

Exceptions to the Duty of Confidentiality

March 2026

Connectivity/Technical Issues

Audio Issues – If you have audio issues on computer, please try accessing by phone at

(701) 801-6121

****No Access Code Required****

If problems persist, contact Paige Tungate at ptungate@DowneyLawGroup.com

Watch the slides at <https://join.freeconferencecall.com/downeycle>

Download the slides at <http://www.downeyethicscle.com/>

Questions – Please submit questions during the program through CHAT or during or after the program by emailing Paige Tungate at ptungate@DowneyLawGroup.com

CLE Information

- *Kansas Credit* – If you are seeking Kansas credit, you will need to enter the **two Attendance Verification Words** and your Kansas Bar information into the Program Survey
 - Please complete the Survey **this week**, so we can ensure you receive proper credit
- *Certificate of Completion* – Available also through the Program Survey
- Three ways to access Program Survey:
 1. Link available in the **CHAT** (right now)
 2. Link at the **end of the slides** (here or at www.DowneyEthicsCLE.com)
 3. Link sent to you in an **email within 30 minutes** of program ending



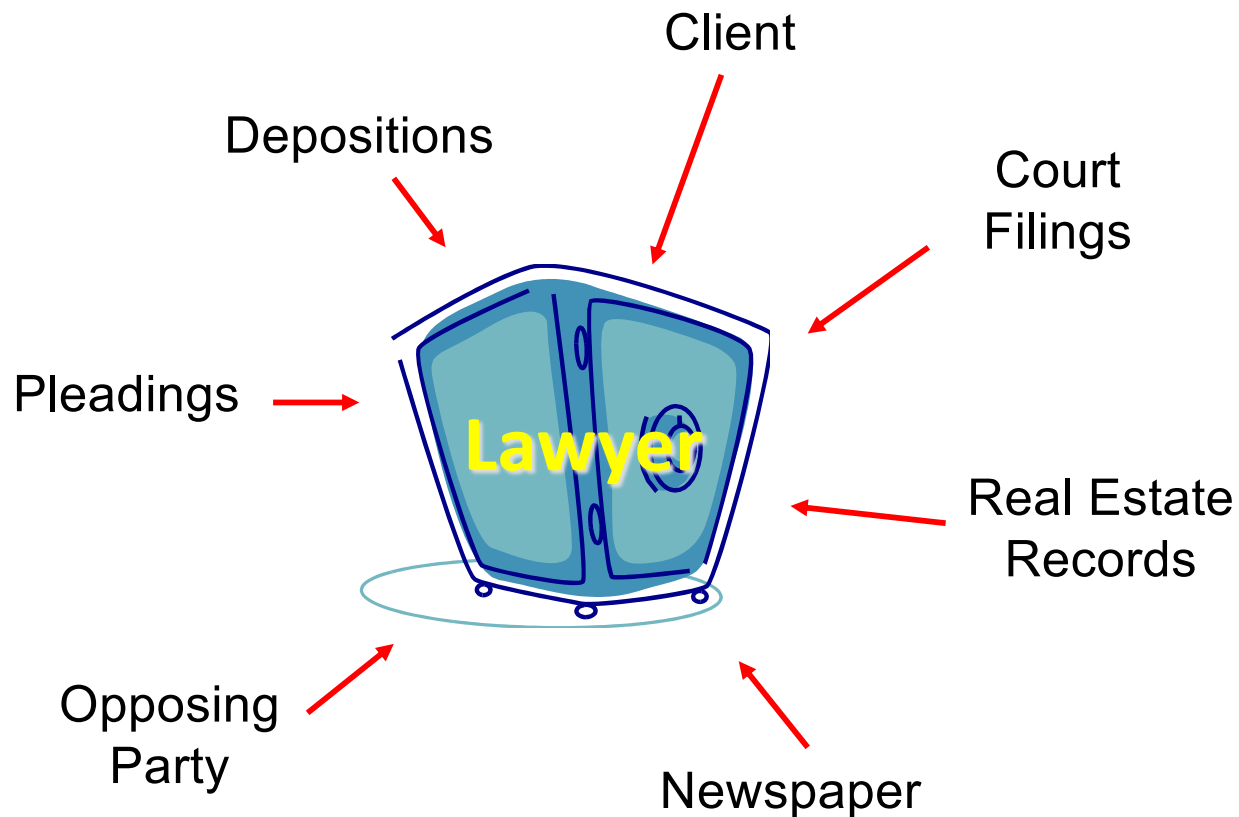
<https://www.surveymonkey.com/r/confide0326>

Overview of Rule 4-1.6(a) and Its Exceptions

Missouri 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).

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



Confidentiality versus Privilege

Duty of Confidentiality

- Ethics rule
- What lawyer can/should (voluntarily) disclose
- Discipline for breach
- Very broad obligation

Attorney-Client Privilege

- Evidentiary rule/principle arising from common law
- What can be protected from discovery
- (No discipline)
- More narrow protection

Missouri Rule 4-1.6(a) – Exceptions to the 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” – Rule 4-1.0(e)

[D]enotes 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.

Notes on “Informed Consent”

- Reflects “informed consent” in other legal contexts
- Written consent not expressly required
- Consent controls the scope of the exception

“Impliedly Authorized . . . to Carry Out the Representation”

“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*.

- 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.”

Notes on “Impliedly Authorized”

- Limited to carrying out the representation
 - Does not allow, for example, lawyer to use client information for marketing
- Does not expressly require written authorization
- Common source of headaches (including complaints) for lawyers

“Permitted by 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.

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; . . .

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.

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**;

“Permitted by 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:

- (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.**

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

Other Rules Protecting Confidences

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.

Rule 4-1.6 cmt [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 Rules 4-1.1, 4-5.1, and 4-5.3.

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. **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. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 4-5.3, Comments [3]-[4].

Rule 4-1.6 cmt [16]

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.

Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Rule 4-1.8(b) – Limit on “Use” of Client Information

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.

Rule 4-1.9(c) – Protection for Former Clients' Information

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.

Rule 4-1.18(b) – Protection for Prospective (But Declined) Client Information

- (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.

Exceptions to the Duty of Confidentiality

Based on Missouri Informal Opinions
from 2020-present

Scenario #1

Client wants to obtain a loan relating to the representation.

Can lawyer provide information to client's lender/bank about the representation?

(Based on Missouri Informal Opinion 2023-10)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Scenario #2

Lawyer wants to use a payment system to process client payments.

Does lawyer need to worry about the payment system obtaining information about client matters?

Can the attorney provide information to the lender/bank about the representation?

(Based on Missouri Informal Opinion 2023-09; also Missouri Informal Opinion 2022-08 about using remote deposit for trust account)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Analysis

What exception would allow disclosure?

- Informed consent
- **Impliedly authorized to carry out the representation**
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Missouri Informal Opinion 2023-09

“[T]he lawyer must still fully consider the terms of use of such program to ensure that client confidentiality is maintained in accordance with Rule 4-1.6. See Rule 4-1.6, Comments [15] and [16]; Rule 4-1.1, Comment [8]; and Missouri Informal Opinions 2021-03, 2018-10, and 2018-09.”

Scenario #3

Lawyer receives credit card payment from Client to receive legal services.

Subsequently Client voids charge.

May Lawyer disclose confidences to contest “chargeback”?

(Based on Missouri Informal Opinion 2020-22)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Rule 4-1.6 cmt [9]

A lawyer entitled to a fee is permitted by Rule 4-1.6(b)(3) 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.

Missouri Informal Opinion 2020-22

Answer

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.

Scenario #4

Lawyer receives a check for Client

After depositing check, Lawyer learns check was forged: Client sought to scam Lawyer

What may/must lawyer report to law enforcement?

(Based on Missouri Informal Opinion 2025-08)

Informal Opinion 2025-08

Question 1

May Lawyer report Client to law enforcement?

Answer 1: This question was addressed in Missouri Informal Opinion 2018-06. It is debatable as to whether an actual client-lawyer relationship formed in this scenario and is a question of fact and law outside the Rules of Professional Conduct. Scope [17]. **However, Lawyer may report Client to law enforcement regardless of whether an actual client-lawyer relationship was formed. Rule 4-1.6, addresses attorney confidentiality for clients and prospective clients. It implicitly permits Lawyer to disclose the crime to law enforcement. See Informal Opinion 2018-06. This is because it is unreasonable for a lawyer to maintain confidentiality when the client has abused the relationship by committing a crime against the lawyer.** In the alternative, if no client-lawyer relationship existed because the relationship was based upon a scam, no confidentiality attaches to the engagement.[1]

Informal Opinion 2025-08

Question 2

Is Lawyer required to report the overdraft to the Office of Chief Disciplinary Counsel?

Answer 2: Rule 4-8.3, which addresses reporting professional misconduct, **does not require Lawyer to self-report Lawyer's own misconduct to the Office of Chief Disciplinary Counsel**. See Missouri Informal Opinions 2023-05 and 2011-04. Whether Lawyer chooses to do so is a matter of Lawyer's independent professional judgment. The Office of Chief Disciplinary Counsel will receive notice of the overdraft from the financial institution where the Lawyer's trust account is held. See Rule 4-1.15(a)(2).

Scenario #5

Client A has filed a disciplinary complaint against Lawyer.

Lawyer is asked to produce trust account records relating to representation of Clients B-E as well as Client A.

May Lawyer disclose financial records relating to representation of Clients A to E?

(Based on Missouri Informal Opinion 2023-06)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Missouri Informal Opinion 2023-06

Answer

Answer: . . .

Pursuant to Rule 5.08(a), the **Chief Disciplinary Counsel is authorized, with or without complaint, to investigate professional misconduct** alleged to have been committed by a lawyer licensed to practice in this jurisdiction. Each regional disciplinary committee or division thereof may conduct an investigation upon request of the Chief Disciplinary Counsel. Rule 5.08(a); see also Rule 5.02.

Rule 4-8.1 states in relevant part that a lawyer in connection with a disciplinary matter **shall not “knowingly fail to respond to a lawful demand for information from ...[a] disciplinary authority,** except that this Rule 4-8.1 does not require disclosure of information otherwise protected by Rule 4-1.6.” In Missouri, the disciplinary authority is the Office of Chief Disciplinary Counsel or a regional disciplinary committee. Failure to cooperate with the Chief Disciplinary Counsel or a regional disciplinary committee with regard to a disciplinary matter constitutes conduct prejudicial to the administration of justice and conduct that reflects adversely on a lawyer’s fitness to practice law. See Formal Opinion 117; Rule 4-8.4(d).

Missouri Informal Opinion 2023-06

Answer

Rule 4-1.6 on confidentiality provides in relevant part that a lawyer shall not reveal information related to the representation of a client unless the client gives informed consent, or the disclosure is permitted by Rule 4-1.6(b).

Rule 4-1.6(b)(3) permits a lawyer to disclose information related to the representation to the extent the lawyer reasonably believes necessary “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” (Emphasis added.) The plain language of Rule 4-1.6(b)(3) does not limit the exception to disclosure of confidential client information contained therein to a complaint by the client or a controversy between the lawyer and the client. Comment [8] to Rule 4-1.6 states in relevant part:

Where a ... 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 ... 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.... The lawyer’s right to respond arises when an assertion of such complicity has been made. Rule 4-1.6(b)(3) 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 also applies, of course, where a proceeding has been commenced.

As stated above, Rule 5.08(a) authorizes the disciplinary authority to investigate professional misconduct with or without complaint. Thus, Rule 4-1.6(b)(3) permits Lawyer to comply with a request from the Chief Disciplinary Counsel or a Regional Disciplinary Committee for information, including testimony, relating to the representation of a client regardless of whether that client has made a complaint to the Chief Disciplinary Counsel or whether the representation of that client was the subject of a complaint. Comment [13] to Rule 4-1.6 notes that some Rules, including Rule 4-8.1, “require disclosure only if such disclosure would be permitted by Rule 4-1.6(b).” Since Lawyer is permitted to disclose the information requested by the disciplinary authority, it is the informal advisory opinion of this Office that such disclosure is required by Rule 4-8.1.

Missouri Informal Opinion 2023-06

Answer

It is important to note that Rule 4-1.6(b) only allows disclosure in a limited form by stating that the lawyer “may reveal information relating to the representation of a client **to the extent the lawyer reasonably believes necessary**” to meet the exception permitted in (b)(1)-(5). Comment [12] to Rule 4-1.6 provides guidance that the disclosure pursuant to Rule 4-1.6(b) must be “only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.”

Scenario #6

What confidentiality concerns are created using generative AI to provide legal services to clients?

(Based on Missouri Informal Opinion 2024-11)

Confidentiality

Second, Lawyer must consider [confidentiality](#). Rule 4-1.6(a) on confidentiality generally prohibits a lawyer from revealing information related to a representation of a client unless an exception is met. That means that Lawyer needs to carefully assess any generative AI platforms or services that will be used by Law Firm to ensure confidentiality of client information is maintained.

Lawyer should carefully consider such factors as the terms and conditions of using a generative AI platform or service to understand the security of the information being inputted, how that information is being used by the platform or service, and what data sources the platform or service is using to produce responses to [prompts or queries](#). See Informal Opinion 2018-04 (cloud computing) and Informal Opinion 2021-12 (virtual practice).

Protecting Information

Additionally, Rule 4-1.6(c) states that “[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.”

Comment [15] to Rule 4-1.6 provides guidance that lawyers are required to act competently to safeguard client confidential information and creates three categories for doing so: (1) unauthorized access by third parties; (2) inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client; and (3) inadvertent or unauthorized disclosure by those subject to the lawyer’s supervision. In describing these categories, Comment [15] to Rule 4-1.6 references Rule 4-1.1 (Competence), Rule 4-5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), and Rule 4-5.3 (Responsibilities Regarding Nonlawyer Assistants).

Comment [15] to Rule 4-1.6 also provides factors that lawyers should consider as to the reasonableness of efforts to safeguard client confidential information, and it includes a reference that state or federal data privacy laws outside the Rules of Professional Conduct may require additional safeguards over client confidential information or notification in the event of a loss of, or unauthorized access to, such information. **In considering the use of a generative AI platform or service, lawyers are required to make reasonable efforts to safeguard client confidential information in accordance with Rule 4-1.6(c) and Lawyer should consider the guidance of Comment [15] as to how client confidential information will be safeguarded.**

Protecting Information (Continued)

Further, Comment [16] to Rule 4-1.6 provides guidance as to reasonable precautions “[w]hen transmitting a communication that includes information relating to the representation of a client...” **Lawyer should consider the guidance from Comment [16] to Rule 4-1.6 to the extent use of a generative AI platform or service may include transmission of client confidential information.**

Scenario #7

Lawyer maintains closed client files in paper form.

Files suffer damage and need to be trashed.

What steps must lawyer take to protect confidences in closed client files?

(Based on Missouri Informal Opinion 2022-10)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Scenario #8

Lawyer (or Lawyer's assistant) inadvertently sends a communication for Client A to Client B

How must Lawyer deal with Client A (and Client B)

(Based upon Missouri Informal Opinion 2022-07)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Scenario #9

Lawyer needs a writing sample to seek employment

May Lawyer use a filed pleading?

(Based on Missouri Informal Opinion 2022-04)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Scenario #10

Lawyer wants to impeach Former Client, who is now a witness in matter where Lawyer is representing another client.

May Lawyer use information learned during the prior representation of Former Client?

(Based on Missouri Informal Opinion 2022-01)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer’s firm or employment?
- *For “former clients”* – Rule 4-1.9(c) permits use of a former client’s (previously) confidential information “when the information has become generally known”

Missouri Informal Opinion 2022-01

Answer

In considering when information is generally known, it is important to note that Missouri Informal Advisory Opinion 2015-02 applies Rules 4-1.9(c) and 4-1.6 and states that “[e]ven if the information is a matter of public record, it is nevertheless confidential information and must not be disclosed....” For the information of Former Client to be generally known pursuant to Rule 4-1.9(c)(1), it is the opinion of this office that it **must be generally known outside just the public records**, meaning **it would be more recognizable by members of the public in the community, or in the industry of the former client, not simply because it was discussed in open court** such that there are court records available through public repositories of such information, including Missouri Case.net. See also Missouri Informal Advisory Opinions 960248 and 960170.

Scenario #11

Client tells Lawyer that Judge made inappropriate comments to Client off the record

Client tells Lawyer not to report Judge

May/must Lawyer report Judge?

(Based on Missouri Informal Opinion 2021-09)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Missouri Rule 4-8.3

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.
- (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
- (c) This Rule 4-8.3 does not require disclosure of information otherwise protected by Rule 4-1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Missouri Informal Opinion 2021-09

Answer: Rule 4-8.3(b) requires Attorney to report Judge to the appropriate authority, the Commission on Retirement, Removal and Discipline, if Attorney “knows” judge has made statements indicating lack of impartiality in a matter if that would be a violation of applicable rules of judicial conduct, the Code of Judicial Conduct under Rule 2. . . .

If Attorney believes Attorney has knowledge of a violation of the applicable rules of judicial conduct such that a report is required, per Rule 4-8.3(c) **Attorney must have the informed consent of Client to disclose any information related to the representation in making the report as required by Rule 4-1.6(a).**

Scenario #12

Lawyer makes representations to Court based upon information received from Client.

Lawyer learns Client's statements were false.

What may/must lawyer do to fix false statements to the Court?

(Based on Missouri Informal Opinion 2025-25)

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Analysis

What exception would allow disclosure?

- Informed consent
- Impliedly authorized to carry out the representation
- Specified exceptions
 - Crime/fraud
 - Seeking ethical advice
 - Self-defense and related issues
 - Complying with a court order or other law
 - Related to changes in a lawyer's firm or employment?

Missouri Rule 4-3.3

- (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.

Missouri Informal Opinion 2020-25

ANSWER: Rule 4-3.3(a)(3) prohibits a lawyer from offering evidence the lawyer knows to be false.

If Attorney has come to “know” that information submitted to the tribunal on behalf of Client is false, Rule 4-3.3(a)(3) requires Attorney to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” . . .

If Attorney comes to know the evidence is false, Attorney should remonstrate with Client, advising Client of Attorney’s duty of candor toward the tribunal and seeking Client’s cooperation in withdrawing or correcting the false evidence. See Rule 4-3.3, Comment [10]; see also Rules 4-1.2(g) and 4-1.4.

If Client will not cooperate, and if withdrawing from the representation will not undo the effect of the false evidence, Attorney must take further remedial measures, including, if necessary, disclosure to the tribunal, even if the disclosure requires Attorney to reveal information that otherwise would be protected by Rule 4-1.6. Rule 4-3.3(c) and Comment [10].

Any disclosure to the tribunal would be limited to what is reasonably necessary to remedy the situation. Rule 4-1.6(c) and Comment [10]. Normally, Attorney’s compliance with Rule 4-3.3 does not thereafter require Attorney to seek leave to withdraw from the representation. See Rule 4-3.3, Comment [15]. However, if the remedial measures result in an extreme deterioration of the client-lawyer relationship such that competent representation cannot be provided, Rule 4-1.16(a) requires Attorney to seek leave to withdraw.

Conclusory Matters

Questions – If you have questions after the program, please email them to Paige Tungate at 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/confide0326>

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/confide0326>

Timed Agenda

12:00-05 Introduction

12:05-55 Discussion of the exceptions to a lawyer's duty of confidentiality

Future Programs

April 15 - Wednesday at 12:00 Noon CT - **Neurodiversity in the Legal Profession**

April 29 - Wednesday at 12:00 Noon CT - **Trust Accounting Ethics**

May 12 – Tuesday at 3:00 PM CT – **Legal Ethics and Multijurisdictional Practice**

May 27 – Wednesday at 12:00 Noon CT – **Legal Ethics, Client Intake, and Engagement Agreements**

June 9 – Tuesday at 3:00 PM CT – **Neurodiversity in the Legal Profession**

June 17 – Wednesday at 12:00 Noon CT – **Legal Ethics Update 2026 – Part II**

June 25 – Thursday at 12:00 Noon CT – **Legal Ethics and Technology 2026**

June 30 – Tuesday at 12:00 Noon CT – **Neurodiversity in the Legal Profession**

June 30 – Tuesday at 3:00 PM CT – **Legal Ethics Update 2026 – Part II**

Thank you



Downey Law Group LLC
(314) 961-6644
(844) 961-6644 toll free
info@DowneyLawGroup.com



<https://www.surveymonkey.com/r/confide0326>