

## ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969)

The Model Code of Professional Responsibility was approved by the American Bar Association (ABA) in 1969 and thereafter was widely adopted by state supreme courts. The Model Code was divided into nine sections, called "Canons" because each section began with one sentence statement or "canon" setting forth the general principle for that section. The Canon was explicated by a series of Ethical Considerations followed by one or more Disciplinary Rules intended for enforcement.

The ABA replaced the Model Code of Professional Responsibility with the Model Rules of Professional Conduct in 1983; over the next 15 years states gradually replaced their version of the Model Code with a version based on the Model Rules. However, particularly on the issue of confidentiality, two Model Code provisions (4-101 found under Canon 4 and 7-102 found under Canon 7) provide important historical background to the current Model Rules, especially Rules 1.6 and 3.3.

**CANON 4**  
**A Lawyer Should Preserve**  
**the Confidences and Secrets**  
**of a Client**

**ETHICAL CONSIDERATIONS**

**EC 4-1** Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.<sup>1</sup> A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.<sup>2</sup> A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

**EC 4-2** The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,<sup>3</sup> when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.<sup>4</sup> Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

**EC 4-3** Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

**EC 4-4** The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

**EC 4-5** A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.<sup>5</sup> Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates.<sup>6</sup>

Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another,<sup>7</sup> and no employment should be accepted that might require such disclosure.

**EC 4-6** The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment.<sup>8</sup> Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets.<sup>9</sup> A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

## DISCIPLINARY RULES

**DR 4-101** -Preservation of Confidences and Secrets of a Client.<sup>10</sup>

(A) -"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) -Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) -Reveal a confidence or secret of his client.<sup>11</sup>

(2) -Use a confidence or secret of his client to the disadvantage of the client.

(3) -Use a confidence or secret of his client for the advantage of himself<sup>12</sup> or of a third person,<sup>13</sup> unless the client consents after full disclosure.

(C) -A lawyer may reveal:

(1) -Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.<sup>14</sup>

(2) -Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.<sup>15</sup>

(3) -The intention of his client to commit a crime<sup>16</sup> and the information necessary to prevent the crime.<sup>17</sup>

(4) -Confidences or secrets necessary to establish or collect his fee<sup>18</sup> or to defend himself or his employees or associates against an accusation of wrongful conduct.<sup>19</sup>

(D) -A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

## NOTES

1. See ABA CANONS OF PROFESSIONAL ETHICS, CANONS 6 and 37 (1908) and *ABA Opinion* 287 (1953).

"The reason underlying the rule with respect to confidential communications between attorney and client is well stated in *MECHEM ON AGENCY*, 2d Ed., Vol. 2, §2297, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice shall be strictly privileged;—that the attorney shall not be permitted, without the consent of his client,—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.' *ABA Opinion* 250(1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client, if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revealment of matters disclosed to an attorney because of the peculiarly intimate relationship existing." *Ellis-Foster Co. v. Union Carbide & Carbon Corp.*, 159 F. Supp. 917, 919 (D.N.J. 1958).

*Cf. ABA Opinions* 314 (1965), 274 (1946) and 268 (1945).

2. “While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer.” *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960).

*Cf. ABA Opinion* 150 (1936).

3. “Where . . . [a client] knowingly and after full disclosure participates in a [legal fee] financing plan which requires the furnishing of certain information to the bank, clearly by his conduct he has waived any privilege as to that information.” *ABA Opinion* 320 (1968)

4. “The lawyer must decide when he takes a case whether it is a suitable one for him to undertake and after this decision is made, he is not justified in turning against his client by exposing injurious evidence entrusted to him . . . [D]oing something intrinsically regrettable, because the only alternative involves worse consequences, is a necessity in every profession.” *WILLISTON, LIFE AND LAW* 271 (1940).

*Cf. ABA Opinions* 177 (1938) and 83 (1932).

5. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 11 (1908).

6. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908).

7. See ABA CANONS OF PROFESSIONAL ETHICS, CANONS 6 and 37 (1908).

“[A]n attorney must not accept professional employment against a client or a former client which will, or even may require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment . . .” *ABA Opinion* 165 (1936).

8. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908).

“Confidential communications between an attorney and his client, made because of the relationship and concerning the subject-matter of the attorney’s employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney’s employment. *Canon 37.*” *ABA Opinion* 154 (1936).

9. *Cf. ABA Opinion* 266 (1945).

10. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908); *cf. ABA CANONS OF PROFESSIONAL ETHICS*, CANON 6 (1908).

11. “§6068 . . . It is the duty of an attorney:

“ . . .  
“(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client. CAL. BUSINESS AND PROFESSIONS CODE §6068 (West 1962). Virtually the same provision is found in the Oregon statutes. ORE. REV. STATS. ch. 9 §9.460(5).

“Communication between lawyer and client are privileged (WIGMORE ON EVIDENCE, 3d Ed., Vol. 8, §§2290-2329). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal adviser (*ibid.*, §2290, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (*ibid.*, §2294, p.563). The mere circumstance that the advice is given without charge therefor does not nullify the privilege (*ibid.*, §2303).” *ABA Opinion* 216 (1941).

“It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client . . .” *ABA Opinion* 155 (1936).

12. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 11 (1908).

“The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client’s business, to his own advantage or profit (7 C.J.S., § 125, p. 958, *Healy v. Gray*, 184 Iowa 111, 168 N.W. 222; *Baumgardner v. Hudson*, D.C. App., 277 F. 552; *Goodrum v. Clement*, D.C App., 277 F. 586)” *ABA Opinion* 250 (1943).

13. See *ABA Opinion* 177 (1938).

14. “[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 448, 107 N.E. 165, 178; *Murphy v. Riggs*, 238 Mich. 151, 213 N.W. 110, 112; Opinion of this Committee, No. 91).” *ABA Opinion* 202 (1940).

*Cf. ABA Opinion* 91 (1933).

15. “A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client’s whereabouts as a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

“It is the opinion of the committee that under such circumstances the attorney’s knowledge of his client’s whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities . . .” *ABA Opinion* 155 (1936).

“We held in Opinion 155 that a communication by a client to his attorney in respect to the future commission of an unlawful act or to a continuing wrong is not privileged from disclosure. Public policy forbids that the relation of attorney and client should be used to conceal wrongdoing on the part of the client.

“ . . .  
“When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court’s order. When that attorney is later advised of a violation of that order, it is his duty to advise his client of the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client’s conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure . . .”

See *ABA Opinion* 156 (1936).

16. *ABA Opinion* 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if “the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.”

See *ABA Opinion* 155 (1936).

17. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908) and *ABA Opinion* (1940).

18. Cf. *ABA Opinion* 250 (1943)

19. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 37 (1908) and *ABA Opinions* 202 (1940) and 19 (1930).

“[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney’s interests arising out of the relation of attorney and client in which disclosure was made.

“The exception is stated in *MECHEM ON AGENCY*, 2d Ed., Vol. 2, §2313, as follows: ‘But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client’s privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.’

“Mr Jones, in his *COMMENTARIES ON EVIDENCE*, 2d Ed., Vol. 5, §2165, states the exception thus: ‘It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney’s rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.’” *ABA Opinion* 250 (1943).