

PRESENTED AT

**The University of Texas School of Law
70th Annual Taxation Conference**

November 30, 2022 – December 1, 2022
Austin, TX

**Mum's the Word:
Maintaining Client Confidentiality
and Dealing with Ethical Challenges
while Working from Anywhere and Everywhere**

Jeffrey D. Chadwick

Author Contact Information:
Jeffrey D. Chadwick
Winstead PC
Houston, Texas 77002
The Woodlands, Texas 77380

jchadwick@winstead.com
281.681.5960

© 2021 University of Miami School of Law. This outline was originally prepared for the 55th Annual Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law, and published by LexisNexis Mathew Bender. It is reprinted with the permission of the Heckerling Institute and the University of Miami.

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Duty of Confidentiality	2
A. Model Rule 1.6: Confidentiality of Information.....	2
B. Distinguishing the Duty of Confidentiality from the Attorney-Client Privilege	3
C. The Beginning of a Client Relationship.....	4
1. Communicating with Prospective Clients.....	4
2. Identifying Conflicts of Interests	6
3. Structuring Engagement Letters	11
D. The Middle of a Client Relationship.....	23
1. Safeguarding Client Information	23
2. Exceptions to the Duty of Confidentiality	34
3. Addressing Breaches of the Duty of Confidentiality.....	37
4. Disclosure of Information by Tax Return Preparers.....	39
E. The End of a Client Relationship.....	39
1. The Duty of Confidentiality Survives	39
2. The Attorney-Client Privilege Generally Survives	37
III. Other Ethical Duties	42
A. Model Rule 1.1: Competence	42
B. Model Rule 1.3: Diligence.....	44
C. Model Rule 1.4: Communications	44
D. Model Rules 5.1 & 5.3: Supervision of Other Lawyers, Staff, and Third Party Service Providers	45
E. Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law	47
IV. Practical Recommendations	49
V. Conclusion	51
Selected Model Rules	52

**Mum's the Word:
Maintaining Client Confidentiality
and Dealing with Ethical Challenges
while Working from Anywhere and Everywhere**

By:

**Jeffrey D. Chadwick
Winstead PC**

I. Introduction

Loose lips sink ships. They also violate ethical duties and destroy client relationships. Clients are seeking trusted advisors, after all, and clients simply cannot trust advisors who fail to uphold their duty of confidentiality.

While it has never been easy to safeguard client information, it certainly seems harder today with so many methods of communication. As the COVID-19 pandemic has transformed kitchen tables and basements into home offices, the need (and struggle) to maintain client confidentiality has never been greater. Like it or not, however, working remotely is here to stay. Clients have grown accustomed to the ease and comfort of virtual meetings and around-the-clock communications, and many temporary working conditions are likely to become permanent fixtures.

Working remotely presents estate planning advisors with unique ethical challenges, chief among which is how to preserve client confidentiality. This paper discusses how the traditional duty of confidentiality applies to a virtual estate planning practice, and provides practical suggestions for addressing conflicts of interests, structuring engagement letters, and safeguarding client communications across all mediums. Specifically:

- Part II provides an in-depth review of the duty of confidentiality, spanning the life cycle of a client relationship;
- Part III explores how a virtual estate planning practice implicates other ethical duties, including the duties of competence, communication, and supervision; and
- Part IV lists practical recommendations for establishing an effective remote working environment.

This paper is focused primarily on the American Bar Association Model Rules of Professional Conduct (each a "Model Rule" and collectively, the "Model Rules") and its comments

(each a "Comment" and collectively, the "Comments"). This paper also discusses opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility (the "Ethics Committee"). An index of applicable Model Rules is included at the end of this paper.¹ Importantly, each state has its own sets of ethical rules and opinions, which are often based on the Model Rules, but may have significant differences. Lawyers should certainly review and adhere to applicable state and local ethical rules. Although the Model Rules and their state counterparts apply only to lawyers, all estate planning advisors can draw on the principles contained therein to help implement best practices for protecting client confidentiality.

Moreover, this paper is not intended to be a definitive ethics guide for estate planning advisors working remotely. Rather, it is designed to raise awareness by providing an overview of ethical issues to consider and confront. This paper is not intended to be, and should not be construed as constituting, the author's opinion regarding any specific case or transaction, or the author's legal advice regarding any specific set of facts.

II. Duty of Confidentiality

Lawyers are required to keep client information confidential, not only to preserve the attorney-client privilege, but also because of the ethical duty of confidentiality. The paragraphs below examine Model Rule 1.6, which sets forth the duty of confidentiality, and compares it to the attorney-client privilege. With that framework established, the remaining paragraphs address common confidentiality issues that arise during the beginning, middle, and end of a client relationship, including specific challenges posed by working remotely.

A. Model Rule 1.6: Confidentiality of Information

Model Rule 1.6 sets forth the general rule regarding a lawyer's duty to maintain client confidentiality. Absent certain exceptions, "[a] lawyer shall not reveal information relating to the representation of a client."² Those exceptions include when the client gives informed consent, when disclosure is impliedly authorized to carry out the representation, and when the lawyer believes disclosure is reasonably necessary to prevent death, substantial bodily harm, or criminal activity, as further discussed in Part II.D.2.

Model Rule 1.6 seems simple enough, and all lawyers should know and understand the importance of the phrase "shall not reveal," compared to "may not reveal." Still, there seem to be endless details buried within this simple rule, along with a number of unique client situations that do not fit neatly into the rule itself.³ In practice, it is probably best to work backwards. Start with the blanket prohibition that "[a] lawyer shall not reveal information relating to the representation

¹ All Model Rules and Comments are available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

² MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

³ For an in-depth review of client hypotheticals implicating the duty of confidentiality, see Thomas E. Spahn, *Confidentiality: Part I (Strength and Scope of the Duty)*, MCGUIRE WOODS, June 2, 2015, available at <http://media.mcguirewoods.com/publications/Ethics-Programs/6693340.pdf>.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Mum's the Word: Maintaining Client Confidentiality while Working from Anywhere and Everywhere

Also available as part of the eCourse

[First Friday Ethics \(June 2023\)](#)

First appeared as part of the conference materials for the

70th Annual Taxation Conference: Day 2 - Business Transactions session

"Mum's the Word: Maintaining Client Confidentiality while Working from Anywhere and Everywhere"