

LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET U
INTRODUCTION TO CLIENT CONFIDENTIALITY

Worksheet U is intended to facilitate a discussion about practices for maintaining client confidentiality.

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- Discuss the importance of client confidentiality for a lawyer's current clients. Discuss the limited exceptions that allow disclosure of confidential information, and provide examples of situations where such exceptions would apply. See Prof. Cond. Rule 1.6.
- Discuss a lawyer's obligation to maintain confidentiality of clients who consult with the lawyer but do not hire him or her or who the lawyer ultimately refuses to represent. See Prof. Cond. Rule 1.18.
- Discuss a lawyer's obligation to maintain client confidences after the termination of the attorney-client relationship. See Prof. Cond. Rule 1.9.
- Discuss common mistakes which inadvertently cause violations of client confidentiality and share practical pointers in and outside one's office for safeguarding confidential information. Among other things, examples for discussion could include:
 - Discuss proper procedures for file keeping and ensuring that clients who visit your office do not see information about other client matters;
 - Discuss the propriety of discussing your client's case in public (even at the courthouse);
 - Discuss the consequence of discussing confidential information with your client when a third party is present by invitation of your client (like their spouse);
 - Discuss office procedures for maintaining and destroying client files which impacts client confidentiality; and
 - Discuss the potential hazards of using email and fax to communicate confidential information about a case.
 - Discuss the lawyer's duty to ensure that non-lawyer assistants safeguard confidential information. See Prof. Cond. Rule 5.3.
- Give specific examples of client information which is confidential and when such information should or should not be revealed, including, among others:
 - The propriety of disclosing that you have been retained by someone;
 - Disclosing the name of your client to a third party;
 - Sharing information about your client's case to opposing counsel during negotiations.
- Discuss the appropriate ways to obtain waiver of privilege and the circumstances in which it is likely to be obtained in the new lawyer's area of practice. Discuss the differences between implied and express waiver and identify conduct which effectuates waiver.

- Discuss a lawyer's obligations when his client offers (or intends to offer) testimony that the lawyer knows or reasonably believes is false. See Prof. Cond. Rule 3.3.
 - Discuss the practical concerns that arise when a third party pays for a client's representation and wants to communicate to the client's lawyer about that representation. Discuss the duties owed to the client.
 - Discuss client confidentiality issues likely to arise in the new lawyer's practice area. For example:
 - When the new lawyer's client is a corporation, which communications are confidential and with whom at the corporation can the new lawyer discuss confidential information?
 - When the new lawyer's client is the government (or a government entity), with whom can the new lawyer discuss confidential information? What obligation does the new lawyer have to inform the public about the matters being prosecuted? What obligation does the new lawyer have to inform the victim of a crime about an investigation or prosecution of a suspect?
 - Discuss practical issues that must be resolved when sharing office space with lawyers not in the same firm regarding safeguarding confidential information of clients. What if the lawyers share staff like a receptionist, secretary or a paralegal?
 - Discuss how to handle a situation where a lawyer inadvertently receives a document containing what appears to be privileged information about an opposing party in pending litigation. See Prof. Cond. Rule 4.4.
 - Share with the new lawyer your firm's procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Kirk R. Hall, *Not So Well-Kept Secrets*.
<http://www.abanet.org/legalservices/lpl/downloads/secrets.pdf>
 - Read and discuss the article by Don Lundberg *File, File, Who's Got the File? Client Rights to Return of Property*, RES GESTAE, September 2007
 - Read and Discuss the article by Don Lundberg *Trust Account Debit Cards and a Footnote on Client Confidentiality*, RES GESTAE, January/February 2006
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RESOURCES

INDIANA RULES OF PROFESSIONAL CONDUCT

Lawyer /Client Relationship

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 names and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.

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http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572243

Rule 1.9. Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and

- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or 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 these Rules 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 these Rules would permit or require with respect to a client.

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Rule 1.18. Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

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III. Advocate Rule 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) 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
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

View complete rule and comments at
http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572262

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.4. Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

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V. LAW FIRMS AND ASSOCIATIONS

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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