

## A Lawyer's Duty to Preserve Confidential Client Information

by  
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Most lawyers are aware of their duty to preserve confidential client information. Generally, lawyers may not disclose confidential client information without client consent unless they are authorized to do so by the limited circumstances enumerated in Rule 1.6, Rules of Professional Conduct.

Fewer lawyers, however, understand exactly when the duty to preserve client confidences and secrets begins and ends. The following two ethical complaints illustrate problems created when a lawyer fails to recognize when the duty begins and ends.

### **When Does it Begin?**

Rural Landowner consulted Allan Attorney about a problem he was having with easements between lake lots and a road. Rural discussed the problem with Allan for about 30 minutes and showed Allan his abstract. Rural's property was located within two townships and Rural did not mention to Allan that his problem and dispute involved Merry Township.

In fact, Allan represented Merry Township from time to time. Rural decided not to retain Allan, but did pay him \$30 for the consultation.

Three years later, the dispute was still not resolved. Rural hired New Counsel who initiated suit against Merry Township. When Allan filed an answer representing the Township, Rural demanded that Allan withdraw because of the earlier consultation. Allan's refusal caused Rural to file an ethics complaint.

Allan's defense was that because he never agreed to represent Rural, there was no attorney-client relationship and therefore no confidentiality obligation ever existed. A brief review of case law and ethics authorities on initial consultations proved this argument overly simplistic. Courts have held that initial discussions for the purpose of hiring counsel do not lose their privileged or confidential nature even where the client later decides not to hire the lawyer. *See e.g., Buys v. Theran*, 639 N.E.2d 720 (Mass. 1994) (phone conversation about possibility of representation); *Desbiens v. Ford Motor Co.*, 439 N.Y.S.2d 452 (N.Y. App. Div. 1981) (firm's review of plaintiff's file and later decision not to represent plaintiff precluded firm's handling defense of claim due to firm's access to plaintiff's information).

The American Law Institute also recognizes the duty to maintain prospective client confidentiality in its final draft of the *Restatement of the Law - The Law Governing Lawyers*. Section 27 of the Restatement defines the obligations owed to prospective clients and requires the lawyer to protect a prospective client's confidential information by "not subsequently using or disclosing confidential information learned in the consultation." This obligation exists without regard to whether the client ultimately retains the lawyer.

Not all of the protections afforded to full-fledged former clients are extended to prospective clients by the Restatement. For example, Restatement 27 would permit adverse representation to a former prospective client in the same matter, provided the lawyer did not obtain confidential information that could be "significantly harmful" to the prospective client.

Nevertheless, even under this analysis, Allan's representation of the Township against Rural was improper inasmuch as Rural would qualify as a former client (and not a former prospective client), since Rural paid Allan for the legal advice. Once Rural's identity is established as a former client, Allan's subsequent representation of the Township against Rural is improper because it involves the same "matter." See Rule 1.9(a), which prohibits representation adverse to a former client in the same or a substantially related matter, without regard to whether confidential information was obtained from the former client.

### **When Does It End?**

Ellen Attorney had represented Small Company in a variety of legal matters over a several year period. Ellen had dealt with Small's manager, Pete on nearly all of these matters. Ellen had also represented Pete in personal legal matters unrelated to Small Company.

Pete eventually became involved in a dispute with Small Company and left the company. Ellen was unaware of Pete's departure from the company until she met with Small's president concerning pending legal matters. During this meeting, the president told Ellen that Pete had been fired for misconduct.

Ellen immediately told the president she would have to withdraw from representing the Company because of a conflict of interest, since she was representing Pete in other personal matters unrelated to the Company. Over the next four days, Ellen withdrew from representing Small Company in several pending matters. In doing so, Ellen had contact with another Small Company principal who confirmed Pete's firing due to misconduct.

Pete subsequently brought an unemployment claim against Small Company. Pete's lawyer in the unemployment claim obtained an affidavit from Ellen reciting her discussions with Small's president and the principal about Pete's firing. Ellen did not obtain Small Company's consent to disclose this information to Pete's lawyer.

Ellen's affidavit constituted the unauthorized use of a "client secret" in violation of Rules 1.6 and 1.9(b). "Client Secrets" are defined as non-privileged information obtained from the client during the representation, the disclosure of which is likely to be detrimental or embarrassing to the client. Ellen argued that the information obtained from the President and the principal did not constitute a client secret because she had already announced her intention to withdraw and the information was imparted to her thereafter. However, it was not the date or timing of when she received the information from her client that mattered, but rather the character and context in which the information was received.

Neither Rule 1.6 nor 1.9 distinguishes between information received from a current client and that obtained during the process of withdrawing from representation. A lawyer's confidentiality duty continues through the termination process. Even after termination, a lawyer is bound to maintain client confidentiality. See Comment to Rule 1.6. Moreover, a lawyer is obligated upon termination to take steps reasonably practicable to protect the client's interests. See *e.g.*, Rule 1.16(d). Clearly, refraining from assisting the client's adversary by disclosing information obtained from the client falls within the ambit of this rule.

The *Restatement of the Law - The Law Governing Lawyers* similarly does not apply a "time of disclosure only" analysis in determining whether information falls within the confidentiality protections. The restatement defines confidential client information as "information relating to the client, acquired by the lawyer or agent of the lawyer in the course of or *as the result of* representing the client," unless the information is generally known by others. Restatement 111 (emphasis added). The Comment to 111 states unequivocally that information acquired after the representation from the client is confidential so long as it is not generally known. Like the Rules of Professional Conduct, the Restatement only authorizes use or disclosure of confidential client information in limited circumstances (e.g., with client consent, where required by law, self-defense of the lawyer, or where necessary in a fee dispute).

## **Conclusion**

Client confidentiality is an important ethical obligation. While the professional standards include exceptions permitting lawyers to use or disclose confidential client information, the circumstances are limited and narrowly construed. Lawyers who disclose client information without client consent risk professional and civil liability if the disclosure is detrimental to the client. Accordingly, lawyers who intend to use client information against a client or former client would be wise to carefully analyze the limited exceptions authorizing use of client information without consent.