

# MUNICIPAL OFFICIALS TRAINING ACADEMY

## **50 Ways to Stay out of Trouble: Ethics and Mandates for Public Officials**

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## I. STATUTORY CONFLICT OF INTEREST

**The law:** See § 105.450-105.467 RSMo., generally  
**Helpful website:** <http://www.mec.mo.gov/EthicsWeb/Compliance/Compliance.aspx>  
**Caveat:** Check your City Code/Charter for additional prohibitions

### Prohibited Conflicts:

- Main statutes describing prohibited transactions (see Appendix D for full statutes):
  - §105.452-.454 – elected and appointed public officials and employees
  - §105.458 – members of governing bodies of political subdivisions
  - §105.462 – persons with rule making authority
- Generally, no appointed or elected official or employee shall:
  - Use or disclose confidential information in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business within which he is associated (105.452)
  - Use decision making authority for the purpose of obtaining financial gain which materially enriches himself, his spouse or dependent children (105.452)
  - Perform any service, act or refrain from acting or attempt to influence a decision by reason of any payment, offer to pay, promise to pay or receipt of anything of actual pecuniary value (105.452, 105.454, 105.458, 105.462)
  - Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit (105.452)
  - Offer, promote, or advocate for a political appointment to any political subdivision in exchange for anything of value (105.452)
  - Sell, rent or lease any property, or provide services to the City in excess of \$500 per transaction or \$5,000 per year unless competitively bid and provided the bid is the lowest received (105.454, 105.458, 105.462)
  - Perform 1 year after termination any service for consideration by which performance of such service, he/she attempts to influence a decision of the City (105.454, 105.462)

**Board of Adjustment and other officials acting in quasi-judicial proceedings:**

- Section 105.464 prohibits any person serving in a judicial or quasi-judicial capacity from participating in any proceeding in which the person knows that a party is: the person or the person's great-grandparent, grandparent, parent, step-parent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin
  - Quasi-judicial proceedings include boards of adjustment or commissions where decisions are based on a record such as in administrative “contested” cases
  - This may include hearings for special use permits, variances, and related quasi-judicial proceedings

**Disclosure Requirements:**

- 105.461 – “... any member of the governing body of a political subdivision who has a substantial personal or private interest in any measure, bill, order or ordinance proposed or pending ... **shall, before such official passes on the measure, bill, order or ordinance, file a written report of the nature of the interest with ... clerk... .**”
- This requirement is deemed met if the member filed a financial interest statement pursuant to sections 105.483 to 105.492 which discloses the basis for such substantial personal or private interest
- **105.483 sets forth who is required to file financial interest statements:**

(11) Each elected official, candidate for elective office, the chief administrative officer, the chief purchasing officer and the general counsel, if employed full time, of each political subdivision with an annual operating budget in excess of one million dollars, and **each official or employee of a political subdivision who is authorized by the governing body of the political subdivision to promulgate rules and regulations with the force of law or to vote on the adoption of rules and regulations with the force of law; unless the political subdivision adopts an ordinance, order or resolution pursuant to subsection 4 of section 105.485**
- **105.485 exception requires City to:**
  - adopt biennially by ordinance or resolution
  - by Sept. 15 the preceding year
  - establishing and making public its own method of disclosing potential conflicts of interest and substantial interests
  - mail a certified copy of the ordinance or resolution to Missouri Ethics Commission within 10 days of adoption
  - containing minimum provisions, which can be found in the full statute (see Appendix D)

## II. NEPOTISM

**The law:** Art. VII, §6 Mo. Const.

**Art. VII, §6 Mo. Const.** Any public officer or employee in this state who *by virtue of his office or employment names or appoints* to public office or employment any relative within the fourth degree, by consanguinity or affinity, **shall thereby forfeit his office or employment**

▪ **Generally:**

- Applies equally to officers AND employees
  - Does not have to be a paid appointment
    - *State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994)
  - Even if the vote was unnecessary in order to make the appointment, if the official takes any action to make the appointment, it's a forfeiture
    - *State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994)
  - You cannot retroactively “fix” the violation
    - Rescinding the appointment does not cure the violation
    - Cannot resign and be reappointed
      - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008)
  - Intent (or ignorance) is irrelevant
    - *State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994)
  - Self-executing v. self-enforcing
    - Only self-enforcing if voluntarily resign
    - Otherwise entitled to due process through judicial determination (quo warranto)
    - Cases say “automatically lose right to hold office” and constitution itself says it is “forfeited” – but Supreme Court has said if they don't voluntarily resign, they have to be judicially removed
      - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008)
      - *State ex inf. Atty. Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994)
- **See Appendix A for Nepotism Relationship Chart**

### **III. INCOMPATIBLE OFFICES**

**The law:** Common law doctrine. Case-by-case determination

- **1. Must be a public office:**
  - *State v. Hawkins*, 257 P. 411 (Mont. 1927) cited by *State ex rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. 1933).
    - Office must have some degree of permanency and continuity (not occasional or temporal)
    - Officeholder must take an official oath of office
    - Created by constitution, legislature, or by a municipality or other body through authority conferred by the legislature
    - Must possess a delegation of a portion of the sovereign power of government, exercised for the benefit of the public
  
- **2. If both public offices, are they incompatible?**
  - Turns on whether duties are “inconsistent, antagonistic, repugnant or conflicting.” *State ex rel. McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. 1942)
  
  - **Primary test:** whether one office is subordinate to the other in some aspect of performing its functions or duties, as where one has some supervision of the other, is required to deal with, control, or assist him. *State ex rel. Walker v. Bus*, 36 S.W. 636, 639 (Mo. 1896)
  
- **See Appendix B for Missouri Examples of Compatible and Incompatible Offices Chart**

#### IV. EX PARTE COMMUNICATIONS

- “Ex Parte” literally means: one side only
- Ex Parte Communication: For this handout’s purpose, refers to communication (oral or written) concerning a pending quasi-judicial case (such as variance request) that is not on the record
- Ex Parte Communication concerns:
  - Endangers right to have decision based on the record
  - Thwarts party’s right to cross-examine and refute evidence
  - Can compromise both the appearance and reality of fairness and due process
  - Can cause the decision to be remanded (i.e., sent back to the City). *See State ex rel. Steak n Shake, Inc. v. City of Richmond Heights*, 560 S.W.2d 373 (Mo. App. 1997) (City Council decision remanded because court found denying conditional use permit was “arbitrary, capricious, and an abuse of discretion” as City admits “members of the Council did base their votes, at least in part, on personal knowledge, on a report never introduced into evidence or seen by appellant, and on other evidence not in the record.”); *see also Tullock v. City of St. Charles*, 602 S.W.2d 860 (Mo. App. 1980)
- **"Ex Parte" Communication Best Practices:**
  - **DO NOT discuss matter with applicants or their attorneys off the record**
  - **DO NOT** hear evidence outside hearing
  - It’s fine to go by the property – but state what you saw and what effect it has so it is now on the record and the applicant can rebut.

## V. ATTORNEY ETHICAL RULE 1.13

**The law:** Missouri Supreme Court Rule 4-1.13 & 4-1.6. (see Appendix D for full Rule)

**Available at:** <http://www.courts.mo.gov/page.jsp?id=46>

### ▪ **Who the City Attorney Represents:**

- *4-1.13 (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.*

- First, the rule makes clear that the City Attorney represents the entity; not the individual members or employees.
- Second, the rule recognizes the reality that an attorney providing legal representation will interact with individuals within the entity.

### ▪ **Why you care:**

- Understand that the City Attorney represents the City – he/she is not your individual lawyer and does not represent you personally in any way
  - May advise you in your official capacity but still representing you in manner that is best for the City
- Understand that the City Attorney’s duties are to the City not to the individual members
  - City Attorney has duty to do what is in the best interest of the City
- Rule 4-1.6(a) Confidentiality:
  - “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule [4-1.6\(b\)](#).”
  - Pursuant to this rule, what you tell the City Attorney in your official capacity as City Official is the City’s privilege to waive
    - i.e., if you tell City Attorney that you stole money from the City – this is not privileged information between you and the City Attorney.
    - Any personal liability you feel you may have, you should consult your own attorney

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# Appendix A

# NEPOTISM RELATIONSHIP CHART

## First Degree

Child                      Parents

## Second Degree

Grandchild    Brother/Sister    Grandparents

## Third Degree

Great Grandchild    Niece/Nephew    Aunt/Uncle  
Great Grandparents

## Fourth Degree

Great Great Grandchild    Grand Niece/Nephew  
First Cousin                      Great Aunt/Uncle  
Great Great Grandparents

### Degrees of family relation explanation:

- A husband is related by marriage (affinity) to his wife's relatives in the same way that she is related to them by blood (consanguinity) and she to his family in the same way, but the kindred of the spouses are not related to one another (*e.g.*, a brother of the husband is **not** related to a brother of the wife).
- Half relationship is the same as a whole relationship; step relationship is the same as a blood relationship.
- A relationship by marriage (affinity) terminates if death or divorce occurs.

# Appendix B

## MISSOURI EXAMPLES - COMPATIBLE AND INCOMPATIBLE OFFICES

### Compatible When Same Person in Same Municipality:

- City Counselor and City Judge - Op. Attorney General No. 85, 1977
- City Marshal and Commissioner of Water and Sewer Department - Op. Attorney General No. 241, 1973
- City Collector and City Assessor - Op. Attorney General No. 323, 1970 (Danforth)
- Marshal and Deputy Constable - Op. Attorney General No. 349, 1967
- City Assessor and City Clerk - Op. Attorney General No. 38, 1960

### Compatible When Same Individual in Two Different Corps:

- County Commissioner and Member of School District Board - Op. Attorney General No. 118-2004 (Nixon)
- Circuit Clerk and Member of School Board - Op. Attorney General No. 84-2001 (Nixon)
- Treasurer of County Ambulance District and County Public Administrator - Op. Attorney General No. 108-92 (Webster)
- Supervisor of a Levee District organized by Circuit Court and County Commissioner in the same County - Op. Attorney General No. 145-91 (Webster)
- Superintendent of school and office in a political party - Op. Attorney General No. 29-79 (Ashcroft)
- Chairman of a Village Board of Trustees and office in a political party - Op. Attorney General No. 29-79 (Ashcroft)
- County Clerk and Superintendent of Schools - Op. Attorney General No. 337-66
- County Administrator and Member of School Board - Op. Attorney General No. 397-64
- City Assessor and Township Clerk - Op. Attorney General No. 188, 1963
- Mayor and Trustee of County Hospital - Op. Attorney General No. 2, 1961
- City Clerk and Trustee of County Hospital - Op. Attorney General No. 2, 1961
- Mayor of Third Class City and County Collector - Op. Attorney General No. 33, 1958
- Township and City Collector- Op. Attorney General No. 53, 1957 (Dalton)
- Water, Street, and Sewer Commissioner and City Collector - Op. Attorney General No. 24, 1955 (Dalton)
- Special Road Commissioner of County not under township organization and City Councilman or Alderman - Op. Attorney General No. 40, 1952 (Taylor)
- Party Central Committee Member and County or Municipal Office UNLESS specifically prohibited by statute - Op. Attorney General No. 40, 1952 (Taylor)
- Clerk of Board of Public Works and Deputy Sherriff - *State ex rel. Langford v. Kansas City*, 261 S.W. 115 (Mo. 1924)
- Member of Board of Education and Deputy Sheriff - *State ex rel. Walker v. Bus*, 36 S.W. 636 (Mo. 1896)
- Circuit Court and County Clerk - *State ex rel. Moore v. Lusk*, 48 Mo. 242 (1871)

#### **Incompatible Same Individual in Same Corp:**

- Member of Emergency Service Board and Employee of that Board - Op. Attorney General No. 109-99 (Nixon)
- Alderman and Special Police Officer - Op. Attorney General No. 404, 1967 (Anderson)
- Alderman and City Collector - Op. Attorney General No. 167, 1963 (Eagleton)
- City Councilman and City Assessor - Op. Attorney General No. 188, 1963
- Any two of City Clerk, City Treasurer, and City Collector - Op. Attorney General No. 24, 1955 (Dalton)
- County Deputy Collector and County Treasurer - *State ex rel. McAllister v. Dunn*, 209 S.W. 110, (Mo. 1919)
- Councilman and City Clerk when Council responsible for appointing City Clerk - *State ex rel. Smith v. Bowman*, 170 S.W. 700 (Mo. App. 1914) (cannot appoint self to paid position)

#### **Incompatible Same Individual in Different Corp:**

- County Auditor of 1<sup>st</sup> class county and City Council Member within that county - Op. Attorney General No. 63-2002 (Nixon)
- County Emergency Planning Coordinator and City Council - Op. Attorney General No. 84-2001 (Nixon)
- County Emergency Planning Coordinator and Member of School Board - Op. Attorney General No. 84-2001 (Nixon)
- County Emergency Planning Coordinator and City Clerk - Op. Attorney General No. 84-2001 (Nixon)
- County Commissioner and School Board Member - Op. Attorney General No. 84-2001 (Nixon)
- Director of Fire Protection District and Trustee of Village located in same District - Op. Attorney General No. 42-90 (Webster)
- Presiding Commissioner of County and Alderman of City within said County - Op. Attorney General No. 121-88 (Webster)
- Clark County Elected Official and Clark County Ambulance District - Op. Attorney General No. 25-88 (Webster)
- Public Employee and Fire Protection District Director - *State ex inf. Gavin v. Gill*, 688 S.W.2d 370 (Mo. 1985)(Prohibition by statute - court found statute not in violation of 1<sup>st</sup> Amendment nor Equal Protection)
- Presiding Judge of County Court of Third Class County and Mayor of Fourth Class City within the same County - Op. Attorney General No. 64-76 (Danforth)
- County Court Judge and Mayor - Op. Attorney General No. 64, 1976
- County Deputy Sherriff and County Coroner - Op. Attorney General No. 104-68 (Anderson)
- Police Judge and Deputy Sherriff - Op. Attorney General No. 46, 1955
- State legislature and Judge - *State ex rel. Owens v. Draper*, 45 Mo. 355 (Mo. 1870) (when judge took state legislature seat, impliedly vacated his judge position)

# Appendix C

## Additional Resources Page

Chapter 105 Missouri Revised Statute → <http://www.moga.mo.gov/statutes/C105.htm>

Missouri Attorney General Opinions → <http://ago.mo.gov/opinions/>

Missouri Bar Informal Formal Ethical Opinions →  
<https://www.mobar.org/ethics/formalopinions.htm>

Missouri Ethics Commission → <http://www.mec.mo.gov/>

Missouri Municipal League → [http://www.mocities.com/?page=OSS\\_ConflictOfIntere](http://www.mocities.com/?page=OSS_ConflictOfIntere)

Rules of Professional conduct (attorneys) → <http://www.courts.mo.gov/page.jsp?id=707>

# Appendix D

## Definitions.

105.450. As used in sections 105.450 to 105.496 and sections 105.955 to 105.963, unless the context clearly requires otherwise, the following terms mean:

(1) "Adversary proceeding", any proceeding in which a record of the proceedings may be kept and maintained as a public record at the request of either party by a court reporter, notary public or other person authorized to keep such record by law or by any rule or regulation of the agency conducting the hearing; or from which an appeal may be taken directly or indirectly, or any proceeding from the decision of which any party must be granted, on request, a hearing de novo; or any arbitration proceeding; or a proceeding of a personnel review board of a political subdivision; or an investigative proceeding initiated by an official, department, division, or agency which pertains to matters which, depending on the conclusion of the investigation, could lead to a judicial or administrative proceeding being initiated against the party by the official, department, division or agency;

(2) "Business entity", a corporation, association, firm, partnership, proprietorship, or business entity of any kind or character;

(3) "Business with which a person is associated":

(a) Any sole proprietorship owned by himself or herself, the person's spouse or any dependent child in the person's custody;

(b) Any partnership or joint venture in which the person or the person's spouse is a partner, other than as a limited partner of a limited partnership, and any corporation or limited partnership in which the person is an officer or director or of which either the person or the person's spouse or dependent child in the person's custody whether singularly or collectively owns in excess of ten percent of the outstanding shares of any class of stock or partnership units; or

(c) Any trust in which the person is a trustee or settlor or in which the person or the person's spouse or dependent child whether singularly or collectively is a beneficiary or holder of a reversionary interest of ten percent or more of the corpus of the trust;

(4) "Commission", the Missouri ethics commission established in section 105.955;

(5) "Confidential information", all information whether transmitted orally or in writing which is of such a nature that it is not, at that time, a matter of public record or public knowledge;

(6) "Decision-making public servant", an official, appointee or employee of the offices or entities delineated in paragraphs (a) through (h) of this subdivision who exercises supervisory authority over the negotiation of contracts, or has the legal authority to adopt or vote on the adoption of rules and regulations with the force of law or exercises primary supervisory responsibility over purchasing decisions. The following officials or entities shall be responsible for designating a decision-making public servant:

(a) The governing body of the political subdivision with a general operating budget in excess of one million dollars;

(b) A department director;

(c) A judge vested with judicial power by article V of the Constitution of the state of Missouri;

(d) Any commission empowered by interstate compact;

(e) A statewide elected official;

(f) The speaker of the house of representatives;

(g) The president pro tem of the senate;

(h) The president or chancellor of a state institution of higher education;

(7) "Dependent child" or "dependent child in the person's custody", all children, stepchildren, foster children and wards under the age of eighteen residing in the person's household and who receive in excess of fifty percent of their support from the person;

(8) "Political subdivision" shall include any political subdivision of the state, and any special district or subdistrict;

(9) "Public document", a state tax return or a document or other record maintained for public inspection without limitation on the right of access to it and a document filed in a juvenile court proceeding;

(10) "Substantial interest", ownership by the individual, the individual's spouse, or the individual's dependent children, whether singularly or collectively, directly or indirectly, of ten percent or more of any business entity, or of an interest having a value of ten thousand dollars or more, or the receipt by an individual, the individual's spouse or the individual's dependent children, whether singularly or collectively, of a salary, gratuity, or other compensation or remuneration of five thousand dollars, or more, per year from any individual, partnership, organization, or association within any calendar year;

(11) "Substantial personal or private interest in any measure, bill, order or ordinance", any interest in a measure, bill, order or ordinance which results from a substantial interest in a business entity.

**Prohibited acts by elected and appointed public officials and employees.**

105.452. 1. No elected or appointed official or employee of the state or any political subdivision thereof shall:

(1) Act or refrain from acting in any capacity in which he is lawfully empowered to act as such an official or employee by reason of any payment, offer to pay, promise to pay, or receipt of anything of actual pecuniary value paid or payable, or received or receivable, to himself or any third person, including any gift or campaign contribution, made or received in relationship to or as a condition of the performance of an official act, other than compensation to be paid by the state or political subdivision; or

(2) Use confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself, his spouse, his dependent child in his custody, or any business with which he is associated;

(3) Disclose confidential information obtained in the course of or by reason of his employment or official capacity in any manner with intent to result in financial gain for himself or any other person;

(4) Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit to such official or his spouse or dependent children, including but not limited to increases in retirement benefits, whether received from the state of Missouri or any third party by reason of such act. For the purposes of this subdivision, "special monetary benefit" means being materially affected in a substantially different manner or degree than the manner or degree in which the public in general will be affected or, if the matter affects only a special class of persons, then affected in a substantially different manner or degree than the manner or degree in which such class will be affected. In all such matters such officials must recuse themselves from acting, except that such official may act on increases in compensation subject to the restrictions of section 13 of article VII of the Missouri Constitution; or

(5) Use his decision-making authority for the purpose of obtaining a financial gain which materially enriches himself, his spouse or dependent children by acting or refraining from acting for the purpose of coercing or extorting from another anything of actual pecuniary value.

2. No elected or appointed official or employee of any political subdivision shall offer, promote, or advocate for a political appointment in exchange for anything of value to any political subdivision.

**Additional prohibited acts by certain elected and appointed public officials and employees, exceptions.**

105.454. **No elected or appointed official or employee** of the state or any political subdivision thereof, serving in an executive or administrative capacity, shall:

(1) Perform any service for any agency of the state, or for any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power for receipt or payment of any compensation, other than of the compensation provided for the performance of his or her official duties, in excess of five hundred dollars per transaction or five thousand dollars per annum, except on transactions made pursuant to an award on a contract let or sale made **after public notice and competitive bidding, provided that the bid or offer is the lowest received;**

(2) Sell, rent or lease any property to any agency of the state, or to any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power and received consideration therefor in excess of five hundred dollars per transaction or five thousand dollars per year, unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(3) **Participate in any matter, directly or indirectly**, in which he or she attempts to influence any decision of any agency of the state, or political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power, **when he or she knows the result of such decision may be the acceptance** of the performance of a service or the sale, rental, or lease of any property to that agency for consideration **in excess of five hundred dollars' value per transaction or five thousand dollars' value per annum to him or her, to his or her spouse, to a dependent child in his or her custody or to any business with which he or she is associated** unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(4) Perform any services during the time of his or her office or employment for any consideration from any person, firm or corporation, other than the compensation provided for the performance of his or her official duties, by which service he or she attempts to influence a decision of any agency of the state, or of any political subdivision in which he or she is an officer or employee or over which he or she has supervisory power;

(5) Perform any service for consideration, during one year after termination of his or her office or employment, by which performance he or she attempts to influence a decision of any agency of the state, or a decision of any political subdivision in which he or she was an officer or employee or over which he or she had supervisory power, except that this provision shall not be construed to prohibit any person from performing such service and receiving compensation therefor, in any adversary proceeding or in the preparation or filing of any public document or to prohibit an employee of the executive department from being employed by any other department, division or agency of the executive branch of state government. For purposes of this subdivision, within ninety days after assuming office, the governor shall by executive order designate those members of his or her staff who have supervisory authority over each department, division or agency of state government for purposes of application of this subdivision. The executive order shall be amended within ninety days of any change in the supervisory assignments of the governor's staff. The governor shall designate not less than three staff members pursuant to this subdivision;

(6) Perform any service for any consideration for any person, firm or corporation after termination of his or her

office or employment in relation to any case, decision, proceeding or application with respect to which he or she was directly concerned or in which he or she personally participated during the period of his or her service or employment.

**Prohibited acts by members of governing bodies of political subdivisions, exceptions.**

105.458. 1. No member of any legislative or governing body of any political subdivision of the state shall:

(1) Perform any service for such political subdivision or any agency of the political subdivision for any consideration other than the compensation provided for the performance of his or her official duties, except as otherwise provided in this section; or

(2) Sell, rent or lease any property to the political subdivision or any agency of the political subdivision for consideration in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received; or

(3) Attempt, for any compensation other than the compensation provided for the performance of his or her official duties, to influence the decision of any agency of the political subdivision on any matter; except that, this provision shall not be construed to prohibit such person from participating for compensation in any adversary proceeding or in the preparation or filing of any public document or conference thereon.

2. No sole proprietorship, partnership, joint venture, or corporation in which any member of any legislative body of any political subdivision is the sole proprietor, a partner having more than a ten percent partnership interest, or a coparticipant or owner of in excess of ten percent of the outstanding shares of any class of stock, shall:

(1) Perform any service for the political subdivision or any agency of the political subdivision for any consideration in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let after public notice and competitive bidding, provided that the bid or offer accepted is the lowest received;

(2) Sell, rent or lease any property to the political subdivision or any agency of the political subdivision where the consideration is in excess of five hundred dollars per transaction or five thousand dollars per annum, or in the case of a school board five thousand dollars per annum, unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received.

**Prohibited acts by persons with rulemaking authority—appearances—exceptions.**

105.462. 1. No member of any agency of the state or any political subdivision thereof who is empowered to adopt a rule or regulation, other than rules and regulations governing the internal affairs of the agency, or who is empowered to fix any rate, adopt zoning or land use planning regulations or plans, or who participates in or votes on the adoption of any such rule, regulation, rate or plan shall:

(1) Attempt to influence the decision or participate, directly or indirectly, in the decision of the agency in which he or she is a member when he or she knows the result of such decision may be the adoption of rates or zoning plans by the agency which may result in a direct financial gain or loss to him or her, to his or her spouse or a dependent child in his or her custody or to any business with which he or she is associated;

(2) Perform any service, during the time of his or her employment, for any person, firm or corporation for compensation other than the compensation provided for the performance of his or her official duties, if by the performance of the service he or she attempts to influence the decision of the agency of the state or political subdivision in which he or she is a member;

(3) Perform for one year after termination of his or her employment any service for compensation for any person, firm or corporation to influence the decision or action of the agency with which he or she served as a member; provided, however, that he or she may, after termination of his or her office or employment, perform such service for consideration in any adversary proceeding or in the preparation or filing of any public document or conference thereon unless he or she participated directly in that matter or in the receipt or analysis of that document while he or she was serving as a member.

2. No such member or any business with which such member is associated shall knowingly perform any service for, or sell, rent or lease any property to any person, firm or corporation which has participated in any proceeding in which the member adopted, participated in the adoption or voted on the adoption of any rate or zoning plan or the granting or revocation of any license during the preceding year and received therefor in excess of five hundred dollars per transaction or one thousand five hundred dollars per annum except on transactions pursuant to an award on contract let or of sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received.

#### **Prohibited acts by persons in judicial or quasi-judicial positions.**

105.464. 1. No person serving in a judicial or quasi-judicial capacity shall participate in such capacity in any proceeding in which the person knows that a party is any of the following: the person or the person's great-grandparent, grandparent, parent, stepparent, guardian, foster parent, spouse, former spouse, child, stepchild, foster child, ward, niece, nephew, brother, sister, uncle, aunt, or cousin.

2. No provision in the section shall be construed to prohibit him from entering an order disqualifying himself or herself or transferring the matter to another court, body, or person for further proceedings.

#### **Interest in measure, bill, or ordinance to be recorded—financial interest statement.**

105.461. 1. The governor, lieutenant governor, any member of the general assembly, or any member of the **governing body of a political subdivision** who has a **substantial personal or private interest** in any measure, bill, order or ordinance proposed or pending before the general assembly or such governing body, shall, before such official passes on the measure, bill, order or ordinance, **file a written report** of the nature of the interest with the chief clerk of the house of representatives or the secretary of the senate **or clerk of such governing body** and such **statement shall be recorded in the appropriate journal or other record of proceedings of the governing body**. The governor shall make the governor's written report along with the governor's approval or disapproval of any bill or act of the general assembly describing the nature of the interest and such report shall be recorded in the journal of the house of representatives or of the senate.

2. The governor, lieutenant governor, any member of the general assembly, or any member of the governing body of a political subdivision shall be deemed to have complied with the requirements of this section if such official has filed, at any time before the official passes on such measure, bill, order or ordinance, **a financial interest statement pursuant to sections 105.483 to 105.492 which discloses the basis for the official's substantial personal or private interest or interests that the official may have therein**. Any such person may amend the person's financial interest statement to disclose any subsequently acquired substantial interest at any time before the person passes on any measure, bill, order or ordinance, and shall be relieved of the provisions of subsection 1 of this section.

#### **Financial interest statements—who shall file, exception.**

**105.483. Each of the following persons shall be required to file a financial interest statement:**

(1) Associate circuit judges, circuit court judges, judges of the courts of appeals and of the supreme court, and candidates for any such office;

(2) Persons holding an elective office of the state, whether by election or appointment, and candidates for such elective office, except those running for or serving as county committee members for a political party pursuant to section 115.609 or section 115.611;

(3) The principal administrative or deputy officers or assistants serving the governor, lieutenant governor, secretary of state, state treasurer, state auditor and attorney general, which officers shall be designated by the respective elected state official;

(4) The members of each board or commission and the chief executive officer of each public entity created pursuant to the constitution or interstate compact or agreement and the members of each board of regents or curators and the chancellor or president of each state institution of higher education;

(5) The director and each assistant deputy director and the general counsel and the chief purchasing officer of each department, division and agency of state government;

(6) Any official or employee of the state authorized by law to promulgate rules and regulations or authorized by law to vote on the adoption of rules and regulations;

(7) Any member of a board or commission created by interstate compact or agreement, including the executive director and any Missouri resident who is a member of the bi-state development agency created pursuant to sections 70.370 to 70.440\*;

(8) Any board member of a metropolitan sewer district authorized under section 30(a) of article VI of the state constitution;

(9) Any member of a commission appointed or operating pursuant to sections 64.650 to 64.950, sections 67.650 to 67.658, or sections 70.840 to 70.859;

(10) The members, the chief executive officer and the chief purchasing officer of each board or commission which enters into or approves contracts for the expenditure of state funds;

(11) Each elected official, candidate for elective office, the chief administrative officer, the chief purchasing officer and the general counsel, if employed full time, of each political subdivision with an annual operating budget in excess of one million dollars, and each official or employee of a political subdivision who is authorized by the governing body of the political subdivision to promulgate rules and regulations with the force of law or to vote on the adoption of rules and regulations with the force of law; unless the political subdivision adopts an ordinance, order or resolution pursuant to subsection 4 of section 105.485;

(12) Any person who is designated as a decision-making public servant by any of the officials or entities listed in subdivision (6) of section 105.450.

#### **105.485 Financial interest statements—form—contents—political subdivisions, compliance.**

105.485. 1. Each financial interest statement required by sections 105.483 to 105.492 shall be on a form prescribed by the commission and shall be signed and verified by a written declaration that it is made under penalties of perjury; provided, however, the form shall not seek information which is not specifically required by sections 105.483 to 105.492.

...

3. For the purposes of subdivisions (1), (2) and (3) of subsection 2 of this section, an individual shall be deemed to have received a salary from his employer or income from any source at the time when he shall receive a negotiable instrument whether or not payable at a later date and at the time when under the practice of his employer or the terms of an agreement he has earned or is entitled to anything of actual value whether or not delivery of the value is deferred or right to it has vested. The term income as used in this section shall have the same meaning as provided in the Internal Revenue Code of 1986, and amendments thereto, as the same may be or becomes effective, at any time or

from time to time for the taxable year, provided that income shall not be considered received or earned for purposes of this section from a partnership or sole proprietorship until such income is converted from business to personal use.

4. Each official, officer or employee or candidate of any political subdivision described in subdivision (11) of section 105.483 shall be required to file a financial interest statement as required by subsection 2 of this section, **unless the political subdivision biennially adopts an ordinance, order or resolution at an open meeting by September fifteenth of the preceding year, which establishes and makes public its own method of disclosing potential conflicts of interest and substantial interests and therefore excludes the political subdivision or district and its officers and employees from the requirements of subsection 2 of this section.** A certified copy of the ordinance, order or resolution shall be sent to the commission within ten days of its adoption. The commission shall assist any political subdivision in developing forms to complete the requirements of this subsection. The ordinance, order or resolution shall contain, at a minimum, the following requirements with respect to disclosure of substantial interests:

(1) Disclosure in writing of the following described transactions, if any such transactions were engaged in during the calendar year:

(a) For such person, and all persons within the first degree of consanguinity or affinity of such person, the date and the identities of the parties to each transaction with a total value in excess of five hundred dollars, if any, that such person had with the political subdivision, other than compensation received as an employee or payment of any tax, fee or penalty due to the political subdivision, and other than transfers for no consideration to the political subdivision;

(b) The date and the identities of the parties to each transaction known to the person with a total value in excess of five hundred dollars, if any, that any business entity in which such person had a substantial interest, had with the political subdivision, other than payment of any tax, fee or penalty due to the political subdivision or transactions involving payment for providing utility service to the political subdivision, and other than transfers for no consideration to the political subdivision;

(2) The chief administrative officer and chief purchasing officer of such political subdivision shall disclose in writing the information described in subdivisions (1), (2) and (6) of subsection 2 of this section;

(3) Disclosure of such other financial interests applicable to officials, officers and employees of the political subdivision, as may be required by the ordinance or resolution;

(4) Duplicate disclosure reports made pursuant to this subsection shall be filed with the commission and the governing body of the political subdivision. The clerk of such governing body shall maintain such disclosure reports available for public inspection and copying during normal business hours.

**Exceptions to applicability of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482.**

105.466. 1. No provision of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482 shall be construed to prohibit any person from performing any ministerial act or any act required by order of a court or by law to be performed.

2. No provision of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482 shall be construed to prohibit any person from communicating with the office of the attorney general or any prosecuting attorney or any attorney for any political subdivision concerning any prospective claim or complaint then under consideration not otherwise prohibited by law.

3. No provision of sections 105.450 to 105.458, 105.462 to 105.468, and 105.472 to 105.482 shall be construed to prohibit any person, firm or corporation from receiving compensation for property taken by the state or any political subdivision thereof under the power of eminent domain in accordance with the provisions of the constitution and the laws of the state.

(L. 1978 H.B. 1610 § 9)

## MISSOURI SUPREME COURT RULE 4-1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with Rule [4-1.13\(b\)](#), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule [4-1.16](#).

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule [4-1.7](#). If the organization's consent to the dual representation is required by Rule [4-1.7](#), the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(Adopted Aug 7, 1985, eff. Jan. 1, 1986. Amended March 1, 2007, eff. July 1, 2007.)

### Comment

#### The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule [4-1.6](#). Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that

investigation between the lawyer and the client's employees or other constituents are covered by Rule [4-1.6](#). This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule [4-1.6](#).

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

### **Relation to Other Rules**

[5] The authority and responsibility provided in this Rule [4-1.13](#) is concurrent with the authority and responsibility provided in other Rules. In particular, this Rule [4-1.13](#) does not limit or expand the lawyer's responsibility under Rules [4-1.6](#), [4-1.8](#), [4-1.16](#), [4-3.3](#), or [4-4.1](#). If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule [4-1.2\(d\)](#) can be applicable.

### **Government Agency**

[6] The duty defined in this Rule [4-1.13](#) applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule [4-1.13](#). Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule [4-1.13](#) does not limit that authority. See Scope.

### **Clarifying the Lawyer's Role**

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

### **Dual Representation**

[9] Rule [4-1.13\(c\)](#) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

### **Derivative Actions**

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

## **RULE 4-1.6: CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule [4-1.6\(b\)](#).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) 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
- (4) to comply with other law or a court order.

(Adopted Aug. 7, 1985, eff. Jan. 1, 1986. Amended March 1, 2007, eff. July 1, 2007.)

### **Comment**

[1] This Rule 4-1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule [4-1.18](#) for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule [4-1.9\(c\)\(2\)](#) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules [4-1.8\(b\)](#) and [4-1.9\(c\)\(1\)](#) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule [4-1.0\(e\)](#) for the definition of "informed consent." This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby

encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, not only applies to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Rule [4-1.6\(a\)](#) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

#### **Authorized Disclosure**

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

#### **Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Rule [4-1.6\(b\)\(1\)](#) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, Rule [4-1.6\(b\)\(2\)](#) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Rule [4-1.6\(b\)\(3\)](#) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by

responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by Rule [4-1.6\(b\)\(3\)](#) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 4-1.6 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 [4-1.4](#). If, however, the other law supersedes this Rule and requires disclosure, Rule [4-1.6\(b\)\(4\)](#) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] 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 [4-1.4](#). Unless review is sought, however, Rule [4-1.6\(b\)\(4\)](#) permits the lawyer to comply with the court's order.

[12] Rule [4-1.6\(b\)](#) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Rule [4-1.6\(b\)](#) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in Rule [4-1.6\(b\)\(1\) to \(b\)\(4\)](#). In exercising the discretion conferred by this Rule 4-1.6, the lawyer may consider such factors as the nature of the lawyer's relationship 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 conduct in question. A lawyer's decision not to disclose as permitted by Rule [4-1.6\(b\)](#) does not violate this Rule 4-1.6. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by Rule [4-1.6\(b\)](#). See Rules [4-1.2\(d\)](#), [4-4.1\(b\)](#), [4-8.1](#), and [4-8.3](#). Rule [4-3.3](#), on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule [4-3.3\(c\)](#).

### **Withdrawal**

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule [4-1.16\(a\)\(1\)](#). After withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in this Rule 4-1.6. Neither this Rule 4-1.6 nor Rule [4-1.8\(b\)](#) nor Rule [4-1.16\(d\)](#) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule 4-1.6, the lawyer may make inquiry within the organization as indicated in Rule [4-1.13\(b\)](#).

### **Acting Competently to Preserve Confidentiality**

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules [4-1.1](#), [4-5.1](#), and [4-5.3](#).

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer

must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule 4-1.6 or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule 4-1.6.

#### **Former Client**

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule [4-1.9\(c\)\(2\)](#). See Rule [4-1.9\(c\)\(1\)](#) for the prohibition against using such information to the disadvantage of the former client.