ETHICS IN THE DIGITAL AGE
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CLE - Ethics in the Digital Age

Presented Dec. 11, 2019 by Federal Public Defender, District of Nevada[1]

Social Media and the Defense Attorney

Defense Attorneys Need to Be Familiar with Social Media and Use it for Research

[Duty of Competence and Diligence – Rules 1.1 & 1.3]

Knowledge of social media and how they work is arguably part of a lawyer's duty of competence in advising his client.

> *See* ABA Model Rules of Professional Conduct (MRPC) 1.1, comment 8 (". . . a lawyer should keep abreast of changes in the law . . ., including the benefits and risks associated with relevant technology . . .).

Because anything posted on social media could be harmful or helpful to a client's case, lawyers must exercise due diligence by actively using social media as part of their cases. *See* MRPC 1.3.

Attorneys Post Info about their Current Clients and Cases at Their Peril

[Duty of Confidentiality – Rules 1.6 & 1.9][2]

Lawyers must obtain client consent before posting information about clients/case on websites or social media due to the **duty of confidentiality**.

> MRPC 1.6, comment 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."); NRPC 1.6; ABA Formal Opinion 480, "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary" (March 6, 2018), available at https://bit.ly/2E6SAW4; ABA Formal Opinion 10-457, "Lawyer Websites" (August 5, 2010), available at https://bit.ly/2LH4M4l.

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[1] Presentation and handout prepared by Asst. Federal Public Defenders Amelia Bizzaro, Brad Levenson, Robert O'Brien, and Kim Sandberg, and Clark County Deputy Public Defender Jessica Smith-Peterson.

[2] Nevada has not issued any specific opinions or rules related to social media and client confidentiality, but as discussed above, the issue is being discussed in many states and by the ABA.

Information related to a representation is covered by the duty of confidentiality, whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.

> ABA Formal Opinion 480 at 2-3 (noting the duty of confidentiality is broader in scope than the attorney-client privilege).

Public information related to the representation and information filed in the record may not be disclosed either.

> ABA Formal Opinion 480, at 3-4 ("Rule 1.6 does not provide an exception for information that is 'generally known' or contained in a 'public record.'").

What about LV Metro procedures or judicial rulings that an attorney learns about during the representation? Is that information confidential?

> Unlikely, unless it could lead to disclosures about your client. *See* Am. Law Inst., "Restatement of the Law Governing Lawyers" § 59, cmt. e (1998). Restatement (Third) of the Law Governing Lawyers that "[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients." *But see* ABA Formal Opinion 480, at 3 (the "salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a)").

Even client identity is protected under the duty of confidentiality.

> State Bar of Nev. Comm'n on Ethics and Prof'l Responsibility Formal Op. 41, at 2 (2009) ("Even the mere identity of a client is protected by Rule 1.6."), available at https://bit.ly/36kXSti; *see also* MRPC 7.2, comment 2 (2017) (requiring prior written consent to use a client name in advertising).

Former clients are not owed the same level of confidentiality and an attorney may discuss information from the representation when that information in "generally known".

> *See* ABA Formal Opinion 479, "The 'Generally Known' Exception to Former-Client Confidentiality" (Dec. 15, 2017), available at https://bit.ly/2RC0A9G.

Tip on Social Media and Commenting on Cases

If you're fired up about a case or something that happened in court and want to say something on social media, either (1) ask permission from your client before using their name or case details or (2) make sure the comment is generalized or vague enough to not be case-related so that you are commenting on the law, legal institution, or public agency rather than information from/about client.[3]

Investigation: Friending a Represented Party on Social Media Could Violate Rules

[Communication with Represented Party – Rule 4.2;
Responsibilities of Lawyers regarding Non-Associates – Rules 5.1-5.3]

"Predatory friending" – sending an adverse party a "friend" request to see information that the author intended to keep out of the public eye – can be unethical.

> NRPC 4.2 prohibits sending a friend request with any sort of message to a represented party. Nevada has not weighed in on whether sending a friend request without a message to see if they take the bait is prohibited. *But see* Ethics Opinion 2011-2, San Diego County Bar Legal Ethics Committee, May 24, 2011, "San Diego Opinion" (citing ABA MRPC 4.2 and finding an attorney may not directly or indirectly communicating with an opposing party about the subject of the representation when that party is represented by counsel), available at https://bit.ly/2Yxqlte.

An attorney cannot get around the rule by having another person, such as a paralegal or private investigator send the friend request.

> *See* MRPC 5.1-5.3 and NRPC 5.1-5.3 (attorney's duty of supervision under Model Rules requires associates, staff attorneys, and paralegals to comply with any applicable guidelines).

Social Media Must Comply with Ethical Advertising Rules in Nevada

[Advertising Rules – Rules 7.1, 7.2, and 7.2A]

[3] The following tips are practical thoughts on how to use social media and still comply with Rule 1.6. This is not a legal opinion or advice, and attorneys should do their own analysis for what actions comply with Rule 1.6.

Advertising rules apply to an attorney's social media, including blogs, Twitter, LinkedIn, etc.

> NRPC 7.2 (includes "public media" in the definition of advertising);[4] *see also* Ethics Opinion 2012-186, CA Legal Ethics Committee (2012) (providing helpful examples of what social media posts would and would not be considered advertising), available at https://bit.ly/2RC0PBC

While personal social media would unlikely be considered media "disseminated for the purpose of advertising legal services," NRPC 7.2A(a)(1) and (2), be aware that some bar associations have found a Linked In profile qualifies as advertisement if it advertises a defense attorney's legal services offered and the primary purpose is to attract new customers.

> *See* N.Y. City Bar Assoc. Formal Opinion 2015-7 (December 30, 2015), available at https://bit.ly/2P61ARM

Even "Endorsements" from Friends/Colleagues Can Be Considered Advertising

[Advertising Rules – Rules 7.1 & 7.2]

If you are endorsed on social media for a skill you don't have (think LinkedIn or Avvo), you could be violating the rules against false advertising.

> *See* NRPC Rule 7.1(d) (prohibiting advertisement with false or misleading endorsements).

Friending Judges or DAs – What Can Your Clients See?

Some attorneys refuse to "friend" or "like" a judge's or DA's personal or election page. Others find that its useful when appearing in front of that court or against that prosecutor to be social media-friendly.

Tip: If you do choose to link to/friend/like a judge's page on social media, be intentional with your privacy settings. Unless you are careful, your clients and the public will be able to see all of your friends/liked pages.

[4] Amended to include social media or "public media" in 2018. Nev. S. Ct. ADKT 527 (March 9, 2018).

Clients and Social Media

Advise them Early About the Dangers of Social Media to their Case

- "Don't talk about your case online."
- "All your postings on the web are likely to be examined and used against you in court."
- Discussing case online could waive attorney-client privilege
- Keep your account private
- Review specific posts with client and discuss implications
- Change and keep private client's password and identification?
- Deactivate? But see below about the hot water an attorney can get into if deactivation leads to deletion/loss of evidence.

Deleting Posts on Social Media Could Be Considering Spoliation of Evidence and Unethical

While an attorney's instinct might be to simply tell the client to "clean up" their social media (or to delete posts without preserving), some courts have found deleting posts to be spoliation and could lead to an adverse instruction in their case.

> *See* NYCLA, Ethics Opinion 745 (July 2, 2013) (noting that preserving the post somehow would eliminate spoliation), available at https://bit.ly/2YBxpFc; Philadelphia – Op 2014-5 (July 2014), available at https://bit.ly/2scYiTJ.
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> *See also Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013) (lawyer sanctioned $542,000 for manipulating client's social media page and misleading opposing counsel and the court about its contents).

Relevant Law

ABA Model Rules of Professional Conduct[5]

Rule 1.1 - Duty of Competence

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

Rule 1.3 - Diligence

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

Rule 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 paragraph (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 reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these Rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (6) to comply with other law or a court order; or

[5] Available at https://bit.ly/2YyXtke.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Nevada Rules of Professional Conduct[6]

Rules 1.1 (Competence) and 1.3 (Diligence)

[the language of these rules mirrors the relevant ABA MRPC above]

Rule 1.6 - Confidentiality of Information

(a) A lawyer shall not reveal information relating to 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 paragraphs (b) and (d).

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

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;

(3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;

(4) To secure legal advice about the lawyer's compliance with these Rules;

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to

[6] Available at https://bit.ly/2YCuj3z.

respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) To comply with other law or a court order.

(7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm.

Rule 7.2 – Advertising

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through the public media, such as a telephone directory, legal directory, newspaper or other periodical, billboards and other signs, radio, television and recorded messages the public may access by dialing a telephone number, or through written or electronic communication not involving solicitation as prohibited by Rule 7.3.

These Rules shall not apply to any advertisement broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and the advertisement is not intended primarily for broadcast or dissemination within the State of Nevada.

(b) If the advertisement uses any actors to portray a lawyer, members of the law firm, clients, or utilizes depictions of fictionalized events or scenes, the same must be disclosed. In the event actors are used, the disclosure must be sufficiently specific to identify which persons in the advertisement are actors, and the disclosure must appear for the duration in which the actor(s) appear in the advertisement.

(c) All advertisements and written communications disseminated pursuant to these Rules shall identify the name of at least one lawyer responsible for their content.

(d) Every advertisement and written communication that indicates one or more areas of law in which the lawyer or law firm practices shall conform to the requirements of Rule 7.4.

(e) Every advertisement and written communication indicating that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery shall contain the following disclaimer if the client may be liable for the opposing parties' fees and costs: "You may have to pay the opposing parties' attorney fees and costs in the event of a loss."

(f) A lawyer who advertises a specific fee or range of fees shall include the duration said fees are in effect and any other limiting conditions to the availability of the fees. For advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.

(g) A lawyer may make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications. However, such statements are subject to proof of verification, to be provided at the request of the state bar or a client or prospective client.

(h) Any statement or disclaimer required by these rules shall be made in each language used in the advertisement or writing with respect to which such required statement or disclaimer relates; provided, however, the mere statement that a particular language is spoken or understood shall not alone result in the need for a statement or disclaimer in that language.

(i) Statement regarding past results. If the advertisement contains any reference to past successes or results obtained, the communicating lawyer or member of the law firm must have served as lead counsel in the matter giving rise to the recovery, or was primarily responsible for the settlement or verdict. The advertisement shall also contain a disclaimer that past results do not guarantee, warrant, or predict future cases.

If the past successes or results obtained include a monetary sum, the amount involved must have been actually received by the client, and the reference must be accompanied by adequate information regarding the nature of the case or matter and the damages or injuries sustained by the client, and if the gross amount received is stated, the attorney fees and litigation expenses withheld from the amount must be stated as well.

(j) Disclaimers. In addition to any specific requirements under these rules, any disclosures or disclaimers required by these rules to appear in an advertisement or unsolicited written communication must be of sufficient size to be clearly legible and prominently placed so as to be conspicuous to the intended viewer. If the disclosure or disclaimer is televised or broadcast in an electronic medium, it shall be displayed for a sufficient time to enable the viewer to see and read the disclosure or disclaimer. If the disclosure or disclaimer is spoken aloud, it shall be plainly audible to the intended listener. If the statement is made on a

website, the required words or statements shall appear on the same page as the statement requiring the disclosure or disclaimer.

(k) The following information in advertisements and written communications shall be presumed not to violate the provisions of Rule 7.1:

(1) Subject to the requirements of this Rule and Rule 7.5, the name of the lawyer or law firm, a listing of lawyers associated with the firm, office addresses and telephone numbers, office and telephone service hours, and a designation such as "attorney" or "law firm."

(2) Date of admission to the State Bar of Nevada and any other bars and a listing of federal courts and jurisdictions other than Nevada where the lawyer is licensed to practice.

(3) Technical and professional licenses granted by the state or other recognized licensing authorities.

(4) Foreign language ability.

(5) Fields of law in which the lawyer is certified or designated, subject to the requirements of Rule 7.4.

(6) Prepaid or group legal service plans in which the lawyer participates.

(7) Acceptance of credit cards.

(8) Fee for initial consultation and fee schedule, subject to the requirements of paragraphs (e) and (f) of this Rule.

(9) A listing of the name and geographic location of a lawyer or law firm as a sponsor of a public service announcement or charitable, civic or community program or event.

(l) Nothing in this Rule prohibits a lawyer or law firm from permitting the inclusion in law lists and law directories intended primarily for the use of the legal profession of such information as has traditionally been included in these publications.

(m) A copy or recording of an advertisement or written or recorded communication shall be submitted to the State Bar in accordance with Rule 7.2A and shall be retained by the lawyer or law firm which advertises for 4 years after its last dissemination along with a record of when and where it was used.

(n) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written or

recorded communication permitted by these Rules and may pay the usual charges of a lawyer referral service or other legal service organization.

Rule 7.2A - Advertising Filing Requirements

(a) Filing requirements. A copy or recording of an advertisement or written or recorded communication published after September 1, 2007, shall be submitted to the state bar in either physical or digital format within 15 days of first dissemination along with a form supplied by the state bar. If a published item that was first disseminated prior to September 1, 2007, will continue to be published after this date, then it must be submitted to the state bar on or before September 17, 2007, along with a form supplied by the state bar.

(b) Failure to file. A lawyer or law firm's failure to file an advertisement in accordance with paragraph (a) is grounds for disciplinary action. In addition, for purposes of disciplinary review pursuant to Supreme Court Rule 106 (privilege and limitation), when a lawyer or law firm fails to file, the 4-year limitation period begins on the date the advertisement was actually known to bar counsel.

January 23, 2014

10 Tips for Avoiding Ethical Lapses When Using Social Media

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You may be among the thousands of legal professionals flocking to social media sites like LinkedIn, Facebook, Twitter, or Google+ to expand your professional presence in the emerging digital frontier. If so, have you paused to consider how the ethics rules apply to your online activities? You should. Some of the ethical constraints that apply to your social media usage as a legal professional may surprise you. Moreover, legal ethics regulators across the country are beginning to pay close attention to what legal professionals are doing with social media, how they are doing it, and why they are doing it. The result is a patchwork quilt of ethics opinions and rule changes intended to clarify how the rules of professional conduct apply to social media activities.

This article provides 10 tips for avoiding ethical lapses while using social media as a legal professional. The authors cite primarily to the ABA Model Rules of Professional Conduct (RPC) and select ethics opinions from various states. In addition to considering the general information in this article, you should carefully review the ethics rules and ethics opinions adopted by the specific jurisdiction(s) in which you are licensed and in which your law firm maintains an office.

1. Social Media Profiles and Posts May Constitute Legal Advertising

Many lawyers – including judges and in-house counsel – may not think of their social media profiles and posts as constituting legal advertisements. After all, legal advertising is limited to glossy brochures, highway billboards, bus benches, late-night television commercials, and the back of the phonebook, right? Wrong. In many jurisdictions, lawyer and law firm websites are deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements.

For example, the Florida Supreme Court recently overhauled that state's advertising rules to make clear that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that

state applied to social media posts, depending on the nature of the posted statement or content.

2. Avoid Making False or Misleading Statements

The ethical prohibition against making false or misleading statements pervades many of the ABA Model Rules, including RPC 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), 7.1 (Communication Concerning a Lawyer's Services), 7.4 (Communication of Fields of Practice and Specialization), and 8.4 (Misconduct), as well as the analogous state ethics rules. ABA Formal Opinion 10-457 concluded that lawyer websites must comply with the ABA Model Rules that prohibit false or misleading statements. The same obligation extends to social media websites.

South Carolina Ethics Opinion 12-03, for example, concluded that lawyers may not participate in websites designed to allow non-lawyer users to post legal questions where the website describes the attorneys answering those questions as "experts." Similarly, New York State Ethics Opinion 972 concluded that a lawyer may not list his or her practice areas under the heading "specialties" on a social media site unless the lawyer is appropriately certified as a specialist – and law firms may not do so at all.

Although most legal professionals are already appropriately sensitive to these restrictions, some social media activities may nevertheless give rise to unanticipated ethical lapses. A common example occurs when a lawyer creates a social media account and completes a profile without realizing that the social media platform will brand the lawyer to the public as an "expert" or a "specialist" or as having legal "expertise" or "specialties." Under RPC 7.4 and equivalent state ethics rules, lawyers are generally prohibited from claiming to be a "specialist" in the law. The ethics rules in many states extend this restriction to use of terms like "expert" or "expertise." Nevertheless, many professional social networking platforms (e.g., LinkedIn and Avvo) may invite lawyers to identify "specialties" or "expertise" in their profiles, or the sites may by default identify and actively promote a lawyer to other users as an "expert" or "specialist" in the law. This is problematic because the lawyer completing his or her profile cannot always remove or avoid these labels.

3. Avoid Making Prohibited Solicitations

Solicitations by a lawyer or a law firm offering to provide legal services and motivated by pecuniary gain are restricted under RPC 7.3 and equivalent state ethics rules. Some, but not all, state analogues recognize limited exceptions for communications to other lawyers, family members, close personal friends, persons with whom the lawyer has a prior professional relationship, and/or persons who have specifically requested information from the lawyer.

By its very design, social media allows users to communicate with each other or the public at-large through one or more means. The rules prohibiting solicitations force legal professionals to evaluate – before sending any public or private social media communication to any other user – *whom* the intended recipient is and *why* the lawyer or law firm is communicating with that particular person. For example, a Facebook "friend request" or LinkedIn "invitation" that offers to provide legal services to a non-lawyer with whom the sending lawyer does not have an existing relationship may very well rise to the level of a prohibited solicitation.

Legal professionals may also unintentionally send prohibited solicitations merely by using certain automatic features of some social media sites that are designed to facilitate convenient connections between users. For instance, LinkedIn provides an option to import e-mail address books to LinkedIn for purposes of sending automatic or batch invitations. This may seem like an efficient option to minimize the time required to locate and connect with everyone you know on LinkedIn. However, sending automatic or batch invitations to everyone identified in your e-mail address book could result in networking invitations being sent to persons who are not lawyers, family members, close personal friends, current or former clients, or others with whom a lawyer may ethically communicate. Moreover, if these recipients do not accept the initial networking invitation, LinkedIn will automatically send two follow up reminders unless the initial invitation is affirmatively withdrawn. Each such reminder would conceivably constitute a separate violation of the rules prohibiting solicitations.

4. Do Not Disclose Privileged or Confidential Information

Social media also creates a potential risk of disclosing (inadvertently or otherwise) privileged or confidential information, including the identities of current or former clients. The duty to protect privileged and confidential client information extends to current clients (RPC 1.6), former clients (RPC 1.9), and prospective clients (RPC 1.18). Consistent with these rules, ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients on websites. In a content-driven environment like social media where users are accustomed to casually commenting on day-to-day activities, including work-related activities, lawyers must be especially careful to avoid posting *any* information that could conceivably violate confidentiality obligations. This includes the casual use of geo-tagging in social media posts or photos that may inadvertently reveal your geographic location when traveling on confidential client business.

There are a few examples of lawyers who found themselves in ethical crosshairs after posting client information online. For example, in *In re Skinner*, 740 S.E.2d 171 (Ga. 2013), the Georgia

Supreme Court rejected a petition for voluntary reprimand (the mildest form of public discipline permitted under that state's rules) where a lawyer admitted to disclosing information online about a former client in response to negative reviews on consumer websites. In a more extreme example, the Illinois Supreme Court in *In re Peshek*, M.R. 23794 (Ill. May 18, 2010) suspended an assistant public defender from practice for 60 days for, among other things, blogging about clients and implying in at least one such post that a client may have committed perjury. The Wisconsin Supreme Court imposed reciprocal discipline on the same attorney for the same misconduct. *In re Disciplinary Proceedings Against Peshek*, 798 N.W.2d 879 (Wis. 2011).

Interestingly, the Virginia Supreme Court held in *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), that confidentiality obligations have limits when weighed against a lawyer's First Amendment protections. Specifically, the court held that although a lawyer's blog posts were commercial speech, the Virginia State Bar could not prohibit the lawyer from posting non-privileged information about clients and former clients without the clients' consent where (1) the information related to closed cases and (2) the information was publicly available from court records and, therefore, the lawyer was free, like any other citizen, to disclose what actually transpired in the courtroom.

5. Do Not Assume You Can "Friend" Judges

In the offline world, it is inevitable that lawyers and judges will meet, network, and sometimes even become personal friends. These real-world professional and personal relationships are, of course, subject to ethical constraints. So, too, are online interactions between lawyers and judges through social media (e.g., becoming Facebook "friends" or LinkedIn connections) subject to ethical constraints.

Different jurisdictions have adopted different standards for judges to follow. ABA Formal Opinion 462 recently concluded that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis. Several states have adopted similar views, including Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01).

In contrast, states like California (Op. 66), Florida, Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3) have adopted a more restrictive view. Florida Ethics Opinion 2009-20, for example, concluded that a judge cannot friend lawyers on Facebook who may appear before the judge

because doing so suggests that the lawyer is in a special position to influence the judge. Florida Ethics Opinion 2012-12 subsequently extended the same rationale to judges using LinkedIn and the more recent Opinion 2013-14 further cautioned judges about the risks of using Twitter. Consistent with these ethics opinions, a Florida court held that a trial judge presiding over a criminal case was required to recuse himself because the judge was Facebook friends with the prosecutor. *See Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).

6. Avoid Communications with Represented Parties

Under RPC 4.2 and equivalent state ethics rules, a lawyer is forbidden from communicating with a person whom the lawyer knows to be represented by counsel without first obtaining consent from the represented person's lawyer. Under RPC 8.4(a) and similar state rules, this prohibition extends to any agents (secretaries, paralegals, private investigators, etc.) who may act on the lawyer's behalf.

These bright-line restrictions effectively prohibit lawyers and their agents from engaging in social media communications with persons whom the lawyer knows to be represented by counsel. This means that a lawyer may not send Facebook friend requests or LinkedIn invitations to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content. In the corporate context, San Diego County Bar Association Opinion 2011-2 concluded that high-ranking employees of a corporation should be treated as represented parties and, therefore, a lawyer could not send a Facebook friend request to those employees to gain access to their Facebook content.

On the other hand, viewing publicly accessible social media content that does not precipitate communication with a represented party (e.g., viewing public blog posts or Tweets) is generally considered fair game. That was the conclusion reached by Oregon Ethics Opinions 2013-189 and 2005-164, which analogized viewing public social media content to reading a magazine article or a published book.

7. Be Cautious When Communicating with Unrepresented Third Parties

Underlying RPC 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person), 4.4 (Respect for Rights of Third Persons), and 8.4 (Misconduct), and similar state ethics rules is concern for protecting third parties against abusive lawyer conduct. In a social media context, these rules require lawyers to be cautious in

online interactions with unrepresented third parties. Issues commonly arise when lawyers use social media to obtain information from third-party witnesses that may be useful in a litigation matter. As with represented parties, publicly viewable social media content is generally fair game. If, however, the information sought is safely nestled behind the third party's privacy settings, ethical constraints may limit the lawyer's options for obtaining it.

Of the jurisdictions that have addressed this issue, the consensus appears to be that a lawyer may not attempt to gain access to non-public social media content by using subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias. For example, ethics opinions in Oregon (Op. 2013-189), Kentucky (Op. KBA E-434), New York State (Op. 843), and New York City (Op. 2010-2) concluded that lawyers are not permitted (either themselves or through agents) to engage in false or deceptive tactics to circumvent social media users' privacy settings to reach non-public information. Ethics opinions by other bar associations, including the Philadelphia Bar Association (Op. 2009-02) and the San Diego County Bar Association (Op. 2011-2), have gone one step further and concluded that lawyers must affirmatively disclose their reasons for communicating with the third party.

8. Beware of Inadvertently Creating Attorney-Client Relationships

An attorney-client relationship may be formed through electronic communications, including social media communications. ABA Formal Opinion 10-457 recognized that by enabling communications between prospective clients and lawyers, websites may give rise to inadvertent lawyer-client relationships and trigger ethical obligations to prospective clients under RPC 1.18. The interactive nature of social media (e.g., inviting and responding to comments to a blog post, engaging in Twitter conversations, or responding to legal questions posted by users on a message board or a law firm's Facebook page) creates a real risk of inadvertently forming attorney-client relationships with non-lawyers, especially when the objective purpose of the communication from the consumer's perspective is to consult with the lawyer about the possibility of forming a lawyer-client relationship regarding a specific matter or legal need. Of course, if an attorney-client relationship attaches, so, too, do the attendant obligations to maintain the confidentiality of client information and to avoid conflicts of interest.

Depending upon the ethics rules in the jurisdiction(s) where the communication takes place, use of appropriate disclaimers in a lawyer's or a law firm's social media profile or in connection with specific posts may help avoid inadvertently creating attorney-client relationships, so long as the lawyer's or law firm's online conduct is consistent with the disclaimer. In that respect, South

Carolina Ethics Opinion 12-03 concluded that "[a]ttempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice is patently unfair and misleading to laypersons."

9. Beware of Potential Unauthorized Practice Violations

A public social media post (like a public Tweet) knows no geographic boundaries. Public social media content is accessible to everyone on the planet who has an Internet connection. If legal professionals elect to interact with non-lawyer social media users, then they must be mindful that their activities may be subject not only to the ethics rules of the jurisdictions in which they are licensed, but also potentially the ethics rules in any jurisdiction where the recipient(s) of any communication is(are) located. Under RPC 5.5 and similar state ethics rules, lawyers are not permitted to practice law in jurisdictions where they are not admitted to practice. Moreover, under RPC 8.5 and analogous state rules, a lawyer may be disciplined in any jurisdiction where he or she is admitted to practice (irrespective of where the conduct at issue takes place) or in any jurisdiction where he or she provides or offers to provide legal services. It is prudent, therefore, for lawyers to avoid online activities that could be construed as the unauthorized practice of law in any jurisdiction(s) where the lawyer is not admitted to practice.

10. Tread Cautiously with Testimonials, Endorsements, and Ratings

Many social media platforms like LinkedIn and Avvo heavily promote the use of testimonials, endorsements, and ratings (either by peers or consumers). These features are typically designed by social media companies with one-size-fits-all functionality and little or no attention given to variations in state ethics rules. Some jurisdictions prohibit or severely restrict lawyers' use of testimonials and endorsements. They may also require testimonials and endorsements to be accompanied by specific disclaimers. South Carolina Ethics Opinion 09-10, for example, provides that (1) lawyers cannot solicit or allow publication of testimonials on websites and (2) lawyers cannot solicit or allow publication of endorsements unless presented in a way that would not be misleading or likely to create unjustified expectations. The opinion also concluded that lawyers who claim their profiles on social media sites like LinkedIn and Avvo (which include functions for endorsements, testimonials, and ratings) are responsible for conforming all of the information on their profiles to the ethics rules.

Lawyers must, therefore, pay careful attention to whether their use of any endorsement, testimonial, or rating features of a social networking site is capable of complying with the ethics rules that apply in the state(s) where they are licensed. If not, then the lawyer may have no choice but to remove that content from his or her profile.

Conclusion

Despite the risks associated with using social media as a legal professional, the unprecedented opportunities this revolutionary technology brings to the legal profession to, among other things, promote greater competency, foster community, and educate the public about the law and the availability of legal services justify the effort necessary to learn how to use the technology in an ethical manner. E-mail technology likely had its early detractors and, yet, virtually all lawyers are now highly dependent on e-mail in their daily law practice. Ten years from now, we may similarly view social media as an essential tool for the practice of law.

ABA American Bar Association | /content/aba-cms-dotorg/en/groups/business_law/publications/blt/2014/01/03_harvey

February 16, 2017

ETHICS CORNER: 12 Rules for Ethically Dealing With Social Media

Daniel J. Siegel

ETHICS CORNER Legal ethics, professionalism, and civility

The practice of law constantly changes. Despite the technological changes, it remains remarkably similar to how we practiced 10, 30, or even 50 years ago. Although computers, smartphones, and social media didn't exist when many of us passed the bar exam, neither did MRIs or other medical tests, and they didn't prevent doctors from changing.

Consider email, whose rise in popularity was highlighted by the phrase, "You've Got Mail," which even became a popular movie. Eventually, lawyers began to embrace this method of communicating. Next came the Internet, which begat websites, Google, smartphones, and, eventually, social media. Yes, social media, those massively popular websites where people—including clients and lawyers—gossip and reveal their deepest secrets.

Gossip has existed since man could talk, and will endure long after Facebook goes the way of MySpace and Friendster and other previously "hot" websites. But for lawyers trying to contain the damage from rash, thoughtless, or spiteful comments or postings by clients (or the lawyers themselves), social media creates new challenges: How can lawyers limit the spread of important client-related information on social media? Fortunately, the American Bar Association Center for Professional Responsibility, and numerous state and local bar ethics committees have issued ethical guidance to help lawyers understand the obligations that arise with social media. From those opinions, I offer the following 12 tips gleaned from that guidance (remember to review the opinions from jurisdictions where you are licensed to confirm that they agree with these opinions):

1. Attorneys may not contact a represented person through social networking websites.

2. Attorneys may not contact a party or a witness by pretext. This prohibition applies to other parties and witnesses who are either identified as a witness for another party or are witnesses the lawyer is prohibited from contacting under the applicable Rules of Professional Conduct.

3. Attorneys may contact unrepresented persons through social networking websites, but may not use a pretextual basis for viewing otherwise private information on those websites.

4. Attorneys may advise clients to change the privacy settings on their social media page. In fact, lawyers *should* discuss the various privacy levels of social networking websites with clients, as well as the implications of failing to change these settings.

5. Attorneys may instruct clients to make information on social media websites "private," but may not instruct or permit them to delete/destroy relevant photos, links, texts, or other content, so that it no longer exists. This rule is no different from the obligation not to destroy physical evidence, i.e., evidence is evidence, regardless of how it was created.

6. Attorneys must obtain a copy of a photograph, link, or other content posted by clients on their social media pages to comply with requests for production or other discovery requests.

7 Attorneys must make reasonable efforts to obtain photographs, links, or other content about which they are aware if they know or reasonably believe it has not been produced by their clients.

8 Attorneys should advise clients about the content of their social networking websites, including their obligation to preserve information, and the limitations on removing information.

9 Attorneys may use information on social networking websites in a dispute or lawsuit. The admissibility of the information is governed by the same standards applied to all other evidence.

10 Attorneys may not reveal confidential client information in response to negative online reviews without a client's informed consent. Thus, responses should be proportional and restrained.

11 Attorneys may review a juror's Internet presence.

12 Attorneys may connect with judges on social networking websites provided the purpose is not to influence judges in carrying out their official duties.

This advice is identical to the advice an attorney would give to clients in the pre-Internet and pre-social media world. Telling clients not to talk about their cases and to preserve evidence, reminding lawyers they cannot reveal confidential information without consent, and knowing that lawyers cannot contact parties and witnesses by pretext, is same advice they gave before the Internet, but is merely repackaged for technology. In short, the more things change, the more they really stay the same, including issues related to ethics and social networking.

Authors

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4 Tips for Attorneys Navigating the Social Media Ethics Minefield

Article By:
Stephen Fairley

Despite all lawyer jokes to the contrary, attorneys are bound by a set of ethics rules set forth by state bar associations. In general, concern about ethics and social media focus on advertising, confidentiality, discovery, and solicitation. While every state's bar rules are unique, here's are 4 specific minefields where you need to check your state bar's rules in order to avoid ethics issues:

Social media profiles.

Some state bar associations treat social media profiles as legal advertisements, requiring attorneys in those states to adhere to very specific advertising rules. Depending on where you practice, you may be required to:

- Label posts as "advertising material" or "attorney advertising" at the beginning and end of each post;
- Identify the person responsible for the content and include contact information for the firm's office;
- Include specific disclaimer information.

Not every state has these requirements; while Tennessee says LinkedIn profiles are advertisements, Texas does not treat LinkedIn or Facebook profiles as ads.

LinkedIn recommendations.

Getting recommendations on LinkedIn from your connections is one of the pillars of the site. However, in states that don't allow testimonials, this could be a violation. Some states that do allow testimonials require attorneys to add disclaimers, or may have additional restrictions on their usage.

The safest way to avoid an ethics violation if you live in one of these states is to screen each comment on your profile before it is posted publicly. You also need to be careful about reciprocal recommendations, since attorneys are prohibited from providing anything of value in exchange for a recommendation.

Blogs.

Legal blogs may be treated differently than law firm websites, which many state bars consider to be advertisements. In some states, a blog that provides only educational information and commentary is not considered an advertisement. By keeping your blog's content focused on information that would be of use to any consumer wanting to know about a particular practice area, you can claim the educational high ground.

Responding on social media.

If someone has posted on Facebook that they just got in an accident where the other driver was at fault, a personal injury lawyer may be tempted to respond with a message offering help. However, since the person posting did not ask for an attorney or have a prior relationship with this specific attorney, this message would

violate ethics rules in many states. If the post specifically asked for help with finding an attorney, then the PI lawyer's response may be permitted.

Whenever you ask someone to contact you in a post, you are generally considered to be engaging in commercial speech for the purpose of soliciting business. The State Bar of California draws a fine distinction here, categorizing general statements like "check out my website" or "call me for a free consultation" as solicitation. However, if you post that you have just written an e-book on a particular legal subject, you can ask people to contact you for a free copy. Best practice here is to know your state bar's restrictions on commercial speech and examine your posts before you put them up for any gray areas. You are responsible for everything that is posted on your social media accounts, so be sure to read and edit all information before it is posted.

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Predatory Friending and Other Pitfalls for Lawyers Using Social Media

by Sarah Thornton | Nov 1, 2018 | News

This article was originally published in the in *COMMUNIQUÉ*, the official publication of the Clark County Bar Association. (November 2018).

By John M. Naylor, Esq.

[PUBLISHER'S NOTE: The Clark County Bar Association (CCBA) provides the opportunity for Nevada lawyers to earn 1.0 Ethics of Continuing Legal Education (CLE) Credit for reading this article and completing the accompanying test. For the test and more information, see pages 22-29 of the print and PDF versions of the November 2018 issue of COMMUNIQUÉ]


John Naylor,

Lawyers regularly utilize social media as a means of marketing and as an investigative tool. As of 2017, about 76 percent of all law firms in the United States maintained some sort of an internet presence. Jessica Weltge and Myra McKenzie-Harris, Esq., *The Minefield of Social Media and Legal Ethics: How to Provide Competent Representation and Avoid the Pitfalls of Modern Technology*, American Bar Association Section of Labor and Employment Law, Ethic and Professional Responsibility Midwinter Meeting (March 24, 2017) (citation omitted), "ABA 2017 Report." Ethical rules regarding an attorney's use of social media, however, have not kept pace and the bar associations that address the issues tend to do so on a piecemeal basis.

This article focuses on two of the many areas that social media impacts. The first is to what extent do Nevada's rules on lawyer advertising apply to social media outlets such as LinkedIn and Facebook. The second is when can an attorney use a social access request, commonly referred to as a "friend request," to gain information about an opposing party or witness. Nevada has not specifically addressed these issues, but other bar associations have and offer guidance.

What exactly is social media?

Social media generally consists of any electronic communication used to share information, ideas, or personal messages. Dorothy M. Bollinger, *Social Media and Employment Law: A Practitioner's Primer*, 20 TEMP. POL. & CIV. RTS. L. REV. 323 (2011). This includes online messaging and cell phone apps, Internet blogs, and social networking websites like LinkedIn, Facebook, Twitter, Google+, YouTube, Pinterest, and Instagram. "ABA 2017 Report," p. 2.

Advertising

The 2018 amendments to advertising rules make clear that they apply to social media. Effective April 8, 2018, the Supreme Court of Nevada approved an amendment to NRPC 7.2 that included "public media" in the definition of advertising. Nev. S. Ct. ADKT 527, March 9, 2018. This certainly covers social media and a look to the model rules confirms that. The amendment brought NRPC 7.2 closer in line with ABA Model Rule 7.2, which the ABA Section of Labor and Employment Law considers to cover social media. "ABA 2017 Report," pp. 14-15. Thus, a fair interpretation of Nevada's rule similarly considers social media to be advertising.

The new guidelines accompanying the amendments appear to endorse this broad application of what is advertising. The State Bar's proposed Lawyer Advertising Interpretive Guidelines (the "2018 Guidelines") have been published for comment. As currently drafted, they do not limit NRPC 7.2's reach when it comes to social media. Thus, all of the disclosures and requirements of NRPC 7.2(a) through (d) apply to blogs, Twitter feeds, LinkedIn pages, and other forms of an attorney's social media presence. NRPC 7.2(b). More specifically, statements in social media regarding fees, use of non-attorneys on a case, years of experience, and jury verdicts require special disclosures under NRPC 7.2.

A second issue is whether the filing requirement of NRPC 7.2A applies to social media. The 2018 amendments mandate that attorneys submit to the State Bar for review "(1) a copy or recording of all advertisements disseminated in exchange for something of value; and (2) written or recorded communications the lawyer causes to be disseminated for the purpose of advertising legal services." (NRPC 7.2A(a)(1) and (2)). The rule only excludes websites. (NRPC 7.2A(a)).
Subsection one would seemingly exclude no-cost to the user platforms for social media such as Facebook, Twitter, and a basic LinkedIn page. Indeed, the State Bar's online submission filing portal for advertising under NRPC 7.2A only refers to "Social Media (if disseminated in exchange for something of value)." State Bar of Nevada website, https://www.nvbar.org/member-services-3895/lawyeradvertising/, accessed August 20, 2018).

Subsection two is broader, covering everything that is intended to be advertising. This would seemingly cover all social media that a firm or lawyer utilizes, and, therefore, triggers the filing requirement.

LinkedIn illustrates the tension between NRPC 7.2A and the usage of these platforms. The basic LinkedIn profile is free, meaning that an attorney need only create an account and

supply what information they wish for the profile. NRPC 7.2A(1) would not apply because nothing is exchanged for value and the argument can be made that the purpose of the profile is nothing more than a directory listing with contact information.

LinkedIn, however, allows a subscriber to pay a monthly fee (in addition to its free service) to get alerts whenever someone is viewing their profile. As "public media," the profile is advertising and is now potentially subject to the filing requirement because something of value is given.

Even if one could escape the requirements of NRPC 7.2A(1), subsection two would seemingly capture everything. Subsection two requires a determination of an attorney's intent. Neither the rule nor the 2018 Guidelines offer any assistance in how to determine intent. Other jurisdictions, however, have attempted to address the issue. For example, in 2015, the New York City Bar Association determined that a LinkedIn page would be considered advertising subject to ABA Model Rules 7.1 through 7.5 if the following five factors were present: (a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising. N.Y. City Bar Assoc. Formal Opinion 2015-7 (December 30, 2015). It would be hard to imagine a LinkedIn page that did not meet all of these criteria, especially given that LinkedIn is generally viewed as a promotional tool and a way to tout one's qualifications and network. Under these circumstances, the best practice would seem to be filing one's LinkedIn page with the State Bar.

The ex parte friend request

Whether preparing a case or preparing to negotiate a contract, many attorneys look at the public information available on an adverse party's Facebook page or other social media. Can you take it a step further by sending an adverse party a "friend" request? An accepted friend request typically opens the door to information that the author intended to keep out of the public eye. Some have dubbed this practice "predatory friending." In Nevada, NRPC 4.2 prohibits an attorney from sending a friend request with any sort of a message to a represented party. But what about sending a simple friend request and nothing more to a represented party and seeing if they take the bait? Currently, there is no guidance as to whether this violates NRPC 4.2.

Other bar associations prohibit this practice. For example, the San Diego Bar Association concluded that an attorney could not send a friend request to a represented party. Ethics Opinion 2011-1, San Diego County Bar Legal Ethics Committee, May 24, 2011, "San Diego Opinion". The San Diego Bar relied on California Rule of Professional Conduct 2-100 and ABA Model Rule 4.2, both of which prohibit an attorney from directly or indirectly communicating with an opposing party about the subject of the representation when that party is represented by counsel. *Id.* at III(A). These rules parallel NRPC 4.2. The San Diego Bar considered the argument that a friend request and nothing more does not involve the

subject of the lawsuit or representation and is therefore permissible. The San Diego Bar flatly rejected this approach. *Id*. at III(3)(a).

The San Diego Bar also relied on ABA Model Rule 4.1(a), which is identical to NRPC 4.1(a) and prohibits lawyers from making false statements. *Id*. at III(B). The San Diego Bar found that sending a friend request without explaining its purpose is a deceptive act. *Id*. Even though the ABA has not formally adopted a position on the application of Model Rule 4.1, it recognizes that several jurisdictions have adopted advisory and formal opinions on the matter and recommends that practitioners be cautious before sending a friend request. "ABA 2017 Report," pp. 24-25.

Can an attorney reach out to unrepresented parties or witnesses through a friend request? The San Diego Bar found that an attorney "should not" do this without fully identifying themselves, disclosing their affiliation, and disclosing the purpose of the request. San Diego Opinion, III(B). Other jurisdictions have taken it one step further. The New York State Bar's Social Media Ethics Guidelines requires attorneys to use their full name and prohibits them from using a false profile to mask their identity. "Guideline 4.B, Social Media Ethics Guidelines of the Commercial and Federal Litigation of the New York State Bar Association" (Updated May 11, 2017). This rule also applies when attorneys reach out to witnesses. *Id*.

An attorney cannot get around the rule by having another person, such as a paralegal or private investigator send the friend request. An attorney's duty of supervision under Model Rules 5.1 through 5.3, which were adopted in Nevada as NRPC 5.1 through 5.3, requires associates, staff attorneys, and paralegals to comply with any applicable guidelines. "ABA 2017 Report" pp. 10-11. Basically, this means that an attorney's paralegal or investigator cannot create a false account to contact anyone.

Conclusion

The ethical implications of social media will continue to evolve, and counsel must be careful to consider all factors before using a social media platform for any purpose. This can be challenging because no governing body, including the ABA, has arrived at a comprehensive set of ethical rules for dealing with social media. In particular, Nevada has not yet adopted any specific rules or guidelines. Until Nevada does so, practitioners might wish to follow the most conservative approach available when utilizing social media.

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LEGAL ETHICS OPINION 1830

MAY CRIMINAL DEFENSE ATTORNEY MAKE DE MINIMIS GIFT TO CLIENT OF MONEY FOR JAIL COMMISSARY PURCHASES?

You have presented a hypothetical involving a public defender's office, which provides criminal defense representation exclusively to indigent clients. Many of these clients also have no relatives to provide them with funds needed to buy items from the jail commissary while the client is incarcerated. Clients frequently request attorneys and/or support staff to give the clients nominal amounts of money for that purpose. The money is used primarily to buy personal items or food beyond that regularly provided to inmates. At times, staff is simultaneously trying to persuade some of these clients to accept plea agreements to which the clients are initially resistant. Your request asks whether it is improper for the attorneys and/or their support staff to provide this money to the clients.

Rule 1.8(e) establishes a prohibition against a lawyer providing certain financial assistance to his clients. Specifically, that provision directs as follows:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

In applying this rule to a particular situation, three questions need to be answered: is the attorney providing financial assistance to a client; is that assistance "in connection with" litigation; and (if so) does the assistance come within either of the two exceptions. Clearly, in the present scenario, an attorney is providing financial assistance to the client in each instance where he provides money for the client's commissary account. The critical question then is whether that assistance is "in connection with" the client's litigation, which would bring the assistance within the prohibition.

Former DR 5-103(B), while similar, did not contain this key phrasing of "assistance in connection with pending or contemplated litigation."[1] Therefore, this Committee's prior opinions do not provide an interpretation of this phrase. In the present instance, the attorney represents the client in the defense of a criminal case; thus, the representation does involve litigation. Does that mean any financial assistance provided to a client is "in

[1] DR 5-103(B)'s phrasing established a broader prohibition, precluding assistance whenever "representing a client in connection with contemplated or pending litigation." Thus, on the face of these rules, the prohibited litigation connection referred to in the original language was with regard to the client's matter, while in the present Rule 1.8, the prohibited litigation connection refers to the expenses themselves.

connection with" that litigation? The Committee thinks not. The rule does not on its face prohibit providing *all* types of financial assistance to clients who are involved in litigation; rather, the prohibition is narrower, precluding only the assistance that is rendered *in connection with the client's litigation*. In making the distinction between those expenses that come within this prohibition and those that do not, it is useful to consider the purpose of the prohibition. The Virginia Supreme Court, in considering the earlier, but similar, DR 5-103(B)[2], described that purpose as follows:

> [T]he rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients. If a client owes his attorney money, the attorney may have his own pocket book in mind as he handles litigation. That attorney might settle for an amount sufficient to cover the loan to his client, while foregoing the risk of a trial where his client could recover a larger amount *or lose everything.* The policy embodied in DR 5-103(B) is that a lawyer simply should not face this risk to independent judgment.

Shea v. Virginia State Bar, 236 Va. 442, 327 S.E.2d 63 (1988). Thus, the spirit of the prohibition is that financial assistance is problematic when it over-involves the attorney in the client's case to such a degree that the attorney's professional judgment is compromised.

In the *Shea* opinion, the Virginia Supreme Court interpreted DR 5-103(B) and rejected all forms of financial assistance to litigation clients. *See Shea v. Virginia State Bar*, 236 Va. 442, 327 S.E.2d 63 (1988). This Committee respectfully notes that the current language of Rule1.8(e) was not before the Court in that case. Thus, the Committee is looking at the phrasing of the Rule 1.8(e) prohibition for the first time. While the provision of this commissary money appears to have nothing to do directly with the litigation that is the subject of the representation, the attorney must be mindful of the considerations of maintaining independence in judgment. For example, a very nominal amount placed in a commissary account for gum or toothpaste is a de minimis gift that may be permissible. The lawyer must be mindful, however, of the duty to maintain independent judgment. If ever the de minimis gift occasions the lawyer to reexamine either his/her relationship with the client or his/her own personal interests of settling or handling the case, then the gift is improper. However, if the nominal funds are given on an occasional basis to assist an indigent client for small and assorted commissary purchases that have nothing to do with the litigation, Rule 1.8 does not create a *per se* prohibition against those gifts to clients, nor does any other provision of the Rules of Professional Conduct.

The Committee recognizes that this interpretation seems to be a departure from prior opinions and places the Virginia position in line with only a minority of jurisdictions. In prior LEOs, interpreting former DR 5-103(B), the Committee prohibited various forms of

[2] As noted in Footnote 1, the old rule and the new rule are not identical. Nevertheless, the Committee sees nothing in the rephrasing that changes the basic purpose of this prohibition, only its scope. Thus, the Committee looks to the *Shea* discussion on this point as relevant.

assistance, but a majority of those opinions do not interpret the prohibition itself but rather one of the exceptions to that prohibition. *See e.g* LEOs ##1256, 1237, 1182, 1133, 1060, 997, 941, 892, 820, 582, 485, 317, 297. However, in LEO 1269, this Committee prohibited an advancement to a client for living expenses as the loan was a business transaction which could affect the personal judgment of the lawyer. Also, in LEO 1441, the Committee opined that a lawyer may not loan money to a litigation client, with no distinction made regarding how the client would spend the money (i.e., on personal versus litigation expenses).

The Committee recognizes that this interpretation is a minority position. The current Rule 1.8(e) mirrors that provision in the ABA's Model Rules of Professional Conduct. The Committee notes that neither the Comments to Virginia's rules nor those of the Model Rules squarely address this issue of which, if any, expenses would not fall within this prohibition. A majority of jurisdictions with rules containing the language at issue interpret the "in connection with" prohibition as including any and all expenses of a litigation client.[3] However, the Committee does not agree with this majority position as applied to occasional de minimis humanitarian gifts as long as the independent professional judgment of the attorney is and can be maintained.

The Committee finds persuasive the approach of those minority jurisdictions, which find that neither the language nor the spirit of this prohibition create a *per se* ban on all financial assistance, regardless of the purpose or size of the assistance.[4] In *Florida Bar v. Taylor*, 648 So. 2d 1190 (Fla. 1994), the lawyer's gift of second-hand clothing to a litigation client was deemed permissible under Rule 1.8(e) as humanitarian in nature, not made in attempt to maintain employment and not made with any expectation of repayment, from the litigation proceeds or otherwise. The Committee concurs with the Florida court's reasoning that there can be gifts to clients, unrelated to the litigation itself and not involving a loan giving the lawyer an improper stake in the matter, that do not violate Rule 1.8(e). A total prohibition on all such giving paints with an unnecessarily broad brush.

Nevertheless, the Committee acknowledges, for example, in the situation you describe, a *substantial* gift could violate ethical requirements by compromising the representation of a client if the lawyer is also at the time trying, with some difficulty, to persuade the client to accept a plea agreement unappealing to the client. It would be too sweeping to suggest that all gifts, of all sizes, in all circumstances would be permissible. Such a scenario is better addressed by the application of other ethics rules, instead of an overly broad interpretation of Rule 1.8(e).

[3] *See e.g., Attorney Greivance Comm'n v. Pennington*, 733 A.2d 1029 (Md. 1999); *In re Pajerowski*, 721 A.2d 992 (N.J. 1998); *Cleveland Bar Ass'n v. Nusbaum*, 753 N.E.2d 183 (Ohio 2001); *State ex rel. Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456 (Okla. 2000); *In re Strait*, 540 S.E.2d 460 (S.C. 2000); *In re Mines*, 612 N.W.2d 619 (S.D.2000); Md. Ethics Op. 2001-10(prohibiting most assistance); S.D. Ethics Op. 2000-3.

[4] *See e.g., Florida Bar v. Taylor*, 648 So.2d 1190 (Fla. 1994); *In re G.M.*, 797 So.2d 931 (Miss. 2001); *Attorney AAA v. Mississippi Bar*, 735 So.2d 294(Miss. 1999) (note that Miss. rule contains unique language); Conn. Ethics Op. 99-42 (1999); Pa. Ethics Op. 99-8, Md. Ethics Op. 00-42(opinion limited to outright gift of small sum of money).

For example, Rule 1.7 governs conflicts of interest. In particular, Rule 1.7(a) prohibits conflicts of interest where an attorney's personal interest poses significant risk of materially limiting the representation. Could the making of a gift to a client create such a conflict? The Committee acknowledges that a client continually asking for monetary gifts from a lawyer could interfere with the independent professional judgment of the lawyer. Nevertheless, the Committee does caution that an attorney in the present scenario, if he is to make these gifts, should do so in such a way that avoids any impression on the part of the client that the gift is a "reward" or inducement for accepting the plea agreement encouraged by the attorney. The attorney's advice on that point should in no way be linked to the offer of the financial gift.

Rule 1.8 governs various prohibited transactions. As discussed above, the Committee does not consider these gifts to come within the prohibition established in Rule 1.8(e). Moreover, as these are gifts and not loans, Rule 1.8(a) regarding business transactions with a client is not triggered. The Committee opines that these gifts do not constitute any of the other forms of prohibited transactions under Rule 1.8. The gifts contemplated in this hypothetical are presumably of appropriately small amounts.

The second part of the question in this request was whether gifts of this small type may be made by nonattorney staff. The Rules of Professional Conduct regulate members of the Virginia State Bar and do not directly regulate nonattorneys.[5] However, to the extent that the Committee has opined that gifts of the sort described pose no ethical problem for the attorneys, the Committee sees no problem in the attorneys allowing their staff to

[5] Rule 5.3 does establish supervisory accountability for support staff's operation in a manner consistent with the Rules of Professional Conduct:

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

make these occasional, de minimis gifts as well. The attorney must be mindful of the prohibition in Rule 8.4(a) that an attorney cannot do indirectly though another, in this case a staff person, what they cannot do directly.

This opinion is advisory only, and not binding on any court or tribunal.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 480 **March 6, 2018**

Confidentiality Obligations for Lawyer Blogging and Other Public Commentary

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation, including information contained in a public record, unless authorized by a provision of the Model Rules.[1]

Introduction

Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs,[2] listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").[3]

Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. A lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 1.6(b). A lawyer's public commentary may also implicate the lawyer's duties under other Rules, including Model Rules 3.5 (Impartiality and Decorum of the Tribunal) and 3.6 (Trial Publicity).

Online public commentary provides a way to share knowledge, opinions, experiences, and news. Many online forms of public commentary offer an interactive comment section, and, as such, are also a form of social media.[4] While technological advances have altered how lawyers

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016 [hereinafter the "Model Rules"]. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] A "blog" is commonly understood to be a website consisting of written entries (posts) regularly updated and typically written in an informal or conversational style by an individual or small group. As recently described in a California State Bar advisory opinion, "[b]logs written by lawyers run the gamut from those having nothing to do with the legal profession, to informational articles, to commentary on legal issues and the state of our system of justice, to self-promotional descriptions of the attorney's legal practice and courtroom successes to overt advertisements for the attorney or her law firm." State Bar of Cal. Comm'n on Prof'l Responsibility & Conduct Op. 2016-196 (2016).

[3] These are just examples of public written communications but this opinion is not limited to these formats. This opinion does not address the various obligations that may arise under Model Rules 7.1-7.5 governing advertising and solicitation, but lawyers may wish to consider their potential application to specific communications.

[4] Lawyers should take care to avoid inadvertently forming attorney-client relationships with readers of their public commentary. Although traditional print format commentary would not give rise to such concerns, lawyers interacting with readers through social media should be aware at least of its possibility. A lawyer commenting publicly about a legal matter standing alone would not create a client-lawyer relationship with readers of the commentary. *See* Model Rule 1.18 for duties to prospective clients. However, the ability of readers/viewers to make comments or to

communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary.[5]

Duty of Confidentiality Under Rule 1.6

Model Rule 1.6(a) provides:

> 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 paragraph (b).

As Comment [2] emphasizes, "[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."

This confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[6] In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

Unless one of the exceptions to Rule 1.6(a) is applicable, a lawyer is prohibited from commenting publicly about any information related to a representation. Even client identity is protected under Model Rule 1.6.[7] Rule 1.6(b) provides other exceptions to Rule 1.6(a).[8] However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a

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ask questions suggests that, where practicable, a lawyer include appropriate disclaimers on websites, blogs and the like, such as "reading/viewing this information does not create an attorney-client relationship."

Lawyer blogging may also create a positional conflict. *See* D.C. Bar Op. 370 (2016) (discussing lawyers' use of social media advising that "[c]aution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict.") *See also* ELLEN J. BENNETT, ELIZABETH J. COHEN & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 148 (8th ed. 2015) (addressing positional conflicts). *See also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 50-51 (11th ed. 2018) ("[S]ocial media presence can pose a risk for attorneys, who must be careful not to contradict their firm's official position on an issue in a pending case"). This opinion does not address positional conflicts.

[5] *Accord* D.C. Bar Op. 370 (2016) (stating that a lawyer who chooses to use social media must comply with ethics rules to the same extent as one communicating through more traditional forms of communication).

[6] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2017). There is also a general principle noted in the Restatement (Third) of the Law Governing Lawyers that "[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS §59, cmt. e (1998). It is beyond the scope of this opinion to define what specific elements will be considered to distinguish between protected client information and information about the law when they entwine.

[7] *See* Wis. Op. EF-17-02 (2017) ("a client's identity, as well as a former client's identity, is information protected by [Rule 1.6]"); State Bar of Nev. Comm'n on Ethics and Prof'l Responsibility Formal Op. 41, at 2 (2009) ("Even the mere identity of a client is protected by Rule 1.6."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct Op. 92-04 (1992) (explaining that a firm may not disclose list of client names with receivable amounts to a bank to obtain financing without client consent). *See also* MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. [2] (2017) & N.Y. Rules of Prof'l Conduct R. 7.1(b)(2) (requiring prior written consent to use a client name in advertising). *But see* Cal. Formal Op. 2011-182 (2011) ("…[I]n most situations, the identity of a client is not considered confidential and in such circumstances Attorney may disclose the fact of the representation to Prospective Client without Witness Client's consent.") (*citing to* LA County Bar Ass'n Prof'l Responsibility & Ethics Comm'n Op. 456 (1989)).

[8] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)-(7) (2017).

lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.[9]

Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.[10] The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.[11]

A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical.[12] Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is

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[9] For ethical issues raised when a lawyer is participating in an investigation or litigation and the lawyer makes extrajudicial statements, see *infra* at page 6.

[10] *See* ABA Formal Op. 479 (2017). *See also In re* Anonymous, 932 N.E.2d 671 (Ind. 2010) (neither client's prior disclosure of information relating to her divorce representation to friends nor availability of information in police reports and other public records absolved lawyer of violation of Rule 1.6); Iowa S. Ct. Attorney Disciplinary Bd. v. Marzen, 779 N.W.2d 757 (Iowa 2010) (all lawyer-client communications, even those including publicly available information, are confidential); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995) ("[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it"); State Bar of Ariz. Op. 2000-11 (2000) (lawyer must "maintain the confidentiality of information relating to representation even if the information is a matter of public record"); State Bar of Nev. Op. 41 (2009) (contrasting broad language of Rule 1.6 with narrower language of Restatement (Third) of the Law Governing Lawyers); Pa. Bar Ass'n Informal Op. 2009-10 (2009) (absent client consent, lawyer may not report opponent's misconduct to disciplinary board even though it is recited in court's opinion); Colo. Formal Op. 130 (2017) ("Nor is there an exception for information otherwise publicly available. For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news."); *But see In re* Sellers, 669 So. 2d 1204 (La. 1996) (lawyer violated Rule 4.1 by failing to disclose existence of collateral mortgage to third party; because "mortgage was filed in the public record, disclosure of its existence could not be a confidential communication, and was not prohibited by Rule 1.6"); Hunter v. Va. State Bar, 744 S.E.2d 611 (Va. 2013) (rejecting state bar's interpretation of Rule 1.6 as prohibiting lawyer from posting on his blog information previously revealed in completed public criminal trials of former clients). See discussion of *Hunter*, *infra*, at note 20.

[11] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-433 (2004) ("Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.")

[12] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.6 cmt. [4] (2017). The possibility of violating Rule 1.6 using hypothetical facts was discussed in ABA Formal Opinion 98-411, which addressed a lawyer's ability to consult with another lawyer about a client's matter. That opinion was issued prior to the adoption of what is now Rule 1.6(b)(4) which permits lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to secure legal advice about the lawyer's compliance with these Rules. However, the directive provided in Formal Opinion 98-411 remains sound, namely, that a lawyer use caution when constructing a hypothetical. For an illustrative case, see *In re* Peshek, M.R. 23794, 2009 PR 00089 (Ill. 2010). Peshek was suspended for sixty days for violating Rule 1.6. Peshek served as a Winnebago County Public defender for about 19 years. After being assaulted by a client, Peshek began publishing an Internet blog, about a third of which was devoted to discussing her work at the public defender's office and her clients. Peshek's blog contained numerous entries about conversations with clients and various details of their cases, and Peshek referred to her clients by either first name, a derivative of their first name, or their jail ID number, which were held to be disclosures of confidential information in violation of Rule 1.6. She was suspended from practice for 60 days.

not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a).[13] Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record."[14] Accordingly, if a lawyer wants to publicly reveal client information, the lawyer[15] must comply with Rule 1.6(a).[16]

First Amendment Considerations

While it is beyond the scope of the Committee's jurisdiction to opine on legal issues in formal opinions, often the application of the ethics rules interacts with a legal issue. Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals' right to free speech, this right is not without bounds.[17] Lawyers' professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs. For example, when a lawyer acts in a representative capacity, courts often conclude that the lawyer's free speech rights are limited.[18]

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[13] We again note that Rule 1.6(b) provides other exceptions to Rule 1.6(a).

[14] Model Rule 1.9 addresses the duties lawyers owe to former clients. Rule 1.9(c)(1) permits a lawyer, who has formerly represented a client, to use information related to the representation that has become generally known to the disadvantage of a former client, and Rule 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation except as the Rules permit or require with respect to a current client. This opinion does not address these issues under Model Rule 1.9. The generally known exception in Rule 1.9(c)(1) is addressed in ABA Formal Opinion 479.

[15] Lawyers also have ethical obligations pursuant to Rules 5.1 and 5.3 to assure that lawyers and staff they supervise comply with these confidentiality obligations.

[16] In addition to the requirements of Rules 1.6(a), a lawyer may consider other practical client relations and ethics issues before discussing client information in public commentary to avoid disseminating information that the client may not want disseminated. For instance, Model Rule 1.8(b) reads: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) could be read to suggest that a lawyer may use client information if it *does not* disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations. *See* RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 60(2) (1998) ("a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made"). *Accord* D.C. Bar Op. 370 (2016) ("It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client's consent in a written form.")

[17] *See* Gregory A. Garbacz, *Gentile v. State Bar of Nevada: Implications for the Media*, 49 WASH. & LEE L. REV. 671 (1992); D. Christopher Albright, *Gentile v. State Bar: Core Speech and a Lawyer's Pretrial Statements to the Press*, 1992 BYU L. REV. 809 (1992); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569 (1998). *See also* Brandon v. Maricopa City, 849 F.3d 837 (9th Cir. 2017) (when a lawyer speaks to the media in her official capacity as an attorney for county officials, such speech involves her conduct as a lawyer and therefore is not "constitutionally protected citizen speech").

[18] *See In re* Snyder, 472 U.S. 634 (1985) (a law license requires conduct "compatible with the role of courts in the administration of justice"); U.S. Dist. Ct. E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993) ("once a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct"); *In re* Shearin, 765 A.2d 930 (Del. 2000) (lawyers' constitutional free speech rights are qualified by their ethical duties); Ky. Bar Ass'n v. Blum, 404 S.W.3d 841 (Ky. 2013) ("It has routinely been upheld that regulating the speech of attorneys is appropriate in order to maintain the public confidence and credibility of the judiciary and as a condition of '[t]he license granted by the court.'" [citing *Snyder*]); State ex rel. Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982) ("A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into

The plain language of Model Rule 1.6 dictates that information relating to the representation, even information that is provided in a public judicial proceeding, remains protected by Model Rule 1.6(a).[19] A lawyer may not voluntarily disclose such information, unless the lawyer obtains the client's informed consent, the disclosure is impliedly authorized to carry out the representation, or another exception to the Model Rule applies.[20]

At least since the adoption of the ABA Canons of Ethics, the privilege of practicing law has required lawyers to hold inviolate information about a client or a client's representation beyond that which is protected by the attorney-client privilege. Indeed, lawyer ethics rules in many jurisdictions recognize that the duty of confidentiality is so fundamental that it arises before a lawyer–client relationship forms, even if it never forms,[21] and lasts well beyond the end of the professional relationship.[22] It is principally, if not singularly, the duty of confidentiality that enables and encourages a client to communicate fully and frankly with his or her lawyer.[23]

Ethical Constraints on Trial Publicity and Other Statements

Model Rule 3.5 prohibits a lawyer from seeking to influence a judge, juror, prospective juror, or other official by means prohibited by law. Although using public commentary with the client's informed consent may be appropriate in certain circumstances, lawyers should take care not to run afoul of other limitations imposed by the Model Rules. [24]

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some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics.").

[19] *See* ABA Formal Op. 479 (2017). See also cases and authorities cited *supra* at note 10.

[20] One jurisdiction has held that a lawyer is not prohibited from writing a blog that includes information relating to a representation that was disclosed in an open public judicial proceeding after the public proceeding had concluded. In Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013) the Supreme Court of Virginia held that the application of Virginia Rule of Professional Conduct 1.6(a) to Hunter's blog posts was an unconstitutional infringement of Hunter's free speech rights. The Committee regards *Hunter* as limited to its facts. Virginia's Rule 1.6 is different than the ABA Model Rule. The Virginia Supreme Court rejected the Virginia State Bar's position on the interpretation and importance of Rule 1.6 because there was "no evidence advanced to support it." But see *People vs. Isaac* which acknowledges *Hunter* but finds a violation of Colorado Rule 1.6. We note, further, that the holding in *Hunter* has been criticized. *See* Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Give Way to the First Amendment & Social Media in Virginia State Bar ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 98-106 (2013).

[21] *See* MODEL RULES OF PROF'L CONDUCT R. 1.18(b) (2017) (Even when no client–lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation except as permitted by the Rules). *Implementation Chart on Model Rule 1.18*, American Bar Ass'n (Sept. 29, 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckdam.pdf.

[22] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9 (2017); *see also* D.C. Bar Op. 324 (Disclosure of Deceased Client's Files) (2004); Swidler & Berlin v. United States, 524 U.S. 399 (1998). *See also* GILLERS, *supra* note 4, at 34 ("[w]hether the [attorney-client] privilege survives death depends on the jurisdiction but in most places it does").

[23] See generally Preamble to ABA Model Rules for a general discussion of the purposes underlying the duty of confidentiality. *See also* GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, §§ 9.2 & 9.3 at 9-6, 9-14 (3d ed. Supp. 2012).

[24] *See, e.g.*, *In re* Joyce Nanine McCool 2015-B-0284 (Sup. Ct. La. 2015) (lawyer disciplined for violation of Rule 3.5 by attempting to communicate with potential jurors through public commentary); *see also* The Florida Bar v. Sean William Conway, No. SC08-326 (2008) (Sup. Ct. Fla.) (lawyer found to have violated Rules 8.4(a) and (d) for posting on the internet statements about a judge's qualifications that lawyer knew were false or with reckless disregard as to their truth or falsity).

Lawyers engaged in an investigation or litigation of a matter are subject to Model Rule 3.6, Trial Publicity. Paragraph (a) of Rule 3.6 (subject to the exceptions provided in paragraphs (b) or (c)) provides that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Thus any public commentary about an investigation or ongoing litigation of a matter made by a lawyer would also violate Rule 3.6(a) if it has a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter, and does not otherwise fall within the exceptions in paragraphs (b) or (c) of Model Rule 3.6.[25]

Conclusion

Lawyers who blog or engage in other public commentary may not reveal information relating to a representation that is protected by Rule 1.6(a), including information contained in a public record, unless disclosure is authorized under the Model Rules.

[25] Pa. Bar Ass'n Formal Op. 2014-300 (2014) (lawyer involved in pending matter may not post about matter on social media). This opinion does not address whether a particular statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding" within the meaning of Model Rule 3.6.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 10-457 **August 5, 2010**
Lawyer Websites

Websites have become a common means by which lawyers communicate with the public. Lawyers must not include misleading information on websites, must be mindful of the expectations created by the website, and must carefully manage inquiries invited through the website. Websites that invite inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website-initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply.[1]

I. Introduction

Many lawyers and law firms have established websites as a means of communicating with the public. A lawyer website can provide to anyone with Internet access a wide array of information about the law, legal institutions, and the value of legal services. Websites also offer lawyers a twenty-four hour marketing tool by calling attention to the particular qualifications of a lawyer or a law firm, explaining the scope of the legal services they provide and describing their clientele, and adding an electronic link to contact an individual lawyer.

The obvious benefit of this information can diminish or disappear if the website visitor misunderstands or is misled by website information and features. A website visitor might rely on general legal information to answer a personal legal question. Another might assume that a website's provision of direct electronic contact to a lawyer implies that the lawyer agrees to preserve the confidentiality of information disclosed by website visitors.

For lawyers, website marketing can give rise to the problem of unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice. This opinion addresses some of the ethical obligations that lawyers should address in considering the content and features of their websites.[2]

II. Website Content

A. Information about Lawyers, their Law Firm, or their Clients

Lawyer websites may provide biographical information about lawyers, including educational background, experience, area of practice, and contact information (telephone, facsimile and e-mail address). A website also may add information about the law firm, such as its history, experience, and areas of practice, including general descriptions about prior engagements. More specific information about a lawyer or law firm's former or current clients, including clients' identities, matters handled, or results obtained also might be included.

Any of this information constitutes a "communication about the lawyer or the lawyer's services," and is therefore subject to the requirements of Model Rule 7.1[3] as well as the prohibitions against false and misleading statements in Rules 8.4(c) (generally) and 4.1(a) (when representing clients). Together, these rules prohibit false, fraudulent or misleading statements of law or fact. Thus, no website communication may be false or misleading, or may omit facts such that the resulting statement is materially misleading. Rules 5.1 and 5.3 extend this obligation to managerial lawyers in law firms by obligating them to make reasonable efforts to ensure the firm has in place measures giving reasonable assurance that all firm lawyers and nonlawyer assistants will comply with the rules of professional conduct.

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] We do not deal here with website content generated by governmental lawyers or offices or by non-profit law advocacy firms or organizations. *See, e.g., In re Primus*, 436 U.S. 412 (1978) (discussing how solicitation of prospective litigants by nonprofit organizations that engage in litigation as form of political expression and political association constitutes expressive and associational conduct entitled to First Amendment protection, which government may regulate only narrowly).

[3] *See, e.g.*, Arizona State Bar Op. 97-04 (1997), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=480; California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, 2001 WL 34029609 (2001); Hawaii Sup. Ct. Disc. Bd. Formal Op. 41 (2001), available at http://www.odchawaii.com/FORMAL_WRITTEN_OPINIONS.html; South Carolina Bar Eth. Advisory Committee Op. 04-06, 2004 WL 1520110 *1 (2004); Vermont Advisory Eth. Op. 2000-04, *available at* http://www.vtbar.org/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Advertising/advertising.htm. Many state and local ethics opinions are published online can be accessed through the ABA Center for Professional Responsibility website at http://www.abanet.org/cpr/links.html.

As applied to lawyer websites, these rules allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer's law firm, including contact information and information about the law practice.[4] To avoid misleading readers, this information should be updated on a regular basis.[5] Specific information that identifies current or former clients or the scope of their matters also may be disclosed, as long as the clients or former clients give informed consent[6] as required by Rules 1.6 (current clients) and 1.9 (former clients).[7] Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.[8]

B. Information about the Law

Lawyers have long offered legal information to the public in a variety of ways, such as by writing books or articles, giving talks to groups, or staffing legal hotlines. Lawyer websites also can assist the public in understanding the law and in identifying when and how to obtain legal services.[9] Legal information might include general information about the law applicable to a lawyer's area(s) of practice, as well as links to other websites, blogs, or forums with related information. Information may be presented in narrative form, in a "FAQ" (frequently asked questions) format, in a "Q & A" (question and answer) format, or in some other manner.[10]

Legal information, like information about a lawyer or the lawyer's services, must meet the requirements of Rules 7.1, 8.4(c), and 4.1(a). Lawyers may offer accurate legal information that does not materially mislead reasonable readers.[11] To avoid misleading readers, lawyers should make sure that legal information is accurate and current,[12] and should include qualifying statements or disclaimers that "may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client."[13] Although no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two. [14]

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[4] *See, e.g.*, North Carolina State Bar Formal Eth. Op. 2009-6 (2009) (firm may provide case summaries on website, including accurate information about verdicts and settlements, as long as it adds specific information about factual and legal circumstances of cases ((complexity, whether liability or damages were contested, whether opposing party was represented by counsel, firm's success in collecting judgment)) in conjunction with appropriate disclaimer to preclude misleading prospective clients).

[5] *See, e.g.*, Missouri Bar Inf. Advisory Op. 20060005 (2006) (firm must remove lawyer's biographical information within reasonable time after lawyer leaves firm).

[6] *See, e.g.*, Ohio Advisory Op. 2000-6, 2000 WL 1872572 *5 (2000) (law firm may list client's name on firm website with client's informed consent). *See also* New York Rule of Professional Conduct 7.1(b) (2) (2009) (lawyer may advertise name of regularly represented client, provided that client has given prior written consent).

[7] These rules apply to "all information relating to the representation, whatever its source" including publicly available information. Model Rule 1.6 cmt. 3. The consent can be oral or written. Rules 1.6 and 1.9(c) require informed consent, but do not require a written confirmation.

[8] *See* ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 09-455 (2009) (Disclosure of Conflicts Information When Lawyers Move Between Law Firms) (absent demonstrable benefit to client's representation, disclosure of client identifying information, including client's name and nature of matter handled, is not impliedly authorized under Rule 1.6(a)).

[9] Model Rule 7.2 Comment [1] acknowledges that the "public's need to know about legal services can be fulfilled in part through advertising," a need that may be "particularly acute" in the case of persons who have not made extensive use of, or fear they may not be able to pay for, legal services.

[10] *See, e.g.*, Vermont Advisory Eth. Op. 2000-04, *supra* note 3 (lawyer may use "frequently asked questions" format as long as information is current, accurate, and includes clear statement that it does not constitute legal advice and readers should not rely on it to solve individual problem).

[11] Rule 7.1 Comment [2] provides that a "truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion ... for which there is no reasonable factual foundation."

[12] ABA Law Practice Management Section, *Best Practice Guidelines for Legal Information Web Site Providers* 1 (Feb. 2003), *available at* http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/best_practice_guidelines.pdf (website providing legal information should provide full and accurate information about identity and contact details of provider on each page of website, as well as dates on which substantive content was last reviewed).

[13] Model Rule 7.1 cmt. 3. *See, e.g.*, ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 2 (website providers should avoid misleading users about jurisdiction to which site's content relates, and if clearly state-specific, the jurisdiction in which the law applies should be identified).

[14] *See, e.g.*, Arizona State Bar Op. 97-04, *supra* note 3 (because of inability to screen for conflicts of interest and possibility of disclosing confidential information, lawyers should not answer specific legal questions posed by laypersons in Internet chat rooms unless question presented is of general nature and advice given is not fact-specific); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2003-164, 2003 WL 23146203 (2003) (legal advice includes making recommendations about specific course of action to follow; public context of radio call-in show that includes warnings about information not being substitute for individualized legal advice makes it unlikely lawyers have agreed to act as caller's lawyer); South Carolina Bar Eth. Advisory Committee Op. 94-27 *2 (1995), 1995 WL 934127 (lawyer may maintain electronic presence for purpose of discussing legal topics, but must obtain sufficient information to make conflicts check before offering legal advice); Utah Eth. Op. 95-01 (1995), 1995 WL 49472 *1 ("how to" booklet on legal subject matter does not constitute practice of law).

With respect to context, lawyers who speak to groups generally have been characterized as offering only general legal information. With respect to content, lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner's individual circumstances. However, a lawyer who poses and answers a hypothetical question usually will not be characterized as offering legal advice. To avoid misunderstanding, our previous opinions have recommended that lawyers who provide general legal information include statements that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.[15]

Such a warning is especially useful for website visitors who may be inexperienced in using legal services, and may believe that they can rely on general legal information to solve their specific problem.[16] It would be prudent to avoid any misunderstanding by warning visitors that the legal information provided is general and should not be relied on as legal advice, and by explaining that legal advice cannot be given without full consideration of all relevant information relating to the visitor's individual situation.

C. Website Visitor Inquiries

Inquiries from a website visitor about legal advice or representation may raise an issue concerning the application of Rule 1.18 (Duties to Prospective Clients).[17] Rule 1.18 protects the confidentiality of prospective client communications. It also recognizes several ways that lawyers may limit subsequent disqualification based on these prospective client disclosures when they decide not to undertake a matter.[18]

Rule 1.18(a) addresses whether the inquirer has become a "prospective client," defined as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship."

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[15] ABA Inf. Op. 85-1512 (1985) (Establishment of Private Multistate Lawyer Referral Service by Nonprofit Religious Organization), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 1983-1998, at 550, 551 (ABA 2000) (not unethical to prepare articles of general legal information for lay public, but may be prudent to include statement that information furnished is only general and not substitute for personalized legal advice); ABA Inf. Op. 85-1510 (1985) (Establishment of Multistate Private Lawyer Referral Service for Benefit of Subscribers to Corporation's Services), in FORMAL AND INFORMAL ETHICS OPINIONS: FORMAL OPINIONS 1983-1998, at 544, 545 (corporate counsel may author articles of general legal information for corporations' subscriber newsletter, but "good practice" to include a statement that information is only general in nature and not substitute for personal legal advice).

[16] *See, e.g.*, ABA Law Practice Management Section, *Best Practice Guidelines*, *supra* note 12 at 3 (websites that provide legal information should give users conspicuous notice that information does not constitute legal advice). Some state opinions also warn against providing specific or particularized facts in a lawyer's communication to avoid creating a client-lawyer relationship. *See also* District of Columbia Bar Eth. Op. 316 (2002), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion316.cfm (online chat rooms and listserves); Maryland State Bar Ass'n Committee on Eth. Op. 2007-18 (2008) (lawyer conducting domestic relations law seminars for lay public); New Jersey Advisory Committee on Prof'l Eth. Op. 712 (2008) (Attorney-Staffed Legal Hotline For Members of Nonprofit Trade Association), *available at* http://lawlibrary.rutgers.edu/ethics/acpe/acp712_1.html (lawyer staffing telephone hotline); New Jersey Advisory Committee on Prof'l Eth. Op 671, 1993 WL 137685 (1993) (Activities and Obligations of Pro Bono Attorneys), (lawyer-volunteer at abused women shelter); New Mexico Bar Op. 2001-1 (2001) (Application of Rules of Professional Conduct to Lawyer's Use of Listserve-type Message Boards and Communications) (listserves); Wisconsin Prof'l Eth. Committee Op. E-95-5 (1995), *available at* http://www.wisbar.org/AM/Template.cfm?Section=Legal_Research&Template=/CustomSource/Search/Search.cfm&output=xml_no_dtd&proxystylesheet=wisbar5&client=wisbar5&filter=1&start=0&Site=SBW&q=%22formal+opinion%22+E%2D95%2D5&submit=ethics (lawyer-volunteer at organization that provides information about landlord-tenant law). The Model Rules defer to "principles of substantive law external to these Rules [to] determine when a client-lawyer relationship exists." Scope cmt. 17.

[17] *See, e.g.*, Arizona State Bar Op. 02-04 (2002), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=288 (lawyer does not owe duty of confidentiality to individuals who unilaterally e-mail inquiries to lawyer when e-mail is unsolicited); California Standing Committee on Prof'l Resp. and Conduct Formal Op. 2001-155, *supra* note 3 (lawyer may avoid incurring duty of confidentiality to persons who seek legal services by visiting lawyer's website and disclose confidential information only if site contains clear disclaimer); Iowa Bar Ass'n Eth. Op. 07-02 (2007), *available at* http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument (message that encourages detailed response about case could in some situations be considered bilateral); New Hampshire Bar Ass'n Eth. Committee Op. 2009-2010/1(2009), *available at* http://www.nhbar.org/legal-links/ethics1.asp (when law firm's website invites public to send e-mail to one of firm's lawyers, it is opening itself to potential obligations to prospective clients); Ass'n of the Bar of the City of New York, Formal Op. 2001-1 (2001) (Obligations Of Law Firm Receiving Unsolicited E-Mail Communications From Prospective Client), *available at* http://www.abcny.org/Ethics/eth2001-01.html (where firm website does not adequately warn that information transmitted will not be treated as confidential, information should be held in confidence by lawyer receiving communication and not disclosed to or used for benefit of another client even though lawyer declines to represent potential client); New Jersey Advisory Committee on Prof'l Eth. Op. 695, 2004 WL 833032 (2004) (firm has duty to keep information received from prospective client confidential); San Diego County Bar Ass'n Eth. Op. 2006-1 (2006), *available at* http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1 (private information received from non-client via unsolicited e-mail is not required to be held as confidential if lawyer has not had opportunity to warn or stop flow of information at or before the communication is delivered).

[18] Lawyers do not normally owe confidentiality obligations to persons who are not clients (protected by Rule 1.6), former clients (Rule 1.9), or prospective clients (Rule 1.18).

To "discuss," meaning to talk about, generally contemplates a two-way communication, which necessarily must begin with an initial communication.[19] Rule 1.18 implicitly recognizes that this initial communication can come either from a lawyer or a person who wishes to become a prospective client.

Rule 1.18 Comment [2] also recognizes that not all initial communications from persons who wish to be prospective clients necessarily result in a "discussion" within the meaning of the rule: "a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a prospective client."

For example, if a lawyer website specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18, will result when a website visitor submits the requested information.[20] If a website visitor submits information to a site that does not specifically request or invite this, the lawyer's response to that submission will determine whether a discussion under Rule 1.18 has occurred.

A telephone, mail or e-mail exchange between an individual seeking legal services and a lawyer is analogous.[21] In these contexts, the lawyer takes part in a bilateral discussion about the possibility of forming a client-lawyer relationship and has the opportunity to limit or encourage the flow of information. For example, the lawyer may ask for additional details or may caution against providing any personal or sensitive information until a conflicts check can be completed.

Lawyers have a similar ability on their websites to control features and content so as to invite, encourage, limit, or discourage the flow of information to and from website visitors.[22] A particular website might facilitate a very direct and almost immediate bilateral communication in response to marketing information about a specific lawyer. It might, for example, specifically encourage a website visitor to submit a personal inquiry about a proposed representation on a conveniently-provided website electronic form which, when responded to, begins a "discussion" about a proposed representation and, absent any cautionary language, invites submission of confidential information.[23] Another website might describe the work of the law firm and each of its lawyers, list only contact information such as a telephone number, e-mail or street address, or provide a website e-mail link to a lawyer. Providing such information alone does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship.[24] A lawyer's response to an inquiry submitted by a visitor who uses this contact information may, however, begin a "discussion" within the meaning of Rule 1.18.

In between these two examples, a variety of website content and features might indicate that a lawyer has agreed to discuss a possible client-lawyer relationship. A former client's website communication to a lawyer about a new matter must be analyzed in light of their previous relationship, which may have given rise to a reasonable expectation of confidentiality.[25] But a person who knows that the lawyer already declined a particular representation or is already representing an adverse party can neither reasonably expect confidentiality, nor reasonably believe that

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[19] For example, in ABA Committee on Eth. and Prof'l Responsibility, Formal Op. 90-358 (1990) (Protection of Information Imparted by Prospective Client), this Committee considered the obligations of a lawyer who engaged in such a "discussion" in the context of a face-to-face meeting.

[20] Rule 1.18 cmt. 1.

[21] *See, e.g.*, Virginia Legal Eth. Op. 1842 (2008), *available at* http://www.vacle.org/opinions/1842.htm (absent voicemail message that asks for detailed information, providing phone number and voicemail is an invitation only to contact lawyer, not to submit confidential information); Iowa State Bar Ass'n Eth. Op. 07-02 ("Communication from and with Potential Clients), *available at* http://www.iowabar.org/ethics.nsf/e61beed77a215f6686256497004ce492/cb0a70672d69d8c1862573380013fb9d?OpenDocument (telephone voicemail message that simply asks for contact details does not give rise to bilateral communication, but message that encourages caller to leave detailed messages about their case could be considered bilateral).

[22] *See, e.g.*, Arizona State Bar Op. 02-04 (2002), *available at* http://www.myazbar.org/Ethics/opinionview.cfm?id=288 (lawyers who maintain websites with e-mail links should include disclaimers to clarify whether e-mail communications from prospective clients will be treated as confidential); Massachusetts Bar Ass'n Op. 07-01 (2007), *available at* http://www.massbar.org/publications/ethics-opinions/2000-2009/2007/opinion-07-01 (lawyer who receives unsolicited information from prospective client through e-mail link on law firm website without effective disclaimer must hold information confidential because law firm has opportunity to set conditions on flow of information); South Dakota Bar Eth. Op. 2002-2 (2002) (lawyer's website that invites viewers to send e-mail through jump site creates expectation of confidentiality).

[23] *See, e.g.*, Iowa State Bar Ass'n Eth. Op. 07-02, *supra* note 21 (web page inviting specific questions constitutes bilateral communication with expectation of confidentiality) and Virginia Legal Eth. Op. 1842 *supra* note 21 (website that specifically invites visitor to submit information in exchange for evaluation invites formation of client-lawyer relationship).

[24] E-mails received from unknown persons who send them apart from the lawyer's website may even more easily be viewed as unsolicited. *See, e.g.*, Arizona State Bar Op. 02-04, *supra* note 22 (e-mail to multiple lawyers asking for representation); Iowa State Bar Ass'n Eth. Op. 07-02, *supra* note 21 (website that gives contact information does not without more indicate that lawyer requested or consented to sending of confidential information); San Diego County Bar Assn. Op. 2006-1, *available at* http://www.sdcba.org/index.cfm?Pg=ethicsopinion06-1 (inquirer found lawyer's e-mail address on state bar membership records website accessible to the public).

[25] *See, e.g.*, Iowa State Bar Ass'n Committee Eth. Op. 07-02, *supra* note 22 (lack of prior relationship with person sending unsolicited e-mail requesting representation was one factor in determining whether communicator's disclosures were unilateral and whether expectation of

the lawyer wishes to discuss a client-lawyer relationship. Similarly, a person who purports to be a prospective client and who communicates with a number of lawyers with the intent to prevent other parties from retaining them in the same matter should have no reasonable expectation of confidentiality or that the lawyer would refrain from an adverse representation.[26]

In other circumstances, it may be difficult to predict when the overall message of a given website communicates a willingness by a lawyer to discuss a particular prospective client-lawyer relationship. Imprecision in a website message and failure to include a clarifying disclaimer may result in a website visitor reasonably viewing the website communication itself as the first step in a discussion.[27] Lawyers are therefore well-advised to consider that a website-generated inquiry may have come from a prospective client, and should pay special attention to including the appropriate warnings mentioned in the next section.

If a discussion with a prospective client has occurred, Rule 1.18(b) prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent.[28] When the discussion reveals a conflict of interest, the lawyer should decline the representation,[29] and cannot disclose the information received without the informed consent of the prospective client.[30] For various reasons, including the need for a conflicts check, the lawyer may have tried to limit the initial discussion and may have clearly expressed those limitations to the prospective client. If this has been done, any information given to the lawyer that exceeds those express limitations generally would not be protected under Rule 1.18(b).

Rule 1.18(c) disqualifies lawyers and their law firms who have received information that "could be significantly harmful" to the prospective client from representing others with adverse interests in the same or substantially related matters.[31] For example, if a prospective client previously had disclosed only an intention to bring a particular lawsuit and has now retained a different lawyer to initiate the same suit, it is difficult to imagine any significant harm that could result from the law firm proceeding with the defense of the same matter.[32] On the other hand, absent an appropriate warning, the prospective client's prior disclosure of more extensive facts about the matter may well be disqualifying.

Rule 1.18(d) creates two exceptions that allow subsequent adverse representation even if the prospective client disclosed information that was significantly harmful: (1) informed consent confirmed in writing from both the affected and the prospective client, or (2) reasonable measures to limit the disqualifying information, combined with timely screening of the disqualified lawyer from the subsequent adverse matter. Rule 1.18(d) (2) specifically would allow the law firm (but not the contacted lawyer) to "undertake or continue" the representation of someone with adverse interests without receiving the informed consent of the prospective client if the lawyer who initially received the information took reasonable precautions to limit the prospective client's initial disclosures and was timely screened from further involvement in the matter as required by Rule 1.0(k).

III. Warnings or Cautionary Statements Intended to Limit, Condition, or Disclaim a Lawyer's Obligations to Website Visitors

Warnings or cautionary statements on a lawyer's website can be designed to and may effectively limit, condition, or disclaim a lawyer's obligation to a website reader. Such warnings or statements may be written so as

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confidentiality was reasonable); Oregon Eth. Op. 2005-146, 2005 WL 5679570 *1 (2005) (lawyer who sends periodic reminders to former clients risks giving recipients reasonable belief they are still current clients).

[26] *See, e.g.*, Virginia Legal Eth. Op. 1794 (2004), *available at* http://www.vacle.org/opinions/1794.htm (person who meets with lawyer for primary purpose of precluding others from obtaining legal representation does not have reasonable expectation of confidentiality); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 2001-1 (2001), *available at* http://www.abcny.org/Ethics/eth2001.html ("taint shoppers," who interview lawyers or law firms for purpose of disqualifying them from future adverse representation, have no good faith expectation of confidentiality).

[27] *See e.g.*, Massachusetts Bar Ass'n Op. 07-01, *supra* note 22 (in absence of effective disclaimer, prospective client visiting law firm website that markets background and qualifications of each lawyer in attractive light, stresses lawyer's skill at solving clients' practical problems, and provides e-mail link for immediate communication with that lawyer might reasonably conclude that firm and its individual lawyers have implicitly "agreed to consider" whether to form client-lawyer relationship).

[28] Rule 1.18(b) allows disclosure or use if permitted by Rule 1.9. Rule 1.9(c) (2) and its Comment [7] in turn link disclosure to Rule 1.6, the general confidentiality rule, which requires client informed consent to disclosure.

[29] Rule 1.18 cmt. 4.

[30] Rule 1.18 cmt. 3.

[31] *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 (2) (2000).

[32] Rule 1.18 cmt. 5 also allows lawyers to condition an initial conversation on the prospective client's informed consent to subsequent adverse representation in the same matter or subsequent use of any confidential information provided.

to avoid a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created;[33] (2) the visitor's information will be kept confidential;[34] (3) legal advice has been given;[35] or (4) the lawyer will be prevented from representing an adverse party.[36]

Limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading. This requires a clear warning in a readable format whose meaning can be understood by a reasonable person.[37] If the website uses a particular language, any waiver, disclaimer, limitation, or condition must be in the same language. The appropriate information should be conspicuously placed to assure that the reader is likely to see it before proceeding.[38]

Finally, a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to its warning.

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[33] *See, e.g.*, New Mexico Bar Op. 2001-1 (2001), *available at* http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html (appropriate disclaimers of attorney-client relationship should accompany any response to listserve message board, but any response that would suggest to reasonable person that, despite disclaimer, relationship is being or has been established, would negate disclaimer); North Carolina State Bar Formal Eth. Op. 2000-3, 2000 WL 33300702 *2 (2000) (Responding to Inquiries Posted on a Message Board on the Web) (lawyers who do not want to create client-lawyer relationships on law firm message board should use specific disclaimers on any communications with inquirers, but substantive law will determine whether client-lawyer relationship is created); Ass'n of the Bar of the City of New York Committee on Prof'l and Jud. Eth. Formal Op. 1998-2 (1998), *available at* http://www.abcny.org/Ethics/eth1998-2.htm (disclaimer that "if specific legal advice is sought, we will indicate that this requires establishment of an attorney-client relationship which cannot be carried out through the use of a web page" may not necessarily serve to shield law firm from claim that attorney-client relationship was established by specific on-line communications); Utah State Bar Eth. Advisory Op. Committee Op. 96-12, 1997 WL 45137 *1 (1997) ("if legal advice is sought from an attorney, if the advice sought is pertinent to the attorney's profession, and if the attorney gives the advice for which fees will be charged, an attorney-client relationship is created that cannot be disclaimed by the attorney giving the advice"); Vermont Bar Ass'n Advisory Eth. Op. 2000-04 (2000), *supra* note 3 (despite website caveat and disclaimers, nonlawyer may still rely on information on website or lawyer's responses; disclaimer cannot preclude possibility of establishing client-lawyer relationship in an individual case).

[34] The Committee does not opine whether a confidentiality waiver might affect the attorney-client privilege. *See, e.g.*, Barton v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 410 F. 3d 1104, 1111-12 (9th Cir. 2005) (checking "yes" box on law firm website that acknowledged providing information in answer to questionnaire "does not constitute a request for legal advice and I am not forming an attorney-client relationship by submitting this information" did not waive attorney-client privilege because confidentiality was not mentioned in attempted disclaimer and questionnaires were nevertheless submitted in course of seeking attorney-client relationship in potential class action). *Cf.* Schiller v. The City of New York, 245 F.R.D. 112, 117-18 (S.D.N.Y. 2007) (although privilege may protect pre-engagement communications from prospective clients, it does not apply to person who completed questionnaires soliciting information from N.Y. Civil Liberties Union to allow it to "effectively advocate for change"). *See also* David Hricik, *To Whom it May Concern: Using Disclaimers to Avoid Disqualification by Receipt of Unsolicited E-Mail from Prospective Clients*, 16 ABA PROFESSIONAL LAWYER 1, 5 (2005) (agreement that waives all confidentiality tries to do too much and might destroy the ability of prospective client who eventually becomes firm client to claim privilege).

[35] *See* note 15 *supra.*

[36] Rule 1.18 cmt. 5.

[37] *See, e.g.*, California Bar Committee on Prof'l Resp. Op. 2005-168, 2005 WL 3068090 *4 (2005) (finding disclaimer stating that "confidential relationship" would not be formed was not enough to waive confidentiality, because it confused not forming client-lawyer relationship with agreeing to keep communications confidential).

[38] *See, e.g.*, District of Columbia Bar Eth. Op. 302 (2000), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion302.cfm (lawyers may want to use "click through" pages that automatically direct the reader to another webpage containing disclaimers to ensure that visitors are not misled and other devices such as confirmatory messages that clarify nature of relationship); Virginia Legal Eth. Op. 1842, *supra* note 21 (approving of prominent "click through" disclaimers that require readers to assent to terms of disclaimer before submitting information). Courts have refused to uphold disclaimers or licensing agreements that appeared on separate pages and did not require a reader's affirmative consent to their terms because they did not provide reasonable notice). *See, e.g.*, Sprecht v. Netscape Communications Corp., 306 F.3d 17, 31-32 (2d Cir. 2002). On the other hand, courts have upheld website restrictions that provided actual knowledge by presenting the information and requiring an affirmative action (a click through or "clickwrap" agreement) before gaining access to the website content. *See, e.g.*, Register.com v. Verio, 356 F.3d 393, 401-02 (2d Cir. 2004).

STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESONSIBILITY

Formal Opinion No. 33
Issued February 9, 2006

BACKGROUND

A Nevada attorney has requested an opinion concerning the application of Supreme Court Rules to the attorney's use of an outside agency to store electronically formatted client information. In the situation posed, the attorney's electronic client files, which contain confidential client information and communications, are stored on a server or other computer device which is physically located and maintained by a third party outside the attorney's direct control and supervision. It is assumed that the attorney can, as part of his or her service contract with the third party, require that all reasonably necessary means be employed by the third party to preserve the confidentiality of the information and to prevent unauthorized access to it and disclosure of it. It is also assumed, however, that employees of the third party agency will, by virtue of their employment, have access, both authorized and unauthorized, to the confidential client information.

QUESTION PRESENTED

The committee has revised the question originally presented to more broadly address the lawyer's duty of confidentiality with respect to electronic client information. The question addressed in this opinion is whether a lawyer violates SCR 156 by storing confidential client information and/or communications, without client consent, in an electronic format on a server or other device that is not exclusively in the lawyer's control.

ANSWER

The lawyer's duty to protect client confidentiality under Supreme Court Rule 156 is not absolute. In order to comply with the rule, the lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure. This may be accomplished while storing client information electronically with a third party to the same extent and subject to the same standards as with storing confidential paper files in a third party warehouse. If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate SCR 156 simply by contracting with a third party to store the information, even if an unauthorized or inadvertent disclosure should occur.

SUPREME COURT RULE INTERPRETED

Supreme Court Rule 156

AUTHORITIES AND REFERENCES

ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999).

ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 95-398 (1995).

ABA Committee on Lawyers' Responsibility for Client Protection, *Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication* (1986).

ABA Committee on Professional Ethics, Informal Opinion No. 1127 (1970).

Anderson, J.C., *Transmitting Legal Documents over the Internet: How to Protect Your Cient and Yourself,* 27 Rutgers Computer & Tech. L.J. 1 (2001).

Annotated Model Rules of Professional Conduct, 5th ed. (ABA, 2003), Rule 1.6 and accompanying commentary.

California Standing Committee on Professional Responsibility and Conduct, Formal Opinion number 1971-25.

Hopkins, R.S. & Reynolds, P.R., *Redefining Privacy and Security in the Electronic Communication Age: A Lawyer's Ethical Duty in the Virtual World of the Internet,* 16 Geo. J. Legal Ethics 675 (2003).

Winick, M.L., Burris, B. & Bush, Y.D. *Playing I Spy with Client Confidences: Confidentiality, Privilege and Electronic Communications,* 31 Tex. Tech L. Rev. 1225 (2000).

DISCUSSION

A lawyer must act competently to safeguard against inadvertent or unauthorized disclosure of confidential client information. While a lawyer is not strictly liable for any breach of client confidentiality, his duty includes reasonable precautions to prevent both accidental and unauthorized disclosure. SCR 156; Model Rule 1.6, comment 16. A client, however, may give informed consent to a means of protection that might otherwise be considered insufficient. For purposes of this opinion, however, it is presumed that the client has not waived any right to confidentiality or consented to a means of protection that would otherwise violate the Supreme Court Rules absent informed consent.

Opinions directly addressing this issue, particularly with respect to electronic data, are scarce and somewhat outdated given the recent advances in electronic communications and data processing. Available opinions and commentary added to Model Rule 1.6 by

the ETHICS 2000 amendments, however, clearly support the answer stated in this opinion.

The ABA Committee on Professional Ethics, in Informal Opinion No. 1127 (1970) (interpreting former Canon 37), addressed the question whether confidential client information could be stored in a central computer facility, in which the information would be accessible to, but would not necessarily be accessed by, employees of the facility. The committee determined that so long as arrangements were made so that the information transmitted to the data processor was kept in confidence, and the employees of the law firm and the data processor did not permit disclosure to any unauthorized person, then there was no violation of the lawyer's duty of confidentiality. The required "arrangements", in the committee's opinion, consisted of competence and reasonable care in 1) the selection of the third party contractor and 2) an express contractual requirement that the contractor and its employees keep the information confidential and protected from unauthorized access or disclosure.

In Formal Opinion number 1971-25, the California Standing Committee on Professional Responsibility and Conduct responded differently, but to a somewhat different question. That opinion addressed an attorney's transmission of confidential client information, without prior client consent, to a "data processing center for bookkeeping, billing, accounting, and statistical purposes." Id. at p. 2. The question there was somewhat different than that presented here in that it was presumed that at least one of the purposes of the transmission of the information to the "data processing center" would necessitate the disclosure of confidential client information to a person or persons not employed, supervised or controlled by the attorney. The committee concluded that without the client's consent, the disclosure of confidential information to a third person in such circumstances violates the attorney's duty of confidentiality.

The issue presented here is more similar to that involved in the ABA committee opinion. The use of an outside data storage or server does not necessarily require the revelation of the data to anyone outside the attorney's employ. The risk, from an ethical consideration, is that a rogue employee of the third party agency, or a "hacker" who gains access through the third party's server or network, will access and perhaps disclose the information without authorization. In terms of the client's confidence, this is no different in kind or quality than the risk that a rogue employee of the attorney, or for that matter a burglar, will gain unauthorized access to his confidential paper files. The question in either case is whether the attorney acted reasonable and competently to protect the confidential information. The California opinion is thus distinguished by the presumption underlying that opinion that the attorney could exercise no control whatsoever over the confidential information in the hands of the third party contractor.

Subsequent ABA opinions concerning client confidentiality in the electronic age have to some degree reflected the evolution of electronic technology itself. In 1986, an ABA committee issued a report cautioning lawyers against electronic client communications and concluded that an attorney should not communicate with clients electronically without first obtaining the client's informed consent or being reasonably assured of the

security of the electronic system in question. ABA Committee on Lawyers' Responsibility for Client Protection, *Lawyers on Line: Ethical Perspectives in the Use of Telecomputer Communication* (1986). The committee did not ban all such communication, but rather described the lawyer's obligation in this regard as an affirmative duty to competently investigate the electronic communications system and form a reasonably conclusion as to its security. Id.

The ABA Committee addressed an issue much closer to that discussed here in Formal Opinion number 95-398, and concluded that a lawyer may give a computer maintenance company access to confidential information in client files, but that in order to comply with the obligation of client confidentiality, he or she "must make reasonable efforts to ensure that the company has in place, or will establish, reasonable procedures to protect the confidentiality of client information." The ABA Committee recognized in that opinion the growing practicality and availability of third party electronic data services, but clearly concluded that the duty of confidentiality is not breached so long the attorney is reasonable and competent in the creation and management of the outside contractor arrangement.

In a later formal opinion, the ABA Committee continued this trend and retreated substantially from the 1986 opinion concerning the encryption of e-mail. That opinion concluded that sending confidential client communications by unencrypted email does not violate the lawyer's duty of confidentiality because unencrypted email still affords a reasonable expectation of privacy from both legal and technological standpoints. ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 99-413 (1999). The committee left open the likelihood, however, that cases of particularly sensitive client communications may require extraordinary security precautions, since the reasonableness and competence of the lawyer's actions must be judged in the context of the relative sensitivity of the particular confidential information or communication at stake. See Model Rule 1.6, comments 16 and 17.

Nearly all state bar associations and committees addressing the issue have adopted the ABA's 1999 approach to email communications. Hopkins & Reynolds at 677-78; Winich, Burris & Bush at 1252-1254. Commentators have argued that further advances in technology will increase the lawyer's obligation with respect to electronic client communications and information and that "reasonable" action to protect client confidentiality already may include encryption, virus protection and other similar security measures as they become more efficient and cost effective, and as electronic communications and data storage may eventually be found to afford less than a reasonable expectation of privacy. Hopkins & Reynolds at 691.

The ABA, at least for now, has continued the course set in the 1999 formal opinion, adding two new comments to Model Rule 1.6 to reinforce the view that electronic communications and information require no special security or confidentiality measures that would not otherwise be required in communication in a more traditional format. The new comments are:

[16] 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.

[17] 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 or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

The previous ABA opinions and the new comments to Rule 1.6 clearly evidence the ABA's policy to treat electronic client communications and information according to existing rules and not to hold an attorney responsible for a breach of client confidentiality, or for storing client information in such a manner that the breach is possible, so long as the attorney:

1. Exercises reasonable care in the selection of the third party contractor, such that the contractor can be reasonably relied upon to keep the information confidential; and
2. Has a reasonable expectation that the information will be kept confidential; and
3. Instructs and requires the third party contractor to keep the information confidential and inaccessible.

CONCLUSION

The ETHICS 2000 comments to Model Rule 1.6, and decisions under the Supreme Court Rules, generally apply traditional rules of confidentiality to new forms of communication and document storage. Thus, the practice at issue here can be compared to the storage of paper documents containing confidential client information in a warehouse operated by company or person outside the lawyer's direct control. In such a case, the same risk exists that an employee of the warehouse, or some other person, will access and perhaps disclose the information without authorization. But neither the Model Rules nor the Supreme Court Rules would prohibit the third party storage arrangement altogether. Rather, they require the attorney to act reasonably and competently to protect the information from inadvertent and unauthorized access and disclosure.

It is therefore the opinion of this committee that an attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney's direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent.

The client may consent to the storage of confidential information in any manner. It is clear that SCR 156 and the Supreme Court Rules generally would prefer that the lawyer obtain the client's informed consent before transmitting confidential information to third parties in any case, but the rules do not prohibit the storage of electronic client information, without client consent, in any manner that complies with the lawyer's duty to competently and reasonably safeguard the confidentiality of client information.

NOTE: This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada pursuant to SCR 225. It is advisory only. It is not binding on the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibility, or any other member of the State Bar of Nevada.

STATE BAR OF NEVADA

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 41[1]
Issued on June 24, 2009

QUESTION

Confidentiality – What types of information about a client does Rule 1.6 restrict the lawyer from revealing?

ANSWER

ALL information relating to the representation of the client.

DISCUSSION

It is well known by both lawyers and clients that the rules of ethics governing lawyers prohibits a lawyer from revealing confidential client information without the consent of the client. This "confidentiality rule" is at the heart of the lawyer-client relationship[2] and has been embodied in the written rules of ethics since 1908.[3] The current Nevada rule is Rule 1.6 of the Nevada Rules of Professional Conduct. The general rule of confidentially is contained in Rule 1.6(a):

> *Rule 1.6. Confidentiality of Information.*
>
> *(a) A lawyer shall not reveal information relating to 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 paragraphs (b) and (c).*

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[1] This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

[2] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.2 (3d ed. 2005).

[3] 1908 ABA Canons of Ethics, Canon 6; 1969 ABA Mode Code, DR 4-101; and 1983 ABA Model Rules of Professional Conduct, Rule 1.6.

Rule 1.6(a) imposes a duty on all lawyers not to reveal information relating to the representation of their clients to anyone unless there is an applicable exception.[4]

The information protected by the lawyer's ethical confidentiality duty under Rule 1.6 is much broader than privileged information protected by the attorney-client privilege under NRS 49.185.[5] Comment [3] to ABA Model Rule 1.6 provides:

> *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.*[6]

Rule 1.6 prohibits a lawyer from volunteering any information relating to representation of a client; the attorney-client privilege prohibits a lawyer from being compelled to reveal confidential communications between a lawyer and a client.[7]

In contrast to predecessor Rule DR 4-101[8], the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.

The first is the omission of the qualifier "confidential" between "reveal" and

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[4] *McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987); *Todd v. State*, 113 Nev. 18, 931 P.2d 721 (1977).

[5] *Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent).

[6] Cited approvingly by *McKay v. Bd. of Co. Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987).

[7] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.2 (3d ed. 2005).

[8] This Rule was in effect in Nevada until 1986.

"information".[9] As a result, all information relating to the representation of the client is thereby made confidential.[10] Rule DR 4-101 protected the client from the lawyer's disclosure of "secrets", defined as: (1) information that the client "has requested to be held inviolate"; and (2) information that would be "embarrassing" or "likely to be detrimental" if revealed.[11]

The second remarkable aspect of Rule 1.6(a) is that the confidential information need not be information that is "adverse" to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.[12]

The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement's definition of "confidential client information", but omitted from Rule 1.6.[13]

Thus, the language of Rule 1.6(a) is so broad that it is – at least on its face – without limitation. Rule 1.6(a) requires that **ALL** information relating to the representation of a client is confidential and protected from disclosure. Even the mere identity of a client is protected by Rule 1.6.[14] The Rule applies:

1. Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically;[15]

2. Even though the information is not protected by the attorney-client

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[9] *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995).

[10] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

[11] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005). In fact, the Washington State Bar revised Model Rule 1.6 so that its Rule 1.6 reads: "A lawyer shall not reveal confidences or secrets relating to representation of a client..." *In re Disciplinary Proceedings Against Schafer*, 66 P.3d 1036 (2003).

[12] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.6, n. 92 (1986).

[13] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (2001).

[14] *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[15] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

privilege;[16]

3. Regardless of when the lawyer learned of the information – even before or after the representation;[17]

4. Even if the information is not embarrassing or detrimental to client;[18]

5. Whatever the source of the information; *i.e.*, whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally;[19]and

6. (In contrast to the attorney-client privilege) even if the information is already generally known – or even public information.[20]

By a literal reading of Rule 1.6, even a laudatory comment about a client or the client's achievement may violate the letter of the Rule. However, the Committee believes that the absolute wording of Rule 1.6 is not literally meant to make every disclosure of the most innocuous bit of client information an ethical violation; but rather it is intended to strongly caution the lawyer to give consideration to the rule of client confidentiality – and whether the informed consent of the client should be obtained – whenever the lawyer makes any verbal, written or electronic communication relating to the client.[21] For example, a lawyer advising his or her spouse that the lawyer will be traveling overnight to a distant city to defend the deposition of Client A in case A vs. B, is technically the revelation of "information relating to representation of a client" without client consent.[22] The Committee suggests that common sense should be a part of Rule 1.6 and the lawyer

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[16]*See Eighth Judicial Dist. Court v. County of Clark*, 116 Nev. 1200, 14 P.3d 1266 (2000)(Agosti, Shearing, Leavitt dissent)

[17]CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 (1986).

[18]CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.2, at 298 and §6.7.3, at 305 (1986); *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[19]Comment [3] to ABA Model 1.6; Restatement 3rd, The Law Governing Lawyers, §59 Cmt b; *In re Advisory Opinion No. 544 of the New Jersey Supreme Court*, 511 A.2d 609 (1986).

[20]GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005); *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995); Ariz. Ethics Op. 2000-11 (2000).

[21]*See* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

[22]CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §6.7.3, at 301 (1986).

should not be disciplined for a harmless disclosure.

The following are examples of common situations which raise issues under Rule 1.6(a) in the absence of client consent. They are offered – not as examples of Rule 1.6 violations *per se* – but as "food for thought" for all lawyers before communicating any information related to the representation of a client:

1. Phoning a client when the client is not at home and leaving a message about the representation on client's answering machine or discussing the matter with the roommate, or spouse of the client;[23]

2. Submitting a copy of the lawyer's client billing statements in support of an application for fees, such as a post-judgment motion or at the end of a probate;[24]

3. Submitting a client list (revealing the identity of the client) to a bank to support the lawyer's loan application;[25]

4. Listing some clients in a law firm brochure (revealing the identity of the clients);[26]

5. Processing a credit card payment (revealing the identity of the client) to the credit card company;[27]

6. Telling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case;[28]

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[23] *People v. Hohertz*, 102 P.3d 1019 (Colo. 2004).

[24] There are generally two types of lawyer billing statements: (1) general "for services rendered" invoices that do not reveal the detail of the work performed; and (2) itemized statements that give a detailed description of all work performed by the lawyer on a date-by-date basis. For purposes of Rule 1.6, the difference does not matter. Even a general balance due invoice contains "information relating to representation of a client", including the fact that the client *is* a client, the client's address, the previous balance due to the lawyer, the amount of payments made by the client to the lawyer and the total billed to the client for the billing period.

[25] Ill. Ethics Op. 97-1 (1997).

[26] Iowa Ethics Op. 97-4 (1997).

[27] Utah Ethics Op. 97-06 (1997).

[28] GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS, §9.15 (3d ed. 2005).

7. A lawyer taking a client file or batch of discovery documents to the local photocopy shop for copying;[29]

8. A law firm employing an outside computer tech support person to trouble shoot the firm's computer system;[30]

9. The auditing of insurance defense attorney billing statements by an insurance company auditor;[31]

10. A request for attorney billing statements by a homeowner to the lawyer for the homeowner's association;

11. A request for attorney billing statements by a disgruntled shareholder of a corporation represented by the lawyer in litigation;

12. A request for attorney billing statements under the Open Records Act[32] to a public entity represented by outside counsel;[33] and

13. The law firm's listing of its "best" clients in Martindale-Hubbell.

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[29]ABA Formal Opinion 08-451 (2008).

[30]ABA Formal Opinion 08-451 (2008).

[31]D.C. Bar Ethics Op. 290 (1999); Amy S. Moats, *A Bermuda Triangle in Tripartite Relationship: Ethical Dilemas Raised by Insurers' Billing and Litigation Management Guidelines*, 105 W. Va. L. Rev. 525 n.58 (Winter 2003).

[32]Chapter 239 of NRS.

[33]Nevada's Open Records Act allows any person to inspect all public records which are not declared by law to be confidential. NRS 239.010. Where a request is made to a public body under the Nevada Open Records Act for inspection or copies of the billing statements of the public body's outside counsel, there is no question that mere invoices by the lawyer to the public body – without detailed descriptions of the work performed – contain "information relating to representation of a client". On the one hand, the lawyer may not allow an Open Records act inspection of the lawyer's billing statements. On the other hand, the public body is not governed by the Nevada Rules of Professional Responsibility. The public body must allow inspection of the lawyer's billing statements except to the extent that they are privileged under Nevada's attorney-client privilege statutes. NRS 49.035 – 49.115.

CONCLUSION

In view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent.

Ethics Opinion on Rule 1.6 Confidentiality 11-23-08.wpd

July 16, 2009

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 55

QUESTION PRESENTED

May a criminal defense lawyer whose former client alleges that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to the State in the course of any proceeding on the defendant's claim, for the purpose of establishing whether the lawyer's representation was competent?

ANSWER

Yes, a criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

DISCUSSION

Rule 1.6 of the Nevada Rules of Professional Conduct (NRPC) generally restricts the disclosure of information related to the representation of a client. The Rule applies to lawyers in all contexts, not just criminal defense. The fundamental requirement of confidentiality is set forth in subsection (a):

> A lawyer shall not reveal information relating to 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 paragraphs (b) and (d).

This Committee has previously opined that, "[i]n view of the unrestricted language of Rule 1.6, all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent." State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 41, June 24, 2009.

The duty of confidentiality continues after the lawyer-client relationship has terminated. Rule 1.9 sets forth a lawyer's duties to former clients, and subsection (c)(2) further provides that "[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . [r]eveal information relating to the representation except as these Rules would permit or require with respect to a client." Rule 1.9 mirrors the unrestricted language of Rule 1.6, extending the duty of confidentiality broadly to "information relating to representation."

The principle of lawyer-client confidentiality is further reflected in the statutory privilege set forth in NRS 49.095:

> **NRS 49.095 General rule of privilege.** A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:
>
> 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
> 2. Between the client's lawyer and the lawyer's representative.
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

However, the information protected under Rule 1.6 extends beyond the information protected by the attorney-client privilege under NRS 49.095. *McKay v. Board of County Comm'rs*, 103 Nev. 490, 494, 746. P.2d 124, 126-27 (1987) (citing Comment [3] to ABA Model Rule 1.6). The lawyer's ethical duty to preserve a client's confidentiality is thus broader than the evidentiary privilege.

Nevertheless, the ethical duty and the statutory privilege both make an exception when the competency of the lawyer's representation faces a subsequent legal challenge by the client. Subsection (b)(5) of Rule 1.6 permits limited disclosure of otherwise confidential client information under the so-called "self-defense" exception:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . [t]o 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.

Similarly, the statutory lawyer-client privilege does not extend "to a communication relevant to an issue of breach of duty by the lawyer to his or her client." NRS 49.115(3); *see also Tower Homes, Ltd. Liab. Co. v. Heaton*, 132 Nev. _, 377 P.3d 118, 123 (Nev. 2016).

The self-defense exception to the ethical duty and statutory privilege of confidentiality has been recognized by the Nevada Supreme Court since the earliest years after Nevada's admission to the Union:

> We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own 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.

Mitchell v. Bromberger, 2 Nev. 346, 349 (1866); *see also Molina v State* 120 Nev. 185, 193, 87 P.3d 533, 539 (2004) (citing former Supreme Court Rule 156(3)(b)).

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client would fall within the scope of the ethical and statutory "self-defense" exceptions to confidentiality. The first and third clauses of Rule 1.6(b)(5) – permitting disclosure to the extent reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" and "to respond to allegations in any proceeding concerning the lawyer's representation of the client" – specifically apply. Furthermore, in filing a petition for postconviction relief, a defendant is required to comply with NRS 34.735, which specifies in pertinent part: "If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective." Under such circumstances, a criminal defense lawyer may disclose confidential information relating to representation of the former client to the extent the lawyer reasonably believes necessary to respond to the allegations of ineffective assistance.

To prevail on an ineffective assistance claim, a defendant must prove that he was denied "reasonably effective assistance" of counsel to his detriment by satisfying the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant must show that his counsel's representation fell below an objective standard of reasonableness. Second, the defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, there would have been a different outcome; for instance, that the defendant would not have pleaded guilty or not have been found guilty at trial. The burden falls upon the defendant to make the requisite showing:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690.

The reasonableness of the representation may turn upon what both the lawyer and the defendant did or did not do, or did or did not communicate to one another, in the course of representation. This may require an inquiry as to what extent the lawyer considered and discussed with the defendant matters that might reasonably be expected to have a material impact on the case, such as the nature of the charges, potential defense strategies, evidentiary issues, what options might be in the defendant's best interest, the consequences of pleading guilty, and whether the defendant had any basis to appeal a conviction. "Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy." *Martinez v. Ryan*, 566 U.S. 1, 11 (2012). The lawyer's actions and decision-making process at every stage of the proceedings may be reviewed, including whether he conducted a reasonable and independent investigation of the case. "Ineffective-assistance claims often depend on evidence outside the trial record." *Id*. at 13.

The defendant's conduct throughout the lawyer-client relationship may also demand scrutiny, including whether he or she was forthcoming with all relevant information and whether he or she followed the advice of counsel:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions . . . [an] inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, 466 U.S. at 691. Consequently, a meaningful evaluation of defense counsel's performance cannot be conducted without the lawyer's disclosure to some extent of confidential information relating to representation of the client, which is expressly permitted under the first and third clauses of Rule 1.6(b)(5) and NRS 49.115(3).

The Committee notes that the American Bar Association Standing Committee on Ethics and Professional Responsibility has taken a conflicting position in ABA Formal Opinion 10-456 (July 14, 2010) (ABA Opinion).[1] The ABA Opinion held that the ABA's Model Rule of Professional Conduct 1.6 precludes communication between former defense counsel and prosecutors in a postconviction proceeding involving an ineffective assistance claim, unless under direct judicial supervision at an evidentiary hearing. The confidentiality mandate in subsection (a) and the self-defense exception in subsection (b)(5) of the ABA Model Rule 1.6 are identical to the language of NRPC 1.6.

The ABA Opinion maintains that the third clause of subsection (b)(5) – permitting disclosure "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client" – is subject to severe constraints. ABA Opinion, at 3. "[A] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences." *Id.* (quoting *Restatement (Third) of the Law Governing Lawyers* §64 cmt. c (2000)). Based primarily on concerns that extrajudicial disclosure in a postconviction proceeding involving an ineffective assistance claim might prejudice the defendant in the event of a retrial, the ABA Opinion concluded that "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

This Committee reaches a different conclusion.

First and foremost, nothing in the express language of Rule 1.6(b)(5) can be inferred to prohibit extrajudicial disclosures to the State in the context of a postconviction ineffective assistance claim. The ABA Opinion even appears to conflict with the ABA's own Comment [10] to Model Rule 1.6, which states that when there is an allegation involving the lawyer's conduct or representation of a former client, "Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding" to respond. While the ABA Opinion contends that

[1] The Committee also notes that there was no consensus on this issue among courts prior to the ABA Opinion.

Comment [10] should be construed narrowly, even a narrow construction cannot justify barring any extrajudicial disclosure when a criminal client has placed his former defense counsel's performance squarely at issue. Significantly, the self-defense exception is tempered in that it only permits disclosure to the extent reasonably necessary to respond to the allegations. Furthermore, subsection (b)(5) is permissive ("[a] lawyer *may* reveal information") and accords the lawyer the professional discretion to refuse to assist the State against the former client's ineffective assistance claim.

Furthermore, the position taken by the ABA Opinion could undermine both the truth-finding function of the judicial process and the principle of fairness that sustains our legal system. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (characterizing "the very nature of a trial as a search for truth."); *Abbott v. Abbott*, 560 U.S. 1, 20 (2010) (noting that nations "rely upon their domestic courts to enforce just laws by legitimate and fair proceedings."). The self-defense exception to confidentiality promotes these objectives of truth and fairness. A convicted defendant alleging ineffective assistance of counsel contends his lawyer's handling of his case was deficient and affected the outcome. The lawyer should be given a fair opportunity to protect his professional reputation by demonstrating that he provided reasonably effective representation under the circumstances. The State has a responsibility to ensure the integrity of the conviction.[2] The lawyer's extrajudicial disclosure of confidential information relating to the representation may be a necessary predicate to ascertaining the truth and maintaining fairness in the process.

These concerns may explain why other jurisdictions have rejected the ABA Opinion. In *State v. Montgomery*, 997 N.E.2d 579 (Ohio Ct. App. 2013), the Ohio Court of Appeals held:

> [W]e differ with the ABA's opinion that an attorney who is the subject of an ineffective assistance of counsel claim who may have a reasonable need to disclose relevant client information should do so only with prior judicial approval in the proceeding in which the claim is joined. . . . the very narrow scope of the information allowed to be disclosed suggests that the rule can be enforced without prior judicial intervention.

Id. at 590. *See also United States v. Wilson*, 2018 U.S. Dist. LEXIS 171611, _ F. Supp. 3d __, 2018 WL 4828400 (D.D.C. October 4, 2018) ("[T]he Court will not prohibit counsel for the United States from communicating and meeting with [the petitioner's] former counsel outside the presence of [the petitioner's] current counsel — so long as the disclosures made by former counsel during those communications and meetings are "reasonably necessary to respond to specific allegations" of ineffective assistance of counsel."); *United States v. Straker*, 258 F. Supp. 3d 151, 157 (D.D.C. 2017) "[C]ourts in this District have regularly permitted the government to communicate with former counsel without the need for supervision by the court or current counsel."); *Courtade v. United States*, 243 F. Supp. 3d 699, n.5 (E.D. Va. 2017) (declining to "prohibit *ex parte*

[2] "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88 (1935), cited in *Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

communications between the government and former counsel in this situation, given the obvious need to fully develop and clarify the record in collateral proceedings."); *Office of Lawyer Regulation v. Thompson (In re Thompson)*, 847 N.W.2d 793, 800 (Wis. 2014) ("Wisconsin's confidentiality rule does not limit permitted disclosures to a 'court-supervised' setting."); *Melo v. United States*, 825 F. Supp. 2d 457, n. 2 (S.D.N.Y. 2011).

The argument against the ABA's position in the context of post-conviction claims of ineffective assistance is perhaps best articulated in *United States v. Ball*, 2017 U.S. Dist. LEXIS 120459 (E.D. Mich. 2017):

> [T]his Court is not persuaded that Formal Opinion 10-456 champions the correct policy. In advising that prosecutors and former defense counsel should not be permitted to communicate without court supervision, the ethics opinion fails to strike the appropriate balance between protecting confidentiality interests and ensuring "fair proceedings" by allowing the prosecution to fully develop its case.

United States v. Ball, 2017 U.S. Dist. LEXIS 120459 at *6.

Several state bar entities have also issued formal opinions rejecting the ABA Opinion. The District of Columbia Bar in Ethics Opinion 364 (Jan. 2013) concluded:

> [The Rule] permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance.

See also North Carolina State Bar, 2011 Formal Ethics Op. 16 (Jan. 27, 2012) (The Rule "affords the lawyer discretion to determine what information is reasonably necessary to disclose, and there is no requirement that the lawyer exercise that discretion only in a 'court-supervised setting.'"); Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Op. 2013-F-156 (June 14, 2013) ("Exceptions to the confidentiality rules permit, but do not require, the former defense lawyer to make limited voluntary disclosures of information to the prosecution outside the in-court supervised proceeding."); Cf. Virginia Informal Ethics Op. 1859 (June 6, 2012).[3]

[3] The Bar Association of San Francisco Ethics Committee in Ethics Opinion 2014-1 (Jan. 2014) also cited the ABA Opinion in considering the ability of an attorney to respond to a negative online review by a former client alleging incompetence. California's former rule on confidentiality at the time of that opinion, Rule of Professional Conduct 3-100, was not based on the ABA Model Rule and contained no self-defense exception. While the San Francisco Ethics Committee concluded that case law on the self-defense exception for California's statutory lawyer-client privilege, California Evidence Code § 958, limited disclosure to formal or imminent legal proceedings, the Committee nonetheless noted that, "[e]ven in those circumstances where disclosure of otherwise confidential information is permitted, *the disclosure must be narrowly tailored to the issues raised by the former client*." [Emphasis added].

The Iowa State Bar Association Committee on Ethics and Practice Guidelines in Iowa Ethics Op. 15-03 (June 15, 2015) noted that the ABA Opinion failed to account for the Rule's application in all contexts, not just criminal defense:

> ABA Formal Ethics Op. 10-456 appears to apply only to post conviction relief litigation which leaves the question open regarding other forms of adverse claims against a lawyer by a former client and the standard the lawyer should use when invoking the so-called implied self-defense waiver. When client confidences are concerned, there should be no distinction between civil, criminal or disciplinary litigation. A matter is confidential and protected or it is not; the self-defense waiver applies or it doesn't and when it does the procedure for invoking it should be uniform.

This Committee joins other jurisdictions in rejecting ABA Formal Opinion 10-456. A criminal defense lawyer confronted with a former client's allegations of ineffective assistance of counsel should be able to disclose relevant confidential information relating to the representation. Judicial intervention is not a prerequisite for disclosing client information under such circumstances. However, disclosure is permitted only to the extent reasonably necessary to respond to the allegations and must be narrowly tailored to the issues raised by the former client.[4]

CONCLUSION

A criminal defense lawyer facing allegations of ineffective assistance of counsel from a former client may disclose confidential information relating to representation of the client to the extent the lawyer reasonably believes necessary to defend against the allegations. Any disclosure must be narrowly tailored to the issues raised by the former client.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

AUTHORITIES

NRS 34.735
NRS 49.095
NRS 49.115
NRPC 1.6
NRPC 1.9
Abbott v. Abbott, 560 U.S. 1 (2010)
Berger v. United States, 295 U.S. 78 (1935)
Courtade v. United States, 243 F. Supp. 3d 699 (E.D. Va. 2017)
Martinez v. Ryan, 566 U.S. 1 (2012)

[4] A practitioner may want to consult another attorney for an opinion as to what extent disclosure is reasonably necessary and can be narrowly tailored to the issues raised by the former client.

McKay v. Board of County Comm'rs, 103 Nev. 490, 746. P.2d 124 (1987)
Melo v. United States, 825 F. Supp. 2d 457 (S.D.N.Y. 2011)
Nix v. Whiteside, 475 U.S. 157 (1986)
Office of Lawyer Regulation v. Thompson (In re Thompson), 847 N.W.2d 793 (Wis. 2014)
State v. Montgomery, 997 N.E.2d 579 (Ohio Ct. App. 2013)
Strickland v. Washington, 466 U.S. 668 (1984)
Tower Homes, Ltd. Liab. Co. v. Heaton, 132 Nev. _,. 377 P.3d 118 (2016)
United States v. Ball, 2017 U.S. Dist. LEXIS 120459 (E.D. Mich. 2017)
United States v. Straker, 258 F. Supp. 3d 151 (D.D.C. 2017)
United States v. Wilson, 2018 U.S. Dist. LEXIS 171611, _ F. Supp. 3d __, 2018 WL 4828400 (D.D.C. October 4, 2018)
Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987)
American Bar Association Model Rule 1.6
American Bar Association, Formal Op. 10-456 (July 14, 2010)
District of Columbia Bar Ethics Op. 364 (Jan. 2013)
State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Op. No. 41, June 24, 2009
North Carolina State Bar, 2011 Formal Ethics Op. 16 (Jan. 27, 2012)
Bar Association of San Francisco Ethics Committee Op. 2014-1 (Jan. 2014)
Board of Professional Responsibility of the Supreme Court of Tennessee, Formal Ethics Op. 2013-F-156 (June 14, 2013)
Iowa State Bar Association Committee on Ethics and Practice Guidelines in Iowa Ethics Op. 15-03 (June 15, 2015)
Virginia Informal Ethics Op. 1859 (June 6, 2012)