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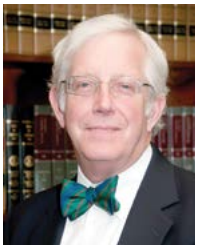

I've Got a Secret: The Duty of Confidentiality is Much Broader Than the Attorney-Client Privilege

In conversations with lawyers and while teaching CLEs, I have learned that lawyers often confuse the common law attorney-client privilege (ACP) and the lawyer's ethical duty of confidentiality under Rule 1.6. The ACP and the ethical duty of confidentiality are quite different in many respects. The ACP is an evidentiary privilege that is applied in court proceedings. The ethical duty of confidentiality applies in many other situations outside of litigation. While both the ACP and the ethical duty of confidentiality arise out of the attorney-client relationship, the ACP only applies to and protects communications by and between lawyer and client in which the purpose of that communication is to give or obtain legal advice or legal services, and where such communication has been made in confidence or with a reasonable expectation of confidentiality. The ACP is waived by the client's disclosure of otherwise privileged communications to a third party, and may sometimes be waived by the lawyer's disclosure of a privileged communication to a third party, whether intentional or inadvertent.

In contrast, the ethical duty of confidentiality covers a much wider spectrum of information in addition to information protected under the ACP. Under ABA Model Rule 1.6, "any information relating to the representation" is protected as confidential. Virginia's Rule 1.6 protects information protected under the ACP and attorney work product, but also any information that the client has requested be kept secret and "**other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.**"

While ACP protection can be waived by the client's disclosure of information to others, an attorney may disclose information protected by Rule 1.6 only if the client consents after consultation, disclosure is "impliedly authorized," or disclosure is permitted or required under paragraphs (b) and (c) of the rule. Thus, the fact that the client may have shared confidential information or discussed the legal matter with others does not permit the lawyer to disclose the same information to others.

Even the client's identity, though not generally regarded as "privileged" under the ACP, may still remain protected under the ethical duty of confidentiality, if the client has expressed a desire that his or her retention of the lawyer remain secret. LEOs 1147 and 1284 state: "The Committee is of the view that even a client's identity may be construed to be a confidence or secret, even when such information is a matter of public record, where the client has specifically requested that such information be kept secret or held inviolate (see *In re Kozlov*, 79 NJ 232, 398 A.2d 882 (1979)". See also EC 4-4 under DR 4-101 of the former Code of Professional Responsibility: "[T]he ethical obligation of a lawyer to guard the confidences and secrets of his client extends beyond the evidentiary privilege without regard to the nature or source of information or the fact that others share the knowledge." This last sentence is critical to understanding the ethical duty of confidentiality. If a lawyer learns from the client's financial advisor relevant information that the client is in financial distress, that information may not be protected by the ACP since the information was not part of a communication between the lawyer and client. That information could be protected as qualified work product and protected from discovery under that doctrine. But the information is clearly protected under the ethical duty of confidentiality even though the source of the information is other than the client, if the disclosure of the information is contrary to the client's wishes or "would be embarrassing or likely to be detrimental to the client."

A lawyer's ethical duty to protect confidential client information continues even after the professional relationship or engagement has ended and even after the client's death. Cmt. [18], Rule 1.6, Rule 1.9(c)(2) and LEO 1207. Thus, former clients are entitled to the same protection as current clients.

Lawyers often assume that once information relating to the representation of a client has become a "matter of public record" it is no longer protected as confidential. I think the confusion is caused in part by the label "confidential." How can information be "confidential" if it is in a public record? This is a common misconception that overlooks the lawyer's personal and fiduciary duty not to disclose

information that is embarrassing or detrimental about a client or a client's matter. We were taught in law school to look beyond the title or label given a statute or rule and instead examine what it specifically states. Again, disclosure of information protected by Rule 1.6 is strictly governed by paragraphs (b) and (c) of the rule. A good illustration of this concept may be found in LEO 1643. A man hired a family lawyer to handle his divorce. The lawyer prepared a Property Settlement Agreement (PSA) that the parties signed and which was incorporated into a final divorce decree that was entered by the court and thus a "matter of public record." After the representation had ended, the former client listed his divorce lawyer as a creditor in his bankruptcy in an endeavor to discharge legal fees he still owed his former divorce lawyer. However, in his bankruptcy filings, the former client omitted assets he had acquired under the terms of the PSA his former lawyer had drafted and then became a public filing.

The question presented was whether it would be improper for the attorney to reveal to the bankruptcy court the information in the property settlement agreement regarding those assets not listed by the former client in his bankruptcy petition. The committee said "yes," holding that disclosure would violate the lawyer's duty of confidentiality even though the information sought to be disclosed was a matter of public record. The committee also examined two exceptions to the duty of confidentiality—(1) whether disclosure was permitted in the context of a fee dispute or controversy and (2) whether disclosure was permitted or reasonably necessary to prevent fraud on a tribunal. The committee found under the facts presented that there was no dispute over the fee the former client owed the lawyer, so that exception did not apply. The committee also concluded that the "fraud on the tribunal" exception did not apply because the fraud did not relate to nor arise in the course of the divorce lawyer's representation of the former client.

Most authority holds that the duty of confidentiality applies and protects a client or former client's information, even if a matter of public record, if the disclosure would be embarrassing or likely detrimental to the client. Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available.[1] A recent California State Bar legal ethics opinion holds that a lawyer may never reveal embarrassing or detrimental secrets about a client learned during the representation—even if the information doesn't come from the client and is publicly available. A lawyer's duty of confidentiality extends beyond attorney-client privileged communications and continues after the representation ends, even if the information could be discovered on the Internet or in court records.[2]

Lawyers need to reflect, think, and essentially have a gag reflex anytime they consider disclosing information about a client or former client. This is true even when a lawyer seeks a court's permission to withdraw from a matter because the client is being difficult. The lawyer must refrain from voluntarily disclosing disparaging or embarrassing information as a basis to withdraw. *In re Gonzalez*, 773 A.2d 1026 (D.C. Ct. App. 2001) (public admonition for lawyer who disclosed as a basis for motion to withdraw that client has missed appointments and made misrepresentations to lawyer).

Confidence in our legal system and our profession rests upon our painstaking care to keep our clients' information safe and confidential. Our allegiance to the ethical duty of confidentiality "is designed to preserve the trust of the client in his lawyer, without which the practice of law, whatever else it might become, would cease to be a profession." *Id.* at 1030.

Endnotes:

1 See, e.g., *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 860 (W.Va. 1995) (Privilege not nullified where circumstances to be disclosed are part of a public record or there are other available sources for such information.); *Akron Bar Assn. v. Holder*, 102 Ohio St.3d 307, 315-16 (2004) (Attorney not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records or the attorney did not learn details from client); *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995) (Rule 1.6 violation found even though information disclosed "was readily available from public sources and not confidential in nature."); *In re Bryan*, 61 P.3d 641 (Kan. 2003) (lawyer violated Rule 1.6 by disclosing, in court documents, existence of defamation suit against former client); *State ex rel. Okla. Bar Ass'n v. Chappell*, 93 P.3d 25 (Okla. 2004) (lawyer in fee dispute with former client violated Rule 1.6 by filing motion referring to criminal charges filed and dismissed against former client); *In re Harman*, 628 N.W.2d 351 (Wis. 2001) (Rule 1.6(a) violation for disclosure to prosecutor of former client's medical records obtained during prior representation; irrelevant whether those records "lost their confidentiality" by being made part of the former client's medical malpractice action). See also *Restatement of the Law (3d) Governing Lawyers* §59, cmt. (d)(2000) ("A lawyer may not justify adverse use or disclosure of client information simply because the information has become known to third parties, if it is not otherwise generally known.").

2 Cal. State Bar Formal Op. 2016-195 found at http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202016-195%20(13-0005).pdf