

# Confidentiality and Its Exceptions

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# Duty of Confidentiality (Missouri Rule 4-1.6)

## Rule 4-1.6(a) – Duty of Confidentiality

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 Rule 4-1.6(b).

# Rule 4-1.6(b) – Exceptions

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

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (2) to secure legal advice about the lawyer's compliance with these Rules
- (3) 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;
- (4) to comply with other law or a court order; or
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

## Rule 4-1.6(c) – Protection of Information

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

# ABA Model Rule 1.6(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 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;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

# ABA Model Rule 1.6(b)(2) and (3)

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

...

- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (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; . . .



# Comparison of MO-IL-KS

	Subparts of Rule 1.6	Exceptions in Rule 1.6(b)	Mandatory Disclosure	Comment Paragraphs
Missouri	3	5	No	19
Illinois	5	7	Yes	21
Kansas	3	5	No	29

# Kansas Difference

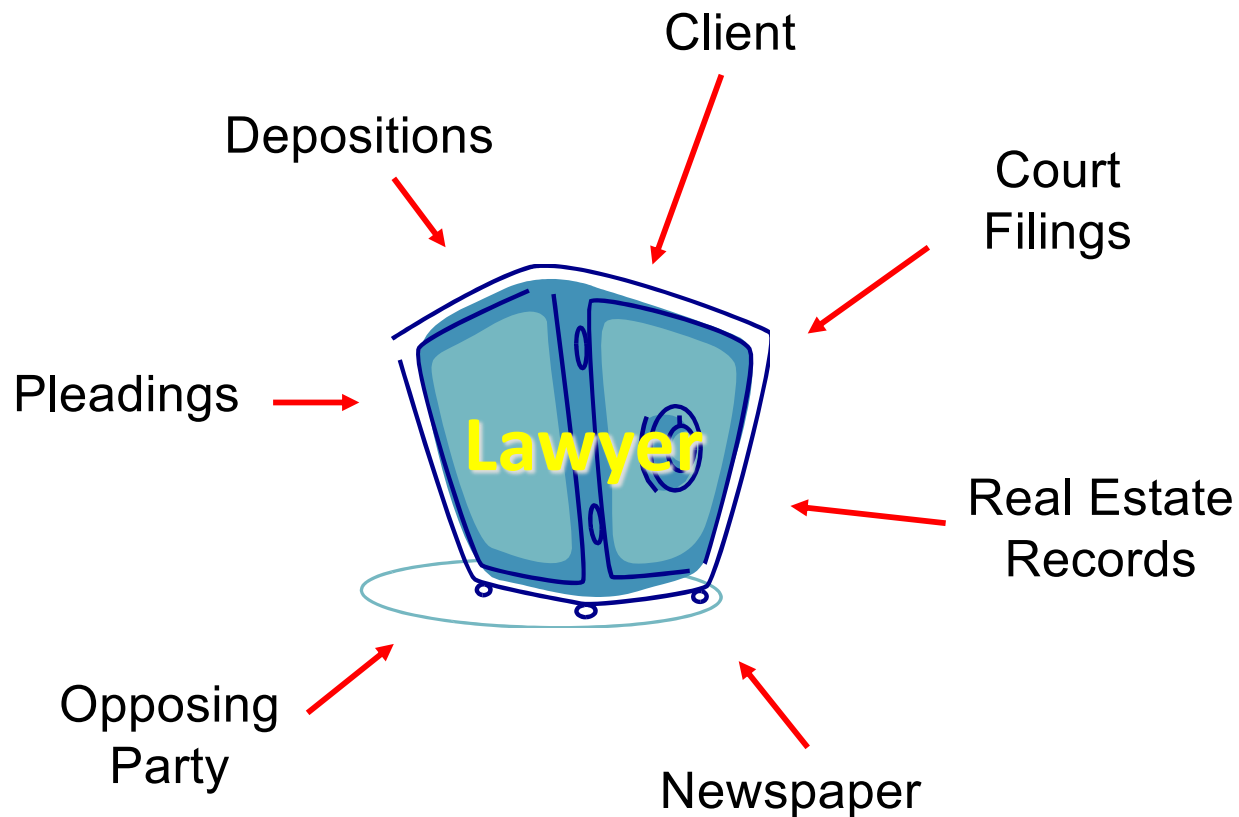
Rule 1.6(b) – Preventing Crimes – A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client **from committing a crime**;

# Illinois Differences

- Rule 1.6(c) – Mandatory Disclosure – A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.
- Rule 1.6(b)(1) -- to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
- Rule 1.6(d) – (d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

# "Information relating to the representation of a client . . ." Rule 4-1.6



# Confidentiality versus Privilege

- **Confidentiality**

- Ethics rule
- What lawyer can/should voluntarily disclose
- Discipline for breach
- Very broad protection

- **Privilege**

- Evidentiary rule
- What can be protected from discovery
- (No discipline)
- More narrow protection

# Missouri Opinion 2020-22

**QUESTION:** Attorney received notice that Client is disputing a credit card payment for legal fees. If **Attorney wishes to dispute the chargeback**, Attorney is required to provide documentation of legal services rendered to Client. What information may Attorney provide?

**ANSWER:** Information relating to the representation of Client, including information about legal services provided and fees charged, may not be disclosed without the informed consent of Client. See Rule 4-1.6; see also Informal Opinion 2015-09. Rule 4-1.6(b)(3) permits a lawyer to reveal confidential information to the extent reasonably necessary to establish a claim or defense in a controversy between the lawyer and client, such as an action against a former client to collect a fee. However, **a credit card chargeback dispute is not such a controversy**. See Rule 4-1.6, Comment [9]. **To dispute the chargeback, Attorney is permitted to provide an affidavit or statement that professional services were provided to Client. Attorney also may state that professional obligations prevent Attorney from providing additional information.** Attorney should ensure that chargebacks for disputed credit card payments cannot be processed as transfers out of the trust account. Informal Opinion 2014-05; see Rule 4-1.15(b)(3). To address the fee dispute, Rule 4-1.5(f) requires Attorney to conscientiously consider participating in the appropriate fee dispute resolution program.

# “Use” – Rule 4-1.8(b)

A lawyer shall not **use** information relating to representation of a client **to the disadvantage of the client** unless the client gives informed consent, except as permitted or required by these Rules.

# Former Clients – Rule 4-1.9(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.



# Prospective Clients – Rule 4-1.18

- (a) A person who consults with a lawyer about 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 4-1.9 would permit with respect to information of a former client.

# Client With Diminished Capacity – Rule 4-1.14

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, **the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.**
- (b) When the lawyer reasonably believes that the client has diminished capacity; is at risk of substantial physical, financial or other harm unless action is taken; and cannot adequately act in the client's own interest, the **lawyer may take reasonably necessary protective action**, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a next friend, guardian ad litem, conservator or guardian.
- (c) **Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client,** but only to the extent reasonably necessary to protect the client's interests.

# Illinois “Misplaced” Provision

Rule 1.6(d): Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers’ assistance program, or in an intermediary program approved by a circuit court in which nondisciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

# Exceptions to Confidentiality

## Rule 4-1.6(a) – Duty of Confidentiality

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 Rule 4-1.6(b)**.

# Informed Consent

- “the client gives informed consent”
- Rule 4-1.0(e): "Informed consent" denotes the agreement by a person to a proposed course of conduct **after the lawyer has communicated adequate information and explanation** about the **material risks of** and **reasonably available alternatives** to the proposed course of conduct.

# Impliedly Authorized

“[T]he disclosure is impliedly authorized in order to carry out the representation”

# Examples – Rule 4-1.6 cmt [5]

- In some situations, for example, a lawyer **may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.**
- **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.



# Rule 4-1.6(b) – Exceptions

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

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (2) to secure legal advice about the lawyer's compliance with these Rules
- (3) 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;
- (4) to comply with other law or a court order; or
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

# ISBA Opinion 21-02

- The Illinois Rules of Professional Conduct allow a lawyer to provide the executor and trustee named in a deceased client's estate planning documents with the final executed copies of those documents and whatever portions of the estate planning file may be helpful to the named fiduciary to carry out the deceased client's intent expressed in those documents.
- The lawyer may give other family members limited information about the deceased client's estate planning documents and file if providing that limited information will allow a beneficiary to enforce her rights or if the disclosure might prevent litigation.
- If a lawyer receives a subpoena issued in a will or trust contest for a deceased client's estate planning file, the lawyer should contest the subpoena and not comply until a court has ordered the lawyer to comply.

# Mandatory Exceptions

# Illinois Rule 1.6(c)

A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

# Candor to Tribunal – Rule 4-3.3(a) & (c)

(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 Rule 4-3.3(a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6.

# Permissive Made Mandatory – Rule 4-4.1

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

(b) **fail to disclose a material fact** when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6

# Discretionary/Permissive Exceptions

# Client Misconduct



# Missouri Rule 4-1.6(b)(1) – Death or Substantial Bodily Harm

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

(1) to prevent **death or substantial bodily harm** that is reasonably certain to occur;

# ILLINOIS Rule 1.6(b)(1) – Unique Rule

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

(1) to **prevent the client from committing a crime** in circumstances other than those specified in paragraph (c);

# KANSAS Rule 1.6(b)(1) – Unique Rule

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) To prevent the client **from committing a crime**

# MODEL/ILLINOIS Rule 1.6(b)(2) & (3)

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

(2) to **prevent the client from committing 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**;

# Comparing Exception (b)(2) and (b)(3)

- to prevent the client 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;
- 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;

# Withdrawal – Rule 4-1.6 cmt [14]

- 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 4-1.16(a)(1).
- After withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in this Rule 4-1.6.
- Neither this Rule 4-1.6 nor Rule 4-1.8(b) nor Rule 4-1.16(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.
- 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 4-1.6, the lawyer may make inquiry within the organization as indicated in Rule 4-1.13(b).

# ISBA Opinion 20-05

- A lawyer who knows about a client's fraud may disclose otherwise confidential client information to third parties if done in such a manner as to prevent, lessen or rectify the client fraud.
- However, even if the information is not disclosed, the lawyer will still likely need to withdraw as client's attorney and take other actions.

# Missouri Informal Opinion 2019-05

**Question:** Attorney's Client has left Attorney voice mail messages that can be interpreted as containing threats of bodily harm against Attorney and others. May Attorney report the threats to law enforcement?

**Answer:** The fact that Client has left threatening voice mail messages with Attorney is information related to the representation governed by Rule 4-1.6, Confidentiality of Information. Attorney is not permitted by Rule 4-1.6 to report the threats to law enforcement unless Client gives informed consent to the report or Attorney is revealing the information to the extent Attorney reasonably believes necessary to prevent death or substantial bodily harm reasonably certain to occur, in accordance with Rule 4-1.6(b)(1).

Comment [6] to Rule 4-1.6 provides guidance that "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 Attorney fails to take necessary action to eliminate the threat.

The decision as to whether Attorney reasonably believes disclosure to law enforcement is necessary to accomplish the purpose specified in Rule 4-1.6(b)(1) will require the use of Attorney's professional judgment in light of all the circumstances known to Attorney.

Any report to law enforcement should be no greater than Attorney reasonably believes necessary to accomplish the purpose under Rule 4-1.6(b)(1). See Comment [12]. A decision by Attorney not to report the threats would not violate Rule 4-1.6. See Comment [13]. If Attorney believes Client is suffering from diminished capacity because of mental impairment, . . . .



# Missouri Informal Opinion 2018-06

**Question:** May Attorney report to law enforcement authorities a purported prospective client who contacted Attorney with the apparent objective of defrauding the lawyer by sending Attorney a bogus check for deposit in Attorney's trust account?

**Answer:** *If Attorney has formed a client-lawyer relationship with the individual, Rule 4-1.6 prohibits disclosure of the suspected trust account scam unless the client gives informed consent, Attorney is required by law or a court order to disclose the information, or another exception to Rule 4-1.6 exists.* Missouri has no crime-fraud exception in Rule 4-1.6. Whether a client-lawyer relationship exists is a question of fact and law outside the scope of the Rules of Professional Conduct. If the individual is a prospective client under Rule 4-1.18, Attorney may not use or disclose information gained in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client. If no client-lawyer relationship was formed and the individual does not qualify as a prospective client under Rule 4-1.18, Attorney has no duty of confidentiality regarding the information and is free to report the information to appropriate law enforcement authorities.

# Missouri Opinion 2020-03

**QUESTION:** In a conversation with Attorney, Client has threatened suicide. What is Attorney ethically obligated or permitted to do?

**ANSWER:** . . . Client’s statements to Attorney are confidential per Rule 4-1.6. If Client grants specific informed consent for Attorney to disclose client’s threats to one or more individuals or entities who may be able to assist Client, Attorney may do so. *See* Rule 4-1.6, Comment [2]; *see also* Rule 4-1.0(e) and Comments [6] – [8] (regarding “informed consent”). Without Client’s informed consent, Rule 4-1.6 permits Attorney to disclose Client’s threats to the extent required by other law or a court order. Rule 4-1.6(b)(4). Whether Attorney has any such legal obligation is a question of law outside the scope of the Rules of Professional Conduct.

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# Missouri Opinion 2020-03

**QUESTION:** In a conversation with Attorney, Client has threatened suicide. What is Attorney ethically obligated or permitted to do?

**ANSWER:** . . .

Rule 4-1.6(b)(1) permits Attorney to disclose Client's threats to the extent reasonably necessary to prevent death or substantial bodily harm that is reasonably certain to occur. Death or substantial bodily 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. Rule 4-1.6, Comment [6]. The decision as to whether Attorney reasonably believes disclosure is necessary to accomplish the purpose specified in Rule 4-1.6(b)(1) will require the use of Attorney's professional judgment in light of all the circumstances known to Attorney. See Informal Opinion 2019-05; *see also* Rule 4, Scope, at [14]; Rule 4-1.6 permits, but does not require, disclosure in accordance with paragraph (b). Rule 4-1.6, Comment [13]. Any disclosure per 4-1.6(b) should be no greater than what Attorney reasonably believes is necessary to accomplish the specified purpose. Rule 4-1.6, Comment [12]. .

..

# Rule 4-1.6(b) – Exceptions

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

- ~~(1) to prevent death or substantial bodily harm that is reasonably certain to occur;~~
- (2) to secure legal advice about the lawyer's compliance with these Rules**
- (3) 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;**
- (4) to comply with other law or a court order; or**
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.**

# Self-Defense

# Getting Advice – Rule 4-1.6(b)(2)

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

- (1) . . .
- (2) to secure legal advice about the lawyer's compliance with these Rules

# Self-Defense Exceptions – Rule 4-1.6(b)(3)

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

- (3) 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;

# Self-Defense Exceptions

- 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



# Missouri Opinion 2018-08

**Question:** May Attorney respond to a negative online review about the representation of a former client if Attorney confines the response to comments directed to information already disclosed by the former client in the review?

**Answer:** In most circumstances, Rules 4-1.9(c) and 4-1.6 prohibit Attorney from revealing information relating to the representation of a client in response to a negative online review, even where the client or someone writing on behalf of the client has posted criticism of the quality of Attorney's representation. Per Rule 4-1.9(c), Attorney has a duty to a former client not to reveal confidential information except as would be permitted with respect to a client. A negative online review generally does not constitute a "controversy" sufficient to trigger the exception in Rule 4-1.6(b)(3) and permit a lawyer to reveal confidential information to the extent reasonably necessary to establish a defense in a controversy between the lawyer and the client. Even if the information is not privileged as a matter of law such that Attorney could be compelled to disclose it in a legal proceeding, Rule 4-1.6 does not permit the voluntary disclosure of confidential information by Attorney in response to an online review. See Comment [3]. Rule 4-1.6 protects all information related to the representation, whatever its source. Comment [3]. Also prohibited are disclosures by a lawyer that do not reveal protected information but could reasonably lead to the discovery of such information by a third person. Comment [4]. If Attorney chooses to post a response to an online review, the response may acknowledge an attorney's obligation to comply with professional obligations and must reveal no information related to the representation in violation of Rule 4-1.6.

# Comply with Law/Court Order

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

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

# Resistance to Disclosure – Rule 4-1.6 cmt [11]

- 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 4-1.4.
- Unless review is sought, however, Rule 4-1.6(b)(4) permits the lawyer to comply with the court's order.

# Missouri Opinion 2017-04

**Question:** May Attorney comply with a court Order directing Attorney to provide to law enforcement information related to the representation of Client, where Client declines to give informed consent for Attorney to provide the confidential information?

**Answer:** Rule 4-1.6(b)(4) allows Attorney to reveal confidential information to the extent reasonably necessary to comply with other law or a court order. Rule 4-3.4(c) forbids a lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no obligation exists. Before complying with the Order, and absent informed consent from Client to do otherwise, attorney should assert on Client's behalf all nonfrivolous claims that the Order is not authorized by other law or that the information is protected by the attorney-client privilege or other applicable law. See Rule 4-1.6, Comment [11]. If Attorney's challenge is denied, Attorney must consult with Client about the possibility of appeal, to the extent required by Rule 4-1.4. See Rule 4-1.6, Comment [11]. If review is not sought, or if Client is no longer Attorney's current client at the time of the adverse ruling, Attorney is free to comply with the Order. Rule 4-1.6(b)(4). If Attorney lacks a good faith basis for an original or further challenge to the Order, Attorney is free to comply with the Order and may be required to do so pursuant to Rule 4-3.4(c).

# Missouri Opinion 2015-09

**Question:** May [Attorney, a federal officer or employee](#), disclose client names on a public financial disclosure form which requires Attorney to list payments to Attorney exceeding a particular sum, and the names of those making the payments, in the two years prior to Attorney's appointment as a federal officer or employee, where the information would include the names of clients and information about clients' legal fees?

**Answer:** [The name of a client, and the fact that the client's legal fee exceeds a particular sum, are confidential under Rule 4-1.6 as information related to the representation.](#) [Attorney may not disclose the information without the client's informed consent or if Attorney is complying with "other law or a court order."](#) [Rule 4-1.6\(b\)\(4\)](#). Whether other law requires disclosure and whether it supersedes Rule 4-1.6 are matters of law outside the scope of the Rules of Professional Conduct, as explained in Comment [10]. If other law appears to require disclosure, Attorney must discuss the matter with the client to the extent required by Rule 4-1.4. If a court, other tribunal, or governmental body claiming authority pursuant to other law orders disclosure, Attorney must assert on behalf of the client all nonfrivolous claims that the order is not authorized by law or that other applicable law protects the information. Rule 4-1.6, Comment [12]. If other law does authorize disclosure, the disclosure may only be made to the extent reasonable necessary to comply with the applicable law. The duty of confidentiality continues after the client-lawyer relationship has ended. Comment [17], citing Rule 4-1.9(c).

# Law Firm Operations

# Rule 4-1.6(b) – Exceptions

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

- ~~(1) to prevent death or substantial bodily harm that is reasonably certain to occur;~~
- (2) to secure legal advice about the lawyer's compliance with these Rules
- (3) 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;~~
- ~~(4) to comply with other law or a court order; or~~
- (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

# Merger/Acquisition Exception

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

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



# Missouri Opinion 2020-05

**QUESTION:** Attorney is negotiating with a law firm for future employment. May Attorney make limited disclosure of a client's confidential information in order to check for conflicts of interest?

**ANSWER:** Lawyers have an ethical obligation to protect against conflicts of interest. See Rules 4-1.7 and 4-1.9. Rule 4-1.6(b)(5) permits Attorney to reveal information relating to the representation of a client for the limited purpose of detecting and resolving conflicts of interest arising from Attorney's change of employment, but only if doing so would not compromise the attorney-client privilege or otherwise prejudice the client. Whether the attorney-client privilege would be compromised is a question of law outside the scope of the Rules of Professional Conduct. See Rule 4-1.6, Comment [3]. **A disclosure pursuant to Rule 4-1.6(b)(5) should not be made until substantive discussions about the new relationship have occurred.** Rule 4-1.6, Comment [18]. Ordinarily, **any such disclosure should be limited to "the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated."** Rule 4-1.6, Comment [18]. Information disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Rule 4-1.6, Comment [19].

# Protecting Client Information

## Rule 4-1.6(c) – Protection of Information

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

# Responsibility of Supervisor

[15] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and 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 Rule 4-1.1, 4-5.1, and 4-5.3

# What Are Reasonable Efforts – Comment [15]

- Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to,
  - the sensitivity of the information
  - the likelihood of disclosure if additional safeguards are not employed
  - the cost of employing additional safeguards
  - the difficulty of implementing the safeguards, and
  - the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
- A **client may require** the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.
- 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.

# Encryption Not Required (Generally)

- 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.

# Encryption Not Required (Generally)

Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include

1. the sensitivity of the information and
2. the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.

# Missouri Opinion 2018-09

**Question:** May Attorney use “cloud computing” in a way that is consistent with Attorney’s ethical obligations?

**Answer:** Attorney may use cloud computing in the practice of law without violating the Rules of Professional Conduct if Attorney maintains competence in the use of relevant technology (Rule 4-1.1) and makes reasonable efforts to safeguard confidential information from inadvertent or unauthorized disclosure or access, as warranted by the particular facts and circumstances of each client’s matter (Rules 4-1.6(c) and Comments [15] and [16]; Rule 4-5.3 and Comment [3]). Attorney should read carefully the cloud computing provider’s terms and conditions of service. Attorney should ensure adequate provider policies and practices as to (1) ownership and security of client information, and (2) attorney and provider access to client information. Reasonable efforts to safeguard confidential information may include (but are not limited to) ensuring adequate provider policies and practices regarding:

- Security measures protecting confidentiality of client information during transmission and storage;
- Prompt notification of Attorney in the event of a security breach or provider’s receipt of a subpoena for client information;
- Ownership of data solely by Attorney or Attorney’s firm;
- No access rights by the provider to client information, except as required by law;
- Regular data backup by the provider;
- Handling of client information in the event Attorney’s relationship with the provider is terminated;
- Compliance with applicable law regarding data storage and transmission;
- Reliable access to data by Attorney;
- No access to data by third parties, including advertisers, except as required by law; and
- Domestic storage of data, or, alternatively, storage in a jurisdiction subject to United States data protection laws or equivalent.

Because what constitutes adequate provider policies and practices in these areas may change as relevant technology evolves, Attorney is encouraged to consult with a qualified information technology professional, take continuing legal education courses on use of technology in practice, and/or engage in regular self-study of materials from reputable sources to maintain competence in the use of cloud computing in the practice of law.



# Missouri Opinion 2020-26

**QUESTION:** Attorney's office laptop, cell phone, bar card, and credit cards were stolen out of Attorney's locked vehicle. What do the Rules of Professional Conduct require Attorney to do?

**ANSWER:** If a stolen electronic device contains, or provides potential access to, information related to the representation of clients or former clients, Attorney must take all steps reasonably necessary to prevent unauthorized access to the information. See Rules 4-1.6(c) and 4-1.1.

These steps may include, but may not be limited to, deactivating the cell phone; taking appropriate steps to secure Attorney's law firm network and/or data in offsite storage; changing all passwords that may be stored on the electronic device; and consulting with a qualified information technology professional if appropriate.

Attorney must communicate with affected clients to the extent reasonably necessary to allow each client to make informed decisions about the representation. Rule 4-1.4; see Rule 4-1.9(c) and Informal Opinion 2017-02.

Attorney must comply with any applicable law requiring notice to affected persons regarding disclosure of their personal information. See Preamble to Rule 4 at [5]. . . .

# Conclusory Matters

- **Questions** – If you have questions after the program, please email them to Paige Tungate at [ptungate@DowneyLawGroup.com](mailto:ptungate@DowneyLawGroup.com)
- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

<https://www.surveymonkey.com/r/secret12-2022>

- **Certificate of Completion** – Available through the Post-Program Survey
- **Kansas Credit** – If you are seeking Kansas credit, you need to enter the [two Attendance Verification Words](#) and your Kansas information into the Post-Program Survey. *Please complete this information in the survey [this week](#), so we can ensure you receive proper credit*



<https://www.surveymonkey.com/r/secret12-2022>

# *Future Programs – Free CLEs*

January 10 (Tuesday) at 3 PM CT – ***Lawyer Trust Accounts***

January 26 (Thursday) at 12 Noon CT – ***Conflicts of Interest Update***

*More programs will be scheduled in February through June 2023*

Register at: [www.downeyethicscle.com](http://www.downeyethicscle.com)



# Thank you



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