

Ethical Issues Under a Changing Legal Environment

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*The views expressed in this presentation are Ms. Hutson's own views and do not necessarily represent the views of the U.S. Department of Justice or the United States government. Ms. Hutson's presentation is limited to slides 23 through 36 (Electronic Communications and Confidentiality).

Overview of Model Rules and Recent Court Opinions

Model Rule 1.6

Confidentiality of Information

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;

Rule 1.6 Confidentiality Of Information (cont'd)

(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

Rule 1.6 Confidentiality Of Information (cont'd)

(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.

Model Rule 1.7

Conflict of Interest: Current Clients

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7 Conflict Of Interest: Current Clients

(cont'd)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Model Rule 1.11

Special Conflicts of Interest For Former and Current Government Officers and Employees

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees (cont'd)

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees (cont'd)

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees (cont'd)

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees (cont'd)

- (e) As used in this Rule, the term "matter" includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Model Rule 1.16

Declining or Terminating Representation

Rule 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

Rule 1.16 Declining Or Terminating Representation (cont'd)

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

Rule 1.16 Declining Or Terminating Representation (cont'd)

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Rule 1.16 Declining Or Terminating Representation (cont'd)

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law

Recent Opinions

- Formal Opinion 476: [Confidentiality Issues when Moving to Withdraw for Nonpayment of Fees in Civil Litigation](#) (December 19, 2016)
- Formal Opinion 475: [Safeguarding Fees That Are Subject to Division With Other Counsel](#) (December 7, 2016)
- Formal Opinion 474: [Referral Fees and Conflict of Interest](#) (April 21, 2016)

Electronic Communications and Confidentiality

Overview

- With ever-changing technology, the way lawyers communicate with and on behalf of their clients is evolving.
- Whereas lawyers used to communicate by letter and hard-copy documents, lawyers now communicate electronically.
- What safeguards should be in place to protect taxpayer information in electronic communications?
- What precautions should lawyers take to protect their clients' privacy concerns, when working in the office, when working remotely, when traveling?
- Are we being held to a higher standard as we become more technologically inclined?

I.R.C. § 6713 — Disclosure or Use of Information by Preparers of Returns (Civil Penalty)

- Section 6713(a) imposes a penalty against return preparers who:
 - Receive compensation for preparing a tax return, or engage in the business of preparing or providing services in connection with the preparation of tax returns; and
 - Disclose any information furnished to him or her in connection with the preparation of any return; or
 - Use any information furnished to him or her for any purpose other than to prepare or assist in preparing the taxpayer's return or for any specifically exempted purpose.
- Strict liability?

I.R.C. § 7216—Disclosure or Use of Information by Preparers of Returns (Misdemeanor Criminal Penalty)

- “Any person who is engaged in the business of preparing, or providing services with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepare any such return for any other person, and who knowingly or recklessly—(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or (2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not more than \$1,000 or imprisoned not more than 1 year, or both, together with the costs of the prosecution.”

Who is a return preparer?

- I.R.C. § 7701(a)(36)(A): “In general—The term ‘tax return preparer’ means any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title. For purposes of the preceding sentence, the preparation of a **substantial portion of a return or claim for refund** shall be treated as if it were the preparation of such return or claim for refund.”
- Treas. Reg. § 301.7701-15. Same. Can include lawyers (i.e., non-signing return preparers).

Practical considerations

- Wi-Fi usage agreements (*e.g.*, Starbucks, Marriott)
- Personal email accounts
- Hotel computers and printers (*e.g.*, hotel business center)
- Train/air travel
- Is transmittal of taxpayer information over unsecured networks reckless? Negligent?

Permitted disclosures—exceptions to sections 6713 and 7216

- Without consent: Treas. Reg. 301.7216-2
 - Disclosures to other tax return preparers
 - For use in securing legal advice
 - Disclosures to another person within the same firm
 - Etc.
- With consent: Treas. Reg. 301.7216-3
 - Rev. Proc. 2013-14
 - Tax return preparer must obtain consent for each disclosure.
 - The consent must be provided on a separate written document.
 - Provides specific language to use in consent.

I.R.C. § 7431

- **(a) In general—**
 - (1) Inspection or disclosure by employee of United States**

If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.
 - (2) Inspection or disclosure by a person who is not an employee of United States**

If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.
- To prevail in a claim under section 7431, a claimant must “demonstrate a violation of Section 6103, and that such a violation resulted from knowing or negligent conduct.”
 - *Elias v. United States*, No. CV 90-0432, 1990 WL 264722, at *3 (C.D. Cal. Dec. 21, 1990), *aff’d*, 974 F.2d 1341 (9th Cir. 1992).

Standard of care

- Are we being held to a higher standard as we become more technologically inclined?
- **Model Rule 1.1, Competence**
 - **Rule 1.1:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
 - **Comment 8:** “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Standard of care

- **Model Rule 1.6, Confidentiality Of Information**
 - **Rule 1.6(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.”
 - **Comment 18:** “...The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). . . .”
 - **Comment 19:** “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. . . .”

Standard of care

- **ABA Formal Opinion 477R (rev. May 22, 2017)**
 - Recognizes that routine communications with clients through unencrypted email pose no greater security threat than other common non-electronic forms of communications.
 - BUT not always reasonable to rely on unencrypted email.

Standard of care

- **ABA Formal Opinion 477R (rev. May 22, 2017) cont'd.**
 - In order to determine when additional security methods are required, the committee turned to the factors outlined in paragraph 18 of the Comment to Model Rule 1.6:
 - The sensitivity of the information
 - The likelihood of disclosure if additional safeguards are not employed
 - The cost of employing additional safeguards
 - The difficulty of implementing the safeguards and
 - The extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Standard of care

- **ABA Formal Opinion 477R (rev. May 22, 2017) cont'd.**
 - Recommends the following steps lawyers should take to guard against disclosure:
 - Understand the nature of the threat
 - Understand how client confidential information is transmitted and stored
 - Understand and use reasonable electronic security measures
 - Determine how electronic communications about clients' matters should be protected
 - Label client confidential information
 - Train lawyers and non-lawyer assistants in technology and information security
 - Conduct due diligence on vendors providing communication technology

Miscellaneous additional authorities

- Rev. Proc. 2007-40: requires authorized IRS e-file providers to have security systems in place to prevent unauthorized disclosures.
- IRS Publication 4557, “Safeguarding Taxpayer Data.”
- IRS News Release FS-2015-24: recommends that tax return preparers create a security plan to protect taxpayer information.

Social Media and Legal Ethics

Overview

- Legal ethics regulators are beginning to pay close attention to how the rules of professional conduct apply to social media activities of lawyers.
- The result is a patchwork quilt of ethics opinions and rule changes relating to social media.
 - This presentation will focus on guidance from the ABA Model Rules and the D.C. Bar
 - Review the guidance in the jurisdiction where you practice
- Pitfalls and Risks of Social Media
 - Informality
 - Fast-paced
 - Permanent (a.k.a. discoverable)
 - Far-reaching
 - Blurred lines between personal and professional lives

DC Bar Opinion 370

- Social Media I: Marketing and Personal Use (Nov. 2016)
 - Attorneys may use social media, but not without caution
 - Attorneys may connect with and communicate with clients, former clients or other lawyers on social networking sites, but:
 - Avoid the formation of an inadvertent attorney-client relationship
 - Avoid the creation of conflicts of interest
 - Protect client confidences and secrets
 - Attorneys may write about their own cases on social media sites, blogs, or other internet-based publications, with the informed consent of their clients
 - Attorneys may, with caution, respond to comments or online reviews from clients
 - An attorney or law firm may identify “specialties” on social media, provided that the representations are not false or misleading
 - Attorneys must review their social media presence for accuracy

Connecting and Communicating on Social Media

- Avoid the formation of an inadvertent attorney-client relationship
 - **Scenario:** Jane writes a comment on Attorney's blog article stating that she has a notice of deficiency that requires a petition to Tax Court, and she asks what information is required in the petition.
 - Attorney posts in a reply the required paragraphs in a Tax Court petition
 - What are Attorney's ethical obligations and has he violated any?
 - Has Attorney inadvertently created an attorney-client relationship?
- *Consider:*
 - ABA Model Rule 1.18 (Duty to prospective client)
 - Circular 230 §10.30(a)(1)

Connecting and Communicating on Social Media

- Avoid the creation of conflicts of interest
 - Caution should be exercised when stating positions on issues, as those positions could be adverse to an interest of a client, thus inadvertently creating a conflict
- *Consider:*
 - Model Rule 1.7 (Conflict of Interest: Current Clients)
 - D.C. Bar Opinion 370

Connecting and Communicating on Social Media

- Attorneys must be cautious to protect client confidences and secrets
 - **Scenario 1:** Attorney posts to Instagram “12 hour day in depositions!” and the post is automatically geo-tagged at the client’s office
 - **Scenario 2:** Attorney tweets “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch’”
 - In either case, has Attorney disclosed privileged or confidential information?
- Consider:
 - ABA Model Rule 1.6 (Duty to current clients)
 - ABA Model Rule 1.9 (Duty to former clients)

Blogs

- Attorneys may write about their own cases on social media sites, blogs, or other internet-based publications, with the informed consent of their clients
 - **Scenario:** Attorney hosts a blog on his law firm website, and he posts an article about recent Tax Court litigation
 - What are Attorney's obligations with respect to the blog?
- Consider:
 - ABA Model Rule 1.6 (Duty of confidentiality)
 - ABA Model Rule 7.1 (Communication concerning a lawyer's services)
 - Circular 230 §10.30(a)(1)
 - ABA Formal Opinion 10-457 (Lawyers must obtain client consent before posting information about clients on websites)

Comments

- Social Media comments and posts can constitute advertising and solicitation of clients
 - **Scenario:** Spammer posts a comment on the article that anyone in need of a tax controversy attorney should click through to his law firm website
 - Does Spammer have ethical obligations with respect to his comment? Does Attorney?
- Consider:
 - ABA Model Rule 7.3 (Solicitation of clients)
 - ABA Model Rule 8.4 (Misconduct)
 - ABA Model Rule 8.5 (Disciplinary authority)
 - Circular 230 §10.30(c)
 - Circular 230 §10.30(a)(2)

Accuracy

- Attorneys must review their social media presence for accuracy
 - **Scenario:** If someone “endorses” an attorney on LinkedIn for skills that she does *not* have, does Attorney have ethical obligations with respect to these endorsements?
- *Consider:*
 - ABA Model Rule 7.1 (Communication Concerning a Lawyer’s Services)
 - ABA Model Rule 7.2 (Advertising)
 - ABA Model Rule 7.4 (Communication of Fields of Practice and Specialization)
 - D.C. Bar Opinion 370 (Attorneys must review their social media presence for accuracy)

Specialties

- An attorney or law firm may identify “specialties” on social media, provided that the representations are not false or misleading
 - **Scenario:** Attorney's LinkedIn profile indicates that she "specializes" in ERISA. Has Attorney violated any ethics rules?
 - ABA Model Rule 7.4 states that a lawyer shall not state or imply that a lawyer is certified as a specialist in particular field, unless:
 - (1) The lawyer has been certified as a specialist by an approved organization; and
 - (2) The name of the certifying organization is clearly identified.
 - Many states extend this restriction to use of terms like “expert” or “expertise”
- Consider:
 - D.C. Bar Opinion 370 (Nov. 2016)
 - New York County Lawyers Ass'n, Professional Ethics Committee, Formal Op. 748 (Mar. 10, 2015)
 - Florida Bar, Advertising Op. (Sept. 11, 2013)
 - New York State Bar Ass'n, Committee on Professional Ethics, Op. 972 (June 26, 2013)

DC Bar Opinion 371

- Social Media II: Use of Social Media in Providing Legal Services (Nov. 2016)
 - Communication with clients
 - Rule 1.6 (Duty of Confidentiality)
 - Rule 1.4 (Communications)
 - Social media as sources of information about cases or matters
 - Potential risks and benefits that client social media could have on litigation, regulatory and transactional matters
 - Document preservation
 - Social media of jurors
 - Social media of judges, arbitrators, or regulators

Real World Examples

- Personal posts can have legal ethics consequences too
 - **Example 1**
 - A Texas attorney requested and received a continuance because her father had passed away.
 - The judge who granted her continuance was subsequently notified of comments on Facebook chronicling days of drinking and partying.
 - **Example 2**
 - An attorney wrote on his personal blog that a Fort Lauderdale judge an “evil, unfair witch”
 - The attorney was reprimanded and fined \$1,200 by the Florida Bar