

Privileged information (Tex. R. Evid. 503)

Unprivileged client information

Comment 3 to Rule: concepts derived from the law of agency and the law of evidence

2. General Rule is a Prohibition:

Lawyer **shall** not knowingly reveal confidential information
1.05(b)

- to anyone else (b)(1)(ii)
- shall not use to the disadvantage of the client unless client consents (b)(2)

Duty continues even after client-lawyer relationship is terminated (b)(3) (conflict of interest rules) (Comment 8)

3. Permissive Exceptions for Disclosure of Confidential Information – Rule 1.05(c)

Lawyer **may** reveal confidential information

- (1) when expressly authorized
- (2) when client consents
- (3) within firm

(4) when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct or other law

(5) & (6) “self-defense” of lawyer

(7) when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act

(8) to the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used

4. Permissive Exceptions for Disclosure of Unprivileged Client Information – Rule 1.05(d)

(1) when implicitly authorized to carry out representation

(2) “self-defense”

**** Limitation on Permissive Exception Disclosures under (c) and (d)**

Disclosure should be no greater than the lawyer believes necessary to serve the purpose of giving rise to the right to disclose under permissive exceptions. See 34 UCLA L. Review 925 (1987)

5. Factors to Consider for Permissive Exceptions under (c) and (d) (Comment 14)

Magnitude, proximity, and likelihood of contemplated wrong, the nature of the lawyer’s relations with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction, and factors that may extenuate the client’s conduct in question.

“In any case a disclosure adverse to the client’s interest should be no greater than the lawyer believes necessary to the purpose.”

(c) and (d) allow preventive action, but failure to take preventive action does not violate those paragraphs. No civil liability is intended to arise from the failure to disclose under (c) and (d), because the rules do not define standards of civil liability of lawyers for professional conduct.

Lawyer’s obligation is to dissuade the client from committing the crime or fraud or to persuade the client to take corrective action. (Comment 18)

6. Mandatory Exceptions for Disclosure of Confidential Information
– Rule 1.05(e) and (f)

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer **shall** reveal confidential information ***to the extent revelation appears reasonably necessary*** to prevent the client from committing the criminal or fraudulent act.

(f) A lawyer **shall** reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).

**** Do NOT have to first try to dissuade client when mandatory disclosure.**

7. Factors to Consider When Mandatory Exception Requires Disclosure (Comments 19 and 20)

Required to act only if the lawyer has information clearly establishing the likelihood of such acts and consequences.

Lawyer must seek to avoid those “lamentable” results by revealing information necessary to prevent the criminal or fraudulent act.

When threatened behavior is likely to have the less serious result of substantial injury to the financial interests or property of another, the lawyer is not required to reveal preventive information, but may do so under permissive exception (c)(7).

Violating (e) can subject lawyer to discipline action:
Was the lawyer’s conduct in light of those [lawyer’s] decisions unreasonable under all existing circumstances as they reasonably appeared to the lawyer?

(f) – must know that services have been misused by the client.

8. Withdrawal from Representation (Comment 21 to Rule 1.05, also Rule 1.15)

Must withdraw if representation will result in violation of a rule
Rule 1.15(a)(1)

Duties of disclosure under (e) do not survive the end of client-attorney relationship, but permissive disclosure still possible under (6) (7) and (8), if requirements of paragraph (e) are met.

D. Rule 3.03. Candor Toward the Tribunal

1. General Rule is Mandatory Requirement:
Lawyer **shall** not knowingly

Covers affirmative acts and omissions

2. Duty to Remedy under (b)

Two step process:

(1) good faith effort to persuade client

(2) shall take reasonable remedial measures

3. Making Statements of Fact

Lawyer making statements of fact in open court is covered:
Comment 2.

Cannot assist client who is committing fraud

4. Anticipated False Evidence (Comment 5)

Must refuse to offer the evidence – from client or other person

Can seek to withdraw

** If allowed to withdraw by the tribunal, **may** be authorized to reveal reasons for it to any other lawyer (under Rule 1.05(c)(7)) subsequently retained by the client, “but normally that Rule would not allow the lawyer to reveal that information to another person **or to the tribunal.**”

5. Past False Evidence (Comments 7 and 8)

General rule: must disclose the existence of the deception to the court or to the other party, "*if necessary to rectify the deception.*"

E. Rule 4.01. Truthfulness in Statements to Others

1. Rule is a mandatory prohibition: lawyer **shall** not knowingly
2. Covers statements of material fact – not opinions (Comment 1)
3. Must disclose material fact if know client is perpetrating crime or fraud AND know that disclosure is necessary to prevent the lawyer from becoming a party to it (Comment 3).
4. Failure to disclose is misconduct only if the lawyer intends to mislead (Comment 3)
5. Must counsel client first (Comment 4)
6. If learn of the client's intention to commit crime or fraud after termination of client-attorney relationship, lawyer is NOT bound by (b). (Comment 6)

ETHICS OPINIONS

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A. To Disclose

1. Texas Ethics Opinion 480 (June 1991)

2. Texas Ethics Opinion 473 (June 1991)

3. ABA Formal Opinion 87-353

B. Or to Not Disclose

1. Texas Ethics Opinion 504 (August 1994)

2. Texas Ethics Opinion 482 (February 1994)

C. Other related opinions (not discussed here)

Under past Canons/Rules: Texas Ethics Opinions 389, 204, 353, 405, 193

Under current Disciplinary Rules: Texas Ethics Opinion 499