

Rule 1.6: Confidentiality of Information

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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; or

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

Supreme Court Commentary

[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 (sic).

[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 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 which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished.

[11] First, 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) (sic) 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.

[12] 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.

[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[14] The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes is necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[15] 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).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided 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 upon withdrawal the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] 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).

Dispute Concerning Lawyer's Conduct

[18] 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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) 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, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the Rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2) 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. As stated above, the 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 minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[20] 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.

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

[22] Paragraph (b)(4) (sic) gives the lawyer professional discretion to reveal such information as the lawyer reasonably believes is necessary to comply with a court order.

Former Client

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

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.6) Confidentiality of information

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

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

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

(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;

~~(2)~~ (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 a disciplinary proceeding, concerning the lawyer's representation of the client; or

~~(3)~~ (6) To comply with other law or a court order.

Supreme Court Commentary 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.~~

[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.

[4] [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer maintain confidentiality of 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.

[5] [3] The principle of client-lawyer confidentiality is given effect in two by 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 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 merely 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.

[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.~~

[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

~~[7]~~ [5] A 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, ~~except to the extent that the client's instructions or special circumstances limit that authority.~~ In litigation some situations, for example, a lawyer may ~~disclose information by admitting~~ be impliedly authorized to admit a fact that cannot properly be disputed or, ~~in negotiation by making to make~~ a disclosure that facilitates a satisfactory conclusion to a matter. [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] [6] ~~The~~ 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 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 which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. [13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph Paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. 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 the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

~~[10] Several situations must be distinguished.~~

~~[11] First, 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 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.~~

~~[12] 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.~~

~~[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.~~

~~[14] The lawyer's exercise of discretion requires consideration of 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. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A~~

~~lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.~~

Withdrawal

~~[15] 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).~~

~~[16] 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.~~

~~[17] 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).~~

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

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no

longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] 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)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. SCR 3.530, Advisory opinion – informal and formal, authorizes a lawyer to request an advisory opinion from the requester's Supreme Court District Committee member regarding ethics and unauthorized practice of law questions. The question may be submitted in writing or by telephone using the KBA Ethics Hotline. Communications between the requester and any District Committee member or Ethics Committee member are granted confidentiality by SCR 3.530 and are permitted disclosure by paragraph (b)(4).

~~Dispute Concerning a Lawyer's Conduct~~

[18] [10] 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){2}(5) 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. Lawyers may also report incidents of potential malpractice that have not ripened into a client claim to a lawyer's liability insurer for legal advice and to comply with policy reporting requirements provided the report is made on a confidential basis and protected by the attorney-client privilege. The right to defend also applies, of course, applies where a proceeding has been commenced. ~~Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.~~

~~[19] [11] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the Rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary 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. A lawyer entitled to a fee is permitted by paragraph (b)(2)(5) 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. As stated above, the 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 minimizing the risk of disclosure.~~

~~[22] [12] Paragraph (b)(4) gives the lawyer professional discretion to reveal such information as the lawyer reasonably believes is necessary to comply with a court order. Other law may require that a lawyer disclose information about a client. 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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] 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 informed consent 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)(6) permits the lawyer to comply with the court's order.

[14] 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.

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

~~Disclosures Otherwise Required or Authorized~~

~~[20] 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.~~

~~[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supercedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.~~

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard 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.

[17] 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 give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

~~[23] [18] 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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

- (1) The proposed KRPC 1.6 adopts MR 1.6 and Comments in its entirety.
 - (a) The Committee added in paragraph (b)(5) “to include a disciplinary proceeding.”
 - (b) The MR adds to the Rule new paragraph (b)(6) permitting disclosure to comply with law or a court order. This disclosure is already authorized in the current KRPC 1.6 and requires no change.
 - (c) The Committee added language to Comment [9] concerning ethics advisory opinions and the Ethics Hotline.
 - (d) The Committee added language to Comment [10] covering reporting potential malpractice claims to insurers.
- (2) The ABA Reporter’s Explanation of Changes to MR 1.6 expresses the Committee’s view on all other changes. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- **ABA Reporter's Explanation of Changes -- Model Rule 1.6**

The Commission is proposing a substantial expansion of the grounds for permissive disclosure under Rule 1.6. While strongly reaffirming the legal profession’s commitment to the core value of confidentiality, the Commission also recognizes the overriding importance of human life and the integrity of the lawyer’s own role within the legal system. In this regard, the Commission agrees with the substantial criticism that has been directed at current Rule 1.6 and regards the Rule as out of step with public policy and the values of the legal profession as reflected in the rules currently in force in most jurisdictions.

As revised, Rule 1.6 will permit (though it will not require) disclosure to prevent death or substantial bodily harm and to prevent or rectify substantial injury resulting from a client’s serious abuse of the lawyer’s services. It will also explicitly permit a lawyer to disclose confidences to obtain legal advice about the lawyer’s compliance with the Rules. Finally, it will permit disclosure where it is required by a law or court order. In light of these

substantial changes to Rule 1.6, the Commission has both reorganized and substantially revised the Comments.

TEXT:

1. Paragraph (a): Replace "consents after consultation" with "informed consent"

The Commission is recommending that throughout the Rules the phrase "consent after consultation" be replaced with "gives informed consent," as defined in Rule 1.0(e). No change in substance is intended.

2. Paragraph (b)(1): Modify to permit disclosure to "prevent reasonably certain death or substantial bodily harm"

The Commission recommends that the exception currently recognized for client crimes threatening imminent death or substantial bodily harm be replaced with a broader exception for disclosures to prevent reasonably certain death or substantial bodily harm, with no requirement of client criminality. This change is in accord with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers. The Rule replaces "imminent" with "reasonably certain," to include a present and substantial threat that a person will suffer such injury at a later date, as in some instances involving toxic torts.

3. Paragraph (b)(2): Add paragraph permitting disclosure to prevent client crimes or frauds reasonably certain to cause substantial economic injury and in which client has used or is using lawyer's services

The Commission recommends that a lawyer be permitted to reveal information relating to the representation to the extent necessary to prevent the client from committing a crime or fraud reasonably certain to result in substantial economic loss, but only when the lawyer's services have been or are being used in furtherance of the crime or fraud. Use of the lawyer's services for such improper ends constitutes a serious abuse of the client lawyer relationship. The client's entitlement to the protection of the Rule must be balanced against the prevention of the injury that would otherwise be suffered and the interest of the lawyer in being able to prevent the misuse of the lawyer's services. Moreover, with respect to future conduct, the client can easily prevent the harm of disclosure by refraining from the wrongful conduct. See also Comment [7].

Support for the Commission's proposal can be found in the eight jurisdictions that permit disclosure when clients threaten crimes or frauds likely to result in substantial injury to the

financial or property interests of another and the 25 jurisdictions that permit a lawyer to reveal the intention of a client to commit any crime. The Commission's proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

4. Paragraph (b)(3): Add paragraph permitting disclosure to prevent, mitigate or rectify substantial economic loss resulting from client crime or fraud in which client has used lawyer's services

The rationale for this exception is the same as that for paragraph (b)(2), the only difference being that the client no longer can prevent disclosure by refraining from the crime or fraud. See also Comment [8]. The Commission believes that the interests of the affected persons in mitigating or recouping their substantial losses and the interest of the lawyer in undoing a wrong in which the lawyer's services were unwittingly used outweigh the interests of a client who has so abused the client lawyer relationship.

Support for the Commission's proposal can be found in the 13 jurisdictions that permit disclosure to rectify the consequences of a crime or fraud in the commission of which the client used the lawyer's services. The proposal is also in accord with Section 67 of the American Law Institute's Restatement of the Law Governing Lawyers.

5. Paragraph (b)(4): Add paragraph permitting disclosure to the extent necessary to secure legal advice regarding lawyer's compliance with Rules

Questions have been raised regarding the propriety of a lawyer revealing confidential information in order to secure legal advice regarding the lawyer's obligations under the Rules, including the lawyer's duty not to counsel or assist clients in crimes or frauds. In most instances, disclosing information to secure such advice is impliedly authorized. Nevertheless, in order to clarify that such disclosures are proper even when not impliedly authorized, the Commission recommends that such disclosures be explicitly permitted under this Rule. It is of overriding importance, both to lawyers and to society at large, that lawyers be permitted to secure advice regarding their legal obligations. Moreover, clients are adequately protected by the requirement that such disclosures be made only when protected by the attorney-client evidentiary privilege. See also Comment [9].

COMMENT:

[1], [2] and [3] The points made in these Comments have been incorporated into

Comment [2]. No change in substance is intended.

[1] This new Comment provides cross references to the other Rules that protect clients, prospective clients and former clients against the disclosure or adverse use of information relating to the representation.

[2] This modification of current Comment [4] combines material in current Comments [1] through [4] into a single Comment setting forth the rationale for the confidentiality duty. No change in substance is intended.

[3] Current Comment [5] has been edited slightly to clarify that the work product doctrine is separate from the attorney client evidentiary privilege. No change in substance is intended.

[6] Given that Rule 1.6 contains no suggestion that there might be an exception for government lawyers who disagree with government policy, the Commission recommends the deletion of current Comment [6] as unnecessary.

[4] This new Comment reminds lawyers that the prohibition applies even when the disclosure does not itself reveal protected information but could lead to the discovery of such information, including the use of a hypothetical that poses an unreasonable risk that the listener will ascertain protected information. No change in substance is intended.

[5] This Comment combines and makes minor stylistic changes to current Comments [7] and [8]. No change in substance is intended.

[6] This new Comment replaces and modifies current Comments [9] and [13]. It states the rationale for the exception recognized in paragraph (b)(1) - disclosures to prevent reasonably certain death or substantial bodily harm. It also explains when such harm is reasonably certain, providing an illustration.

~~[10], [11], [12], [14], [15] and [16]~~ The substance of these Comments has been included in various new Comments. The caption "Withdrawal" has also been deleted.

Ed. Note: Current KRPC Comment [17] is also deleted.

[7] Comment [7] is new and provides the rationale for paragraph (b)(2) - disclosure to prevent future crimes or frauds threatening substantial economic harm. It also provides a cross reference to Rules 1.2 and 1.16, which govern the lawyer's conduct regardless of whether the lawyer chooses to exercise the lawyer's discretion to disclose.

[8] This new Comment provides the rationale for the exception recognized in paragraph

(b)(3) - disclosure to prevent, mitigate or rectify substantial economic loss resulting from a client's past crimes or frauds in the furtherance of which the client has used the lawyer's services.

[9] This new Comment provides the rationale for the exception recognized in paragraph (b)(4) - securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules.

Caption: The caption has been deleted as no longer necessary.

[10] This Comment relating to paragraph (b)(5), disclosure permitted to defend against charges of lawyer misconduct, is derived from current Comment [18]. The new third sentence is taken from current Comment [19]. The deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[11] This Comment contains the core of current Comment [19] that addresses disclosure necessary to collect a lawyer's fees. The deleted second sentence has been included in Comment [10] and the deleted last sentence has been incorporated into Comment [14]. No change in substance is intended.

[12] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with other law that may require disclosure of information relating to a client's representation. This issue is cursorily discussed in current Comment [21]. Although recognizing that paragraph (b)(6) permits disclosure to comply with other law, this Comment emphasizes the lawyer's duty to consult with the client to the extent required by Rule 1.4. No change in substance is intended.

[13] This new Comment addresses the lawyer's responsibilities when the lawyer is faced with a court order requiring disclosure of information relating to a client's representation or is called to testify concerning a client. This issue is addressed in current Comment [20]. Although recognizing that paragraph (b)(6) permits disclosure to comply with a court order, this Comment requires the lawyer, absent the client's informed consent to the contrary, to invoke all nonfrivolous claims that the information is privileged and to consult with the client about the possibility of appealing an adverse ruling. No change in substance is intended.

[14] Combining points made in current Comments [14], [18] and [19], this new

Comment explains the Rule 1.6(b) requirement that disclosure be limited to information the lawyer reasonably believes is needed to accomplish the purpose for which disclosure is permitted. It emphasizes remonstrating with the client to take appropriate action, disclosing no more than necessary and, where appropriate, seeking protective orders against further dissemination of the information. No change in substance is intended.

[15] This new Comment incorporates the substance of current Comment [14]. A new introductory sentence has been added, and the beginning of the second sentence has been revised for stylistic reasons. The last two sentences provide a cross reference to other Model Rules that may require disclosure.

Caption: This caption has been deleted because current Comments [20] and [21] have been deleted.

[20] and [21] Current Comments [20] and [21] have been deleted because these matters are now discussed in Comments [12] and [13].

Caption: This new caption has been added to call attention to the two new Comments that discuss the requirement that lawyers act competently and diligently to preserve confidentiality.

[16] This new Comment cross references Rules 1.1, 5.1 and 5.3, calling attention to the responsibility of the lawyer to act competently to safeguard information relating to the representation. A number of states have retained the formulation of ABA Model Code of Professional Responsibility DR 4 101(D), "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4 101(C) through an employee." Much of the recent discourse about confidentiality has focused on the lawyer's duty to act competently to prevent disclosure. The Commission believes this issue is important and ought to be flagged in the Comment. No change in substance, however, is intended.

[17] This new Comment addresses the lawyer's duty of care when transmitting confidential information. Although much of the current debate concerns the use of unencrypted e mail, the Comment speaks more generally in terms of special security measures and reasonable

expectations of privacy. It takes a case by case approach to the problem. The Commission believes this Comment is consistent with the prevailing resolution of this issue in recent ethics committee decisions.

[18] This Comment is identical to current Comment [22] (*Ed. Note: this is current KRPC Comment [23]*), with the addition of cross references to Rule 1.9(c)(1) and (2).

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

(1) The Committee added in Rule 1.6, paragraph (b)(5) “to include a disciplinary proceeding” to clarify that disciplinary proceedings were covered.

(2) The Committee added the following Comment language:

(a) Add as the last sentence of Rule 1.6, Comment [9]:

SCR 3.530, Advisory opinion – informal and formal, authorizes a lawyer to request an advisory opinion from the requester’s Supreme Court District Committee member regarding ethics and unauthorized practice of law questions. The question may be submitted in writing or by telephone on the KBA Ethics Hotline. Communications between the requester and any District Committee member or Ethics Committee member are granted confidentiality by SCR 3.530 and are permitted disclosure by (b)(4).

Reason for addition: SCR 3.530 implicitly permits disclosure of client confidential information when seeking an ethics advisory opinion, but does not specifically provide that such a disclosure is an exception to Rule 1.6. This addition joins SCR 3.530 with Rule 1.6 (b) (4) that permits disclosure of confidential information when seeking legal advice about compliance with Professional Conduct Rules. It makes it clear that Rule 1.6 is not violated by use of SCR 3.530 procedures. It also serves to inform lawyers of the availability of confidential KBA advice on ethics problems.

(b) Add as the penultimate sentence of Rule 1.6 Comment [10]:

Lawyers may also report incidents of potential malpractice that have not ripened into a client claim to a lawyer’s liability insurer for legal advice and to comply with policy reporting requirements provided the report is made on a confidential basis and protected by the attorney-client privilege.

Reasons for addition: Most malpractice situations are covered by the disclosure permitted by Rule 1.6 (b) (5), the so-called lawyer defense exception. The question arises, however, of what a lawyer may reveal to an insurer when the probability of a claim is remote instead of immediate. This occurs when the lawyer is dealing with an uncertain situation that may potentially develop into a malpractice claim. Typically the client is unaware of the problem and because of the uncertainty involved the lawyer believes it premature to discuss it with the client. It is hard to argue that the client has waived confidentiality when the client does not even know there may be a problem. Yet it is in the best interest of both the lawyer and the client for the lawyer to report a potential claim to an insurer for legal advice and to assure policy coverage if the worst occurs. Furthermore, since the report is protected by the attorney-client privilege (Asbury v. Beerbower, Ky., 589 S.W.2d 216 at 217(1979)), there should be no prejudice to the client.

An extension of the lawyer defense exception to Rule 1.6 is warranted for potential claims. A lawyer must be able to take appropriate action to prevent malpractice and protect the client from an error. This disclosure is consistent with judicial policy in Kentucky that encourages lawyers to seek help with client problems as shown by the application of the attorney-client privilege to insurer reports, Rule 1.6's lawyer defense exception to confidentiality duties, and the establishment of a confidential Ethics Hotline for Kentucky lawyers.

Dissent and Committee Response

Committee members Sheldon G. Gilman, Janet P. Jakubowicz, John T. Ballantine, Donald H. Combs and Olu A. Stevens dissent from the Committee's Rule 1.6 recommendation. Their dissenting opinion is inserted here for consideration by the reviewing authorities. The results of the Committee's consideration of this dissent follow the opinion.

The proposed new Rule authorizes disclosure of confidential client information in stated circumstances. This dissent first argues against a Rule permitting disclosure in those situations which affect financial and property interests. It is noteworthy that organizations as diverse as the U.S. Chamber of Commerce and the ACLU have also argued against such disclosures in order to stop the Aerosion of the attorney-client

privilege.® For a more complete discussion of these opposing opinions the reader is encouraged to consider an article in the Georgetown Journal of Legal Ethics; specifically, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 The Geo. Jour. of Legal Ethics 1003 (Summer 2004).

In the event the proposed new Rule is adopted, then this dissent presents three additional problems with the proposed Rule that should be resolved in order to provide meaningful guidance to the lawyer who endeavors to comply with the Rule.

First Objection - Revealing Client Confidences To Prevent Or Mitigate Financial Injury

The initial ABA Ethics 2000 version of Rule 1.6 did not include an exception that would permit disclosure of client confidences to prevent or mitigate damages affecting financial and property interests. These two exceptions were added at the recommendation of the ABA Task Force on Corporate Responsibility in the wake of the Sarbanes-Oxley Act and the SEC regulations that were adopted after Sarbanes-Oxley. Unfortunately, these new exceptions are much broader than required by the Sarbanes-Oxley Act and are unnecessary in light of the already existing permissive disclosure permitted by Kentucky=s Rule 1.6 which permits disclosure in order *to comply with other law or a court order.*® While the ABA Rule 1.6 would make disclosure voluntary, ABA Rule 1.6 puts lawyers in the position where they have responsibility to mitigate or rectify their client=s injuries to another=s financial interests or property, and this unquestionably makes lawyers adverse to their clients and undermines the concept of confidentiality, especially as Rule 1.4(a)(5) now requires that lawyers consult with their client regarding any relevant limitation on the lawyer=s conduct.

The states that have not adopted the new ABA version of Rule 1.6 have made the following arguments:

- ! First, lawyers will face increased liability and legal inquiries into whether the lawyer *should have known*® of the crime or fraud, when in reality the lawyer is likely to have knowledge only in hindsight. In this respect, the proposed Rule introduces a *whistle blower*® element to the ethics Rules that may often pressure the lawyer to disclose for fear of guessing wrong about the client=s activities or intentions.
- ! Second, expanding the circumstances in which a lawyer may disclose client confidences will create an additional impediment to a relationship of trust between

lawyer and client, thereby reducing the likelihood that the lawyer would be able to counsel the client to abide by the law. How is a lawyer to explain to his/her client that depending on the circumstances I, your lawyer, may reveal your confidences without first obtaining your permission, and, by the way, tell me everything about your situation. See *The Attorney-Client Privilege in the United States, an Age-Old Principle under Modern Pressures*, ABA 2003 Symposium Issue of the Professional Lawyer, at page 44.

Further, with regards to those who would explain that such disclosures are only Voluntary,⁶ there have already been significant comments that disclosure is mandated because the language of the new ABA Rule 1.6 creates a strong imperative to disclose in order to prevent and/or rectify financial harm. We have had practical experience with innocent victims of our clients' actions who will be more than willing to "sue the lawyer" when the lawyer could have taken steps to protect the victim of the client's wrongful conduct. We prefer that lawyers not become a source of future indemnity.

The better alternative for Kentucky is illustrated by Illinois Bar Rule 1.6, as follows.

(a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not, during or after termination of the professional relationship with the client, use or reveal a confidence or secret of the client known to the lawyer unless the client consents after disclosure.

(b) A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm.

(c) A lawyer may use or reveal:

(1) confidences or secrets when permitted under these Rules or required by law or court order; or

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b); or

(3) confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) . . .

(e)

The Illinois Rule does not permit disclosure for an injury to the financial interests or property of another, but permits disclosure when required by law or court order. Hence, as the new ABA Rule 1.6 creates an unnecessary level of distrust between the lawyer and client it should be rejected. Further, any suggestion that Kentucky adopt the ABA edition so that we may create uniformity among the states is unrealistic and is not of sufficient merit to cause Kentucky to adopt the ABA edition. The better approach for Kentucky may be found by the Illinois example.

Finally, to those who argue that we in Kentucky should adopt the ABA's proposed Rule 1.6(b) because other states have done so and there is a need for national consistency is not a compelling argument when so many of the Rules adopted by this Committee are not in lock-step with the ABA Rules.

Second Objection - Absence of Requiring Lawyer Communication With The Client

If Kentucky is to adopt the proposed ABA Rule 1.6, then we believe that the ABA edition is defective because it does not encourage a lawyer to communicate with his/her client to avoid or correct a client's injury to the financial interests or property of another. If Kentucky is to adopt the new ABA Rule, then Kentucky should, at a minimum, modify the recommended ABA Rule to make it clear that if a lawyer is going to reveal client information that is adverse to the client's interest, that the lawyer be permitted do so only *after* the lawyer attempts, *if feasible under the circumstances*, to counsel the client to refrain from the inappropriate action and/or have the client accept responsibility for such inappropriate conduct and take action to mitigate the damages caused by such action.

Most lawyers agree that a lawyer has an affirmative obligation to try to have the client do the right thing. The ABA agrees with the essence of this concept because it *suggests* that the lawyer consult with his/her client before making the disclosure. Unfortunately, the ABA has buried this suggestion in one sentence in 18 paragraphs of Comments. The ABA version to the Comments suggests that a lawyer first seek to persuade the client to take suitable action to obviate the need for disclosure, however, this minimal reference provides very little guidance.

The caution to communicate with one's client before disclosing confidential client information should be embodied in the Rule, and not hidden in one sentence of 18 paragraphs of Comments.

Third Objection - Use of Lawyer=s Services In "Furtherance@ Of Client's Actions

If Kentucky is to adopt the proposed ABA Rule 1.6, then we believe that the ABA edition is defective because neither the Rule nor the Comments define or illustrate what actions constitute the use of the lawyer's services in "furtherance" of the client's improper actions. The ABA Rule would permit a lawyer to make a disclosure of confidential client information when the lawyer=s services were used in Afurtherance@ of the client=s misconduct. However, the ABA Comments do not sufficiently explain the types of actions that would constitute the use of the lawyer's services in the Afurtherance@ of the client's improper actions.

The ABA=s Comments should be expanded to include a discussion that requires a nexus to the use of the lawyer=s services and the injury that resulted from the client=s misconduct. As a condition precedent to any disclosure it should be necessary for the lawyer to reasonably conclude that (i) the lawyer=s services were used by the client to further the client=s intentional wrongful misconduct and (ii) the lawyer=s services were a significant contributing factor leading to the damages suffered by the innocent victim of the client=s wrongful conduct. In essence, the Comments should explain the need for finding a direct nexus between the lawyer=s performance of services and the financial loss that is suffered by the innocent victim of the client=s wrongful conduct before the lawyer may disclose otherwise confidential client information.

The absence of clarifying advice only serves to weaken the operation of the Rule, and, therefore, the suggested addition to the Comments should be required.

Committee Consideration of the Dissent to its Recommendation: The dissent is a thoughtful analysis of alternatives and objections to the ABA Model Rule and Comments that the Committee recommends. The Committee disagrees with that portion of the dissent that is essentially an objection to adding paragraph (b) (2) and (3) concerning permissive disclosure of information to avoid substantial injury to financial interests. The policy reflected in permitting such disclosure concerns recent scandals and changes in the law with which we are all familiar. The Committee concluded that this expansion in permissive disclosure is warranted, taking into consideration that the great majority of states now have identical or comparable Rules. The dissent includes objections that in effect seek clarification or embellishment of the Rule or Comments. The Committee

concluded that these considerations were either implicit in the Rule or express in other Rules (e.g., 1.4, Communication), or did not warrant a change. In the final analysis, the Committee decided that adhering to the ABA Model Rule is the best course of action for Kentucky that keeps us in the main stream of current ethical standards and consistent with virtually all other jurisdictions.

The Court did not adopt proposed 1.6(b)(2) and (3) and comments 7 and 8. Otherwise Committee proposal adopted without change. Order 2009-05, eff 7-15-09.