59 confidentiality rule, for example, applies not merely only to matters communicated in
60 confidence by the client but also to all information relating to the representation,
61 whatever its source. A lawyer may not disclose such information except as authorized
62 or required by the Rules of Professional Conduct or other law. See also Scope.

63 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the
64 representation of a client. This prohibition also applies to disclosures by a lawyer that
65 do not in themselves reveal protected information but could reasonably lead to the
66 discovery of such information by a third person. A lawyer's use of a hypothetical to
67 discuss issues relating to the representation is permissible so long as there is no
68 reasonable likelihood that the listener will be able to ascertain the identity of the client or
69 the situation involved.

70 Authorized Disclosure

71 ~~[5] A lawyer may disclose information. Except to the extent that the client's~~
72 ~~instructions or special circumstances limit that authority, a lawyer is impliedly authorized~~
73 ~~to make disclosures~~ about a client when ~~necessary in the proper representation of the~~
74 ~~client. In litigation appropriate in carrying out the representation. In some situations,~~ for
75 example, a lawyer may ~~disclose information by admitting~~ ~~be impliedly authorized to~~
76 ~~admit~~ a fact that cannot properly be disputed, ~~or in negotiation by making~~ ~~or to make~~ a
77 disclosure that facilitates a satisfactory conclusion ~~to the matter~~. Lawyers in a firm may,
78 in the course of the firm's practice, disclose to each other information relating to a client
79 of the firm, unless the client has instructed that particular information be confined to
80 specified lawyers.

81 Disclosure Adverse to Client

82 ~~The confidentiality rule is subject to limited exceptions. In becoming privy to~~
83 ~~information about a client, a lawyer may foresee that the client intends serious and~~
84 ~~perhaps irreparable harm to another person. To the extent a lawyer is prohibited from~~
85 ~~making disclosure, the interests of the potential victim are sacrificed in favor of~~
86 ~~preserving the client's confidences even though the client's purpose is wrongful. To the~~
87 ~~extent a lawyer is required or permitted to disclose a client's purposes, the client may be~~
88 ~~inhibited from revealing facts which would enable the lawyer to counsel against a~~
89 ~~wrongful course of action. A rule governing disclosure of threatened harm thus involves~~
90 ~~balancing the interests of one group of potential victims against those of another. On the~~
91 ~~assumption that lawyers generally fulfill their duty to advise against the commission of~~
92 ~~deliberately wrongful acts, the public is better protected if full disclosure by the client is~~
93 ~~encouraged than if it is inhibited.~~

94 Generally speaking, information relating to the representation must be kept
95 confidential, as stated in paragraph (a). However, where the client is or has been
96 engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is
97 involved, the principle of confidentiality may have to yield, depending on the lawyer's
98 knowledge about and relationship to the conduct in question and the seriousness of that
99 conduct. Several situations must be distinguished.

100 First, the lawyer may not counsel or assist a client in conduct that is criminal or
101 fraudulent. See Rule 1.2(d). As noted in the Comment to that Rule, there can be
102 situations where the lawyer may have to reveal information relating to the
103 representation in order to avoid assisting a client's criminal or fraudulent conduct.
104 Paragraph 1.6(b)(4) permits doing so. Similarly, a lawyer has a duty under Rule
105 3.3(a)(4) not to use false or fabricated evidence. This duty is essentially a special
106 instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or
107 fraudulent conduct. Rule 1.6(b)(4) permits revealing information to the extent necessary
108 to comply with Rule 3.3(a). The same is true of compliance with Rule 4.1 concerning
109 truthfulness of a lawyer's own representations.

110 Second, the lawyer may have been innocently involved in past conduct by the client
111 that was criminal or fraudulent. In such a situation, the lawyer has not violated Rule
112 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing
113 that the conduct is of that character. Even if the involvement was innocent, however, the
114 fact remains that the lawyer's professional services were made the instrument of the
115 client's crime or fraud. The lawyer, therefore, has a legitimate interest in being able to
116 rectify the consequences of such conduct and has the professional right, although not a
117 professional duty, to rectify the situation. Exercising that right may require revealing
118 information relating to the representation. Paragraph (b)(2) gives the lawyer
119 professional discretion to reveal such information to the extent necessary to accomplish
120 rectification.

121 Third, the lawyer may learn that a client intends prospective conduct that is criminal
122 or fraudulent. Inaction by the lawyer is not a violation of Rule 1.2(d), except in the
123 limited circumstances where failure to act constitutes assisting the client. See Comment
124 to Rule 1.2(d). However, the lawyer's knowledge of the client's purpose may enable the

125 ~~lawyer to prevent commission of the prospective crime or fraud. If the prospective crime~~
126 ~~or fraud is likely to result in substantial injury, the lawyer may feel a moral obligation to~~
127 ~~take preventive action. When the threatened injury is grave, such as homicide or~~
128 ~~serious bodily injury, the lawyer may have an obligation under tort or criminal law to take~~
129 ~~reasonable preventive measures. Whether the lawyer's concern is based on moral or~~
130 ~~legal considerations, the interest in preventing the harm may be more compelling than~~
131 ~~the interest in preserving confidentiality of information relating to the client. As stated in~~
132 ~~paragraph (b)(1), the lawyer has professional discretion to reveal information in order to~~
133 ~~prevent substantial harm likely to result from a client's criminal or fraudulent act.~~

134 ~~It is arguable that the lawyer should have a professional obligation to make a~~
135 ~~disclosure in order to prevent homicide or serious bodily injury which the lawyer knows~~
136 ~~is intended by a client. However, it is very difficult for a lawyer to "know" when such a~~
137 ~~heinous purpose will actually be carried out, for the client may have a change of mind.~~
138 ~~To require disclosure when the client intends such an act, at risk of disciplinary liability if~~
139 ~~the assessment of the client's purpose turns out to be wrong, would be to impose a~~
140 ~~penal risk that might interfere with the lawyer's resolution of an inherently difficult moral~~
141 ~~dilemma.~~

142 ~~The lawyer's exercise of discretion requires consideration of such factors as the~~
143 ~~magnitude, proximity and likelihood of the contemplated wrong, the nature of the~~
144 ~~lawyer's relationship with the client and with those who might be injured by the client,~~
145 ~~the lawyer's own involvement in the transaction and factors that may extenuate the~~
146 ~~conduct in question. In any case, a disclosure adverse to the client's interest should be~~
147 ~~no greater than the lawyer believes necessary to the purpose. A lawyer's decision not to~~
148 ~~take preventive action permitted by paragraph (b)(1) does not violate this Rule.~~
149 ~~The term "another" in paragraph (b)(1) includes a person, organization and government.~~

150 ~~Paragraph (b)(2) does not apply where a lawyer is employed after a crime of fraud~~
151 ~~has been committed to represent the client in matters ensuing therefrom.~~

152 ~~Dispute Concerning Lawyer's Conduct~~

153 ~~If the lawyer is charged with wrongdoing in which the client's conduct is implicated,~~
154 ~~the rule of confidentiality should not prevent the lawyer from defending himself.~~

155 [6] Although the public interest is usually best served by a strict rule requiring
156 lawyers to preserve the confidentiality of information relating to the representation of
157 their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)
158 recognizes the overriding value of life and physical integrity and permits disclosure
159 reasonably necessary to prevent reasonably certain death or substantial bodily harm.
160 Such harm is reasonably certain to occur if it will be suffered imminently or if there is a
161 present and substantial threat that a person will suffer such harm at a later date if the
162 lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows
163 that a client has accidentally discharged toxic waste into a town's water supply may
164 reveal this information to the authorities if there is a present and substantial risk that a
165 person who drinks the water will contract a life-threatening or debilitating disease and
166 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of
167 victims.

168 [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits
169 the lawyer to reveal information to the extent necessary to enable affected persons or
170 appropriate authorities to prevent the client from committing a crime or fraud, as defined
171 in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or
172 property interests of another and in furtherance of which the client has used or is using
173 the lawyer's services. The client can, of course, prevent such disclosure by refraining
174 from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to
175 reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct
176 the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with
177 respect to the lawyer's obligation or right to withdraw from the representation of the
178 client in such circumstances, and Rule 1.13(c) which permits the lawyer, where the
179 client is an organization, to reveal information relating to the representation in limited
180 circumstances.

181 [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of
182 the client's crime or fraud until after it has been consummated. Although the client no
183 longer has the option of preventing disclosure by refraining from the wrongful conduct,
184 there will be situations in which the loss suffered by the affected person can be
185 prevented, rectified or mitigated. In such situations, the lawyer may disclose information

186 relating to the representation to the extent necessary to enable the affected persons to
187 prevent or mitigate reasonably certain losses or to attempt to recoup their losses.
188 Paragraph (b)(3) does not apply when a person who has committed a crime or fraud
189 thereafter employs a lawyer for representation concerning that offense.

190 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing
191 confidential legal advice about the lawyer's personal responsibility to comply with these
192 Rules. In most situations, disclosing information to secure such advice will be impliedly
193 authorized for the lawyer to carry out the representation. Even when the disclosure is
194 not impliedly authorized, paragraph (b)(4) permits such disclosure because of the
195 importance of a lawyer's compliance with the Rules of Professional Conduct.

196 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a
197 client's conduct or other misconduct of the lawyer involving representation of the client,
198 the lawyer may respond to the extent the lawyer reasonably believes necessary to
199 establish a defense. The same is true with respect to a claim involving the conduct or
200 representation of a former client. Such a charge can arise in a civil, criminal ~~or~~
201 ~~professional,~~ disciplinary or other proceeding and can be based on a wrong allegedly
202 committed by the lawyer against the client or on a wrong alleged by a third person, for
203 example, a person claiming to have been defrauded by the lawyer and client acting
204 together. ~~A lawyer entitled to a fee is not prevented by the rule of confidentiality from~~
205 ~~proving the services rendered in an action to collect it.~~

206 ~~Disclosures Otherwise Required or Authorized~~

207 ~~The attorney-client privilege is defined differently in various jurisdictions. If a lawyer~~
208 ~~is called as a witness to give testimony concerning a client, absent waiver by the client,~~
209 ~~Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable.~~

210 ~~The Rules of Professional Conduct in various circumstances permit or require a~~
211 ~~lawyer to disclose information relating to the representation. See Rules 1.13, 2.2, 2.3,~~
212 ~~3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by~~
213 ~~other provisions of law to give information about a client. Whether another provision of~~
214 ~~law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules,~~
215 ~~but a presumption should exist against such a supersession.~~

216 ~~Use of Information~~

217 ~~A lawyer may not make use of information relating to the representation in a manner~~
218 ~~disadvantageous to the client. The duty of confidentiality continues after the client-~~
219 ~~lawyer relationship has terminated. See Rule 1.9.~~

220 The lawyer's right to respond arises when an assertion of such complicity has been
221 made. Paragraph (b)(5) does not require the lawyer to await the commencement of an
222 action or proceeding that charges such complicity, so that the defense may be
223 established by responding directly to a third party who has made such an assertion.
224 The right to defend also applies, of course, where a proceeding has been commenced.

225 [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services
226 rendered in an action to collect it. This aspect of the rule expresses the principle that
227 the beneficiary of a fiduciary relationship may not exploit it to the detriment of the
228 fiduciary.

229 [12] Other law may require that a lawyer disclose information about a client.
230 Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of
231 these Rules. When disclosure of information relating to the representation appears to
232 be required by other law, the lawyer must discuss the matter with the client to the extent
233 required by Rule 1.4. If, however, the other law supersedes this Rule and requires
234 disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are
235 necessary to comply with the law.

236 [13] A lawyer may be ordered to reveal information relating to the representation of
237 a client by a court or by another tribunal or governmental entity claiming authority
238 pursuant to other law to compel the disclosure. Absent informed consent of the client to
239 do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that
240 the order is not authorized by other law or that the information sought is protected
241 against disclosure by the attorney-client privilege or other applicable law. In the event
242 of an adverse ruling, the lawyer must consult with the client about the possibility of
243 appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph
244 (b)(6) permits the lawyer to comply with the court's order.

245 [14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably
246 believes the disclosure is necessary to accomplish one of the purposes specified.
247 Where practicable, the lawyer should first seek to persuade the client to take suitable

248 action to obviate the need for disclosure. In any case, a disclosure adverse to the
249 client's interest should be no greater than the lawyer reasonably believes necessary to
250 accomplish the purpose. If the disclosure will be made in connection with a judicial
251 proceeding, the disclosure should be made in a manner that limits access to the
252 information to the tribunal or other persons having a need to know it and appropriate
253 protective orders or other arrangements should be sought by the lawyer to the fullest
254 extent practicable.

255 [15] Paragraph (b) permits but does not require the disclosure of information relating
256 to a client's representation to accomplish the purposes specified in paragraphs (b)(1)
257 through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may
258 consider such factors as the nature of the lawyer's relationship with the client and with
259 those who might be injured by the client, the lawyer's own involvement in the
260 transaction and factors that may extenuate the conduct in question. A lawyer's decision
261 not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may
262 be required, however, by other rules. Some rules require disclosure only if such
263 disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3.
264 Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of
265 whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

267 [16] A lawyer must act competently to safeguard information relating to the
268 representation of a client against inadvertent or unauthorized disclosure by the lawyer
269 or other persons who are participating in the representation of the client or who are
270 subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

271 [17] When transmitting a communication that includes information relating to the
272 representation of a client, the lawyer must take reasonable precautions to prevent the
273 information from coming into the hands of unintended recipients. This duty, however,
274 does not require that the lawyer use special security measures if the method of
275 communication affords a reasonable expectation of privacy. Special circumstances,
276 however, may warrant special precautions. Factors to be considered in determining the
277 reasonableness of the lawyer's expectation of confidentiality include the sensitivity of
278 the information and the extent to which the privacy of the communication is protected by

279 law or by a confidentiality agreement. A client may require the lawyer to implement
280 special security measures not required by this Rule or may give informed consent to the
281 use of a means of communication that would otherwise be prohibited by this Rule.

282 Former Client

283 [18] The duty of confidentiality continues after the client-lawyer relationship has
284 terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such
285 information to the disadvantage of the former client.

286 [19] Paragraph (d) is an addition to ABA Model Rule 1.6 and provides for
287 confidentiality of information between lawyers providing assistance to other lawyers
288 under an Utah State Bar endorsed lawyer assistance program.

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