



LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET V

CLIENT CONFIDENTIALITY

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

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- 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 Tennessee Rules of Professional Conduct 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 Tennessee Rules of Professional Conduct Rule 1.18.
- Discuss a lawyer's obligation to maintain client confidences after the termination of the attorney-client relationship. See Tennessee Rules of Professional Conduct 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;
- Discuss the potential hazards of using email and fax to communicate confidential information about a case; and
- Discuss the lawyer's duty to ensure that non-lawyer assistants safeguard confidential information. See Tennessee Rules of Professional Conduct 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 Tennessee Rules of Professional Conduct 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 Tennessee Rules of Professional Conduct 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>



ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

RESOURCES

TENNESSEE 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 unless:

- (1) the client gives informed consent;
- (2) the disclosure is impliedly authorized in order to carry out the representation; or
- (3) the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) 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 or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
- (2) to prevent the client from committing a 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, unless disclosure is prohibited or restricted by RPC 3.3;
- (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 fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by RPC 3.3;
- (4) to secure legal advice about the lawyer's compliance with these Rules; or
- (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.



(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
- (3) to comply with RPC 3.3, 4.1, or other law.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) 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 unless the former client gives informed consent, confirmed in writing.

(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:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by RPCs 1.6 and 1.9(c) that is 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 reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

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 RPC 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (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 prospective client in the matter, except as provided in paragraph (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 paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:



(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

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

III. ADVOCATE

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or

(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) in an ex parte proceeding, fail to 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.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss with the client the consequences of the client's failure to do so.

(f) If a lawyer, after discussion with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.



(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by RPC 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by RPC 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by RPC 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

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:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; or

(2) threaten to present a criminal or lawyer disciplinary charge for the purpose of obtaining an advantage in a civil matter.

(b) A lawyer who receives information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including information protected by the attorney-client privilege or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall:

(1) immediately terminate review or use of the information;

(2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and

(3) abide by that person's or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:



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

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

(c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

View complete rules and comments at: <http://www.tsc.state.tn.us/rules/supreme-court/8>