

Legal Profession

MF Chapter 7

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Contents

M&F3rd Chapter 7	1
Confidentiality Exceptions	1
Model Rule 1.6	1
To Prevent Death or Bodily Harm	2
Financial Harm	5
Securing Legal Advice	6
Lawyer Self-Defense	6
Confidentiality vs. Candor	6
Model Rule 4.1(a)	6
Rule 4.1(b)	7
More Fraud	10
Confidentiality & Corporations	10
Model Rule 1.13(b)	11
To Comply With Court Orders	12
New Rule 1.6(c)	12
Nebraska's Rule 1.6	13
Exceptions To Attorney-Client Privilege	13
Crime-Fraud Exception	14
Claimants Through Same Deceased Client	15
Breach of Duty (Lawyer OR Client)	15
Lawyer Attesting To A Document	15
Joint Clients	15
Underlying Information Not Protected	16
Recommended Reading & Viewing	16

M&F3rd Chapter 7

Confidentiality Exceptions

Notes, Slide Text, Optional Readings

Confidentiality Exceptions

Model Rule 1.6

Model Rule 1.6(a) says:

A lawyer SHALL NOT reveal information relating to the representation ...
UNLESS:

- the client gives informed consent,
- the disclosure is impliedly authorized OR
- the disclosure is permitted by some exception to this rule.

This command is not absolute, but many lawyers of a certain age think it is.

A lawyer acting in her official lawyer capacity and representing her client in court or in a transaction is impliedly authorized to disclose confidential information. And the client may consent to disclosure in other situations in which the lawyer is NOT impliedly authorized to disclose. But lawyer must obtain informed consent to the disclosure.

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

Exceptions

Part (b) of the same rule lists seven exceptions to the overarching command of thou shalt not disclose confidential information.

A lawyer MAY reveal confidential information ... if necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that ... [will] cause substantial injury ... [\$ or property].

3. to prevent mitigate or rectify substantial injury [\$ or property] that ... [will] result or has resulted from the client's commission of a crime or fraud
4. to get legal advice about complying with these Rules;
5. to establish a claim or defense on behalf of the lawyer ... or
6. to comply with other law or a court order.
7. to detect and resolve conflicts of interest arising from the lawyer's change of employment.

Notice these are only EDITED reminders of the exceptions. For instance, note how the full text of exceptions (b)(2) and (b)(3) specify that they apply only if THE CLIENT is committing or has committed a crime or fraud, and even then only when the client IS USING or HAS USED the lawyer's services.

Those are two big qualifications to a rule that, on first reading, seems to deputize lawyers in the fight against financial fraud. This is not a IF YOU SEE SOMETHING, SAY SOMETHING rule. The lawyer must be sure that all the ingredients of the exceptions apply before deciding to disclose under Rule 1.6(b)

Note also that new exception (b)(7) allowing lawyers to disclose confidential information when changing employment applies "only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client."

To Prevent Death or Bodily Harm

Old Rule 1.6(b)(1) required IMMINENT death or serious bodily harm. The new rule requires REASONABLY CERTAIN death or serious bodily harm.

Note, so far, this exception has NOT been interpreted to cover the prevention of serious mental anguish or psychological trauma. Consider an example from [RLGL § 60](#):

Lawyer is appointed to represent Client, a person who has been accused of murder. During confidential conferences between them, Client informs Lawyer that Client in fact committed not only the murder charged but two others as well. Client gives Lawyer sufficient detail to confirm beyond question that Client's story is true. The two other murders involve victims whose bodies have not yet been discovered. Because of similarities between the circumstances of the murders, parents of one of the victims approach Lawyer and beg for any information about their child. Lawyer realizes the personal anguish of the victim's parents and the peace the information that he knows

could bring them. Unless Client consents to disclosure (see § 62), Lawyer must respond that Lawyer has no information to give them.

- [§ 60 A Lawyer's Duty to Safeguard Confidential Client Information.](#)
- [RLGL § 66: Using or Disclosing Information to Prevent Death or Serious Bodily Harm](#)

The client who is likely to endanger others

What about child abuse? Model Rule 1.6(b)(1) and Comment 6. No longer a requirement that the harm must be imminent!

As for child abusers, under Rule 1.6(b)(1) the lawyer may disclose the client's intent to commit FUTURE ABUSE, but a client's confession to a lawyer about past conduct is CONFIDENTIAL AND PRIVILEGED and may not be disclosed.

These are TOUGH issues. What about when the client suspects his or her spouse of ongoing child sexual abuse, but the client instructs the lawyer not to disclose to anyone?

Certainly the lawyer needs to seek advice about how to proceed.

[Nebraska Revised Statute 28-711](#)

Duty To Report Child Subjected To Abuse or Neglect

When any physician, any medical institution, any nurse, any school employee, any social worker, the Inspector General ... **or any other person** has reasonable cause to believe that a child has been subjected to child abuse or neglect ... he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department.

[Nebraska Revised Statute 28-711, Child subjected to abuse or neglect; report; contents; toll-free number](#)

Some jurisdictions explicitly define persons to include lawyers who must report under these statutes. Other jurisdictions specifically exclude lawyers from coverage. Probably the toughest calls involve statutes (like Nebraska's) where no mention is made of lawyers. Are we to conclude that these reporting statutes silently trump the lawyer's duty of confidentiality?

Nebraska's reporting statute contains another quirk. It lists those who must report: physician, medical institution, nurse, etc. and then adds OR ANY OTHER

PERSON?

Huh? It's like an animal cruelty statute that says: Geese, giraffes, wolverines or any other animal. I mean, why do that? If I'm a lawyer with a client who says, "Don't you DARE tell anybody about the child abuse I committed," I doubt that this reporting statute silently overrules both your duty to keep your client's confidences and the attorney-client privilege at once.

It's one thing to say a lawyer MAY report child abuse, and presumably lawyers with hard evidence WOULD report.

Quite another thing to say lawyers MUST report, because then the law will sweep up a lot of edge cases reported by lawyers who fear prosecution.

Also by commanding lawyers to report, a LOT of child abuse will be driven even further underground and out of sight. If speaking to a lawyer about child abuse means your lawyer will report you, sex offenders won't seek legal advice or medical help for fear of being arrested and indicted. Speaking to a lawyer means having the whole world know about a mere allegation of child abuse and your husband thrown in jail while an investigation takes place.

That said, the trend in many jurisdictions is to have attorneys covered by these child abuse reporting statutes, so this would be an excellent problem to address by calling Disciplinary Counsel and asking for advice.

Priests?

Should we read the mandatory reporting statutes to require that a priest who hears about child abuse in the confessional should be required to report?

The U.S. Supreme Court denied cert. when presented with that question recently, so a [Baton Rouge trial judge will decide the question](#).

How About Toxic Waste

Rule 1.6 comment 6

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.

Financial Harm

As we saw above, the (b)(2) and (b)(3) financial harm exceptions above are complicated. These rules came out [Ethics 2000](#) and the Enron, Worldcom, Tyco financial frauds.

These exceptions are convoluted. Sometimes it helps to disassemble the components into bullets, in which case we have a rule exception that reads:

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

- 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

These rules were added to Model Rule 1.6 in 2003 in the wake of Enron, Tyco, Worldcom. Delaware and Louisiana have adopted the ABA's 2003 version of 1.6 verbatim.

There is as yet no [Tarasoff](#) rule for lawyers. In other words, these exceptions provide that the lawyer MAY, not MUST, disclose.

- [RLGL § 67: Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss.](#)

Securing Legal Advice

When uncertain about their legal or ethical obligations, lawyers must seek advice about how to proceed and must be able to disclose enough confidential information to get a second ethical opinion.

So Rule 1.6 adds a specific exception:

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

Lawyer Self-Defense

Lawyers may disclose confidential information to defend themselves against claims brought by the client, or to defend against claims brought against the lawyer

accusing her of aiding and abetting or otherwise participating in the illegal conduct of her clients.

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;

Confidentiality vs. Candor

Model Rule 4.1(a)

Confidentiality & Lawyers Duty To Be Truthful

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;
- (b) or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment [2] clarifies an exception to that rule's prohibition on false statements, to wit:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category ...

[ABA Formal Opinion 06-439](#) agrees that such statements do not normally count as false statements of material fact and instead constitute "puffing."

However, FACTUAL STATEMENTS, like "My client sent me an email and told me just yesterday that she would never settle this case for less than \$100,000." Such statements are far more problematic. Now the lawyer is outright lying. About facts. Not just puffing about the supposed worth of claims.

In the words of Formal Opinion 06-439:

Whether in a direct negotiation or in a caucused mediation, care must be taken by the lawyer to ensure that communications regarding the client's position, which otherwise would not be considered statements

‘of fact,’ are not conveyed in language that converts them, even inadvertently, into false factual representations.

Pathological liars don’t make good negotiators, because nobody trusts them to keep their word. Many fine lawyers see no need for posturing or puffery and prefer dealing squarely with all concerned. And even a warlike, scorched-earth, take-no-prisoners litigator settles 90% of her cases. Yes, it’s nice to have a formidable reputation for winning in court, just in case negotiations break down, but once into settlement terms, doesn’t it make sense to speak truth and try to reach a fair resolution?

Deception and scheming are not assets when making deals. Many great lawyers never lie or even fudge the truth. Why? Why not instead develop a reputation for speaking the truth and being a person of your word?

Your CREDIBILITY!

Regard your good name as the richest jewel. For credit is like fire;
when once you have kindled it you may easily preserve it, but if you
once extinguish it, you will find it an arduous task to rekindle it again.
—Socrates

Rule 4.1(b)

A lawyer must disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Mandatory Disclosure?

Rule 4.1(b) opens a can of worms, because it purports to be mandatory. Unlike the exceptions to Rule 1.6 (“a lawyer *may* disclose”), Rule 4.1(b) says “*must disclose* ...” unless disclosure is prohibited by Rule 1.6.”

Why so complicated? The Rule is a two-headed beast. What Rule 4.1(b) seems to do is turn certain of the *may* exceptions into *must* disclose.

A *BNA Practice Guide excerpt* highlights the sheer complexity of manipulating these both Rules at once.

There is some slippage between the requirements of Model Rule 4.1(b) and Model Rule 1.6(b)(2). Rule 1.6(b)(2) *permits* disclosure if the lawyer “reasonably believes” disclosure is necessary to prevent a crime or fraud in which the client is using or has used the lawyer’s services.

Rule 4.1(b), however, **REQUIRES** disclosure if the lawyer knows that disclosure is in fact “necessary” to avoid assisting a client’s crime or fraud (with the exemption for information protected by Model Rule 1.6). If disclosure is in fact necessary to avoid assisting in a client’s crime or fraud, but the lawyer reasonably does not believe that the client is using his services to further a crime or fraud, would the disclosure be prohibited under Model Rule 1.6(b)?

Does “avoid assisting” a client’s criminal or fraudulent act denote a level of participation different from “prevent the client from committing a crime or fraud ... in furtherance of which the client has used or is using the lawyer’s services”?

The answer in the black letter of the rule itself is that Model Rule 4.1(b) does not require any disclosure that would violate the confidentiality rule. But if a disclosure would be permitted by Rule 1.6(b) (the “crime/fraud exception” to the confidentiality rule), then the disclosure is probably going to be required by Rule 4.1(b).

The net effect of Rule 4.1(b), therefore, is that it takes a subset of the disclosures permitted by Rule 1.6(b) and makes them mandatory.

Ethical rules should be simple. Easy to understand and apply. Not an exercise in set theory.

More Fraud

Under the Model Rules, “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. Rule 1.0(d)

Rest. 2nd Torts § 551(2)(c)

Restatement (Second) of Torts § 551(2)(c) creates fraud liability for non-disclosure of material facts that induce justifiable reliance, if an actor fails to disclose subsequently acquired information that the actor “knows will make untrue or misleading a previous representation that when made was true or believed to be so.”

Rest. 2nd Torts § 552(2) Misrepresentation

- A false representation;

Rule 1.6(b) Confidentiality Exceptions

MAY disclose
not
MUST disclose

Rule 4.1(b)
Turns a subset of
Rule 1.6(b) MAY disclose
exceptions into MUST disclose?

Figure 1: Rule 4.1(b) a subset of Rule 6.1(b)

- Concerning a presently existing material fact;
- Which the representor KNEW to be false or was made recklessly (fraud), or
- which was made negligently;
- For the purpose of inducing another to act;
- The other party reasonably relied on it;
- To his injury or damage.

Even under *Ultramares*, if the misrepresentation is intentional or reckless, third parties may recover even if not in privity, as long as they reasonably relied on a misrepresentation of material fact.

Ultramares however also held that privity was required for negligent misrepresentation. This rule has gradually eroded and been replaced by the Rest. 2nd of Torts 552(2)

Confidentiality & Corporations

What does the company want?

- How to determine what the incorporeal entity of a corporation “wants” in a given situation?
- Think of [Model Rule 1.13](#) as an exhaustion of internal remedies within the company to determine what IT wants.

Model Rule 1.13(b)

“If a lawyer for an organization knows that an officer ... is engaged in action ... that is a violation of law ... likely to result in substantial injury to the organization ... the lawyer shall refer the matter to higher authority in the organization ... including ... the highest authority ...”

We call this “going up the ladder” within the entity. The rungs on the ladder are described in Model Rule 1.13(b),(c), and (d) and the lawyer must proceed in the interests of the corporation until the entity acts to redress the violations of law.

If the corporation refuses to comply with the lawyer’s advice, then of course the lawyer must withdraw from representation. The lawyer may also “reveal information relating to the representation **whether or not Rule 1.6 permits such disclosure**, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

the business judgment rule

Rule 1.13 Comment 3:

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.

Don't second guess business decisions, but vigorously second guess LEGAL decisions.

Test Question

You represent Mike Miner who hires you to help him get a \$3 million bank loan to form a South American gold venture. The loan is to be paid out:

- 1/3 on signing
- 1/3 on delivery of equipment
- 1/3 on completion of work

You complete the paperwork creating the venture and the loan docs. And the first third is paid out

Then you discover that the entire venture is a fraud.

Now what?

To Comply With Court Orders

Rule 1.6(b)(6): "a lawyer may reveal information ... to comply with other law or a court order."

Rule 3.4(c): "a lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal, except ..."

Model Rule 1.6 Comment 12

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.

New Rule 1.6(c)

Preserving & Protecting Client Information

Following the [Ethics 20/20 Commission's recommendations](#), the ABA has added new Rule 1.6(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.

What are reasonable efforts? [Comments 18 and 19](#) describe some of the factors a lawyer may consider:

- sensitivity of information
- likelihood of disclosure
- cost
- difficulty of implementing
- extent safeguards affect representation
- client may require special security
- client may give informed consent to forgo measures

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

Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

Nebraska's Rule 1.6

§ 3-501.6 - Confidentiality of information.

A lawyer may reveal information relating to the representation of a client ... to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm ...;

Exceptions To Attorney-Client Privilege

Unlike the broad duty of confidentiality which covers ALL information related to the representation whatever its source, the attorney-client privilege is NARROW and specific. As comment 3 to Rule 1.6 puts it:

The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.

The privilege comes with its own exceptions. Wikipedia does a good job with a [SHORT fair summary of the privilege and its exceptions](#).

Courts permit exceptions to the attorney-client privilege when the harm caused by protecting the information is so great that public policy demands it. Certainly the privilege will not protect the communications of a client who is seeking advice about how to commit a fraud or crime.

Also, the privilege does not apply when an attorney is acting as a business advisor (i.e. board member) to a company, or simply performing some other non-legal service for a client.

These exceptions vary by jurisdiction but usually include the following:

- Communication was in furtherance of crime or fraud;
- Communication clarifies probate when claimants take through the same deceased client;
- Communication allows lawyer or client to defend against a breach of duty claims or to collect a fee;
- Communication is necessary to authenticate a document attested by the lawyer;
- Communication occurred about joint clients.

Crime-Fraud Exception

The attorney-client privilege ... cannot be used to shield ONGOING or intended FUTURE criminal conduct. –*United States v. Zolin* (Sct. 1989)

By far the biggest and most important exception is the crime-fraud exception. It applies when the client is engaged in ongoing criminal activity, or intends to seek advice about committing some future crime.

Note crime-fraud is PROSPECTIVE. Is there really a crime-fraud exception? Isn't

it redundant or superfluous? Courts define the privilege as: “A communication for the purpose of obtaining or providing legal assistance?” Doesn’t this by its own terms exclude communications seeking advice how to break the law.

“Excuse me can you help me set up a money-laundering operation?”

“Can you help me set up an illegal tax shelter?”

“Yes, I murdered the victim. And I am going to take the stand and say that at the time of the murder I was eating dinner with my Mom.”

To best promote the purposes of the attorney-client privilege, the crime fraud exception should apply ONLY if the communication seeks assistance in or furtherance of future criminal conduct.

United States v. Zolin (Sct.1989)

If prosecutors suspect the crime-fraud exception applies, they must follow a two-step process:

1. First, show facts ... that in camera review of the materials may reveal evidence that the crime-fraud exception applies.
2. Then, if judge decides this question in favor of the government, the otherwise privileged material may be submitted for in camera inspection.

Is there “reasonable cause to believe that the atty’s services were used to further an ongoing unlawful scheme?”

The lawyer’s innocence does NOT preserve the attorney-client privilege against the crime-fraud exception. The attorney’s lack of any guilty knowledge did not matter because the privilege was the client’s and the client’s misconduct sufficed to lose it.

Crime-fraud exception turns on client’s intent rather than the lawyer’s knowledge of the client’s goal.

Lawyers learn to look at their emails and their advice the way a judge or jury might look at it after the fact.

Claimants Through Same Deceased Client

Some Probate lawyers argue that you can resist this if the client wanted it resisted.

Better course is if the testator says, “And you better make sure that no good dirty rotten son-in-law of mine does NOT get his hands on my gun collection”

Then you can put the waiver right in the Will.

Breach of Duty (Lawyer OR Client)

- Malpractice Action.
- Criminal Proceeding.
- SEC v. Lawyer (e.g. Sarbanes-Oxley)
- Client v. Lawyer

Lawyer Attesting To A Document

- Notary.
- Deeds.
- Affidavits, etc.

Joint Clients

Joint clients may assert the attorney-client privilege when it's *The World vs. Them*.

But any ONE of the joint clients may waive the privilege when all were present for the conference or helped create the document.

If one client tells the common lawyer something relevant to the joint representation, the lawyer must tell the others.

When joint clients fall out, their communications are NOT protected by the attorney-client privilege.

Underlying Information Not Protected

"The privilege protects communication with counsel, but does not protect the underlying information. –Stephen Gillers

Client emails lawyer a problematic Word document that client wrote and transmitted a few years ago and in which client arguably committed fraud. Client's communications in the body of the email and the possibly even the fact that client emailed lawyer are protected by the attorney-client privilege.

However the document remains evidence. And if the other side seeks discovery, the client has not somehow cloaked the document in the attorney-client privilege by mailing it to the lawyer.

Recommended Reading & Viewing

Some vivid real-life examples of the innocent-person-on-death-row dilemma (see M&F3rd Problem 7-4 on page 212).

- [NYTimes: Lawyer Reveals Secret, Toppling Death Sentence](#)
- [Inmate's Freedom May Hinge on Secret Kept For 26 Years](#)
- [BNA: Disclosure: Required by Law or Court Order](#)

Corporate Counsel

Confidentiality

Three ABA/BNA articles on the corporate attorney-client privilege:

1. Corporate Attorney-Client Privilege Is Established, but It Can Be Unpredictable? [30 Law. Man. Prof. Conduct 23](#).
2. Protecting the Corporate Attorney-Client Privilege From Unintended Waiver [30 Law. Man. Prof. Conduct 55](#).
3. Exceptions to Corporate Privilege, and Role of Work Product Doctrine [30 Law. Man. Prof. Conduct 84](#)

And just one of many articles on social media and confidentiality.

- [Ethical Limitations on Informal Discovery of Social Media Information](#) by Steven C. Bennett, 36 American J. of Trial Advocacy 473 (Spring 2013).