

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Confidentiality of Information

[48 Pa.B. 7743]

[Saturday, December 22, 2018]

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania ("Board") is considering recommending to the Supreme Court of Pennsylvania that it adopt amendments to Pennsylvania Rule of Professional Conduct ("RPC") 1.6, to authorize a lawyer to reveal confidential information otherwise protected by the rule to the extent that the lawyer reasonably believes necessary "to comply with other law or court order" and to add conforming language to the Comment to the rule. These changes are set forth in Annex A.

Rule 1.6 governs a lawyer's disclosure of information relating to the representation of a client during the lawyer's representation of that client. The fiduciary relationship existing between lawyer and client requires the lawyer's preservation of confidential information, as effective representation relies upon free discussion between lawyer and client.

Paragraph (a) provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent" or the disclosure is "impliedly authorized in order to carry out the representation," or as otherwise provided in other paragraphs of the rule.

Paragraph (b) directs that a lawyer shall reveal confidential information if necessary to comply with the lawyer's duties of candor to the tribunal.

Paragraph (c) sets forth seven limited exceptions when a lawyer may reveal such confidential information to the extent that the lawyer believes necessary. This paragraph is discretionary and does not create a duty on the lawyer to make any disclosure. The comments to Rule 1.6 give guidance as to each of the exceptions, providing examples and explanations in order to further clarify each circumstance. However, three comments give guidance that may cause confusion to lawyers when attempting to ascertain the extent of their duties. Comment (3) states, in pertinent part, "[t]he rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law." Comment (18) states, in pertinent part, "[o]ther law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules." Comment (21) notes that a lawyer "[m]ay be ordered to reveal information relating to the representation of a client by a court. . ."

While these comments reference that a lawyer may be confronted by situations where disclosure of confidential information is necessary to comply with other law or court order, there is no specific authority in the black-letter rule that permits the lawyer to make disclosures prohibited by 1.6(a). Disclosure of confidential information under these circumstances may be implicitly authorized,¹ but Pennsylvania lawyers should not have to face a choice between defying a court's order or other law and violating their ethical duties to clients.

The Board proposes amending 1.6(c) to add an express exception to the lawyer's duty of confidentiality that permits the lawyer to reveal such confidential information the lawyer believes necessary to comply with other law or court order. The Board's intent in amending this rule is to give Pennsylvania lawyers certainty that they are not violating the ethical rules if they need to reveal information under these circumstances.

The Board proposes amending Comments (18) and (21) to conform to the proposed amendment.

We note that in 2002, the American Bar Association ("ABA") adopted this specific exception to Model Rule 1.6, along with corresponding commentary, as part of the ABA's Ethics 2000 Commission updates. This rule provision is currently in effect in 46 states and the District of Columbia. Historically, Pennsylvania has supported adoption of the ABA Model Rule amendments to promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction, except where controlling Pennsylvania precedent or other important policy considerations justify a deviation from the Model Rule

language. The within proposed amendments more closely conform the Pennsylvania Rule to ABA Model Rule 1.6 and to the rules in the vast majority of jurisdictions.

Interested persons are invited to submit written comments regarding the proposed amendments to The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, Facsimile number (717-231-3381), Email address Dboard.comments@pacourts.us on or before February 1, 2019.

*By the Disciplinary Board of the
Supreme Court of Pennsylvania*

JESSE G. HEREDA,
Executive Director

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

Subchapter A. RULES OF PROFESSIONAL CONDUCT

§ 81.4. Rules of Professional Conduct.

The following is the Rules of Professional Conduct:

CLIENT-LAWYER RELATIONSHIP

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

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(7) to detect and resolve conflicts of interest 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.

(8) to comply with other law or court order.

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

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Comment:

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Detection of Conflicts of Interest

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(18) Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. **If, however, the other law requires disclosure, paragraph (c)(8) permits the lawyer to make such disclosures as are necessary to comply with the law.**

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(21) 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 1.4. **Unless review is sought, paragraph (c)(8) permits the lawyer to comply with the court's order.**

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[Pa.B. Doc. No. 18-1963. Filed for public inspection December 21, 2018, 9:00 a.m.]

¹ The Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee has issued opinions which conclude that there is an "implicit" or "forced" exception to RPC 1.6(a) applicable to circumstances where disclosure is mandated by an order of court or other tribunal. See Formal Opinions 2002-106 and 2010-300.

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