

# Confidentiality

## Practical and Ethical Guidelines

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Federal Defender Services  
Sandy Garrett, Chief Disciplinary Counsel  
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### Rule 1.6 – Confidentiality of Information

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- (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).

## Rule 1.6 – Confidentiality of Information

(Cont.)

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(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; or
- (6) 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.

## Rule 1.6 – Confidentiality of Information

(Cont.)

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(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.

(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.

## Rule 1.1 - Competence

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A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

## Rule 1.1 – Comment 8

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\*Spoiler Alert: The Perils of Social Media

### **Maintaining Competence**

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

## Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

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(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

## Rule 1.3 – Diligence

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A lawyer shall act with reasonable diligence and promptness in representing a client.

## Rule 1.4 - Communication

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(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## Rule 1.7 – Conflict of Interest: Current Clients

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(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

## Rule 1.7 – Conflict of Interest: Current Clients

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(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
- (2) each affected client gives informed consent.

## Rule 1.7 – Comment 35

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### **Common Representation of Co-Defendants in Criminal or Juvenile Delinquency Proceedings**

[35] The potential for conflict of interest in representing multiple defendants in a criminal case or in juvenile delinquency proceedings is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. However, where the lawyer chooses to undertake such a joint representation, paragraph (c) requires that the lawyer demonstrate to the satisfaction of the tribunal that good cause exists to believe that no conflict of interest prohibited by paragraph (b) presently exists or is likely to exist in the future. This showing reflects the same standard currently required by Tennessee Rule of Criminal Procedure 44(c).

## Rule 1.16 – Declining or Terminating Representation

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- a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
- (1) the representation will result in a violation of the Rules of Professional Conduct or other law;
  - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
  - (3) the lawyer is discharged.
- b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or imprudent;
  - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
  - (6) the representation will result in an unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client;
  - (7) other good cause for withdrawal exists; or
  - (8) the client gives informed consent confirmed in writing to the withdrawal of the lawyer.

## Rule 1.16 – Declining or Terminating Representation (Cont.)

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(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) A lawyer who is discharged by a client, or withdraws from representation of a client, shall, to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interests may include: (1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation; and (6) promptly refunding any advance payment of fees that have not been earned or expenses that have not been incurred.

# Criminal Law Practice

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## A Hotbed of Ethics Complaints

### Practical Pointers to Avoid Complaints

Beverly Sharpe, Director of Consumer Assistance Program

## Practical Pointers for Rule 1.2

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- DON'T refuse to file motions requested by clients without consultation and explanation to them.
- DO explain why their motion requests are not appropriate, not useful or are premature.
  
- DON'T fail to explain why certain issues will not be in the appeal. Remember Rule 1.4 requires consultation and communication.
- DO consult on issues and send the client a copy of your brief, state's brief and your reply.
  
- DON'T fail to consult with the client on issues in a post-conviction petition and any amendment. See also Rule 1.4 Communication.
- DO explain why some issues should not be included and copy the client on the amended petition.
  
- DON'T fail to explain why certain witnesses and proof cannot be used at an evidentiary hearing. See also Rule 1.4 Communication.
- DO explain your reasons and strategy for how you will conduct the post-conviction hearing.
  
- DON'T fail to consider a proper withdrawal if there is a basic, irreconcilable disagreement on issues.
- DO explain why some issues are misguided and the ethical rule prohibiting filing frivolous issues. See also Rule 3.1 Meritorious Claims and Contentions.
  
- DON'T fail to inform clients upfront if your representation is for one court or one charge only.
- DO use written contracts so that there is no misunderstanding about the limits of your representation.



## Practical Pointers for Rule 1.3

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- **DON'T** continue cases for your convenience or due to your unreasonable failure to be prepared.
- **DO** have fail-proof reminder and calendar systems for your business obligations.
  
- **DON'T** delay cases when important client objectives or goals are on the line, which is almost always.
- **DO** document to the file and explain to the client why any delay is necessary or desirable.
  
- **DON'T** give clients unrealistic expectations of fast results if that is unlikely.
- **DO** warn clients upfront about the time frame of a case and delays that may occur.

## Practical Pointers for Rule 1.4

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- **DON'T** communicate only the morning of court with the client.
- **DO** call or write in advance as to preparation or what to expect at court.
  
- **DON'T** promise at a hurried court appearance to visit the jail in a few days and then not do so.
- **DO** avoid such a promise if you usually can't keep it. Instead agree to write or call to follow up.
  
- **DON'T** ignore repeated client letters or calls with questions or ideas for witnesses or a defense.
- **DO** respond in some fashion even if it is necessarily brief and document your communication.
  
- **DON'T** neglect to inform clients why their court date was continued and of the new court date.
- **DO** inform clients in advance of delay or if delay is intentional or strategic, why so. Remember RPC 1.3 requires diligence.

## Practical Pointers for Rule 1.4

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- **DON'T** allow the client's relatives to have unrealistic expectations to speak with you frequently.
- **DO** make it clear upfront if, when, and how often the client's relatives may contact you.
- **DON'T** give the client the impression that they may call you anytime, anywhere without charge.
- **DO** make it clear that calls to you are not free and that an assistant handles routine questions.
- **DON'T** allow an assistant to be discourteous or agree to call-backs if you won't really call later.
- **DO** train your assistant to answer routine questions accurately and to use good manners.

## Practical Pointers for Rule 1.6

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- **DON'T** be careless by talking about a case to other attorneys or friends at social events.
- **DO** keep a reputation for strict adherence to guarding the confidences of clients.
- **DON'T** share client information with their relatives or friends without the client's explicit permission.
- **DO** get your client's written permission before sharing information with others.
- **DON'T** think you can discuss a case so generally that the client's identity can't be guessed by someone.
- **DO** maintain your client's trust by never speaking about the cases of other clients to them.

## Practical Pointers for Rule 1.6

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- **DON'T** have confidential discussions with your client in a crowded courthouse setting.
- **DO** be sure your client feels secure to discuss matters without others overhearing.
  
- **DON'T** fail to warn clients of potential situations where “loose lips sink ships”.
- **DO** tell clients that attorney-client privilege is at risk if a third person is present to hear confidences.
  
- **DON'T** give clients their files without checking that no other client's materials are included.
- **DO** caution your legal assistant about strictly guarding confidences in every situation, including being overheard in the office or at social occasions.

## Practical Pointers for Rule 1.7

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- **DON'T** forget the stringent requirements to represent co-defendants in criminal or juvenile delinquency cases and the strong caution against doing so.
- **DO** get written informed consent from co-defendants and demonstrate to the tribunal there is no current or potential conflict. Also see Comment [35] and TN Rule of Criminal Procedure 44(c).
  
- **DON'T** forget who your former clients are and their relation to a current case or client.
- **DO** have a system to check for conflicts that does not rely on your memory alone.
  
- **DON'T** forget that witness cross-examination (current or former client) may create a conflict.
- **DO** remember that a future potential conflict must be considered and found not to be likely to develop.

## Practical Pointers for Rule 1.16

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- DON'T fail to give your client copies of most writings on a timely basis. See also Rule 1.4 Communication.
- DO document materials provided for when clients claim no discovery or an unreturned file.
  
- DON'T fail to learn what copy and postage costs the Administrative Office of the Courts will reimburse for indigent criminals.
- DO factor in the copy and postage costs upfront when setting expense costs for retained clients.
  
- DON'T neglect to withdraw soon enough to avoid prejudice to the client's cause.
- DO follow proper notice and withdrawal procedures requiring permission from the judge.
  
- DON'T neglect to follow the rules for retention, storage and disposition of closed files.
- DO promptly surrender files to the client upon withdrawal or termination.

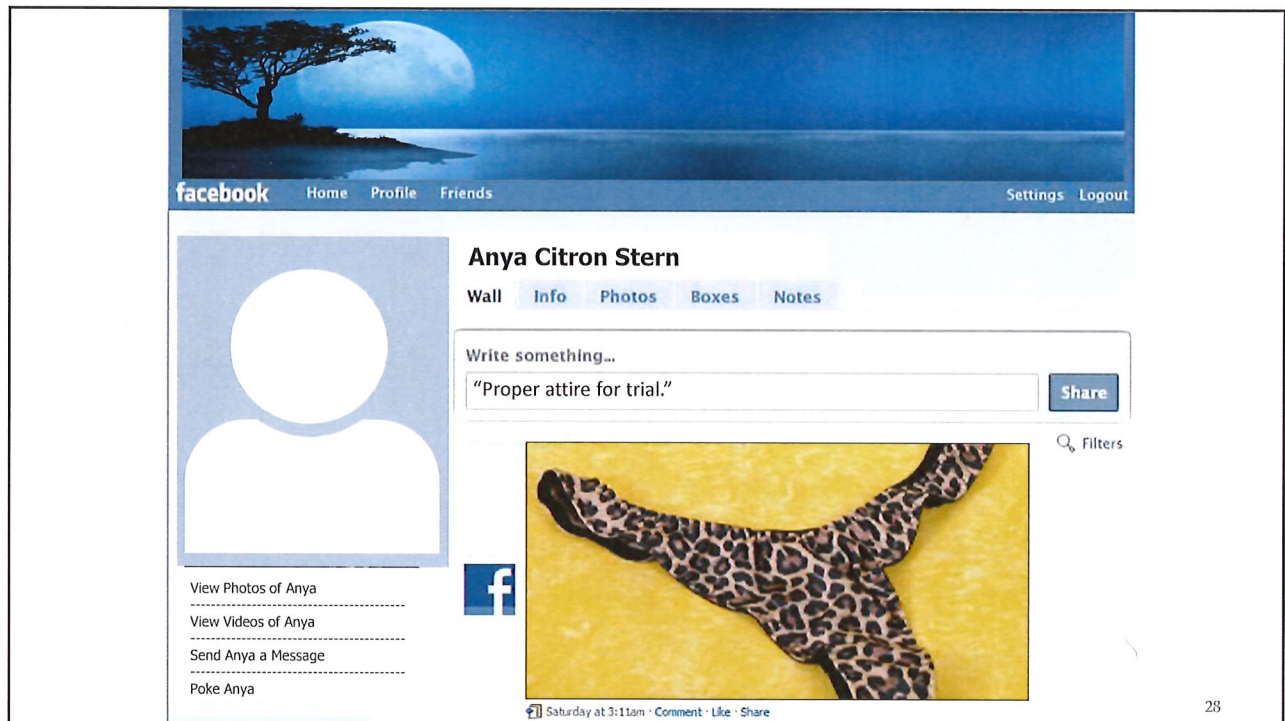
What could go wrong?



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## ABA Formal Ethics Opinion 480 (2018)

In re: Peshek, No. M.R. 23794 (Ill. 2010)



Tex. State Bar Prof'l Ethics Comm., Op. 662 (Aug. 2016)

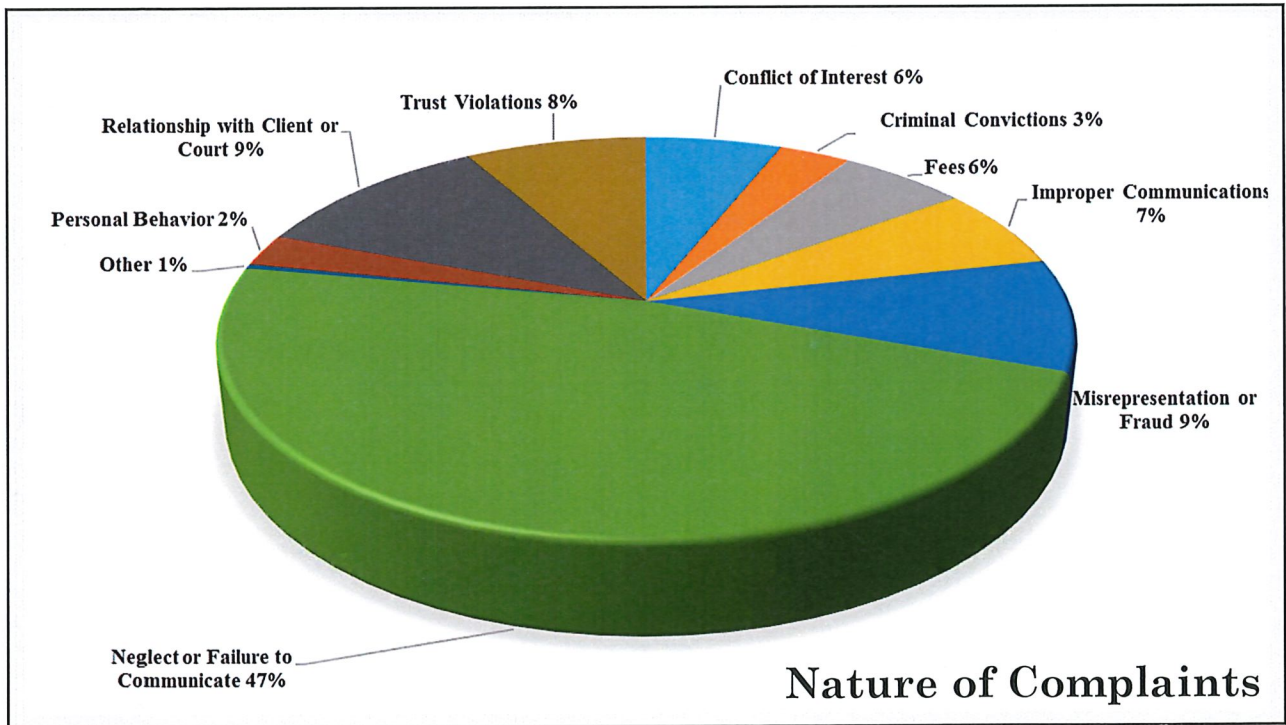
U.S. v. Mejia, 655 F.3d 126 (2d Cir. 2011) cert. denied.  
132 S. Ct. 533, 181 L.Ed.2d 374 (2011)

Disciplinary Proceedings against Peter Thompson,  
2014 WI 25 (Wis. May 20, 2014)

In the Matter of David Herron,  
No. 119, 726 (Kan. May 10, 2019)



State of Nebraska ex. Rel. Counsel for Discipline of the Nebraska Supreme Court v. Tonderum,  
Nos. 5-13-083, 5-13-084 (Neb. Nov. 22, 2013)



In re Walwyn, 531 S.W.3d 131 (Tenn. 2017)

In re Vogel, 482 S.W. 3d 520, 522 (Tenn. 2016)

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