



CONFIDENTIALITY OF | **MRPC**
INFORMATION: | **1.6**

RULE 1.6: GENERAL RULE

- (a) A lawyer shall not reveal information relating to the representation of a client **UNLESS**
- Client gives informed consent,
 - Disclosure is impliedly authorized in order to carry out the representation **or**
 - Disclosure is permitted by (b).

RULE 1.6: EXCEPTIONS

(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;

EXCEPTIONS UNDER TEXAS AND ABA RULES

	ABA	TEXAS
To prevent serious bodily crime	May	Must
To prevent non-bodily crime (if they're using your services)	May	May
To prevent non-criminal fraud (if they're using your services)	May	May
To rectify past crime/fraud (If they used your services)	May	May
Fraud on the court	Must	Shall

Texas Rules of Professional Conduct (TRPC) 1.05: Confidentiality of Information

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.

RULE 1.6: EXCEPTIONS

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

(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;

RULE 1.6: EXCEPTIONS

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

(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;

RULE 1.6: EXCEPTIONS

(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;

RULE 1.6: EXCEPTIONS

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

or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, **but only if** the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

APA FORM. OP. 90-358

An attorney undertook the representation of a client in a breach of contract claim and began working on the matter. A few weeks later, the opposing party in the litigation consulted with another lawyer in the attorney's firm about the same matter, but during the consultation, disclosed no confidential information except the identity of the other party and the nature of the claim.

The other lawyer did a routine conflict check, quickly discovered the conflict with this new potential client, and immediately declined to represent the party. The lawyer and the attorney already representing the first client discussed the situation. Would it be proper for the attorney to disclose to his client that the opposing party had come in for a consultation with another lawyer in his firm?

The attorney may NOT disclose to the client that the opposing party consulted with another lawyer in the firm, but he may continue to represent the client if the attorney does not use any information gleaned from the other party's consultation against the other party.

RULE 1.6: DUTY TO PRESERVE CONFIDENTIALITY

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

1.6 COMMENTS: GENERAL

[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 other rules governing disclosure of information regarding previous and potential clients.

1.6 COMMENTS: PRINCIPLE

[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. 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.

1.6 COMMENTS: RELATED BODIES OF LAW

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law:

- Attorney-client privilege,
- Work product doctrine and
- Rule of confidentiality established in professional ethics.

1.6 COMMENTS: ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

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.

1.6 COMMENTS: CONFIDENTIALITY RULE

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 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.

1.6 COMMENTS: AUTHORIZED DISCLOSURE

[5] 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**

1.6 COMMENTS:

DISCLOSURE ADVERSE TO CLIENT CONTINUED...

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 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

1.6 COMMENTS: COURT/LAW EXCEPTION

[15] Absent informed consent of the client, 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 law.

1.6 COMMENTS: DISCLOSURE

[16] Paragraph (b) permits disclosures. . .

Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.

1.6 COMMENTS: DISCLOSURE CONTINUED

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.

1.6 COMMENT 17: OTHER RULES

[17] . . . 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, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

1.6 COMMENT 18: SAFE HARBOR PROVISION

[18] . . . The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

1.6 COMMENT 18: SAFE HARBOR PROVISION

[18] . . . Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

1.6 COMMENTS: FORMER CLIENTS

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated.

ABA FORMAL OP. 18-480

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.

TEXAS OPINION #669, MARCH 2018

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer retained by an insurance company notify the insurance company that the insured client he was assigned to represent is not cooperating in the defense of the client's lawsuit?

ANSW: If an insured fails to communicate with a lawyer who is retained to defend the insured, then the lawyer may withdraw from the representation. In that event, the lawyer must protect the insured's confidential information and may **not**, in the absence of the insured's consent, disclose to the insurance company the reason for the withdrawal.

TEXAS OPINION #669, MARCH 2018

In connection with moving to withdraw from the suit, the lawyer should avoid disclosing, either to the court or to the insurance company, the specific reason for the withdrawal.

The lawyer instead should provide only a general explanation that professional considerations require withdrawal, although there are circumstances in which a court may require that additional information be provided to the court.

WAIVER IMPLICATIONS OF LAWYERS' SELF-DEFENSE PRIVILEGE DISCLOSURES

The ethics rules and attorney-client privilege principles both allow lawyers to disclose privileged communications when defending themselves from clients' and even third parties' attacks. But do such disclosures waive the clients' privilege, thus allowing the whole world to see the communications?

United States v. Lander, No. 13-CR-151-A, 2018 U.S. Dist. LEXIS 129133, at *1-2 (W.D.N.Y. Aug. 1, 2018) (criminal defendant's allegation that his former lawyer "coerced" him into pleading guilty waived the client's privilege protection for "all communications" that the former lawyer "reasonably believes necessary to disapprove the allegations.")

SISER NORTH AMERICA, INC. V. WORLD PAPER INC.,
2018 U.S. DIST. LEXIS 133379 (E.D. MICH. AUG. 8, 2018),

Defendants' lawyer withdrew after the magistrate judge sanctioned him. In defending himself, the lawyer disclosed privileged communications: (1) to his own personal lawyer; and (2) in attachments to a defensive pleading filed with the court (under seal) and served on plaintiffs.

Now represented by a new lawyer, defendants sought an order requiring plaintiffs to return those privileged attachments. The plaintiffs argued that the withdrawn lawyer's disclosures to his personal lawyer and to them waived defendants' privilege, thus freeing them to use those communications.

The court rejected plaintiff's argument and ordered it to return (and not use) the privileged documents -- concluding: (1) that the accused lawyer "was permitted to disclose privileged information to his attorney . . . in defending against such allegations"; (2) that the accused lawyer's "disclosure [in the defensive pleading attachments] did not constitute a waiver of privilege since it was done pursuant to [the ethics rules] for the limited scope of defending himself."