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# Working Remotely and Safeguarding the Attorney-Client Privilege: Legal Ethics

Preventing Inadvertent Waiver, Maintaining Confidentiality and Privilege in a Work From Home Environment

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TUESDAY, JUNE 2, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

A. Neil Hartzell, Partner, **Freeman Mathis & Gary**, Boston  
David Lefkowitz, Principal, **The Lefkowitz Firm**, Atlanta

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# WORKING REMOTELY AND SAFEGUARDING THE ATTORNEY-CLIENT PRIVILEGE: LEGAL ETHICS

PREVENTING INADVERTENT WAIVER, MAINTAINING CONFIDENTIALITY AND PRIVILEGE IN A WORK FROM HOME ENVIRONMENT

A LIVE CLE WEBINAR ON TUESDAY, JUNE 2 @ 1:00PM EDT

Today's faculty features:

David Lefkowitz, The Lefkowitz Firm, Atlanta, GA

A. Neil Hartzell, Freeman Mathis & Gary, Boston, MA

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

### *Client-Lawyer Relationship*

- (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).

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

- (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;

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

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

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (6) to comply with other law or a court order; or
  - (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.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

- (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.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### *Client-Lawyer Relationship*

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

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - 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. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. . .

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## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

- [2] ...The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

- [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

- [3] ...The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

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

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Authorized Disclosure**

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

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [6] ...Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [7] ...The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

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

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [10] ... Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Disclosure Adverse to Client**

- [12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### Detection of Conflicts of Interest

- [13] ... [T]he disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [14] ... Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [15] ... In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [16] ... If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. . . .

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Detection of Conflicts of Interest**

- [17] ...A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

## ABA MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION - COMMENT

### **Former Client**

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

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

### **The “Generally Known” Exception to Former-Client Confidentiality**

- A lawyer’s duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client’s disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become “generally known.”

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

### **The “Generally Known” Exception to Former-Client Confidentiality**

- The “generally known” exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client’s industry, profession, or trade. Information is not “generally known” simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Confidentiality is essential to the attorney-client relationship. The duty to protect the confidentiality of client information has been enforced in rules governing lawyers since the Canons of Ethics were adopted in 1908.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- The focus of this opinion is a lawyer's duty of confidentiality to former clients under Model Rule of Professional Conduct 1.9(c). More particularly, this opinion explains when information relating to the representation of a former client has become generally known, such that the lawyer may use it to the disadvantage of the former client without violating Model Rule 1.9(c)(1).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client’s representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b). Model Rule 1.9 extends lawyers’ duty of confidentiality to former clients. Model Rules 1.9(a) and (b) govern situations in which a lawyer’s knowledge of a former client’s confidential information would create a conflict of interest in a subsequent representation. Model Rule 1.9(c) “separately regulates the use and disclosure of confidential information” regardless of “whether or not a subsequent representation is involved.” MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2017).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Model Rule 1.9(c)(2) governs the revelation of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules “would permit or require with respect to a [current] client.” Lawyers thus have the same duties not to reveal former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- In contrast, Model Rule 1.9(c)(1) addresses the use of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client’s representation “to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become generally known.” MODEL RULES R. 1.9(c)(1) (2017).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- The generally known exception to the use of former-client information was introduced in the 1983 Model Rules. The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. A number of courts and other authorities conclude that information is not generally known merely because it is publicly available or might qualify as a public record or as a matter of public record.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- ... [D]iscussing confidentiality issues under Rules 1.6 and 1.9, the New York State Bar Association’s Committee on Professional Ethics (“NYSBA Committee”) opined that “information is generally known only if it is known to a sizeable percentage of people in ‘the local community or in the trade, field or profession to which the information relates.’” N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 991, at ¶ 20 (2013).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- “[I]nformation is not ‘generally known’ simply because it is in the public domain or available in a public file.” *Id.* at ¶ 17. The Illinois State Bar Association likewise reasoned that information is generally known within the meaning of Rule 1.9 if it constitutes “‘common knowledge in the community.’” Ill. State Bar Ass’n. Advisory Op. 05-01, 2006 WL 4584283, at \*3 (2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958)).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect “confidential information relating to the representation of a client.” MASS. RULES OF PROF’L CONDUCT R. 1.6(a) (2017).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Similarly, under New York Rule of Professional Conduct 1.6(a), a lawyer generally cannot “knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person,”<sup>16</sup> but “confidential information” does not include “information that is generally known in the local community or in the trade, field or profession to which the information relates.” *Id.* at cmt. [4A].

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client’s industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 479 (DECEMBER 15, 2017)

- A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known.

## AMERICAN BAR ASSOCIATION – 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- While technological advances have altered how lawyers communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary.

### **Duty of Confidentiality Under Rule 1.6**

- 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).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.”

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.” In other words, the scope of protection afforded by Rule 1.6 is far broader than attorney-client privileged information.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- However, because it is highly unlikely that a disclosure exception under Rule 1.6(b) would apply to a lawyer's public commentary, we assume for this opinion that exceptions arising under Rule 1.6(b) are not applicable.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- ... [W]hen 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).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- ... [W]hen 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). Rule 1.6 does not provide an exception for information that is “generally known” or contained in a “public record.”

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- Accordingly, if a lawyer wants to publicly reveal client information, the lawyer must comply with Rule 1.6(a).

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

### **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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- Lawyers engaged in an investigation or litigation of a matter are subject to Model Rule 3.6, Trial Publicity.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## AMERICAN BAR ASSOCIATION – FORMAL OPINION 480 (MARCH 6, 2018)

- 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.

## ADR CONSIDERATIONS

- What security measures are used by the ADR providers to ensure that mediations and arbitrations are not subject to attack by hackers.
- Ethical considerations of cyber security as it relates to the virtual conduct of arbitrations and mediations.

## HYPOTHETICAL I

- A prospective client fills out an On-Line Consultation form which she sees on your website. The prospective client writes that she wants to sue one of your best friends. Upon receiving the consultation form, you immediately email the prospective client and tell her that you cannot represent her. Your website says that any information presented in the consultation form is not confidential.
  - **Can you tell your friend that you received this email?**
- Georgia Rule 1.6, Comment 4(A) (Confidentiality of Information)
- Arizona State Bar Rule No. 02-04 (not privileged) (in materials)
- Upjohn v. United States, 449 U.S. 383 (1981) (communications made in an attempt to secure legal representation are privileged)

## HYPOTHETICAL I

- **What if this prospective client had sent you an email, and you could see that 10 other lawyers were copied on the same email?**
- Georgia Rule 1.6, Comment 4(A) (Confidentiality of Information)
- Arizona State Bar Rule No. 02-04 (not privileged)
- Upjohn v. United States, 449 U.S. 383 (1981) (communications made in an attempt to secure legal representation are privileged) (not in materials)

## HYPOTHETICAL 2

- Lucy Lawyer has been hired to incorporate Colleen Client's retail business, which is a relatively simple legal matter that will be concluded within a few weeks. After incorporation of the business is finished, Lucy expects to perform no further work for Colleen. Before the work is completed, a third person tells Lucy that Colleen's husband, an accountant, is having an affair with a secretary at the accounting firm where he works.
  - **Must the lawyer reveal that information to Colleen?**
  - **Would it be different if the husband was going to own any stock?**
  - **Would it be different if it was a divorce matter? A Will? A POA? A Living Will? Advanced Medical Directive?**

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- Fiduciary Duties
- Georgia Rule 1.4 (Communication)

## HYPOTHETICAL 3

- You represent a criminal defendant accused of murder. During the debriefing of your client, he tells you of separate incidents where he murdered 3 other individuals. The client tells you where he dumped the bodies of his other victims.
  - **After confirming your client's story regarding where the remains of these other victims were left, can you advise the authorities, or family members of the victims, of this information?**
- Georgia Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)
- Georgia Rule 1.6 (Confidentiality of Information)
- Georgia Rule 1.6 (Comment 8)
- People v. Belge, 372 N.Y.S.2d 798 (1975)

## HYPOTHETICAL 4

- Suppose you are representing a driver and passenger in a personal injury lawsuit against Coke. Upon accepting the claim, the available evidence reflected that the Coke truck went through a red light prior to crashing into your clients' car.
  - **Are there any ethical concerns with regard to representing the driver and the passenger in the claim against Coke?**
- Fiduciary Duties
- Georgia Rule 1.4 (Communication)

## HYPOTHETICAL 4

- Suppose you are representing a driver and passenger in a personal injury lawsuit against Coke. Upon accepting the claim, the available evidence reflected that the Coke truck went through a red light prior to crashing into your clients' car.
  - **While preparing for the driver's deposition, he discloses to you that he was smoking pot at a friend's house prior to the crash. What disclosures can/must you make? Must you withdraw?**
- Fiduciary Duties
- Georgia Rule 1.4 (Communication)
- Georgia Rule 1.7 (Conflict of Interest – General Rule)
- Georgia Rule 1.6 (Confidentiality of Information)
- Georgia Rule 1.16(a) (Declining or Terminating Representation)
- Georgia Rule 1.9 Conflict of Interest: Former Client

## HYPOTHETICAL 5

- We all know that court proceedings are public record, so:
  - **Can a criminal defense lawyer put this in her blog: “I just obtained an acquittal for a client who had tested positive for cocaine.”**
- Georgia Rule 1.6(a)

## HYPOTHETICAL 6

- You are a criminal defense lawyer and represent a defendant on charges of aggravated sexual assault. You obtain an acquittal for your client, and he is ecstatic. You take a “selfie” of yourself and your client in the courtroom immediately after the verdict. You want to post the photo on your firm’s website.
  - **Must you get the client’s consent?**
  - **What if your retainer agreement states that your firm utilizes advertising and social media, and contains a blanket release of publicity rights by the client, which he signed?**
  - **Should you be concerned about other consequences?**

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  - **What if your retainer agreement states that your firm utilizes advertising and social media, and contains a blanket release of publicity rights by the client, which he signed?**
  - **Should you be concerned about other consequences?**
  
- Georgia Rule 1.6(a) (also see Comment 5)
- Georgia Rule 1.8(b)
- Georgia Rule 1.0(k)

## HYPOTHETICAL 7

- You obtained a good result for a client in a contract dispute. Your client was not as satisfied as you had hoped, but everything seemed fine when the representation concluded. Two weeks later, your client posted a nasty review on Google. The client claimed you lied to him and did not distribute the settlement proceeds properly. In fact, your former client is lying, and you can prove it. You have responded to the on-line review by noting that you respectfully disagree with the client. Your client then responded with a comment that your “failure to respond substantively is proof that you have no defense to your charges.” The client also writes that he will sue you eventually.
  - **What can you do in response to these bad reviews?**

## HYPOTHETICAL 7

- **What can you do in response to these bad reviews?**

- **Georgia Rule 1.6: Confidentiality of Information**

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

- (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;

## HYPOTHETICAL 7

- **What can you do in response to these bad reviews?**

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

**(5) (i) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client,**

**(ii) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or**

**(iii) to respond to allegations in any proceeding concerning the lawyer's representation of the client;**

## HYPOTHETICAL 7

- **What can you do in response to these bad reviews?**

- **Texas State Bar Opinion 662 (2016)**

A lawyer may not publish a response to a former client's negative review on the internet if the response reveals any confidential information, but explains that the lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the rules of ethics.

## HYPOTHETICAL 7

- **What can you do in response to these bad reviews?**

- **People v. James C. Underhill, Jr., 2015 WL 4944192 (Colo. 2015)**

Attorneys suspended for, among other things, disclosing confidential information following internet complaints.

- **In re the Matter of Tsamis, No. 2013PR00095 (Ill. 2014)**

Attorney reprimanded for revealing information following a negative online review.

## HYPOTHETICAL 8

- One day you open an email from your opposing counsel, and all it says is: “See attached.” You click on the document and it opens on your monitor. The document is just a few sentences long, and it is entitled “Memo.” You realize that the short memo was not intended for you, and it contains juicy information regarding the other side’s view of the case.
  - **What can you do with the memo?**

## HYPOTHETICAL 8

- One day you open an email from your opposing counsel, and all it says is: “See attached.” You click on the document and it opens on your monitor. The document is just a few sentences long, and it is entitled “Memo.” You realize that the short memo was not intended for you, and it contains juicy information regarding the other side’s view of the case.
  - **What can you do with the memo?**
- Georgia Rule 3.4 Fairness to Opposing Party and Counsel
- Georgia Rule 4.4 Respect for Rights of Third Persons
- ABA Formal Opinion 06-440 (Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382)
- ABA Formal Opinion 05-437 (Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368)
- ABA Formal Opinion 06-442 (No prohibition on lawyers discovering and using metadata found in documents that other lawyers transmit to them)
- Alston & Bird v. Mellon Ventures, 307 Ga.App. 640 (2010)

## HYPOTHETICAL 8

- Defense Lawyers, this is what you found:

Memo from client to plaintiff's attorney:

Thus far the defense lawyer has not figured out that I had had 2 prior surgeries on my back when I was living in New Zealand for a few years. This secret is stressing me out, but let's get ready for trial.

- **What can you do with the memo?**

## HYPOTHETICAL 8

- Plaintiff's Lawyers, this is what you found:

Memo from claims representative to defense attorney:

You are authorized to offer \$600,000 at this time, with the understanding that we will settle this case for the \$2,000,000 policy limits if plaintiff and her attorney send a time-limit demand for that amount. Don't tell plaintiff's counsel about the umbrella policy. They think it lapsed because of non-payment.

- **What can you do with the memo?**

## HYPOTHETICAL 9

- At 6:00 a.m., you receive a phone call from a neighbor who has to be in court at 9:00 a.m. on a criminal matter. He begs for help. You never handle criminal matters and probably cannot provide representation that is within the standard of care.
  - **Can you assist your neighbor without violating the Rules of Professional Conduct?**

## HYPOTHETICAL 9

- At 6:00 a.m., you receive a phone call from a neighbor who has to be in court at 9:00 a.m. on a criminal matter. He begs for help. You never handle criminal matters and probably cannot provide representation that is within the standard of care.
  - **Can you assist your neighbor without violating the Rules of Professional Conduct?**
- Panelists Rule 1.1(3) says: In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to our consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

## HOARDING AND WORKING ON UNFAMILIAR MATTERS IN THE TIMES OF PANDEMIC

- What does that mean? It means, for example, that when a transactional lawyer learns that her client has a dispute with a business partner, the lawyer tries to solve the problem herself instead of passing it on to the firm's litigation group, because she thinks she needs more billable hours.\*

\* For further discussion, please see Nicole Hyland, *Tips for Minimizing Law Firm Liability During COVID-19*, LAW 360 (Apr. 28, 2020).

## HOARDING AND WORKING ON UNFAMILIAR MATTERS IN THE TIMES OF PANDEMIC

- A related problem is “dabbling” where a lawyer – due to similar financial concerns – starts to drift outside his practice area. For example, a commercial litigator whose business is slowing down due to court closures may put out feelers for employment, bankruptcy or insurance work, because that is where most of the business seems to be.\*

\* For further discussion, please see Nicole Hyland, *Tips for Minimizing Law Firm Liability During COVID-19*, LAW 360 (Apr. 28, 2020).

## REMOTE SECURITY ISSUES

- Institute a firmwide data security policy with appropriate safeguards.
- Use appropriate password protection, two-factor authentication, and encryption for all devices, including computers, home Wi-Fi routers and printers.
- Use secure recognized networks and a company-provided virtual private network if possible.
- Disable smart speakers and other artificial intelligence devices when having confidential conversations.
- Ensure the lawyers and staff are properly trained on new or unfamiliar technologies.\*

\* For further discussion, please see Nicole Hyland, *Tips for Minimizing Law Firm Liability During COVID-19*, LAW 360 (Apr. 28, 2020).

## REMOTE SECURITY ISSUES

- Distribute a list of approved software, including cloud-storage and file-share solutions, to deter lawyers and staff from using unapproved software to transfer confidential data.
- Use secure videoconferencing platforms and use passwords when discussing confidential matters.
- Train personnel to identify, avoid and internally report potential cybercrimes and security incidents, such as phishing, ransomware attacks, inadvertently downloading malware, escrow and wire transfer scams, etc.
- Determine whether the law firm's insurance policy covers data security losses and, if not, consider supplementing the firm's coverage.\*

\* For further discussion, please see Nicole Hyland, *Tips for Minimizing Law Firm Liability During COVID-19*, LAW 360 (Apr. 28, 2020).

# ZOOM

- Zoom offers software-based communication services, allowing users to participate in video conferences on desktop computers, laptops and mobile devices. Zoom is Delaware corporation, with its principal place of business at 55 Almaden Boulevard, San Jose, California.
- By March 2020, Zoom was hosting approximately 200 million daily meeting participants on its platform, compared to the approximately 10 million daily meeting participants in January 2020, an increase of 2,000% in three months.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - A number of people reported that their Zoom conferenced had been interrupted by uninvited participants seeking to disrupt the conference. Dubbed “Zoombombing,” some of these disruptions evidenced an intent to harass participants on the basis of their race, gender, religion, or their membership in another historically marginalized class.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - There were a number of privacy and data security concerns reported in the media, as well. For example, there were reports that Zoom failed to use AES 256 bit encryption and end-to-end encryption as it had publicly represented. Additionally, some media outlets picket up a report that Zoom had been inadvertently issuing encryption keys either by or through data centers in China for some calls taking place purely between individuals in the United States.

The Zoom logo is displayed in white, uppercase letters on a dark blue rectangular background. Above this background, there are three horizontal bars of different colors: dark blue, light blue, and grey.

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - Zoom used Facebook's SDK for iOS to enable users to login via Facebook on Zoom's iOS mobile app. Zoom was unaware that Facebook collected technical device information related to its users' phones when they opened the Zoom iOS mobile app.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - In recognition of the fact that Zoom has acted quickly to address the issues identified above, had worked cooperatively with the NYAG's investigation, and has provided valuable services to schools, local governments and health care institutions to help address the unique circumstances of the global pandemic, the NYAG is willing to accept a letter agreement.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - Among other things:
    - Zoom shall comply with Executive Law § 63(12) and GBL §§ 349 and 350 and shall not misrepresent the collection, maintenance and safeguarding of consumers' personal information and regulation of abusive activity on its platform.
    - Zoom shall comply with the Children's Online Privacy Protection Act ("COPPA") Rule, 16 C.F.R. Part 312.
    - Zoom shall comply with New York Education Law § 2-d and implementing regulations, 8 N.Y.C.R.R. Part 121, and related regulations.
    - Zoom shall maintain a comprehensive information security program that is reasonable designed to protect the security, confidentiality, and integrity of personal information that Zoom collects, receives, or processes.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - Among other things:
    - Zoom shall employ reasonable encryption and security protocols, including by encrypting all personal information at rest in persistent storage on its cloud servers and by encrypting all personal information in transit except where the user fails to utilize a Zoom app or Zoom software for the transmission. Zoom will update and upgrade its security and encryption as industry standards evolve.
    - Zoom shall develop and maintain reasonable procedures to address credential stuffing attacks, including evaluation of whether a login request is being made by a real person or through automation, and through automatic password resets for affected credentials.
    - Zoom shall adhere to industry standards for preserving user security when bypassing operating system security measures.

# ZOOM

- **Letter Agreement between Zoom and the NYAG dated May 7, 2020**
  - Among other things:
    - Zoom shall continue to operate a vulnerability management program to address known vulnerabilities, including those set forth above, and have reasonable safeguards to discover and fix new vulnerabilities.
    - Zoom shall continue to maintain reasonable procedures to enable users to easily report violations of the Zoom Acceptable Use Policy, including allowing meeting hosts to report a user for engaging in abusive conduct.

## SCAM OF THE WEEK: EXPLOITING THE CORONAVIRUS: MALICIOUS ZOOM INSTALLER

- Whether you're working from home or trying to stay in touch with loved ones, video conferencing apps like Zoom are becoming the new normal. Cybercriminals have exploited this type of application before, but their latest scam may be the trickiest yet
- Scammers are sending out phishing emails with links to download the latest version of Zoom. When clicked, the link takes you to a third-party website-not the official Zoom site-to download an installer. If you download and run the file, the program truly does install Zoom. The trick is, the installer also places a remote access trojan (RAT) on to your computer. This RAT gives cybercriminals the ability to observe everything you do on your machine. This includes keylogging (saving what you type), recording video calls, and taking screenshots - all of which can be used to steal your sensitive information.

## DON'T FALL VICTIM TO THIS SCAM! REMEMBER THE FOLLOWING:

- If an email directs you to install or update an application, do not click on the link in the email. Instead, go directly to the official website through your browser. This ensures you are accessing the real page and keeping your credentials safe.
- When using a work device, reach out to your IT department before installing any software. They can check that the application is legitimate and safe.



THANK YOU

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