



**LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET V
INTRODUCTION TO CLIENT CONFIDENTIALITY**

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

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



- Sharing information about your client's case to opposing counsel during negotiations.
- Discuss the appropriate ways to obtain waiver of privilege and the circumstances in which it is likely to be obtained in the new lawyer's area of practice. Discuss the differences between implied and express waiver and identify conduct which effectuates waiver.
- Discuss a lawyer's obligations when his client offers (or intends to offer) testimony that the lawyer knows or reasonably believes is false. See Prof. Cond. Rule 3.3.
- Discuss the practical concerns that arise when a third party pays for a client's representation and wants to communicate to the client's lawyer about that representation. Discuss the duties owed to the client.
- Discuss client confidentiality issues likely to arise in the new lawyer's practice area. For example:
 - When the new lawyer's client is a corporation, which communications are confidential and with whom at the corporation can the new lawyer discuss confidential information?
 - When the new lawyer's client is the government (or a government entity), with whom can the new lawyer discuss confidential information? What obligation does the new lawyer have to inform the public about the matters being prosecuted? What obligation does the new lawyer have to inform the victim of a crime about an investigation or prosecution of a suspect?
- Discuss practical issues that must be resolved when sharing office space with lawyers not in the same firm regarding safeguarding confidential information of clients. What if the lawyers share staff like a receptionist, secretary or a paralegal?
- Discuss how to handle a situation where a lawyer inadvertently receives a document containing what appears to be privileged information about an opposing party in pending litigation. See Prof. Cond. Rule 4.4.
- Share with the new lawyer your firm's procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Kirk R. Hall, *Not So Well-Kept Secrets*.
<http://www.abanet.org/legalservices/lpl/downloads/secrets.pdf>



RESOURCES

OHIO RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the commission of a crime by the client or other person;
- (3) to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, 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, including any disciplinary matter, concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.

View comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_6

RULE 1.9: DUTIES TO FORMER CLIENTS



(a) Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client where both of the following apply:

- (1) the interests of the client are materially adverse to that person;
- (2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.

(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 do either of the following:

- (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;
- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to division (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in division (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in division (d).



(d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing;
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and both of the following apply:
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to the prospective client.

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_18

III. Advocate

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

(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* measures to remedy the situation, 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, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by [Rule 1.6](#).



(d) In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

View complete rule and comments at

http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_6

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document was inadvertently sent shall promptly notify the sender.

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule4_4

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or government agency has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:



- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;
- (2) the lawyer has managerial authority in the law firm or government agency in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule5_3

Not So Well-Kept Secrets

Office checkup will prevent unintended breach of client's confidence

BY KIRK R. HALL

Clients trust that the information they pass on in confidence to their lawyers will not fall into the hands of others.

But is there a basis for that trust? Is your office being maintained and operated in a way that assures the protection of client confidences?

The answers have potentially high stakes. Failing to protect client confidences and secrets not only violates professional conduct rules for lawyers, but also may cause the loss of attorney-client and work product privileges, and result in serious malpractice claims, as well.

Take a walk through your firm's offices—listen to what is being said and look at what is open to view.

If you don't like what you see and hear, it is time to make changes in your office procedures to protect your clients' confidential information from unauthorized disclosure. Begin the assessment as soon as you enter the offices:

Reception area. Think of times you have been waiting in a doctor's office, and other patients or sales people have come in. It is a natural tendency to listen to what these people are telling the receptionist or nurse. The same thing is happening in your reception area.

Any discussion between firm lawyers and clients about their cases should be conducted away from the reception area, preferably in lawyers' offices or conference rooms.

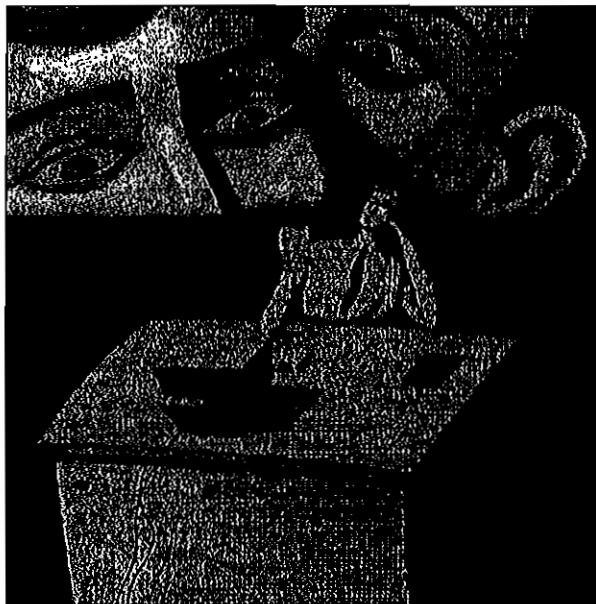
But discussions about cases can occur in other contexts, as well. For instance, a secretary or paralegal called to the reception area to retrieve materials being dropped off by a client often becomes engaged in a discussion about the client's matters. In such cases, the client should be guided to an area that offers privacy, especially if others already are in the

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reception area.

Does the firm's receptionist announce the name of the person holding for you on the telephone and the purpose of the call so that everyone within earshot can hear? Such a practice may give away important information. At a minimum, it may be better to use only the caller's last name.

What about outside the office?



Do you ever hear lawyers or staff discussing cases or clients in the elevator or sitting at the next table at lunch? Everyone at the firm should be reminded not to discuss any client matters outside the office.

Files. Are files left lying around in open view of visitors? Given natural curiosity, it can be very tempting to a visitor to read what is in plain view if the lawyer leaves the office even for a few minutes.

Clients should not be left alone even with their own files, which may contain information or notes that could be misconstrued. A secretary or paralegal who is meeting with the client should take the entire file when going to make photocopies.

Sometimes clients or other visitors may ask to use the phone. If this is allowed in your office, be sure the telephone is in an area away from any client files.

Computer screens. Does the computer at your firm's reception desk face visitors when they approach? Can any information on the

screen be read by someone standing at the desk? This is another way client confidences can be inadvertently divulged.

A computer screen should either face away from visitors or the terminal's dimmer switch should be used to blank the screen. Some software programs have features that will blank screens after as little as a minute without a keystroke being entered; all it takes is a keystroke to bring the screen back.

Discarded paper.

Most law offices never give their wastepaper a second thought because they trust their janitorial services. The Oregon State Bar Professional Liability Fund recently received a call, however, from a lawyer concerned about the fact that a box of a client's documents left sitting on the floor had been discarded by the janitorial staff.

Many boxes of documents received from clients may look like discarded paper, so there should be some understanding with the janitorial service about what should and should not be touched.

Recently a group claimed that its members had gone through Dr. Jack Kevorkian's discarded trash and found what it considered damning information relating to one of Kevorkian's assisted suicides. Could a similar scenario unfold at your law office?

Many law offices now recycle paper. It may be wise to consider shredding it first.

The Professional Liability Fund office in Oregon, for example, contracts with a mobile shredding unit that routinely shreds all of its paper before recycling it. Small shredding machines can be purchased for less than \$100, which makes the safeguard affordable for even the solo practitioner.

During World War II, a familiar saying cautioned that "loose lips sink ships." Don't let a loose policy toward protecting confidential information put a hole in your law firm. This may be the time to institute new procedures to assure that your client confidences are safe. ■